UNCITRAL
UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

YEARBOOK

Volume XL: 2009

UNITED NATIONS

UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW

YEARBOOK

Volume XL: 2009

UNITED NATIONS
New York, 2012

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/2009

UNITED NATIONS PUBLICATION
Sales No. E.12.V.17
ISBN 978-92-1-133804-1
ISSN 0251-4265

Publishing production: English, Publishing and Library Section, United Nations Office at Vienna.

CONTENTS

Part Three. Annexes

INTRODUCTION

This is the fortieth 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 forty-second session, which was held in Vienna, from 29 June - 17 July 2009, 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 forty-second 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 Secretariat. Also included in this part are selected working papers that were prepared for the Working Groups.

Part three contains summary records, the bibliography of recent writings related to the Commission's work, a list of documents before the forty-second session and a list of documents relating to the work of the Commission reproduced in the previous volumes of the *Yearbook.*

UNCITRAL secretariat
Vienna International Centre
P.O.Box 500, 1400 Vienna, Austria
Telephone: (+43-1) 26060-4060 Telex: 135612 Telefax: (+43-1) 26060-5813
E-Mail: uncitral@uncitral.org Internet: http://www.uncitral.org

---

[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:

Volume	*Years covered*	*United Nations publication Sales No. or document symbol*
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
VIII	1977	E.78.V.7
IX	1978	E.80.V.8
X	1979	E.81.V.2
XI	1980	E.81.V.8

Volume	*Years covered*	*United Nations publication Sales No. or document symbol*
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
XXXVI	2005	E.10.V.4
XXXVII	2006	A/CN.9/SER.A/2006
XXXVIII	2007	A/CN.9/SER.A/2007
XXXIX	2008	A/CN.9/SER.A/2008

Part One

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

THE FORTY-SECOND SESSION (2009)

A. Report of the United Nations Commission on International Trade Law on its forty-second session (Vienna, 29 June-17 July 2009) (A/64/17)

[Original: English]

CONTENTS

I. Introduction

1. The present report of the United Nations Commission on International Trade Law (UNCITRAL) covers the forty-second session of the Commission, held in Vienna from 29 June to 17 July 2009.

2. Pursuant to General Assembly resolution 2205 (XXI) of 17 December 1966, this 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 forty-second session of the Commission was opened on 29 June 2009.

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 Assembly further increased the membership of the Commission from 36 to 60 States. The current members of the Commission, elected on 17 November 2003 and on 22 May 2007, 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), Armenia (2013), Australia (2010), Austria (2010), Bahrain (2013), Belarus (2010), Benin (2013), Bolivia (Plurinational State of) (2013), Bulgaria (2013), Cameroon (2013), Canada (2013), Chile (2013), China (2013), Colombia (2010), Czech Republic (2010), Ecuador (2010), Egypt (2013), El Salvador (2013), Fiji (2010), France (2013), Gabon (2010), Germany (2013), Greece (2013), Guatemala (2010), Honduras (2013), India (2010), Iran (Islamic Republic of) (2010), Israel (2010), Italy (2010), Japan (2013), Kenya (2010), Latvia (2013), Lebanon (2010), Madagascar (2010), Malaysia (2013), Malta (2013), Mexico (2013), Mongolia (2010), Morocco (2013), Namibia (2013), Nigeria (2010), Norway (2013), Pakistan (2010), Paraguay (2010), Poland (2010), Republic of Korea (2013), Russian Federation (2013), Senegal (2013), Serbia (2010), Singapore (2013), South Africa (2013), Spain (2010), Sri Lanka (2013), Switzerland (2010), Thailand (2010), Uganda (2010), United Kingdom of Great Britain and Northern Ireland (2013), United States of America (2010), Venezuela (Bolivarian Republic of) (2010) and

[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, 30 were elected by the Assembly at its fifty-eighth session, on 17 November 2003 (decision 58/407), and 30 were elected by the Assembly at its sixty-first session, on 22 May 2007 (decision 61/417). 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.

Zimbabwe (2010).With the exception of Benin, Chile, Ecuador, Fiji, Gabon, Guatemala, Israel, Madagascar, Malta, Mongolia, Namibia, Senegal, Sri Lanka and Zimbabwe, all the members of the Commission were represented at the first part of the session. The first part of the session was attended by observers from the following States: Argentina, Azerbaijan, Belgium, Brazil, Cuba, Democratic Republic of the Congo, Dominican Republic, Finland, Hungary, Indonesia, Iraq, Jordan, Kuwait, Libyan Arab Jamahiriya, Panama, Peru, Philippines, Portugal, Qatar, Romania, Slovakia, Tunisia, Turkey, United Republic of Tanzania and Yemen.

5. With the exception of Benin, Ecuador, Gabon, Greece, Guatemala, Latvia, Madagascar, Malta, Namibia, Pakistan, Paraguay, Uganda 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, Argentina, Azerbaijan, Belgium, Brazil, Côte d'Ivoire, Croatia, Dominican Republic, Finland, Indonesia, Jordan, Kazakhstan, Kuwait, Mali, New Zealand, Nicaragua, Panama, Peru, Philippines, Romania, Slovakia, Slovenia, Sweden, Tunisia, Turkey and Yemen.

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

(a) *United Nations system*: Food and Agriculture Organization and World Bank;

(b) *Intergovernmental organizations*: Caribbean Community, East African Community, Eurasian Economic Community, European Commission, International Association of Insolvency Regulators, International Institute for the Unification of Private Law, Organization for Economic Cooperation and Development, Permanent Court of Arbitration and World Trade Organization (WTO);

(c) *Invited non-governmental organizations*: American Bar Association, Center for International Legal Studies, Comité maritime international, European Company Lawyers Association, International Association of Restructuring, Insolvency and Bankruptcy Professionals (INSOL), International Chamber of Commerce, International Council for Commercial Arbitration, International Federation of Consulting Engineers, International Swaps and Derivatives Association and the Regional Centre for International Commercial Arbitration in Lagos, Nigeria.

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:	Soo-Geun OH (Republic of Korea)
Vice-Chairpersons:	Susan DOWNING (Australia)
	Jean Marc MPAY (Cameroon)
	Maria SZYMANSKA (Poland)
Rapporteur:	Ricardo SANDOVAL LÓPEZ (Chile)

D. Agenda

10. The agenda of the session, as adopted by the Commission at its 888th meeting, on 29 June 2009, was as follows:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Finalization and adoption of UNCITRAL notes on cooperation, communication and coordination in cross-border insolvency proceedings.
5. Draft UNCITRAL model law on public procurement.
6. Arbitration and conciliation: progress report of Working Group II.
7. Insolvency law: progress report of Working Group V.
8. Security interests: progress report of Working Group VI.
9. Possible future work in the area of transport law: commentary on the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea.
10. Possible future work in the area of electronic commerce.
11. Possible future work in the area of commercial fraud.
12. Endorsement of texts of other organizations: Uniform Customs and Practice for Documentary Credits (UCP 600) published by the International Chamber of Commerce.
13. Monitoring implementation of the New York Convention.
14. Technical assistance to law reform.
15. Status and promotion of UNCITRAL legal texts.
16. Working methods of UNCITRAL.
17. Coordination and cooperation:
    (a) General;
    (b) Reports of other international organizations.
18. Role of UNCITRAL in promoting the rule of law at the national and international levels.

19. International commercial arbitration moot competitions:

(a) Willem C. Vis International Commercial Arbitration Moot competition;

(b) Madrid commercial arbitration moot competition.

20. Relevant General Assembly resolutions.

21. Other business.

22. Date and place of future meetings.

23. Adoption of the report of the Commission.

E. Establishment of the Committee of the Whole

11. The Commission established the Committee of the Whole and referred agenda item 5 to it for consideration. The Commission elected Mireille-France Blanchard (Canada) Chairperson of the Committee. The Committee met from 2 to 10 July and held 14 meetings. At its 892nd meeting, on 10 July, the Commission considered the report of the Committee of the Whole and agreed to include it in the present report (see paras. 49-282 below).

F. Adoption of the report

12. At its 899th and 900th meetings, on 17 July 2009, the Commission adopted the present report by consensus.

III. Finalization and adoption of UNCITRAL notes on cooperation, communication and coordination in cross-border insolvency proceedings

13. The Commission recalled that, at its thirty-ninth session, in 2006, it had agreed that initial work to compile practical experience with respect to negotiating and using cross-border insolvency agreements should be facilitated informally through consultation with judges and insolvency practitioners and that a preliminary progress report on that work should be presented to the Commission for further consideration at its fortieth session, in 2007.[2] The Commission also recalled that, during the first part of its fortieth session, in 2007, the Commission had considered that preliminary report (A/CN.9/629) and had expressed its satisfaction with respect to the progress made on the work of compiling practical experience with negotiating and using cross-border insolvency protocols; the Commission had reaffirmed that that work should continue to be developed informally by the Secretariat in consultation with judges, practitioners and other experts.[3]

14. The Commission also recalled that, at its forty-first session, in 2008, it had before it a note by the Secretariat reporting on further progress with respect to that work (A/CN.9/654). At that session, the Commission had noted that further

---

[2] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17* (A/61/17), para. 209 (c).

[3] Ibid., *Sixty-second Session, Supplement No. 17* (A/62/17), part I, para. 191.

consultations had been held with judges and insolvency practitioners and a compilation of practical experience, organized around the outline of contents annexed to the previous report to the Commission (A/CN.9/629), had been prepared by the Secretariat. Because of timing and translation constraints, that compilation could not be submitted to the Commission's forty-first session.[4]

15. It was recalled that, at its forty-first session, the Commission had expressed its satisfaction with respect to the progress made on the work of compiling practical experience and had decided that the compilation should be presented as a working paper to Working Group V (Insolvency Law) at its thirty-fifth session (Vienna, 17-21 November 2008) for an initial discussion. Working Group V could then decide to continue discussing the compilation at its thirty-sixth session (New York, 18-22 May 2009) and make its recommendations to the forty-second session of the Commission, in 2009, bearing in mind that coordination and cooperation based on cross-border insolvency agreements were likely to be of considerable importance in finding solutions for the international treatment of enterprise groups in insolvency.[5]

16. It was noted that the Working Group considered the draft notes on cooperation, communication and coordination in cross-border insolvency proceedings (A/CN.9/WG.V/WP.83) at its thirty-fifth session, when it agreed that the notes should be circulated to Governments for comment prior to its thirty-sixth session (A/CN.9/666, para. 22). That version of the draft notes was circulated in November 2008.

17. The draft notes were revised on the basis of the decisions made by the Working Group at its thirty-fifth session, the comments received from Governments and additional cross-border insolvency agreements that were entered into after the preparation of the first draft.

18. At its current session, the Commission had before it the revised version of the draft notes (A/CN.9/WG.V/WP.86), the comments of States on the draft notes (A/CN.9/WG.V/WP.86/Add.1-3) and the report of the thirty-sixth session of the Working Group at which the draft notes were further considered (A/CN.9/671, paras. 12-15). The Commission heard an oral presentation on the draft notes and noted that some minor updating was required to take account of important cross-border insolvency agreements entered into since the consideration by the Working Group at its thirty-sixth session.

19. The Commission expressed its appreciation for the draft notes and emphasized their usefulness for practitioners and judges, as well as creditors and other stakeholders in insolvency proceedings, particularly in the context of the current financial crisis. In that regard, the notes were viewed as very timely, having application in a number of large, complex cases and being the first document dealing with cross-border insolvency agreements to be prepared by an international organization. The Commission also expressed its appreciation for the incorporation of the suggestions made by Governments following circulation of the draft notes (document A/CN.9/WG.V/WP.83; see paras. 16 and 17 above) and agreed that the document should be entitled "Practice Guide on Cross-Border Insolvency Cooperation".

---

[4] Ibid., *Sixty-third Session, Supplement No. 17* (A/63/17), para. 320.

[5] Ibid., para. 321.

20. With respect to the term "court" as used in the draft Practice Guide and as defined in paragraph 13 (f) of A/CN.9/WG.V/WP.86, it was clarified that, consistent with the terminology of the UNCITRAL Model Law on Cross-Border Insolvency (UNCITRAL Model Insolvency Law)[6] and the Legislative Guide on Insolvency Law,[7] it included judicial and other authorities, including administrative authorities, competent to control or supervise insolvency proceedings. To avoid any confusion with regard to the use of that term, the Commission agreed to delete the second sentence of paragraph 8 of A/CN.9/WG.V/WP.86.

21. With respect to paragraph 17 of part III A, the Commission agreed to modify the first sentence, so that it would read as follows: "Where parties desire court approval of an agreement, certain jurisdictions may require the court to find appropriate statutory authorization for such approval, as it may not be covered by the court's 'general equitable or inherent powers'."

22. The Commission agreed to modify the second sentence of paragraph 18 of part III A, so that it would read as follows: "As noted above with respect to insolvency representatives, one issue to take into consideration is that since judges must act on the basis of legal authority, acting outside that authority could make them personally liable." The Commission also agreed that, in order to align the third and fourth sentences with the revised second sentence and paragraph 17, the words "formally approve" should replace the words "enter into" in the third sentence and that the words after "familiarity with cross-border agreements" in the fourth sentence should be deleted. It further agreed to remove the references to common and civil law in paragraphs 17 and 18 and replace them with a more generic reference, such as "some" or "certain" jurisdictions.

23. To address the concern that the term "cross-border agreement" was too general, the Commission agreed that those agreements should be referred to as "cross-border insolvency agreements" and, as a short form, as "insolvency agreements" or "agreements".

24. At its 890th meeting, on 1 July 2009, the Commission adopted the following decision:

"*The United Nations Commission on International Trade Law*,

"*Noting* that increased trade and investment leads to a greater incidence of cases where business is conducted on a global basis, and enterprises and individuals have assets and interests in more than one State,

"*Noting also* that where the subjects of insolvency proceedings are debtors with assets in more than one State or are members of an enterprise group with business operations and assets in more than one State, there is generally an urgent need for cross-border cooperation in, and coordination of, the supervision and administration of the assets and affairs of those individual debtors and enterprise group members, including, as applicable, multiple parallel insolvency proceedings,

"*Considering* that cooperation and coordination in cross-border insolvency cases has the potential to significantly improve the chances for rescuing financially troubled individuals and enterprise groups,

---

[6] Ibid., United Nations publication, Sales No. E.99.V.3. See also paragraph 376 (o) below.

[7] Ibid., Sales No. E.05.V.10.

"*Acknowledging* that familiarity with cross-border cooperation and coordination and the means by which it might be implemented in practice is not widespread,

"*Convinced* that providing readily accessible information on current practice with respect to cross-border coordination and cooperation for reference and use by judges, practitioners and other stakeholders in insolvency proceedings has the potential to facilitate and promote that cooperation and coordination and avoid unnecessary delay and costs,

"*Recalling* that the UNCITRAL Model Law on Cross-Border Insolvency provides a legislative framework that facilitates effective cross-border coordination and cooperation,

"1. *Adopts* the Practice Guide on Cross-Border Insolvency Cooperation contained in working paper A/CN.9/WG.V/WP.86 and authorizes the Secretariat to add further information with respect to recently adopted cross-border insolvency agreements and to edit and finalize the text of the Practice Guide in the light of the deliberations of the Commission;

"2. *Requests* the Secretary-General to publish, including electronically, the text of the Practice Guide and to transmit it to Governments with the request that the text be made available to relevant authorities so that it becomes widely known and available;

"3. *Recommends* that the Practice Guide be given due consideration, as appropriate, by judges, insolvency practitioners and other stakeholders involved in cross-border insolvency proceedings;

"4. *Recommends* that all States continue to consider implementation of the UNCITRAL Model Law on Cross-Border Insolvency."

IV. Draft UNCITRAL model law on public procurement

A. Introduction

25. The Commission recalled that, at its thirty-seventh session, in 2004, it had agreed that the UNCITRAL Model Law on Procurement of Goods, Construction and Services[8] (the 1994 Model Procurement Law) would benefit from being updated to reflect new practices, in particular those resulting from the use of electronic communications in public procurement, and the experience gained in the use of the 1994 Model Procurement Law as a basis for law reform.[9] The Commission also recalled that at that session, it had decided to entrust the drafting of proposals for the revision of the 1994 Model Procurement Law to its Working Group I (Procurement). The Working Group was given a flexible mandate to identify the issues to be addressed in its considerations.[10]

26. The Commission noted that the Working Group had begun its work at its sixth session (Vienna, 30 August-3 September 2004), since when it had held

---

[8] United Nations publication, Sales No. E.98.V.13.

[9] Ibid., *Fifty-ninth Session, Supplement No. 17* (A/59/17), para. 81.

[10] Ibid., para. 82.

11 one-week sessions to consider revisions to the 1994 Model Procurement Law.[11] The Commission recalled that, from its thirty-eighth session, in 2005, to its forty-first session, in 2008, it had reaffirmed its support for the review being undertaken and for the inclusion of novel procurement practices in a revised model law on public procurement (the revised model law).[12] It also recalled that, at its thirty-ninth session, the Commission recommended that the Working Group, in updating the 1994 Model Procurement Law and the Guide, should take into account issues of conflicts of interest and should consider whether any specific provisions addressing those issues would be warranted in the revised model law.[13] At its fortieth session, the Commission recommended that the Working Group should adopt a concrete agenda for its forthcoming sessions in order to expedite progress in its work.[14] At its forty-first session, the Commission invited the Working Group to proceed expeditiously with the completion of the project, with a view to permitting the finalization and adoption of the revised model law, together with its guide to enactment, within a reasonable time.[15]

27. At its current session, the Commission had before it the following: (a) a draft model law on public procurement with an accompanying note by the Secretariat (A/CN.9/WG.I/WP.68 and Add.1 and A/CN.9/WG.I/WP.69 and Add.1-5); (b) the reports of the fourteenth (Vienna, 8-12 September 2008), fifteenth (New York, 2-6 February 2009) and sixteenth[16] (New York, 26-29 May 2009) sessions of the Working Group (A/CN.9/664, A/CN.9/668 and A/CN.9/672, respectively); and (c) further proposals for the revision of the 1994 Model Procurement Law.

B. Report on the progress made by Working Group I (Procurement) in the fulfilment of its mandate

28. The Commission noted that the focus of the early sessions of the Working Group was primarily on the following key subjects, for which the Working Group was recommending entirely new provisions or substantial amendments: (a) the use of electronic communications in public procurement; (b) electronic reverse auctions; (c) abnormally low submissions; and (d) framework agreements. It was reported that the principles for most of those provisions had been agreed upon, but that some drafting issues remained outstanding.

29. It was noted that later sessions had focused on procurement of services, alternative procurement methods, simplification and standardization of the

---

[11] For the reports of the Working Group on the work of its sixth to sixteenth sessions, see A/CN.9/568, A/CN.9/575, A/CN.9/590, A/CN.9/595, A/CN.9/615, A/CN.9/623, A/CN.9/640, A/CN.9/648, A/CN.9/664, A/CN.9/668 and A/CN.9/672, respectively.

[12] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 17* (A/60/17), para. 172; ibid., *Sixty-first Session, Supplement No. 17* (A/61/17), para. 192; ibid., *Sixty-second Session, Supplement No. 17* (A/62/17), part I, para. 170; and ibid., *Sixty-third Session, Supplement No. 17* (A/63/17), para. 307.

[13] Ibid., *Sixty-first Session, Supplement No. 17* (A/61/17), para. 192.

[14] Ibid., *Sixty-second Session, Supplement No. 17* (A/62/17), part I, para. 170.

[15] Ibid., *Sixty-third Session, Supplement No. 17* (A/63/17), para. 307.

[16] At the request of the Working Group (A/CN.9/668, para. 277) and upon consultation with the Bureau of the Commission, the sixteenth session of the Working Group was convened from 26 to 29 May 2009, at a time initially scheduled for the forty-fifth session of Working Group IV (Electronic Commerce).

1994 Model Procurement Law and conflicts of interest, and that new provisions and substantial amendments on those subjects were being considered.

30. The Commission heard a report on the progress achieved in separate areas of work.

31. As regards general aspects of electronic procurement, it was noted that provisions of the revised model law would allow for the use of electronic communications in the procurement process, in a new article 8, which would address form and means of communications together and would replace article 9 of the 1994 Model Procurement Law (which dealt only with the form of communications). The proposed article 8 would: (a) provide for functional equivalence between paper- and non-paper based communications; (b) contain safeguards addressing confidentiality, traceability and integrity; (c) prevent any form or means of communications from being used to restrict access to procurement; and (d) ensure transparency and predictability by requiring any specific requirements as to the form and means of communications to be specified by the procuring entity at the beginning of the procurement proceedings.

32. As regards electronic reverse auctions, it was explained that the term referred to an online, real-time auction, during which bidders submitted successively improved bids. Recognizing their potential benefits (price savings), the Working Group was recommending provisions for them, but not for auctions in a non-electronic form because of the risks of collusion in the latter. Provisions on electronic reverse auctions would set out (a) conditions for the use of electronic reverse auctions and (b) procedural rules for two types of such auctions: those used as a phase in other procurement methods and those used as a stand-alone procurement method. The revised model law would provide for the type of auction where the best bid according to the award criteria was identified automatically at the end of the auction process. This type of electronic reverse auctions, which did not allow post-auction evaluation, required (a) an automatic re-evaluation of bids as they were revised during the auction and (b) disclosure to all bidders at all times during the auction of sufficient information to allow them to determine whether their bid was the winning one. It was noted that the important issue considered by the Working Group in the context of electronic reverse auctions was the extent to which non-price factors could feature in such auctions. The Working Group noted concerns that such factors could complicate the process, and lead to less transparency.

33. As regards framework agreements, it was explained that the term described two-stage procurements in which a framework agreement between suppliers and the procuring entity was made at the first stage and procurement contracts were issued in the form of orders at the second stage. It was noted that framework agreements were not addressed in the 1994 Model Procurement Law, partly because they were used infrequently at that time. In the light of their increasing use and advantages (mainly reductions in administrative and transactional costs and times and assuring the security of supply), the Working Group provided for them in the draft revised text. Three types were addressed. The first type was a “closed” framework agreement, i.e. one concluded with one or more suppliers in which the specification and all terms and conditions of the procurement were set out in the framework and there was no further opening of competition between the suppliers at the second stage. The second type was also a “closed” framework agreement but it differed in that it would always have more than one supplier as a party, not all terms would be finalized and set out in the framework agreement, and a further competition would

take place at the second stage to award a procurement contract. The third type was an "open" framework agreement, i.e. one concluded with more than one supplier to which further suppliers could subsequently become parties. The second stage of "open" framework agreements would be competitive in the same way as the second type of "closed" framework agreements.

34. The Commission heard that the provisions would include both general conditions for the use of framework agreements and procedures for each type, but that the conditions for use and some other aspects remained outstanding. Further, there would be controls to prevent and limit certain risks that frameworks presented in practice, including risks to effective competition in the longer term, risks of collusion between suppliers and difficulties in monitoring the operation of framework agreements. Thus, for example, States would be required to include in their laws a maximum duration for closed frameworks (to avoid them being used to shut out suppliers from competition for long periods). The Commission also noted that the provisions placed emphasis on ensuring transparency in the operation of framework agreements by requiring a series of public notices to be communicated throughout the process.

35. As regards suppliers' lists, the Working Group had acknowledged that such lists existed and were in use, and that such use in practice should be subject to minimum standards. At its thirteenth session, the Working Group concluded that the topic would not be addressed in the revised model law because the flexible provisions on framework agreements would be sufficient and would avoid some of the risks of lists. The reasons for that conclusion would be set out in the guide to enactment, which would also address concerns related to the use of lists, such as lack of transparency and restrictions on market access, which might arise even where controls such as permanently open and simple registration procedures had been put in place, and even where lists were intended to be optional.

36. As regards abnormally low submissions, which might entail a performance risk, the Working Group had decided that the risk could arise in any procurement procedure (though it had initially considered that the risk arose in the context of electronic reverse auctions). It therefore recommended provisions in the revised model law to require the procuring entity to investigate a potentially abnormally low submission. Only after such an investigation, and where the procuring entity concluded that the submission was abnormally low and a performance risk existed, could the procuring entity reject the submission. The limitation on this ability was noted to be important for ensuring fair and equal treatment of suppliers.

37. The Working Group had reconsidered the provisions addressing the procurement of services, alternative procurement methods and their impact on simplification and standardization of the 1994 Model Procurement Law. The preliminary decision of the Working Group was to retain all options for the procurement of services, with enhanced guidance for their use. In the course of consideration, it became apparent however that services procedures contained in different articles of the 1994 Model Procurement Law were substantially the same and that only one services selection procedure — the selection procedure with consecutive negotiations — was distinct. In the light of such a significant overlap, the Working Group had reconsidered whether all methods should be retained. The review of all procurement methods therefore became one main element of simplification and standardization of the 1994 Model Procurement Law.

38. Some delegations had formulated a proposal for a negotiated procurement method to be used for any type of procurement, to be called "Request for proposals with competitive dialogue", the results of which were presented to the Commission as a new procurement method. The Commission noted that the main issues in that method included: providing sufficient flexibility in the method (considered to facilitate achieving best value for money) while building in procedures to avoid the risk that the discretion conferred would be abused; ensuring sufficient transparency without removing all flexibility; and specifying ways for the procuring entity to control the number of suppliers with which it would negotiate (for example, through pre-selection, an assessment of responsiveness or exclusion of solutions). The Commission also heard about the importance of establishing the aspects of the procurement that could be negotiated during the dialogue phase.

39. The Commission noted that other methods from the 1994 Model Procurement Law (including competitive negotiations, two-stage tendering, and perhaps consecutive negotiations) might be retained in specific circumstances (such as competitive negotiations in the case of urgent procurement) and that the need for such methods would be assessed based on the extent to which they differed and the extent to which they addressed circumstances that were distinct from that proposed in the new procurement method.

40. In addition, the Working Group had reconsidered the conditions for use of alternative methods, and recommended a requirement to use the most competitive method available. Thus, open (international) solicitation should take place by default unless restricted or domestic tendering was justified and competitive negotiations, for example, should be preferable to single-source procurement in cases of urgency wherever possible. The reformulations, it was said, would be finalized after the various procurement methods had been examined and their uses had been completed. The Commission heard that such an examination would also entail a consideration of whether the resulting number of procurement methods was optimal.

41. Other aspects of the Working Group's work in simplifying and standardizing the 1994 Model Procurement Law were described. First, as not all procurement in the defence and national security arena was considered to be sensitive or confidential, the blanket exemption of those sectors from the scope of the 1994 Model Procurement Law had been revisited. The aim was to bring national defence and national security sectors, where appropriate, into the general ambit of the revised model law, to promote a harmonized legal procurement regime across various sectors in enacting States. However, appropriate modifications, for example to transparency obligations, would be required and were proposed in the draft revised text, drawing on provisions of the 1994 Model Procurement Law, to accommodate sensitive or confidential types of procurement.

42. The Commission heard that the general provisions in chapter I had been expanded in the draft revised model law contained in the addenda to document A/CN.9/WG.I/WP.69 (the draft revised model law) to include rules that under the 1994 Model Procurement Law were applicable only to tendering proceedings, but that were, in fact, of general application. The Commission noted that those rules addressed the choice of procurement method and open or direct solicitation, the description of procurement (specifications and other terms), evaluation criteria, tender securities, prequalification proceedings, confidentiality and the acceptance of tender and entry into force of procurement contract. Other topics, such as requests

for expression of interest and general rules on clarifications and modifications of solicitation documents might also be included in chapter I.

43. It was noted that the 1994 Model Procurement Law distinguished between the procurement of goods and construction on the one hand, and services on the other hand. The Commission heard that the draft revised model law had adopted a different approach, one that focused on whether the procurement was straightforward or more complex. For example, one of the determining factors in the choice of an appropriate procurement method would be whether the subject of the procurement could easily be identified and evaluated, regardless of whether that subject was goods, construction or services. The default method of tendering (which required specifications and evaluation criteria to be specified in advance) would not be changed, but if it were not possible to formulate detailed specifications or characteristics at the outset of the procurement and to evaluate tenders through quantifiable criteria, the procurement might involve dialogue with the market or negotiations (using two-stage tendering or request for proposals with competitive dialogue). Procurement of low-value, simple or standardized items could be undertaken through a request for quotations procedure or an electronic reverse auction. Importantly, it was noted that a fundamental provision of the 1994 Procurement Model Law, according to which only exceptional circumstances would justify recourse to single-source procurement, remained and the Commission would be invited to consider strengthening safeguards to ensure that those circumstances would be objectively assessed.

44. As regards the evaluation and comparison of tenders, the Working Group had formulated a single set of requirements as regards evaluation criteria that would replace several inconsistent, incomplete provisions in the 1994 Model Procurement Law. The essence of the provisions was that such criteria should: be relevant to the subject matter of the procurement; to the extent practicable, be objective and quantifiable; and be disclosed (together with their relative weights, thresholds, and any margins of preference, and with information on the manner in which the criteria, margins, relative weights and thresholds would be applied) at the outset of the procurement. The aim, it was observed, was to enable submissions to be evaluated objectively and compared on a common basis.

45. The Working Group had reviewed the manner in which the use of procurement to promote industrial, social and environmental policies (notably to protect the domestic economy) was addressed in the 1994 Model Procurement Law. The Commission, it was noted, would consider the issue, including the matter of whether socioeconomic factors should be treated as evaluation criteria with all the transparency and objectivity rules then applicable to them and/or as qualification criteria (as was the practice in some jurisdictions with set-asides programmes), with reference to the relevant documents before it at the current session.

46. As regards remedies in procurement, the Working Group had decided to strengthen the provisions to ensure that they were consistent with the United Nations Convention against Corruption,[17] providing for a mandatory system of independent review and deleting the exemptions from review contained in the 1994 Model Procurement Law. The Working Group had also recommended the introduction of a standstill period between the identification of the successful submission and entry into force of a procurement contract in order to ensure an

---

[17] United Nations, *Treaty Series*, vol. 2349, No. 42146.

effective review procedure. The extent of relief that may be granted in administrative proceedings, it was noted, had not yet been finalized.

47. As regards other issues identified for consideration in the review of the 1994 Model Procurement Law, it was reported that:

(a) Although the question of community participation in procurement fell outside the scope of the 1994 Model Procurement Law as it related primarily to the planning and implementation phases, given the growing importance of local community participation and the possible need for enabling legislation, the Working Group had ensured that the revised model law would not pose obstacles to such participation in project-related procurement and that further guidance in the guide would be given;

(b) It was recalled that the 1994 Model Procurement Law permitted procuring entities to call for the legalization of documents from all suppliers, which could be time consuming and expensive for suppliers. In addition to the deterrent effect, all or part of the increased overheads for suppliers might be passed on to procuring entities. Hence, the Working Group recommended an amendment to the provisions contained in the 1994 Model Procurement Law to allow the procuring entity to require the legalization of documentation only from a successful supplier;

(c) Noting that the Convention against Corruption required procurement systems to address conflicts and declarations of interest and that the 1994 Model Procurement Law did not address them, the draft revised model law had been expanded to make appropriate provision.

48. The Commission endorsed the suggestion made as regards the establishment of a committee of the whole to consider the draft revised model law at the current session. It also decided that the committee in its work should address the issues of defence sector procurement and consider socioeconomic factors in public procurement. It heard statements about the importance of the guidance provided by UNCITRAL, in particular the guidance on how to protect domestic interests and treat sensitive procurement without undermining the objectives of the 1994 Model Procurement Law.

C. Report of the Committee of the Whole on its consideration of the draft revised model law

Article 1. Scope of application

49. The Committee noted that the draft article had been revised pursuant to the Working Group's decision to bring defence sector procurement within the scope of the revised model law. No comments specific to the article were made. However, a proposal was made to amend several articles of the draft revised model law to accommodate types of procurement that involved sensitive issues.

50. The Committee decided to consider that proposal in conjunction with specific relevant articles. (See further paras. 100-119, 123-137 and 253-266.)

Article 2. Definitions

51. It was noted that the purpose of article 2 was to provide definitions of recurrent terms rather than to provide an exhaustive list of all terms used in the

revised model law. It was the understanding that the article would be supplemented with a more comprehensive glossary.

52. Support was expressed for setting out the definitions contained in article 2 in alphabetical order, as appropriate in each respective language.

53. Caution was expressed for substituting terms that were well known and widely used in many jurisdictions with new terms. It was also noted that an excessively long list of definitions should be avoided.

Subparagraph (a)

54. It was noted that it was important for the title and the definition in subparagraph (a) to be consistent. It was therefore proposed that the word "procurement" should be replaced with the phrase "public procurement" and that the latter term should be used consistently throughout the text of the revised model law. In response, it was explained that the term "procurement" was intended only to refer to the procurement process and therefore no distinction was drawn between public and private procurement in this context. It was noted, in addition, that this distinction was built into the definition of the "procuring entity". The suggestion was therefore made to address the matter in a glossary rather than in article 2. The Committee agreed to that suggestion.

Subparagraph (e): "[submission] security"

55. With respect to subparagraph (e), concern was expressed about the use of the term "submission security" instead of "tender security". It was explained that the latter term was well known in procurement circles while the former might be confusing and meaningless. The other view was that the term "submission security" should be retained given that the term "submission" had been introduced in subparagraph (g) (see paras. 58-60 below). The need to ensure consistency and coherence in the use of terms throughout the revised model law was highlighted. It was suggested that, in order to ensure more clarity and logical sequence of definitions, the definition "submission" should be placed before the definition "submission security".

56. Some delegates preferred the term "tender or other security" to the term "submission security". Another proposal was to use the term "guarantee to carry out the procurement contract." A compromise solution was suggested to use the term "[submission] [tender or other] security" with an option to the enacting State to choose the definition as appropriate in its jurisdiction. (See para. 176 below.)

57. Concern was also expressed that the wording in subparagraph (e), when read together with subparagraph (g), could imply that multiple securities might be required in any single procurement proceeding where several bids, proposals or offers were presented. It was proposed that the guide could clarify that the provisions did not intend to convey any such meaning.

Subparagraph (g): "submission(s)"

58. Support was expressed for introducing a new collective and generic term that would refer to tenders, proposals, offers, quotations or bids.

59. A query was made about the desirability of using for such purposes the term "submission". Difficulties with the use and translation of the new suggested term

"submission" were highlighted. The term preferred might be "tender", which in many jurisdictions was used as a collective and generic term. Another suggestion was to consider the term "supply". The prevailing view was that the text would not be further amended.

60. In the course of subsequent deliberations, it was considered that, in the light of the compromise solution to use the term "[submission] [tender or other] security" in lieu of the term "submission security" (see para. 56 above), the term "submission(s)" should be replaced with the term "tender or other submission(s)". Some delegations however expressed reservations about the proposed change since in their view the use of this proposed definition throughout the revised model law would distort the meaning of some provisions.

Subparagraph (m): "direct solicitation"

61. Concern was expressed about the fact that the definition "direct solicitation" might imply that the procuring entity would have unlimited discretion in deciding from whom it might solicit submissions. In response, it was suggested that the definition should be rephrased to read "solicitation from supplier(s) or contractor(s) chosen by the procuring entity".

62. Another suggestion that gained substantial support in the Committee was to remove that definition from article 2 in order to avoid direct solicitation being put on an equal footing with open solicitation rather than being treated as an exceptional matter.

63. Subsequently, however, it was decided that the suggested amended definition of "direct solicitation" (see para. 61 above), with the addition of a reference to the exceptional nature of direct solicitation, should be retained in article 2. It was stated that it would be in accordance with standard drafting techniques to keep all definitions in one article, and that so doing would facilitate the understanding of the subsequent articles in which the term "direct solicitation" appeared, such as in article 7 (6).

Subparagraphs (n) to (s): definitions related to framework agreements

64. Support was expressed for retaining the definitions related to framework agreements in article 2 as doing so would allow users of the revised model law to familiarize themselves from the outset with terminology used in the context of the new procedure of the revised model law.

65. The other view was that those definitions should be moved from article 2 to the section of the draft revised model law dealing with framework agreements. Another proposal was to retain in article 2 only the definition in subparagraph (n) and move definitions in subparagraphs (o) to (s) to the section dealing with framework agreements. It was noted in that respect that it was usual practice to put all definitions in one place at the beginning of a legal instrument rather than to spread them throughout the text. Another approach suggested was to set out subparagraphs (o) to (s) as sub-subparagraphs to subparagraph (n).

66. A willingness to be flexible about all the suggested options was expressed. It was proposed that the Committee, in order to expedite its work, might decide to refer such and similar non-substantive issues to a drafting group that it might create. The UNCITRAL practice with establishing drafting groups and mandates usually given to them was recalled, in particular that drafting groups were created to

address purely drafting issues, mainly to ensure parity between various language versions of an instrument.

Subparagraph (t): "material change in the description of the subject matter of the procurement or all other terms and conditions of the procurement"

67. Support was expressed for retaining the definition in the revised model law and the use therein of the word "would" not "could". The word "would", it was felt, conveyed better an idea that one meant not a theoretical possibility that a change might produce the result specified in the definition but rather that it would inevitably lead to such a result.

68. Another suggestion was to use the term "fundamental change", not the term "material change". The Committee noted that differences between the two terms had been discussed in the Working Group, which had opted for the use of the term "material change" because in its view it allowed for more flexibility, as was appropriate in the context envisaged.

69. It was noted that a similar concept was found in the proposed article 32 (2) (b) but in a different context. It was therefore queried whether it would be advisable to refer in article 2 to "material change" only in the context of framework agreements. In response, it was noted that the definition would have to be redrafted to make it generally applicable to all situations where discretion was given to the procuring entity to change the terms and conditions of the procurement. A relevant discussion in the context of the most recently introduced competitive dialogue procedure was recalled in this respect. Preference was expressed for addressing the concept "material change" in each case in the relevant context rather than for trying to define it generically in article 2.

70. In response to another query, it was confirmed that situations identified in the definition were supposed to be listed alternatively, not cumulatively, and that such an understanding should be conveyed in all language versions.

71. The Committee deferred consideration of that definition until after redrafting when, it was proposed, the Committee would consider whether the definition of "material change" should be retained in article 2 or whether it would be better addressed in other provisions.

Additional definitions

72. The view was expressed that it would be desirable to add in article 2 a definition of an electronic reverse auction as well as any other recurrent terms used in connection with this new procurement technique.

73. In response to the suggestion that not only electronic reverse auctions but also conventional auctions should be defined in article 2, the Committee was reminded that the Working Group had decided not to regulate the latter type of auctions, which posed high risks of collusion among bidders (see para. 32 above).

74. The Secretariat was requested to propose a list of additional terms that it would be desirable to have defined in article 2 in the light of the consideration by the Committee of the draft revised model law. It was the understanding in the Committee that the substance of any additional definitions would have to be decided upon by the Committee. Opposition was expressed to adding new definitions if that would jeopardize the progress of the Committee's work on the draft revised model

law. The understanding was that no new definitions would be added in article 2 unless necessary and taking into account the impact of doing so on the achievement of the desired goal of completing the project at the current session of the Commission.

Article 3. International obligations of this State relating to procurement [and intergovernmental agreements within (this State)]

75. A query was raised about the square brackets in the title of the article, which had also appeared in the 1994 Model Procurement Law. The point was made that the text in square brackets was relevant to the provisions of paragraph (c) of the article, which, however, did not appear in square brackets. It was noted that internal consistency should be achieved within the provisions. If the intention was to restrict them to international obligations, then the square bracketed text in the title, together with paragraph (c), should be removed as both were dealing with the purely domestic issue of a federal State. If however, the intention remained to deal in the article with both international agreements and agreements between a federal State and its subjects, then paragraph (c) and the corresponding text in the square brackets in the title should be put in square brackets. It was noted that the guide might explain that the provisions within the square brackets were relevant to, and intended for consideration by, federal States.

76. The appropriateness of the entire article was questioned. It was stated that the article addressed issues dealt with in the constitution of an enacting State and therefore were not of a legislative nature and should not appear in the revised model law. In response, it was observed that those issues had been discussed at the time of the preparation of the 1994 Model Procurement Law and that it had been decided that the provisions should nevertheless be included in the Model Law because of their operational value. It was recalled that, in authorizing the review of the 1994 Model Procurement Law, the Commission had instructed not to depart from its basic principles. It was considered that article 3 contained such a principle. It was suggested that the guide or a footnote accompanying this article might alert enacting States of the fact that the provisions of the article might need to be adapted to constitutional requirements. With reference to paragraph (b) in particular, it was noted that "agreements entered" might need to be not only signed but also ratified by parliament, in order for them to be binding in an enacting State.

77. While several delegations supported that suggestion, some others were of the view that the approach did not address the concern expressed, i.e. that the content of article 3 as it stood was inappropriate for a procurement law, in that it strayed into constitutional matters. It was stressed that it was inappropriate for a model law to regulate hierarchy between procurement law and international treaties or bilateral obligations.

78. The prevailing view was that the provisions should be retained in the revised model law, but that the guide should alert enacting States that they should not enact this article if its provisions conflicted with their constitutional law. It was the understanding in the Committee that the square brackets would remain in the title of the article and that paragraph (c) would also be put in square brackets to indicate that these provisions were relevant only in the context of federal States.

Articles 4 and 5

79. No comment was made with respect to articles 4 and 5, which were found to be generally acceptable.

Article 6. Information on planned procurement activities

80. Support was expressed for replacing the word "obligate" with the word "oblige" in the text of article 6.

81. The Committee had before it the following proposal for an additional paragraph in article 6:

> "(2) A procuring entity may issue a request for expressions of interest before commencing procurement proceedings under this Law. [Such a request shall be published in ... (the enacting State specifies the official gazette or other official publication in which the request is to be published). The request shall also be published, in a language customarily used in international trade, in a newspaper of wide international circulation or in a relevant trade publication or relevant technical or professional journal of wide international circulation.[, except where the procurement proceedings are intended to be limited to domestic suppliers or contractors under article [7 (6) (c) (i) and (ii)] of this Law].] Neither the request nor any response shall confer any rights on suppliers or contractors, including any right to have a submission evaluated; nor does the notice oblige the procuring entity to issue a solicitation."

82. A query was made about the location of the provisions in this article rather than in articles regulating requests for proposals procedures where the stage of request for expression of interests was common (the notion of a request for an expression of interest being found in the 1994 Model Procurement Law (articles 37 and 48)). The Committee was informed about the discussion that took place on this subject at the sixteenth session of the Working Group (New York, 26-29 May 2009), in which it was decided that requests for expressions of interests might be relevant to any other procurement method, although they might be more common in requests for proposals procedures. To avoid confusion with the terminology already widely used in the context of requests for proposals procedures, a suggestion that eventually gained support was to consider replacing in the proposed paragraph the term "request for expression of interest" with the term "notice seeking interest" or other similar term.

83. The view was expressed that the proposed article 6 should remain as it was, without adding new provisions (which were in any case optional and created no legal obligations). This view was underscored because the phrase in the draft article 6 on information on planned procurement activities could be interpreted very broadly to encompass the intended meaning of the newly proposed paragraph (2). Considerable overlap between the existing provisions of the proposed article 6 and the newly proposed paragraph (2) above was noted.

84. The alternative view, which eventually prevailed, was that the newly proposed paragraph (2) had a distinct application and should be added to draft article 6, and that the guide should clarify how the resulting paragraphs (1) and (2) of article 6 would operate in practice. It was explained that, in some jurisdictions, the steps described in both paragraphs could be part of the procurement proceedings, could

immediately precede the procurement proceedings or could simply be a step in a long or medium-term plan.

85. A reservation was expressed against the suggestion to retain draft article 6 if proposed paragraph (2) were added. The optional nature of both paragraphs in draft article 6 was stressed. It was therefore observed that it would be more appropriate to move them from the draft revised model law to the guide, as examples of best practice in procurement planning and investigation of the market. Another suggestion was to put the provisions in square brackets for further consideration. Opposition to this latter proposal was raised, since it was felt that the provisions had been duly considered on several occasions and reflected the prevailing view among delegations.

86. The prevailing view was to retain the provisions of both proposed paragraphs of article 6 in the text of the revised model law with the amendments agreed at the current session (see paras. 80 and 82 above). The value of retaining these provisions in the revised model law was emphasized with reference to the Convention against Corruption, as ensuring transparency throughout the process and eliminating any advantageous position of suppliers or contractors that might otherwise gain access to procurement planning phases in a non-transparent way. It was understood that this point and the reasons for including these provisions as a matter of general application to all procurement methods in chapter I should be explained in the guide.

87. Concern was expressed about the burden on procuring entities of publishing the text in paper form. The wording proposed was "to make this information accessible" rather than to specify that such information should be published in a newspaper. In response, it was noted that under article 8, which provided for functional equivalence between various publication media, reference to a newspaper would already imply paper or non-paper means. Ultimately, it was decided to remove the second and third sentences from the proposed paragraph (2) to the guide.

Article 7. Rules concerning methods, techniques and procedures for procurement and type of solicitation

Paragraph (3)

88. It was recalled that the agreement in the Working Group was to use the term "economic efficiency" in paragraph (3) of the article. It was suggested that since one of the objectives of the revised model law as set out in its preamble was "maximizing economy and efficiency in public procurement" the choice of the term to be used should be considered in conjunction with this preamble provision.

89. Some delegates expressed difficulty in understanding the term "economic efficiency" and said that the terms "economy or efficiency" or "economy and efficiency" would be preferable. In the view of one delegation, a reference to "economy" meant that the use of a procurement method would be less costly, while the term "efficiency" meant that the use of a procurement method would involve less time. Satisfaction of either of these considerations, it was said, should be sufficient to justify recourse to alternative procurement methods set out in chapter III of the draft revised model law. While this understanding was shared by another delegation, the suggestion was made to use the term "economic efficiency"

as achieving the desirable ratio between time and cost considerations. It was suggested that further explanations might be provided in the guide.

90. The view was expressed that whichever term would be used to convey the intended meaning, it should appear either only in article 7 (3) or, in addition, in all articles of chapter III. Preference was expressed for the former approach since, it was said, article 7 (3) set out the general requirements justifying recourse to chapter III provisions. Consequently, whatever the terms of those requirements, they would be applicable to all procurement methods in that chapter.

91. The general view was that specific conditions for use of different procurement methods should not be set out in article 7 but retained in the articles regulating each relevant procurement method. It was understood that article 7 should set out the general conditions justifying recourse (a) to chapter III procurement methods in lieu of tendering and (b) to chapter IV procurement methods in lieu of tendering and chapter III procurement methods.

92. Economic efficiency was considered by some delegations to be the main condition for recourse to procurement methods set out in chapter III in lieu of tendering, while the inability to define specifications and/or establish evaluation criteria in quantifiable or monetary terms was considered to be the main condition for recourse to chapter IV procurement methods.

93. The Committee considered the proposal that the following principle should be reflected in the revised paragraph (3): "Where the procuring entity would be required to use tendering proceedings under paragraph (1) of this article, but considers for reasons of economic efficiency that it would be appropriate to use a method specified in chapter III, it may do so [if the conditions for use of the relevant procurement method in chapter III are satisfied] [only in accordance with the conditions specified for each such procurement method]." The understanding was that the guide would provide guidance on the relationship between paragraph (3) and paragraphs (1) and (4).

94. It was queried whether the idea proposed to be reflected in paragraph (3) of the article would eliminate the main difference between conditions for recourse to procurement methods set out in chapter III and conditions for recourse to procurement methods set out in chapter IV. It was considered to be essential to retain the idea that both tendering and the procurement methods alternative to tendering set out in chapter III were subject to the same criterion, that it was feasible to provide a detailed description of the subject matter of the procurement and to establish the evaluation criteria in quantifiable or monetary terms, and that this criterion would not be fulfilled in the case of procurement methods set out in chapter IV.

95. In the view of some delegations, economic efficiency was not the main reason for recourse to all procurement methods set out in chapter III. For example, recourse to two-envelope tendering was justified by other considerations, and recourse to request for quotations was justified by considerations of economic efficiency only by implication. Therefore, it was considered whether specifying in article 7 (3) economic efficiency as a general condition for recourse to all procurement methods in chapter III would be appropriate. A proposal was therefore made to delete from the paragraph the following wording: "but where the use of tendering proceedings would not be appropriate for reasons of economic efficiency [economy and efficiency] [economy or efficiency]." The paragraph would then read as follows:

"Where it is feasible to provide detailed description of the subject matter of the procurement and to establish the evaluation criteria in quantifiable or monetary terms, a procuring entity may use a method of procurement referred to in chapter III of this Law provided that the conditions for the use of the method concerned, as specified in the relevant provisions of chapter III, are satisfied."

96. It was decided, in the light of the mutual impact of the provisions in paragraph (3) and those in chapter III, to consider the paragraph at a later stage together with the relevant provisions of chapter III.

Paragraph (4)

97. It was decided, in the light of the mutual impact of the provisions in that paragraph with those in chapter IV, to consider the paragraph at a later stage together with the relevant provisions of chapter IV.

Paragraph (5)

98. It was decided that the term "stand-alone" should be retained and that the term "as appropriate" should be deleted.

Paragraph (6) (a) chapeau

99. The prevailing view was that the phrase "without prejudice to article 24" should be removed from the text.

Paragraph (6) (a) (ii)

100. It was acknowledged that the provisions were intended to accommodate sensitive types of procurement that usually took place in the defence sector. The proposal was made to remove any ambiguity in the term "confidentiality" by changing the text to read as follows: "Direct solicitation is required by reasons of essential national security or essential national defence purposes." It was noted that the proposal would also be relevant to paragraph (7) (a) (iv), which involved the same considerations.

101. Reference in this context was made to article XXIII (1) of the 1994 WTO Agreement on Government Procurement,[18] and article III of the Agreement as revised in 2006.[19] Both of these articles, it was stated, allowed exceptions to transparency for the protection of essential security interests relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defence purposes. It was considered important to take into account these provisions.

102. However, the Committee noted that the proposed wording might be insufficiently broad to cover sensitive procurements outside the defence sector, such as the procurement of a vaccine in the case of a pandemic. It was noted that both versions of the Agreement distinguished between measures necessary for national security and national defence, and measures necessary, for example, for public order or safety. An alternative view was that the wording could be interpreted more flexibly and that the guide could provide examples of situations intended to be

[18] Available at www.wto.org/english/tratop_E/gproc_e/gp_gpa_e.htm.
[19] Available at www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm.

covered by the notion of "essential national security" (such as procurement in the case of a pandemic or the procurement of sensitive items for medical tests or experiments).

103. Some delegates supported flexibility as regards retaining a reference to "confidentiality" in the text, on the condition that the guide would clarify that it did not refer to confidentiality in the sense of preserving commercially sensitive information (such as trade secrets). All procurement was considered to be confidential in this sense. It was suggested therefore that the text should limit the scope of the term "confidentiality" to State secrets arising from considerations of national security or national defence.

104. The prevailing view was that the text should be revised as proposed in paragraph 100 above.

Paragraph (6) (b)

105. A proposal was made to delete paragraph 6 (b) in the light of the changes to be made to paragraph (6) (a) (ii).

106. Concern was expressed that such a deletion would remove mention of exemptions from transparency requirements in the revised model law that could be essential in the context of the sensitive nature of certain types of procurement.

107. Support was expressed for the view that the provisions should remain but be redrafted in the light of the changes agreed to be made in paragraph (6) (a) (ii). It was suggested, for example, that the opening phrase should be replaced with the following wording: "if direct solicitation is used in situations referred to in paragraph (6) (a) (ii)."

108. It was noted that such a phrase would be excessively broad as it would justify exemptions from transparency in all cases of procurement involving essential national security or essential national defence. It was therefore suggested that it should be narrowed only to those procurements referred to in paragraph (6) (a) (ii) that were considered by the procuring entity to be confidential.

109. The following wording was proposed to replace the opening phrase in paragraph (6) (b) (which would limit exemptions from disclosure requirements to strictly justifiable cases): "if direct solicitation is used in the situations referred to in paragraph (6) (a) (ii), and where the procuring entity determines for considerations of confidentiality that the whole or part of the provisions as regards public disclosure of this Law should not apply, it shall include …" It was noted that the same considerations would be applicable in the context of article 7 (7) (c).

110. While some support was expressed for the idea intended to be conveyed by the proposed wording, the prevailing view was that the term "confidentiality" should be avoided in any revised text, since this term could justify unlimited exemptions and lead to abuses. The following wording was therefore suggested: "if direct solicitation is used in the circumstances set out in paragraph (6) (a) (ii) and where these circumstances make it necessary not to disclose the relevant information, the procuring entity may decide not to apply articles […] of this Law." The alternative view was that the originally suggested opening phrase "if direct solicitation is used in situations referred to in paragraph (6) (a) (ii)" (see para. 107 above) was sufficient and should not be expanded.

111. In the light of the implications of the proposed provisions on enacting States, the strong view was expressed that the scope of the provisions setting out exemptions from transparency requirements of the revised model law should be very clear and should limit any subjectivity on the part of the procuring entity to what was absolutely necessary.

112. A query was made as to whether all the cross-references conferring exemptions to the transparency requirements of the revised model law contained in the text were appropriate. It was noted that the Committee should express its position as regards each exemption. The Committee was therefore invited to consider which of the following exemptions should remain or be added: (a) exemption from open solicitation (article 24 and article 15 (2) (providing for public notification of prequalification proceedings)); (b) exemption from public notification about pre-qualified suppliers or contractors (article 15 (9)); (c) exemption from public notice of the award of the procurement contract (article 20); and (d) exemption from public access to the relevant records of procurement proceedings (article 22 (2)).

113. The inclusion of cross-references to article 15 (2) and (9) (prequalification) was queried, since it was considered that direct solicitation, as per the proposed definition in article 2 (see paras. 61 and 63 above), involved the solicitation from chosen suppliers rather than prequalification. The alternative view was that it would be desirable to preserve flexibility in this matter and, thus, that cross-references to these provisions should remain.

114. In the view of some other delegations, it would not be necessary to set out any specific exemptions in paragraph (6) (b), since these exemptions were already implicit in the term "direct solicitation" read together with paragraph (6) (a) (ii). In the view of yet other delegations, exemptions should be set out but taking into account the need to achieve a balance between the interests of the procuring entity in exempting some sensitive information from the public disclosure requirement on justifiable grounds and the need to provide minimum information to the public to ensure public oversight and review even in cases of sensitive procurement.

115. A query was made as to whether the procuring entity should have the right to choose which of the provided exemptions it could invoke in particular circumstances. One view was that the wording proposed in paragraph 109 above, in referring to "the whole or part of the provisions as regards public disclosure of this Law", gave the procuring entity the flexibility to decide whether to invoke all or some public disclosure exemptions.

116. The importance of preserving in the text safeguards against abuse of the exemptions was highlighted, such as the requirement that the procuring entity must include in the record of procurement proceedings a statement of the grounds and circumstances on which it relied to justify its determination. It was also proposed that the guide should provide detailed explanations of the provisions, in particular the significance of the exemptions, and should highlight that it is the procuring entity that determines whether sufficient grounds exist to treat a relevant procurement as confidential.

117. The general feeling was that the provisions would have to be redrafted to envisage all appropriate alternatives to open solicitation. The view was expressed that the term "direct solicitation" might better be avoided altogether in any revised text.

118. In the course of subsequent deliberations, support was expressed for the following wording to replace paragraph (6) (b): "If solicitation proceeds pursuant to article 7 (6) (a) (ii), the procuring entity shall determine which provisions of this Law calling for public disclosure shall not apply, and shall include in the record required by article 22, a statement of the [grounds and circumstances] [reasons] which justified such determination."

Paragraph (7)

119. It was proposed that subparagraph (a) (iv) and the reference to "national interest" in subparagraph (c) should be revised by the Secretariat in the light of the deliberations of the Committee on procurement in the defence sector (see paras. 100-104).

Paragraph (8)

120. It was proposed that the words "or the use of direct solicitation" should be deleted. The alternative proposal, which gained support, was to redraft the paragraph to ensure that any decision by the procuring entity to use a procurement method other than tendering and any decision not to use open solicitation in other procurement methods would have to be reflected and justified in the record. The Committee deferred consideration of the paragraph and the remaining paragraphs of article 7 to a later stage.

Article 8. Communications in procurement

Paragraph (2)

121. The Committee had before it the following proposal for a revised paragraph (2):

> "(2) Communication of information between suppliers or contractors and the procuring entity referred to in articles [14 (1) (d), 15 (6) and (9), 19 (4), 30 (2) (a), 32 (1), …, and in the case of direct solicitation in accordance with article 7 (6) (a),] may be made by means that do not provide a record of the content of the information on the condition that, immediately thereafter, confirmation of the communication is given to the recipient of the communication in a form that provides a record of the content of the information and that is accessible so as to be usable for subsequent reference."

122. With reference to a query set out in footnote 61 of document A/CN.9/WG.I/WP.69/Add.1, the prevailing view was that a cross-reference to article 19 (4) should be deleted. The Secretariat was entrusted to ensure accuracy of the remaining cross-references in these provisions.

New paragraph (3)

123. The Committee had before it the following proposal for a new paragraph (3):

> "When the procurement involves, requires and/or contains classified information as regards national defence or national security, the procuring entity shall specify in solicitation documents measures and requirements needed to ensure the security of such information at the requisite level."

124. The proponents explained that additional provisions would be needed in the text to accommodate the particular issues arising from the inclusion of defence procurement within the scope of the revised model law. In response to a query as to whether the security concerns were already addressed in paragraph (5), the proponents pointed to the different scopes of the proposed new text and paragraph (5).

125. It was explained that the requirements or measures referred to in the proposed text concerned technical requirements addressed to suppliers or contractors to ensure the integrity of information, such as encryption requirements, and would allow the procuring entity to stipulate, for example, the level of the officer tasked with receiving the information concerned. Paragraph (5), on the other hand, addressed internal requirements with which the procuring entity had to comply.

126. Several delegates strongly supported including those provisions in the revised model law because not doing so, it was said, would make the that model law unusable in the national security and defence sectors.

127. Opposition to including the proposed provisions in the revised model law was expressed. It was considered that the proposed provisions would complicate chapter I, which was supposed to set out provisions of general application to public procurement. The provisions were considered unnecessary also because enacting States might already have specific regulations addressing classified information in the national defence or national security sector. In response, it was observed that the proposed text had been crafted broadly to avoid including details that might conflict with other regulations and that it was the understanding of the proponents that the guide would specify that the provisions were subject to applicable regulations in each enacting State.

128. A proposal to have a special article or chapter dedicated to procurement in the defence and security sectors did not gain support. It was explained that defence and national security procurement, among other kinds of procurement, of a sensitive nature, would be exempted from certain general principles of the revised model law. Treating them separately and distinctly in the revised model law would, in the view of some delegations, result in a departure from the general premise on which the draft revised model law was based — that is, the complexity of the procurement in question rather than its subject matter or the sector in which it took place. At the same time, support was expressed for the view that a general review of the draft revised model law, to accommodate sensitive procurement where appropriate through exemptions from general rules, was unavoidable. (See paras 253-266 below.)

129. It was agreed that article 8 would be the appropriate location for the proposal as it addressed communications, but flexibility was expressed as regards the best paragraph within that article for the provisions to be set out. Suggestions to merge the proposed text with paragraph (5) did not gain support given their substantially different scopes (see paras 124 and 125 above). Substantial support was expressed for the suggestion to add the proposed text as a new subparagraph (b) in paragraph (3).

130. Concern was expressed about this suggestion since relocating the provisions to paragraph (3) might imply that they were of general rather than exceptional application. It was cautioned that expanding the application of measures justifiable in national defence and national security sectors to other sectors might lead to discriminatory practices. A preference was therefore expressed for stand-alone

provisions on this subject with the replacement of the words "shall specify" with the words "shall have the right to specify".

131. Since the proposal essentially addressed the information that the procuring entity must specify in solicitation documents, the view prevailed that the following text based on the proposal should be set out not separately but as a new subparagraph (b) in paragraph (3) as follows:

> "Where the procurement involves, requires and/or contains classified information as regards national defence or national security, measures and requirements needed to ensure the security of such information at the requisite level;"

132. In connection with this text, it was queried whether protection should be given to classified or similar information only in the defence or other national security sectors. Support was expressed for a suggestion to broaden the scope of the proposal. The following suggestions were considered to that end:

(a) To refer to "protected" or "sensitive" information rather than "classified" information;

(b) To broaden the scope of the classified information, by adding the words "or in any other instance" after the words "national defence or national security";

(c) Alternatively, to refer to "classified information [either] as regards national defence or national security, or any other information requiring protection";

(d) Alternatively, to refer to "classified information [such] as regards national defence or national security";

(e) To refer to "national defence or the national interest" rather than "national defence or national security".

133. In considering the alternative formulations given above, the view was expressed that the reference to "classified" information might be too restrictive and that an alternative term, such as "sensitive" or "protected" information, might better convey the type of information concerned. On the other hand, it was observed that the term "classified" information was a term of art well understood in relevant circles. Caution against too broad an expansion of the concept of "classified information" was urged. Support was expressed for the inclusion in the text of the words "or any other information requiring protection" as set out in paragraph 132 (c) above, as an appropriate way of resolving these issues.

134. In this context, it was recalled that, in the light of the earlier deliberations in the Committee on article 7 (6) (a) (ii) (see paras. 100-104 above), the references to "national security" were intended to be interpreted broadly, so that the protection of public health in cases of (for example) a pandemic would fall within the provisions. On the one hand, concern was expressed about the fact that, notwithstanding the understanding reached, a reference to "national defence or national security", even where broadly construed, might not allow for the protection of classified or similar information not in the national defence or national security domain, such as information on public health. On the other hand, concern was expressed about the fact that the use of the phrase "or any other instance" would confer an open-ended discretion that might lead to abuse. In response, it was said that this provision addressed the protection of classified or similar information only, and not the broader question of the use of direct solicitation or other transparency measures.

135. Other views expressed were that the guide should explain the scope of the provisions, and that they were linked to the scope of article 7 (6) (a) (ii). It was also stressed that the provisions should make it clear that the protection was afforded to classified or similar information, and not to information that the procuring entity might simply wish to protect.

136. A query was made as to how the protection would affect the obligation of the procuring entity to maintain a comprehensive record of the procurement and to make certain parts thereof available to the public.

137. The Committee decided that future considerations of the new provisions for article 8 should be based on the following wording that would be considered together with the related provisions of the deferred article 7 (see paras. 100-120 above):

> "(3) (b) Where the procurement involves, requires, and/or contains [sensitive] [classified] information [such] [either] [as] [regards] national defence or national security [or national interest] [or other information requiring protection], and if the procuring entity considers it necessary, measures and requirements needed to ensure the security of such information at the requisite level;"

Paragraph (3), new subparagraph (c), old subparagraph (b)

138. The Committee had before it the following proposal for a new subparagraph (3) (c):

> "(c) The means to be used to communicate information by or on behalf of the procuring entity to a supplier or contractor or to the public or by a supplier or contractor to the procuring entity or other entity acting on its behalf."

139. No objection was raised to the proposal, which was found to be generally acceptable.

Paragraph (4)

140. The Committee had before it the following proposal for paragraph (4):

> "(4) The procuring entity shall use means of communication that are in common use by suppliers or contractors in the relevant context. In addition, the procuring entity shall hold any meeting of suppliers or contractors using means that ensure that suppliers or contractors can fully and contemporaneously participate in the meeting."

141. It was suggested that the phrase "any meeting of suppliers or contractors" should be replaced with the phrase "any meeting with suppliers or contractors." No objection was raised to this suggestion or the remainder of the proposal. The proposal with this amendment was found to be generally acceptable.

Paragraph (5)

142. The Committee had before it the following proposal for paragraph (5):

> "(5) The procuring entity shall put in place appropriate measures to secure the authenticity, integrity and confidentiality of information concerned."

143. No objection was raised to the proposal, which was found to be generally acceptable.

Article 11. Rules concerning description of the subject matter of the procurement, and the terms and conditions of the procurement contract or framework agreement

144. The Committee had before it the following proposal for paragraph (1) of article 11:

> "(1) The procuring entity shall set out in the solicitation documents the description of the subject matter of the procurement that it will use in the examination of tenders or other submissions. Where thresholds are set by the procuring entity for identifying non-responsive submissions, the procuring entity shall also set out the thresholds and the manner in which they are to be applied in the examination in the solicitation documents."

145. Concern was expressed about using the term "threshold" without it being defined in article 2 or in the guide in the specific context of article 11 as referring to minimum technical requirements. The point was made that this term had different connotations in many jurisdictions and in some international texts, such as the WTO Agreement on Government Procurement and European Union directives on procurement,[20] where the term usually referred to monetary thresholds that might dictate the use of particular procurement methods. The technical meaning assigned to the term in the context of various articles of the draft revised model law was noted.

146. In order to stress the distinct meaning intended to be conveyed in this article, alternative terms were proposed to be used in lieu of the term "threshold", such as "benchmark", "minimum requirements", "minimum level of" or "minimum criteria". It was suggested that whichever term was used in the context of these provisions, it might need to be defined in article 2 in order to eliminate any ambiguity as to its intended meaning.

147. A consensus emerged to substitute the term "threshold" with an alternative term. Support was expressed for the use of the term "minimum requirements". Some reservation was expressed about the use of another alternative term proposed — "minimum criteria", as it might create unnecessary confusion since the word "criteria" was also used in the context of assessment of qualifications or evaluation.

148. The Secretariat was entrusted with finding the appropriate term to replace the term "threshold". It was recalled that a glossary of terms would be prepared and it was considered more appropriate to explain the term used in the context of article 11 there rather than in article 2.

---

[20] 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).

Article 12. Rules concerning evaluation criteria [the evaluation of submissions]

Structure and general issues

149. Concern was expressed about the structure of the article. It was proposed that the article should be restructured with the following three elements: first, principles applicable to the evaluation criteria; second, the obligation to publish the evaluation criteria and related information in the solicitation documents; and third, the manner in which the evaluation criteria and other related evaluation aspects were to be applied in the evaluation process. Support was expressed for that suggestion.

150. Other structural changes were proposed, such as reordering paragraphs 2 and 3. The alternative view was that the article as proposed was coherent and no structural changes would be required.

151. A preference was expressed for using the term "evaluation criteria" rather than "criteria" throughout the article and in other provisions of the revised model law according to the context. It was also the understanding that amendments would be required in the text in the light of the proposed definition of "tender or other submission(s)" (see para. 60 above).

Paragraph (1), chapeau provisions

152. The Committee had before it the following proposal for the title and chapeau of paragraph (1):

> **"Article 12. Rules concerning evaluation criteria**
>
> (1) In examining, evaluating and comparing tenders or other submissions and determining the successful submission (the evaluation procedure), the procuring entity shall:"

153. A preference was expressed for replacing the proposed chapeau provisions with the phrase "In order to determine the successful submission, the procuring entity shall:".

Paragraph (1) (a) to (c)

154. Concern was expressed about the inclusion of an essential principle, that "the evaluation criteria must be relevant to the subject matter of the procurement", only in paragraph (1) (a). It was noted that this paragraph addressed the evaluation and comparison of submissions, at which stage the procuring entity would have to apply the criteria set out in the solicitation documents. It was considered essential that all requirements governing the evaluation criteria, including this one, be established very early in the procurement process and set out in the solicitation documents. It was therefore proposed that the principle should be set out without a link to any stage of the procurement proceedings as an overarching requirement, such as in paragraph (3). In a similar vein, it was suggested that all such requirements be placed at the beginning of the article.

155. It was suggested that the provisions of subparagraphs (1) (a) to (c) should be merged with the chapeau provisions in order to avoid repetitions and to set out the essential principles applicable to the evaluation criteria. These principles included that the evaluation criteria and all other information related to the evaluation process must be set out in the solicitation documents and that the evaluation criteria must be relevant to the subject matter of the procurement. It was also proposed that

the notion that the evaluation criteria should correspond to the market conditions be included.

156. The Committee agreed that subsequent consideration of paragraph (1) of the article would be based on the following wording:

> "[In order to determine the successful tender or other submission] [In evaluating and comparing tenders or other submissions and determining the successful tender or other submission], the procuring entity shall use only those evaluation criteria that have been set out in the solicitation documents, [and which shall relate to the subject matter of the procurement] and shall apply them in the manner that has been disclosed in those solicitation documents."

Paragraph (2)

157. The Committee had before it the following proposal for paragraph (2):

> "(2) Any non-price evaluation criteria shall, to the extent practicable, be objective and quantifiable. All evaluation criteria shall be given a relative weight in the evaluation procedure and, wherever practicable, shall be expressed in monetary terms."

158. No objection was raised to the proposal, which was approved.

Paragraph (3)

159. The Committee had before it the following proposal for paragraph (3):

> "(3) (a) The evaluation criteria must relate to the subject matter of the procurement.
>
> (b) The evaluation criteria may [concern] [consider] only:
>
> (i) The price, subject to any margin of preference applied pursuant to paragraph (4) (b) of this article;
>
> (ii) The cost of operating, maintaining and repairing goods or construction, the time for delivery of goods, completion of construction or provision of services, the functional characteristics of goods or construction, the terms of payment and of guarantees in respect of the subject matter of the procurement, subject to any margin of preference applied pursuant to paragraph (4) (b) of this article;
>
> (iii) Where the procurement is conducted in accordance with article … [two-envelope tendering] or with chapter IV, and where relevant, the qualifications, experience, reputation, reliability and professional and managerial competence of the supplier or contractor and of the personnel to be involved in providing the services, subject to any margin of preference applied pursuant to paragraph (4) (b) of this article."

160. It was proposed that the following revisions be made to the suggested new wording for paragraph (3), and the view was reiterated that the paragraph should appear before paragraph (2) (see para. 150 above):

(a) In subparagraph (b), to delete the words "consider" and "only". No objection was raised to the deletion of the word "consider". In support of the proposal to delete the word "only", it was observed that it might not be possible to

set out exhaustively all the possible evaluation criteria. This deletion was supported on the condition that all criteria would be published in the solicitation documents for transparency reasons and be relevant to the subject matter of the procurement. In opposing the deletion, it was commented that the reason for including the word "only" was to avoid the introduction of subjective criteria. It was added that there was a clearly defined structured approach to the paragraph, making the aim of an exhaustive set of criteria clear. It was suggested, therefore, that the word "only" either be retained or included in square brackets with an explanation of the policy considerations in the guide. It the light of disagreement on this point, it was proposed that the word should be retained in the provisions in square brackets for enacting States to choose whether to delete or retain it. This approach was preferred to another proposal to replace the word "only" with the words "in particular". The Committee decided to retain the word "only" in square brackets pending further deliberations;

(b) In subparagraph (b) (i), to add a reference to socioeconomic factors after the reference to margins of preference and replace a cross reference to paragraph (4) (b) with a reference to paragraph (4). The importance of bringing socioeconomic factors within the ambit of paragraph (3) was emphasized in order to clarify how such factors were supposed to be taken into account in a transparent and objective manner in the evaluation and comparison of submissions. Both support and opposition to this proposal were voiced. It was noted that the provisions were based on the corresponding provisions in the 1994 Model Procurement Law, and that the intention was to require objective and transparent adjustments in price according to a margin of preference to be set out and disclosed to suppliers and contractors in advance of the procurement. Reference to socioeconomic factors in this context, it was suggested, could make the provisions non-transparent and subjective. It was suggested that the proposal should be considered at a later stage together with all other proposed provisions relevant to the consideration of socioeconomic factors in the evaluation and comparison of submissions;

(c) In subparagraph (b) (iii), to delete references to "qualifications, experience, reputation". It was noted that the provisions were based on article 39 of the 1994 Model Procurement Law, which addressed services procurement. A concern was raised about converting them to evaluation criteria relevant to all types of procurement. The inherent subjectivity of the term "reputation" raised particular concern on the part of some delegations, and substantial support was expressed for its deletion. The Committee agreed to a suggestion to replace the term "reputation" with the term "references", as being more objective. The Committee also agreed to delete the reference to "qualifications", with the resulting provisions that had originally been proposed to be deleted reading "experience, references";

(d) Also in subparagraph (b) (iii), to replace the reference to "services" with a reference to "subject matter of the procurement", in line with the decision not to differentiate procurement under the revised model law on the basis of whether goods, construction or services were being procured;

(e) To add a new subparagraph referring to "performances in environmental protection". Support was expressed for this suggestion and eventually it was agreed that a reference to ecological considerations should be added.

Paragraph (4)

161. The proposal was made to replace subparagraph (a) with the phrase "consider socioeconomic factors" and to list the examples of socioeconomic factors from the 1994 Model Procurement Law in the guide. Support was expressed for this approach as it would appropriately provide for more flexibility in an area that was constantly evolving and involved politically sensitive issues.

162. Strong objection was expressed to the amendment of these provisions of the 1994 Model Procurement Law. A reference in this respect was made to the accompanying guide text, which was considered to be broadly consistent with the WTO Agreement on Government Procurement, explaining the exceptional nature of the provisions and stating that they should be available only to developing countries. Concern was expressed that amending the text would distort the balance achieved in 1994, might open the door to protectionism in various countries and would not be consistent with trends in international regulation of procurement. Strong support was therefore expressed for retaining the provisions as they appeared in the 1994 Model Procurement Law together with the cautionary wording in the accompanying guide.

163. The alternative proposal was to amend subparagraph (a) to read as follows: "consider socioeconomic factors, such as", on the understanding that an illustrative list of socioeconomic factors could be provided in the revised model law or be omitted with the result that it would be up to an enacting State to specify the relevant socioeconomic factors according to the circumstances on the ground. The prevailing view was that it would be helpful to provide for an illustrative list of socioeconomic factors in the revised model law and that such a list could be based on the provisions of the 1994 Model Procurement Law, updated as necessary.

164. It was suggested that an updated illustrative list might refer to such socioeconomic factors as: "specific industrial sector development, development of small and medium-sized enterprises, minority enterprises, small social organizations, disadvantaged groups, persons with disabilities, regional and local development, environmental improvements, improvement in the rights of women, the young and the elderly, people who belong to indigenous and traditional groups, as well as economic factors, such as balance of payment position and foreign exchange reserves." Support was expressed for including this updated illustrative list in the revised model law.

165. In response to a concern about transparency and objectivity in applying socioeconomic factors in the evaluation and comparison of submissions, the general understanding was that the requirement of the 1994 Model Procurement Law that these factors and the manner of their application would have to be addressed in procurement regulations would be retained. In addition, it was suggested that paragraph 4 (a) might explicitly require the socioeconomic factors to be applied in an objective and transparent manner, with the guide explaining how such transparency and objectivity could be achieved in practice. The importance of keeping a comprehensive record was highlighted in this respect.

166. It was suggested that: subparagraph (a) should start with the phrase "in establishing non-price criteria"; subparagraph (b) should start with the phrase "in establishing price criteria"; and subparagraph (c) should be deleted. No objection was raised to this suggestion.

167. It was decided that consideration of the paragraph with all proposed revisions thereto should be deferred to a later stage.

Paragraph (5)

168. No comments were made with respect to the paragraph.

Paragraph (6)

169. Support was expressed for retaining the term "lowest evaluated tender" in the revised model law.

170. Some delegations, however, did not find the drafting history of the term (A/CN.9/WG.I/WP.68, paras. 21-27) so convincing as to justify the retention of the term. Concern was reiterated about the term as implying that the supplier receiving the lowest rating at the end of the evaluation process would be the successful supplier. In response, it was observed that, from the practitioner's point of view, the term did not raise any difficulty. Reference in this respect was made to provisions of paragraph (2) of the article that helped to understand the intended meaning of the concept of the lowest evaluated tender.

171. The alternative terms, such as "most advantageous tender", used in the WTO Agreement on Government Procurement, "most economical tender" or "best evaluated tender", were suggested for consideration. Another solution proposed was to retain the term "lowest evaluated tender" with an explanation in the guide about the origin of the term and the drafting history provided in document A/CN.9/WG.I/WP.68.

172. Another suggestion, which, it was noted, might also assist in resolving problems with terminology, was to delete subparagraphs (a) to (e). It was considered more appropriate to include these provisions in the articles addressing specific procurement methods.

173. The Committee decided to delete subparagraphs (a) to (e) and retain in paragraph (6) the following text: "The evaluation procedure shall be conducted by applying the evaluation criteria in the manner set out in the solicitation documents, to determine the [successful tender or other successful submission] [most advantageous tender or other successful submission]".

174. A general remark was made that the drafting history of the 1994 Model Procurement Law might be irrelevant in many aspects since the entire philosophy of the revised model law should reflect the changes that had taken place in procurement since 1994. The revised model law would be viewed as a more complex document that was not only concerned with the issue of opening up markets, which was the major concern of the 1994 version. In particular, it was pointed out that the basic premise expressed in the 1994 Model Procurement Law that some States were not ripe for certain sophisticated procurement methods or techniques should be removed, since many States had made considerable progress in their procurement administration and it could be said that the same principles and concerns preoccupied developed and developing countries alike. How to achieve the best value for money was cited as an example of the issues that remained valid for all jurisdictions.

Article 14. Submission securities

175. It was the understanding that, in the light of the proposal to change to the definition "[submission] security" to "[submission] [tender or other] security" in article 2 (see para. 56 above), consequential amendments would be required throughout the revised model law in the relevant context, including in this article.

176. Concern about the proposed changes in the definition "[submission] security" was raised in the specific context of article 14, where the use of the newly suggested term "tender or other security", it was said, might distort the content of the article. Additional concerns were raised about this new term, in particular its exact scope and the absence of a reference therein to "other submission security" in line with the newly proposed definition "tender or other submission(s)" (see paras. 55-60 above).

Article 15. Prequalification proceedings

177. The decision of the Working Group not to provide for pre-selection in this article was recalled. It was therefore suggested that the term describing the proceedings of article 15 in various languages should not inadvertently convey any such meaning.

178. It was proposed that the last words in paragraph (7) should read "the invitation to prequalify", in the light of the content of paragraph (3) of the article. No objection was raised to this suggestion.

Article 16. Rejection of all submissions

179. It was noted that, although consequential changes would be made in the provisions to reflect the proposed definition "tender or other submission(s)" (see para. 60 above), some difficulties with the use of that definition persisted. Provisions containing the anticipated amendments, it was said, would be unnecessarily complicated and difficult to understand.

180. The Committee was informed about the drafting history of the article preceding the adoption of the 1994 Model Procurement Law and consideration of the article in the Working Group, with reference to document A/CN.9/WG.I/WP.68/Add.1 (paras. 25-36). The Committee noted that discussion of the article should take into account decisions made in the Working Group in the course of the revision of the 1994 Model Procurement Law that had an impact on some provisions of the article, such as the Working Group's decision to strengthen review provisions. It was recalled that under the 1994 Model Procurement Law, many decisions of the procuring entity, including a decision to reject all submissions, were exempted from review, and that it was proposed to remove this exemption (article 52 (2) (d)), among others, from the revised model law.

181. The Committee had before it the following proposals:

(a) To delete in paragraph (1), the words in square brackets "cancel the procurement" and "but is not required to justify those grounds". The latter deletion, it was explained, was proposed in the light of the provisions in paragraph (2) of the article. It was further proposed that other provisions in square brackets should be retained in the text without square brackets;

(b) To delete in paragraph (2) the words "towards suppliers or contractors that have presented submissions";

(c) To replace paragraphs (1) and (3) of the article with the following text: "In case the procurement is cancelled by the procuring entity prior to the acceptance of the successful submission, notice of cancellation of the procurement and those grounds should be given promptly to all suppliers or contractors that presented submissions". Some support was expressed for this proposal with some modification (see para. 186 below);

(d) To replace the article with a text that provided for (i) the right to cancel the procurement at any stage of the procurement proceedings, (ii) a notification of the cancellation being provided in the same manner as the initial solicitation, (iii) an additional notification with grounds to suppliers or contractors that had presented submissions, and (iv) no liability on the side of the procuring entity.

182. The Committee subsequently focused on the following issues in conjunction with these proposals: (a) whether the term "rejection of all submissions" accurately described the intended meaning of the article; (b) whether the procuring entity should have the right to cancel the procurement and at which stage of the procurement proceedings; (c) the time frame intended to be covered by the article; (d) whether a notice of cancellation should always be provided and in which manner it should be provided; (e) whether grounds and justifications for cancellation must always be provided and, if so, whether they should be provided in the same way as a notice of cancellation or only to participating suppliers or contractors; and (f) safeguards against the improper use of the right given to the procuring entity under the article.

Whether "rejection of all submissions" accurately described the intended meaning of the article

183. Support was expressed for the view that the term "rejection of all submissions" was problematic and should be replaced with "annulment of the procurement proceedings", "cancellation of the procurement proceedings" or "termination of the procurement proceedings". The term "rejection" was seen as too closely linked to the examination, evaluation and comparison of submissions and the rejection, for example, of unresponsive submissions. Concern was raised about the use of the term "annulment" and a general preference was expressed for the use of the term "cancellation" or "termination". Other delegations were of the view that the term "rejection of all submissions" should be retained.

184. The Committee decided that the Secretariat should find an appropriate term that would convey more accurately the intended meaning of article 16 and would avoid confusion with other provisions of the revised model law that allowed rejection of individual submissions on various grounds (for example, on the ground of inducement, conflicts of interest, as being non-responsive or not achieving the required threshold).

185. In the course of subsequent deliberations, it was agreed to use the term "cancellation of the procurement" and to amend the article accordingly.

Whether the procuring entity should have the right to cancel the procurement and at which stage of the procurement proceedings

186. Support was expressed for the view that the procuring entity should have an unconditional right to cancel the procurement at any stage of the procurement proceedings. It was therefore suggested that the following sentence should replace

the opening phrase in the proposal reproduced in paragraph 181 (c) above: "the procuring entity shall have the right to cancel the procurement at any stage of the procurement proceedings."

The time frame intended to be covered by the article

187. Views differed as regards the time frame that should be covered in article 16. Some inconsistency between the first and second sentences of paragraph (1) of the proposed article 16, which was also found in the 1994 Model Procurement Law, was noted in this regard. A view was expressed that the provisions should permit cancellation up to the deadline for presenting submissions. Two other main options considered were to allow cancellation (a) up to the acceptance of the successful submission or (b) up to the stage of conclusion or entry into force of the procurement contract.

188. In explanation of the first option, it was stated that the purpose of the article was to provide protection to suppliers or contractors that presented submissions. Thus the period that preceded the presentation of submissions and the period after the acceptance of the successful submission would not be relevant. The acceptance of the successful submission would be the appropriate cut-off point in the light of article 19, which provided sufficient safeguards to the suppliers or contractor whose submission was accepted but the procurement was cancelled subsequently. It was explained that in such a case, the safeguards provided for in article 19 would apply, not those in article 16.

189. A compromise emerged that the provisions should concern the entire procurement process covered by the revised model law, in other words until the conclusion of the procurement contract, after which general provisions of contract law were applicable.

Whether a notice of cancellation should always be provided and in which manner it should be provided

190. Support was expressed for the view that a notice of cancellation should always be provided. Views varied whether it should be provided individually to participating suppliers or contractors alone, or whether it should be issued in the same way and in the same media in which the original notice of procurement is published.

191. The prevailing view was that if the procurement were cancelled before submissions were presented or if the submissions were presented but not opened, the notice of cancellation was to be published in the same way and in the same media in which the original notice of procurement had been published and any unopened submissions would be returned unopened to participating suppliers and contractors. A public notice of cancellation of the procurement was considered essential for the oversight by the public. It was further explained that in the case of opened submissions, the notice of cancellation should also be given individually to each supplier or contractor that had presented a submission.

192. The view was reiterated that, as explained in paragraph 188 above, the stage preceding the presentation of submissions would be irrelevant and should therefore not be regulated by the article.

Whether grounds and justifications for cancellation must always be provided and, if so, whether they should be provided in the same way as a notice of cancellation or only to suppliers or contractors concerned

193. Support was expressed for the view that if the procurement were cancelled before submissions were presented or if the submissions were presented but not opened, the procuring entity should not be required to provide any grounds or justifications for cancellation. If, however, the procurement were cancelled during subsequent stages of the procurement proceedings, grounds should be provided in the notice of cancellation issued individually to each supplier or contractor concerned.

194. The view was reiterated that, as explained in paragraph 188 above, the stage preceding the presentation of submissions would be irrelevant and should therefore not be regulated by the article.

195. Some delegations were of the view that the obligation to notify grounds for cancellation should not be automatic but should arise following a request from the suppliers or contractors concerned. This limitation was seen as important for not increasing the bureaucratic burden. It was also suggested that the guide should highlight, in the same vein, that the grounds provided could be short but should nonetheless be comprehensible.

196. Other delegations did not share these views. They considered that imposing such an obligation on the procuring entity would be the only way to ensure transparency and meaningful review. They therefore proposed that the words "upon request" in paragraph (1) of the proposed article be deleted. It was also noted that under the law of some jurisdictions, the procuring entity would in any case have to communicate the grounds to all suppliers or contractors affected by a decision to reject all submissions. In response, the point was made that requirements of national laws of any individual country should not become a determining factor for revisions of the 1994 Model Procurement Law.

197. An understanding was expressed that justification should not be required, as any such requirement would be inconsistent with paragraph (2) of the article (which itself provided that the procuring entity shall incur no liability, solely by virtue of its invoking paragraph (1) of the article). At the same time, there was a general understanding that the procuring entity might decide to provide justifications.

198. In the light of these discussions, it was proposed that a distinction between "grounds" and "justifications" should be eliminated in the provisions, by replacing these two terms with the word "reasons".

Safeguards against improper use of the right given to the procuring entity under the article

199. In the light of the unconditional right given to the procuring entity to cancel the procurement, it was considered essential to provide for safeguards against any abuse of this right. It was noted, in this regard, that the provisions could be used for corruptive practices.

200. The Committee in this respect recalled the Working Group's decision to delete the exception from review of a decision to cancel the procurement, which had been set out in article 52 (2) (d) of the 1994 Model Procurement Law. Provisions on the record of procurement proceedings that would require including in the record the fact of and grounds for the decision under article 16 were also noted. The obligation

on the part of the procuring entity to provide affected suppliers or contractors with reasons for the decision was also cited as an important safeguard. It was also recalled that under the review provisions of the revised model law, the affected suppliers would be able to seek recovery of the costs of preparing and presenting submissions.

201. It was proposed that the revised model law or the guide might provide for additional safeguards by, for example, listing exceptional circumstances that would justify the cancellation of the procurement (for example, budgetary considerations). Opposition was expressed to the suggestion that any specific conditions governing the procuring entity's right to cancel the procurement under article 16 should be provided in the revised model law, as they could not be exhaustive. Instead, it was considered sufficient to list in the guide possible circumstances that would justify exercise by the procuring entity of its right under article 16. Such circumstances, it was pointed out, would arise mainly from public interest considerations, as had already been highlighted in the 1994 Guide. An observer informed the Commission that cancellation of the procurement in practice often took place after submissions had been examined, evaluated and compared either because all the submissions had turned out to be unresponsive, effective competition was missing or the proposed prices substantially exceeded the available budget.

202. Requiring a higher-level approval for taking a decision under article 16 and reserving the right in the solicitation documents to cancel the procurement were also mentioned as possible safeguards. In response to an enquiry as to why provisions of the 1994 Model Procurement Law to such effect had been deleted from the proposed article, the relevant Working Group's decisions were recalled, including a strong view expressed in that Group that these provisions created an unnecessary bureaucratic burden (with reference to a higher-level approval) or were superfluous (as regards reserving the right in the solicitation documents) particularly in the light of administrative law provisions giving the right to the procuring entity to cancel the procurement in any case (A/CN.9/668, paras. 112 and 113).

203. Among other possible safeguards, some delegations noted that laws in their jurisdictions required that possible grounds for cancellation should be specified in the solicitation documents. Another safeguard proposed for consideration was that the procuring entity should be prohibited from resorting to direct solicitation or single-source procurement on the same subject matter following the cancelled procurement.

204. A query was raised as to whether the procuring entity should incur liability as a result of its decision to cancel the procurement. In this respect and in the light of the decision by the Working Group to delete the exemption of the decision of the procuring entity to cancel the procurement from review, the need for the provisions of paragraph (2) was questioned. Varying views were expressed on this point.

205. The general understanding was that the provisions of paragraph (2) addressed issues distinct from the right to review the decision of the procuring entity to cancel the procurement proceedings. It was stated that the right would exist and could be exercised but whether liability on the part of the procuring entity would arise would depend on the factual circumstances of each case (in particular, the extent to which the procuring entity complied with applicable procedures such as the requirement to provide a prompt notice of the cancellation and reasons for cancellation where applicable).

206. A preference was expressed for retaining paragraph (2). It was explained that the paragraph was important because it provided protection to the procuring entity from unjustifiable protests and, at the same time, safeguarded against an unjustifiable cancellation of the procurement proceedings by the procuring entity.

207. The other view was that paragraph (2) was superfluous and might be deleted with suitable explanation in the guide. Yet another view was that paragraph (2) should be deleted in order to allow for review of the decision concerned. It was explained that the issue of liability was linked to the right of review and the right to seek compensation for damages, such as recovery of costs incurred for preparing and presenting a submission (as envisaged, for example, in the WTO Agreement on Government Procurement).

208. An additional view was that the issue of liability should be addressed differently depending on when a decision to cancel the procurement proceedings was made: if it was made before the submissions were presented and opened, the issue of liability should not arise; otherwise, liability should be envisaged. In this regard, reference was made to the wording of the provisions, which allowed limited interpretation since it restricted liability towards suppliers or contractors having presented submissions.

Article 17. Rejection of abnormally low submissions

209. The Committee noted that changes would be made to the title and text of this article in the light of the newly proposed definition “tender or other submission(s)” (see para. 60 above).

210. It was proposed that the words “and/or” in square brackets in paragraph (1) be deleted.

211. A query was raised about the meaning of the term “constituent elements of a submission”, in response to which it was noted that the term referred to the aspects of a tender or other submission other than price, notably the quality of the subject matter of the procurement. A subsequent query was whether an abnormally low submission could be identified by reference to price alone, by reference to all elements of the submission without price or by reference to price in conjunction with the other constituent elements of the submission. It was proposed that the phrase “the submitted price with the constituent elements of a submission” should be replaced with “the submitted price and/or the constituent elements of a submission” if it were intended to provide for all three possibilities. Another view was that price must always be analysed in the context of other constituent elements of the submissions concerned. The latter view prevailed, as a result of which the proposal to delete in paragraph (1) the words in square brackets “and/or” was accepted. The amended paragraph was found to be generally acceptable. It was also proposed that relevant explanations should be provided in the guide.

212. As regards the use of the word “reasonable” in paragraph (1) (b), the view was expressed that the phrase set out in footnote 23 of document A/CN.9/WG.I/WP.69/Add.2 be used in lieu of the word “reasonable”, as it was a more objective formulation. This view was accepted and it was noted that consequent drafting changes to avoid repetition would be made in due course.

Article 18. Rejection of a submission on the ground of inducements from suppliers or contractors or on the ground of conflicts of interest

213. The Committee noted that changes would be made to the title and text of this article 18 in the light of the newly proposed definition "tender or other submission(s)" (see para. 60 above).

214. As regards new paragraph (b), the link between a conflict of interest and an unfair competitive advantage was queried. It was stated that those two concepts could arise independently of each other and support was expressed for separating the two concepts in the provisions as follows:

> "(b) The supplier or contractor has [gained] an unfair competitive advantage [created by conflicts of interest or otherwise] or has a conflict of interest, in violation of the applicable standards."

215. It was pointed out that, although an unfair competitive advantage might be expected to arise from a conflict of interest, this would not necessarily always be the case (for example, where the same lawyer represented both sides in the case). At the same time, it was explained that an unfair competitive advantage might be gained under unrelated circumstances (such as consolidation of businesses or a prior business relationship).

216. It was queried whether the concepts of an "unfair competitive advantage" or a "conflict of interest" as set out in the text should be qualified by the word "material" or by another term that indicated that the conflict or advantage could be mitigated. It was stressed that some conflicts could not be mitigated, such as those that might arise if a consultant who had participated in formulating the terms and conditions of the procurement subsequently presented a submission. Although it was added that some other conflicts or advantages could be mitigated through the provision of information to other suppliers, there was no support for the suggestion that either concept should be qualified as suggested.

217. Different views were expressed as to whether to retain the word "gained" in the provisions. One view was that retaining it would create an additional, potentially superfluous, element. The contrary view was that it was necessary to retain the word to indicate how an unfair competitive advantage had arisen. The view prevailed that the word should be deleted.

218. It was queried whether both references to conflicts of interest in the proposal were necessary. After debate, it was concluded that only one such reference should be made, and the prevailing view was to remove the phrase "created by a conflict of interest or otherwise" from the provisions, explaining the notion concerned in the guide. It was also agreed that the guide should explain the term "unfair competitive advantage".

219. It was agreed to replace paragraph (1) (b) with the following two subparagraphs:

> "(b) The supplier or contractor has an unfair competitive advantage in violation of the applicable standards;
>
> (c) The supplier or contractor has a conflict of interest in violation of the applicable standards."

220. It was understood that references to the standards in both subparagraphs would be explained in the guide, which would highlight that those standards might evolve

over time. It was also understood that changes would be required in the title of the article to reflect the distinct concepts of conflict of interest and unfair competitive advantage.

221. In the view of one delegation, it would be desirable to incorporate procedures and safeguards against any unjustifiable rejection in cases referred to in newly proposed subparagraphs (b) and (c), drawing on the provisions of article 17 (1). In response, it was suggested that it would be sufficient for the guide to encourage a dialogue between the procuring entity and an affected supplier or contractor.

222. The article as amended was found to be generally acceptable.

Article 19. Acceptance of submissions and entry into force of the procurement contract

223. The Committee noted that changes would be made to the title and text of article 19 in the light of the newly proposed definition "tender or other submission(s)" (see para. 60 above).

Paragraph (2)

224. The Committee had before it the following proposal for paragraph (2):

> "(2) The procuring entity shall promptly notify all suppliers or contractors whose tenders or other submissions were evaluated of its intended decision to accept the successful tender or submission. The notice shall contain, at a minimum, the following information
>
> (a) The name and address of the supplier or contractor presenting the successful tender or submission;
>
> (b) The contract price or, where necessary, a summary of other characteristics and relative advantages of the successful tender or submission, provided that the procuring entity shall not disclose any information if its disclosure would be contrary to law, would impede law enforcement, would not be in the public interest, would prejudice the legitimate commercial interests of the suppliers or contractors or would impede fair competition;
>
> (c) The period before the entry into force of the procurement contract during which the suppliers or contractors concerned may seek review of the decisions of the procuring entity related to the ascertainment of the successful tender or submission (the standstill period shall be […] (to be determined by an enacting State))."

225. It was explained that subparagraph (b) should be expanded to accommodate national defence and national security considerations, to reflect the provisions that would be included in article 7 (6) (a) (ii). The need to ensure consistency in any resulting provisions and draft article 21 was stressed.

226. It was also explained that the newly proposed subparagraph (c) did not contain the following wording that appeared in the proposed article 19 (2) (c) in document A/CN.9/WG.I/WP.69/Add.2: "The standstill period shall be sufficiently long, to allow the suppliers or contractors concerned to seek where necessary the effective review in accordance with chapter VII of this Law, and shall run from the date of the dispatch of the notice to all the suppliers or contractors concerned in accordance with this paragraph." It was suggested that this wording should be

moved to the guide. The newly proposed wording would allow an enacting State, it was said, to specify the duration of the standstill period with a view to ensuring effective review in accordance with local circumstances. It was confirmed that the intention was to apply the same standstill period in the context of framework agreements.

227. A preference was expressed for reinstating the following words at the end of the proposed subparagraph (c): "and shall run from the date of the dispatch of the notice to all the suppliers or contractors concerned in accordance with this paragraph." The other view was that it would be better for provisions suggested for reinstatement to be reflected in the guide, as such provisions were closely connected to the administrative review systems of each enacting State that would determine when a standstill period should start.

228. A query was made as to whether a standstill period could have any other logical starting point. It was felt that, according to best procurement practice, there could not be a better starting point than the point in time at which all the suppliers or contractors concerned were appropriately notified about the outcome of the evaluation process. While some delegations expressed flexibility as regards the location of the provisions, other delegations insisted that they were sufficiently important to be reflected in the revised model law itself.

229. It was noted that certainty for suppliers and contractors on the one hand and the procuring entity on the other hand as to the beginning and end of the standstill period was critical for ensuring both that the suppliers and contractors could take such action as was warranted and that the procuring entity could award the contract without risking an upset. For this reason, it was said, the date of dispatch would create the highest level of certainty and should be retained as the starting point for the standstill period. The discussions that had taken place in 1994 on the question of effectiveness of the notification and that had been reflected in the 1994 Guide, to the effect that the date of dispatch was the date that provided for the most certainty, were recalled. Another view was that the date of receipt should be the relevant date, because the standstill period should reflect the time available to the recipient to consider whether to lodge a request for review, and that some systems operated on this principle. A further view was that the issue of determining whether the standstill period should start from the date of dispatch or receipt of the relevant notice should be left to enacting States. A broad reference to the concept of "notification taking effect" to replace reference to the time of dispatch or receipt was also mentioned. However, concern was expressed that this concept would not be recognized in some jurisdictions.

230. A consensus emerged to reinsert the following words at the end of the proposed subparagraph (c): "and shall run from the date of the dispatch of the notice to all the suppliers or contractors concerned in accordance with this paragraph."

231. The importance of sending a notice individually to each supplier or contractor concerned was highlighted. Putting a notice on the website was considered to be insufficient.

232. A concern was expressed about the deletion from the proposed subparagraph (c) of the provisions that required the standstill period to be sufficiently long to allow suppliers or contractors an effective review. A preference was expressed for reinstating this idea.

233. The other view was that paragraph (c) as proposed in paragraph 224 above was sufficient in that respect. It was observed that the concept "standstill period" had proved to be a difficult issue because of differences between review provisions in enacting States. Those States that had an effective administrative review system, it was recalled, were reluctant to introduce a standstill period because it was considered to cause delays in the process without bringing about a commensurate benefit. The newly proposed paragraph (c) was considered as a good compromise for accommodating the needs of States with various administrative review systems, in that it gave enacting States the discretion to determine the duration of the standstill period according to local requirements.

234. It was proposed that the revised model law might leave it up to enacting States to specify in their procurement law a minimum duration, rather than a fixed duration, for the standstill period. The understanding was that the procuring entity should then have flexibility in determining the exact duration of the standstill period appropriate for each procurement, subject to that statutory minimum. The provisions of the new article 8 were recalled in this context, which gave the discretion to the procuring entity to choose the means of communication in the procurement proceedings. It was noted that the appropriate duration of the standstill period would depend to a considerable extent upon the main means of communications used and whether procurement was domestic or international.

235. It was noted that the discretion of the procuring entity to determine the exact duration of the standstill period in the light of the specific factors of individual procurement (while within the prescribed minimum) should be coupled with an obligation upon the procuring entity to disclose the exact duration of that period in the solicitation documents. The importance of disclosing such information from the outset of the procurement was highlighted given the impact that such information would have on suppliers or contractors.

236. The other view was that the greater need was to ensure certainty, which, it was said, would only be achieved by the use of a defined period in the text. In addition, it was queried what the impact would be if the standstill period were lengthy, because the overall objectives of the revised model law included certainty, transparency and efficiency. In this regard, it was suggested that enacting States would need flexibility to stipulate the period itself.

237. The Committee entrusted the Secretariat to revise the provisions in relevant part along the following lines: "The standstill period shall be at least (…[specific number of days to be determined by the enacting State]) days," on the understanding that article 27 would stipulate that the exact standstill period applicable for each procurement had to be included in the solicitation documents. It was noted that the reference in the text to "at least" would be consistent with the wording in the WTO Agreement on Government Procurement and the European Union remedies directive.[21]

238. It was considered that the guide should explain the impact that the duration of the standstill period would have on overall objectives of the revised model law as regards transparency, accountability, efficiency and equitable treatment of suppliers

---

[21] Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council directive 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, available at http://ec.europa.eu/internal_market/publicprocurement/remedies/remedies_en.htm.

or contractors. It was also understood that the guide would explain the impact of a lengthy standstill period on the costs that would be considered and factored in by suppliers or contractors in their submissions and in deciding whether to participate.

239. A query was raised as regards the guidance that should be provided to enacting States on the duration of the standstill period. In response, it was explained that the aim of the standstill period was to allow suppliers or contractors sufficient time to decide whether to protest the procuring entity's intended decision to accept the successful submission. The standstill period was, therefore, supposed to be relatively short. It was also explained that once the protest had been submitted, the provisions on review proceedings would address a suspension of the procurement procedure. Local and regional regulation of the duration of the standstill period was mentioned. For example, it was noted that in the European context it was considered that a period of around 10 days should be provided to suppliers to decide whether to initiate review proceedings. Local regulations therefore provided for a standstill period of 10 calendar days in cases where the notice was sent electronically and for a period 15 calendar days in other cases. The reason for the difference, it was said, was to ensure equality of treatment, by allowing for the additional time that would be required for a notice sent by traditional mail to reach overseas suppliers. It was suggested that these considerations should be reflected in the guide.

240. A query was made as to whether the provisions include an express requirement for the procuring entity to notify unsuccessful suppliers or contractors of the fact that they had not been successful and of the grounds for that decision. In response, it was observed that providing a full statement of the grounds to each supplier or contractor might be burdensome. In this context, the Committee was informed of positive experience with debriefing in some jurisdictions and it was observed that debriefing would represent best practice. At the same time, the difficulty of providing for a mandatory and enforceable regulatory regime for debriefing was highlighted, particularly in the light of the widely varying scope of debriefing from one procurement to another. It was therefore suggested that it would be useful to address the issues of debriefing only in the guide.

241. In order to remove a perceived ambiguity in the provisions as regards the reference to "suppliers or contractors concerned", the suggestion was made to refer consistently in subparagraph (c) either to "suppliers or contractors that did not win" or to "suppliers or contractors whose submissions were evaluated". The latter formulation was preferred as being consistent with the chapeau provisions of paragraph (2) (while, it was said, the former would exclude from the group of recipients of the notice the winning supplier, which would contradict the intention of the provisions).

Paragraph (3)

242. Support was expressed for retaining the wording of paragraph (3) as it appeared in A/CN.9/WG.I/WP.69/Add.2. It was suggested that in the course of considering paragraph (11) and the related provisions of article 55 (3) (e), the Committee might consider referring in paragraph (3) to open framework agreements and deleting paragraph (11).

243. The Committee deferred consideration of paragraph (3).

244. The Committee proceeded with consideration of paragraphs (8) and (11) of the article, noting that other provisions of the article did not raise any outstanding issues.

Paragraph (8)

245. It was suggested that the following words should be deleted from the proposed text: "that [are in force] [remain valid]", and that the guide should explain that the award under the provisions in these circumstances should be to the next lowest priced or the lowest evaluated submission. The point was made that the provisions should be redrafted to provide more clarity.

246. No objection was raised to these suggestions.

Paragraph (11)

247. Having noted the connection between paragraph (11) and draft article 55 (3) (e) and a statement made by a delegation in connection with paragraph (3) (see para. 242 above), the Committee deferred consideration of the paragraph.

Article 21. Confidentiality

248. It was proposed that: in paragraph (1) the word in square brackets "inappropriate" should be deleted; in paragraph (2) the words "except as provided in chapter IV" should be inserted and the words "pursuant to articles in chapter IV of this Law" should be deleted; and a new paragraph (3) should be added reading "the procuring entity may impose on suppliers or contractors requirements aimed at protecting the classified information with regards national defence or national security they communicate throughout the tendering and contracting procedure. It may also request these suppliers or contractors to ensure compliance with such requirements by their subcontractors."

Paragraph (1)

249. General support was expressed for deleting the word "inappropriate".

Paragraph (2)

250. The proposals as regards paragraph (2) (see para. 248 above) were stated to be unacceptable to some delegations, as they excluded the provisions of chapter IV from the application of the article. It was noted that draft article 21 was based on repetitive provisions of the 1994 Model Procurement Law regulating procurement methods involving negotiations. It was stressed that provisions of paragraph 2 were particularly valid in the context of chapter IV, which dealt with such procurement methods.

251. The relevance of the article to all procurement methods was highlighted. The essence of the article was seen as preserving the comparative advantage that a supplier might have over another (such as technical excellence), which should not be compromised during the process, and which might be at particular risk where negotiations took place.

252. Some drafting improvements were suggested, such as that provisions should be redrafted: (a) to ensure consistency with the provisions of article 19 (2) (b) (the broader formulation in article 19 (2) (b) being preferable to some delegations, though it was also questioned whether it would be appropriate to repeat all references in that article in article 21); (b) to reflect the introduction of a new procurement method — request for proposals with competitive dialogue — by referring where appropriate to dialogue; (c) to covey the idea that a confidentiality

requirement would also apply to information exchanged in the course of negotiations or dialogue; and (d) to use the phrase appearing at the beginning of paragraph (2) with an added reference to dialogue throughout the article, as appropriate.

New paragraph (3)

253. Support was expressed for including a new paragraph (3) as proposed in paragraph 248 above. Other delegations opposed the inclusion of the suggested provisions in article 21 while yet other delegations questioned the need for a new paragraph (3) in article 21 in the light of proposed relevant changes to article 8. It was also pointed out that the proposed wording for a new paragraph (3) was facilitative, not mandatory, and thus might be inappropriate for the revised model law.

254. A preference was expressed for locating the proposed provisions in article 7 (6) or 8. The understanding was that article 21 had a broad scope, was applicable to all procurement regardless of the sector in which it took place, and was intended to protect parties in the procurement proceedings rather than the subject matter of the procurement (which para. (3) addressed). The other view was that the location of the provisions in article 21 was appropriate.

255. While flexibility was expressed as regards their location, the need for the provisions was emphasized in the light of the Working Group's decision to expand the scope of the 1994 Model Procurement Law to include procurement in the national defence and national security sectors. It was considered that this expanded scope would have to be reconsidered if the particular characteristics of defence and national security sectors were not accommodated.

256. It was suggested that there were several possible solutions to the question of principle. The first would be to adopt the solution of the 1994 Model Procurement Law to exclude defence procurement, which was a solution that this Committee and the Working Group before it had rejected. Such a solution was not accepted by some delegations on the ground that their jurisdictions sought guidance from UNCITRAL as regards procurement in the defence sector.

257. It was not questioned that the decision of the Working Group to expand the scope of the 1994 Model Procurement Law to include national defence and national security was a significant achievement. There was also no dispute about the need to provide for special treatment in the light of specific features of this sector procurement. However, questions were raised about the desirability of including provisions in article 21 and, more broadly, about ways of accommodating this sector in the revised model law (a question that required in-depth consideration and involved taking account of which entities would undertake such procurement).

258. The alternative to a blanket exclusion, it was said, was to address the procurement in this sector in one of the following ways. The first way would be to treat defence procurement as procurement with piecemeal exceptions where necessary, i.e. the current approach. It was noted that the experience at the current session showed that this method of work would be time-consuming and might ultimately not be productive.

259. The second way would be to introduce provisions in a separate chapter or a new model law on defence procurement, an approach that had been taken in the European Union and at least one of its member States. It was noted that that had

been a significant task, one that had taken several years of work. This approach also presupposed detailed regulation of an area that had traditionally been considered to fall within the sovereign prerogative of enacting States to regulate, independently, according to their own national defence policy. Finally, it was noted that such a chapter would be limited in scope as it would not take into account sensitive procurement outside the defence sector.

260. An alternative solution would be to provide a general or partial exemption from the provisions of the revised model law in article 1, by narrowing the ambit of the 1994 Model Procurement Law exemption to ensure that it addressed strictly defence procurement and could not be abused. Alternative suggestions were to place issues arising as regards confidentiality and defence procurement in a single location rather than including repetitious references to national defence and national security procurement. A preference was expressed for article 7 for such a provision or to bring the relevant provisions of article 8 to article 21.

261. After deliberation, consensus was reached on the need for appropriate provisions to address confidentiality in defence procurement and on the fact that this was one aspect of a larger debate about how to accommodate the special nature of defence procurement.

262. Although some delegations were of the view that the Secretariat should be entrusted to draft appropriate provisions to accommodate sensitive procurement, primarily in the defence sector, other delegations did not consider it feasible for the Secretariat to fulfil this task without clear guidance from the Committee on how defence sector and other sensitive procurement should be approached in the revised model law.

263. The point was made that a comprehensive consideration of the topic was unavoidable and it would be preferable to hold such consideration without reference to each provision of the draft revised model law. The following questions were identified for comprehensive consideration of the defence sector procurement: (a) the specific needs of this sector, such as the treatment of classified information; and (b) ways to accommodate such needs. In that regard, it was noted that the specific needs of procurement in the defence sector might arise from either the sensitive nature of the subject of the procurement or from the treatment of classified information even if the subject was not sensitive (for example, when the need arose to ensure confidentiality of information about a delivery schedule or the location of delivery), or both.

264. The other suggestion was that, instead of considering the topic separately and comprehensively, the Committee should continue examining provisions of the draft revised model law and look into issues pertaining to defence sector procurement in conjunction with relevant articles of the draft revised model law. That approach, it was said, would assist delegations in obtaining a comprehensive picture of the exemptions needed to be provided for in the revised model law, in order to accommodate sensitive procurement. The view was reiterated that such a review should not be limited to defence procurement alone but, rather, should address sensitive procurement in general.

265. The prevailing view was that the decision of the Working Group to include procurement in the defence sector within the scope of the revised model law, on the basis of the views expressed within the Working Group to justify inclusion, should be endorsed, and that the Secretariat should be entrusted with preparing drafting suggestions for further consideration by the Working Group taking into account the

following considerations: (a) in this sector, recourse to direct solicitation and procurement methods alternative to tendering should be allowed; (b) special measures for protecting classified information should be envisaged; (c) the specific characteristics of procurement in this sector should be reflected in the provisions regulating the content of the record of procurement proceedings and access to the record; and (d) in drafting provisions to accommodate the procurement in the defence sector, repetitions should be avoided.

266. It was also the understanding that the provisions in the revised model law on procurement in the defence sector would be accompanied by the provisions in the guide, explaining grounds for special measures that might be taken by the procuring entity to protect classified information, including in the supply chain.

Article 22. Record of procurement proceedings

Paragraph (1)

267. It was proposed that:

(a) Subparagraphs (b) and (e) should be revised to provide for the possibility of more than one procurement contract resulting from procurement proceedings;

(b) Reference to socioeconomic factors and the manner of their consideration in the evaluation process should be added to subparagraph (f);

(c) In subparagraph (g), the Committee's agreement to use the term "cancellation of the procurement" (see para. 185 above) should be reflected;

(d) In subparagraph (k) the words "and [any other information that the Working Group decides to add]" should be deleted;

(e) In subparagraph (l), the words "of services" and "on which the procuring entity relied to justify the selection procedure used" should be deleted, and that the subparagraph would remain in square brackets pending consideration of chapter IV.

Paragraph (2)

268. It was proposed that the paragraph should be revised to provide for the possibility that more than one procurement contract might result from procurement proceedings.

Paragraph (4)

269. The proposal was that the beginning of the paragraph should be expanded to read "except when ordered to do so by a competent court or competent authority". It was further proposed that the suggested additional reference to competent authority should be explained in the guide (in particular that a competent authority might include the parliament or auditor general and might vary among enacting States). Another view was that the wording should read "except when ordered to do so by a competent authority", with an explanation in the guide that the term "competent authority" referred to both the court and to competent administrative authorities, including oversight bodies.

270. Strong support was expressed for retaining the provisions as they were. It was highlighted that the provisions referred to exceptional cases when disclosure should be authorized (for example, when such disclosure would be "contrary to law"). It

was clarified that in such exceptional cases, any competent authority might request disclosure but that the final decision as to whether such disclosure must take place should be a judicial one. The impartiality of the judiciary and the risk that other branches might not be independent were highlighted in this respect.

271. A further suggestion was to keep the text as it was, with an explanation in the guide that other competent authorities might be authorized under applicable local regulations to order disclosure of information in the cases specified in subparagraphs (a) and (b). Opposition was expressed to that suggestion. It was felt that the revised model law should provide minimum essential requirements.

272. Support was expressed for the suggestion that the opening words should read "except when ordered to do so by a competent court or administrative organ referred to in article 58 of this Law". It was explained that this wording restricted the pool of administrative authorities that could be authorized to order disclosure in the exceptional cases referred to in the paragraph.

273. Another suggestion was to add the following words "and/or competent authority or administrative agency" in square brackets, so that the enacting State could select the text according to the local circumstances.

274. No consensus on the provisions was reached and it was decided to include the various proposals in square brackets for further consideration. It was also noted that the wording chosen for paragraph (4) (a) might also affect similar provisions in paragraph (3), and therefore consistency would need to be ensured for similar circumstances.

275. It was also suggested that the opening words in paragraph (4) (a) should be redrafted to read "information from the record of the procurement proceedings". Another suggestion was to redraft the chapeau provisions and paragraph (a) in positive terms to add clarity since, it was felt, the current wording could be interpreted in different ways.

Paragraph (5)

276. A query was made as to whether the wording of paragraph (5) might imply that there was no obligation to maintain the record, contrary to the provisions of paragraph (1). It was proposed that the words "without prejudice to chapter VII" should be added at the beginning of the paragraph in order to avoid such an interpretation.

277. An alternative proposal was made for paragraph (5) to be deleted in the light of chapter VII, in particular article 56, of the draft revised model law. It was pointed out that the suppliers or contractors might seek damages against the procuring entity under these provisions for not maintaining the record as required under article 22. In this regard, it was noted that the supplier or contractor would be obliged to demonstrate loss or injury in order to substantiate a claim for damages under the review provisions. The fact of an insufficient record, it was stated, could not, in and of itself, be grounds for the claim.

278. The other view was that the provisions should be retained for the same reasons as those expressed with regard to paragraph (2) of article 16 (see paras. 205 and 206 above), notably that they made it clear that the failure of the procuring entity to maintain the record in accordance with article 22 did not automatically give rise to liability on the part of the procuring entity. The provisions indicated, it was further explained, that the burden of proof as regards liability was on the supplier or

contractor. The provisions were considered to be of assistance to the procuring entity as a safeguard against unjustifiable protests.

279. Consensus was that the provisions should be deleted. It was proposed that the guide should explain that the consequences of a failure to maintain the record might be regulated by other rules applicable in enacting States.

Period of time during which the record had to be preserved

280. A proposal to include a minimum or maximum period for retention of the record, to reflect (for example) contractual limitation periods, did not gain support since there would be no universally acceptable period. This was considered to be a question to be addressed within the enacting State.

Future work

281. The understanding in the Committee was that the Secretariat should be requested to prepare new draft provisions of the revised model law to reflect deliberations at the current session. The idea of holding inter-session informal consultations was supported. The importance of ensuring inclusiveness and as wide a geographical representation of participants as possible in such consultations was highlighted. The Secretariat was requested to make all efforts within available resources to provide the relevant documents in the six official languages of the United Nations.

Report of the deliberations

282. The Committee considered the draft report of its deliberations and proposed amendments thereto. It agreed to recommend to the Commission the adoption of the report as amended.

D. Decisions by the Commission with respect to agenda item 5

283. The Commission took note of the report of the Committee of the Whole. In particular, the Commission noted the Committee's conclusion according to which the revised model law was not ready for adoption at this session of the Commission. The Commission further noted that the Committee was able to consider only chapter I of the draft revised model law and, although some issues were still outstanding from this chapter, most provisions thereof had been agreed upon. The Commission also noted that the Committee had requested that the Secretariat be entrusted with preparing drafting suggestions, for consideration by Working Group I (Procurement), to address those outstanding issues. The Commission further noted that the Committee had recommended the adoption of the report.

284. The Commission adopted the report of the Committee of the Whole as recommended. It also took note of the reports of Working Group I on the work of its fourteenth to sixteenth sessions (A/CN.9/664, A/CN.9/668 and A/CN.9/672) and requested the Working Group to continue its work on the review of the 1994 Model Procurement Law.

285. The importance of completing the revised model law as soon as reasonably possible was highlighted. It was emphasized that the revised model law would have considerable impact on ongoing procurement law reforms at the local and regional levels. Guidance from UNCITRAL in the procurement field was in particular sought

on such issues as electronic reverse auctions, framework agreements, e-procurement in general, competitive dialogue and procurement in the defence sector. The importance of UNCITRAL outreach activities was also underscored and the UNCITRAL secretariat was encouraged to increase its promotional efforts for a more widespread use of its uniform law standards in procurement and other areas. (For the two forthcoming sessions of the Working Group, see subpara. 437 (a) below).

V. Arbitration and conciliation: progress report of Working Group II

286. The Commission recalled that, at its thirty-ninth session, in 2006, it had agreed that Working Group II (Arbitration and Conciliation) should undertake a revision of the Arbitration Rules of the United Nations Commission on International Trade Law[22] (the UNCITRAL Arbitration Rules).[23]

287. It was also recalled that at that session, the Commission had noted that, as one of the early instruments developed by UNCITRAL in the field of arbitration, the UNCITRAL Arbitration Rules were widely recognized as a very successful text, having been adopted by many arbitration centres and used in many different instances, 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 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.[24]

288. It was further recalled that, at its fortieth session, in 2007, the Commission had noted that the UNCITRAL Arbitration Rules had not been amended since their adoption in 1976 and that the review should seek to modernize the Rules and to promote greater efficiency in arbitral proceedings. The Commission generally agreed that the mandate of the Working Group to maintain the original structure and spirit of the UNCITRAL Arbitration Rules had provided useful guidance to the Working Group in its deliberations to date and should continue to be a guiding principle for its work.[25]

289. The Commission further recalled that, at its forty-first session, in 2008, the Commission had noted that the Working Group had decided, at its forty-eighth session, to proceed with its work on the revision of the UNCITRAL Arbitration Rules in their generic form and to seek guidance from the Commission on whether, after completion of its current work on the Rules, the Working Group should consider in further depth the specificity of treaty-based arbitration and, if so, which form that work should take (A/CN.9/646, para. 69).[26]

---

22 United Nations publication, Sales No. E.93.V.6.

23 *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17* (A/61/17), para. 187.

24 Ibid., para. 184.

25 Ibid., *Sixty-second Session, Supplement No. 17* (A/62/17), part I, para. 174.

26 Ibid., *Sixty-third Session, Supplement No. 17* (A/63/17), para. 313.

290. It was further recalled that, after discussion at that session, the Commission had agreed that it would not be desirable to include specific provisions on treaty-based arbitration in the UNCITRAL Arbitration Rules themselves and that any work on investor-State disputes that the Working Group might have to undertake in the future should not delay the completion of the revision of the UNCITRAL Arbitration Rules in their generic form. As to timing, the Commission had agreed that the topic of transparency in treaty-based investor-State arbitration was worthy of future consideration and should be dealt with as a matter of priority immediately after completion of the current revision of the UNCITRAL Arbitration Rules. As to the scope of such future work, the Commission had agreed by consensus on the importance of ensuring transparency in investor-State dispute resolution. Written observations regarding that issue had been presented by one delegation (A/CN.9/662) and a statement had also been made on behalf of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. The Commission had been of the view that, as noted by the Working Group at its forty-eighth session (A/CN.9/646, para. 57), the issue of transparency as a desirable objective in investor-State arbitration should be addressed by future work. As to the form that any future work product might take, the Commission had noted that various possibilities had been envisaged by the Working Group (ibid., para. 69) in the field of treaty-based arbitration, including the preparation of instruments such as model clauses, specific rules or guidelines, an annex to the UNCITRAL Arbitration Rules in their generic form, separate arbitration rules or optional clauses for adoption in specific treaties. The Commission had decided that it was too early to make a decision on the form of a future instrument on treaty-based arbitration and that broad discretion should be left to the Working Group in that respect. With a view to facilitating consideration of the issues of transparency in treaty-based arbitration by the Working Group at a future session, the Commission had requested the Secretariat, resources permitting, to undertake preliminary research and compile information regarding current practices. The Commission had urged member States to contribute broad information to the Secretariat regarding their practices with respect to transparency in investor-State arbitration. It had been emphasized that, when composing delegations to the Working Group sessions that would be devoted to that project, member States and observers should seek to achieve the highest level of expertise in treaty law and treaty-based investor-State arbitration.[27]

291. At its current session, the Commission had before it the reports of the forty-ninth (Vienna, 15-19 September 2008) and fiftieth (New York, 9-13 February 2009) sessions of the Working Group (A/CN.9/665 and A/CN.9/669, respectively). The Commission commended the Working Group for the progress made regarding the revision of the UNCITRAL Arbitration Rules and the Secretariat for the quality of the documentation prepared for the Working Group.

292. The Commission noted that the Working Group had discussed at its forty-ninth session a proposal aimed at expanding the role of the Secretary-General of the Permanent Court of Arbitration at The Hague under the UNCITRAL Arbitration Rules (A/CN.9/665, paras. 47-50). The 1976 version of the Rules included a mechanism whereby the Secretary-General of the Permanent Court of Arbitration should, if so requested by a party, designate an appointing authority to provide certain services in support of arbitral proceedings. The appointing authority would appoint members of an arbitral tribunal under articles 6 and 7 of the Rules and

---

[27] Ibid., para. 314.

might also be called upon, under article 12 of the Rules, to decide on challenges to arbitrators. Under articles 39 and 41 (respectively) of the Rules, the appointing authority might also assist the parties in fixing the arbitrators' fees and the arbitral tribunal in fixing the deposit for costs. The Secretary-General of the Permanent Court of Arbitration, despite the Court being neither a United Nations body, nor a body created to deal with commercial, non-governmental disputes, agreed to act as the designating authority under the Rules and thus to play a role that was clearly more limited than, and qualitatively different from, that of an appointing authority. A proposal was made in the Working Group to replace the existing mechanism by a provision to the effect that where parties were unable to agree on an appointing authority, the Secretary-General of the Permanent Court of Arbitration should act directly as the appointing authority subject to the parties' right to request the him or her to designate another appointing authority, and to the discretion of the Court's Secretary-General to designate another appointing authority, if it considered it appropriate. The Commission noted that that proposal had initially been made at the forty-sixth session of the Working Group (A/CN.9/619, paras. 71-74), where it had been considered a major and unnecessary departure from the existing UNCITRAL Arbitration Rules and where it had been decided that the mechanism on the designating and appointing authorities as designed under the 1976 version of the Rules should be preserved (A/CN.9/619, para. 74, and A/CN.9/665, para. 49). The Commission further noted that, at the forty-ninth session of the Working Group, diverging views had been expressed as to whether that question should be debated again in the Working Group and the view had been expressed that, whether or not consensus could be reached in the Working Group regarding a possible default rule, the matter was of a political nature and could only be settled by the Commission (A/CN.9/665, paras. 49-50). At its current session, the Commission had before it a note on the designating and appointing authorities under the UNCITRAL Arbitration Rules (A/CN.9/677).

293. After discussion, the Commission agreed that the existing mechanism on designating and appointing authorities, as designed under the 1976 version of the Rules, should not be changed. It was recalled that the mechanism regarding designating and appointing authorities under the 1976 version of the Rules was not considered to be a problematic area by the Working Group, when defining matters for revision at its forty-fifth session. That mechanism was generally not reported as having created delays for the parties or difficulties in the functioning of the Rules. It was further said that since the provision on designating and appointing authorities under the 1976 version of the Rules did not cause any significant burden and offered benefits, there was no need to alter the structure of the Rules in that respect. In the context of that discussion, the Commission recognized the expertise and the sense of accountability of the Permanent Court of Arbitration, as well as the quality of the services it rendered under the UNCITRAL Arbitration Rules.

294. The two-stage process defined under the 1976 version of the Rules was said to offer flexibility (by allowing the designation of a wide range of appointing authorities to suit the needs of particular cases) that a default appointing authority would preclude. It was observed that the Rules could easily be adapted for use in a wide variety of circumstances covering a broad range of disputes and that one measure of the UNCITRAL Arbitration Rules' success in achieving broad applicability and in their ability to meet the needs of parties in a wide range of legal cultures and types of disputes had been the significant number of independent arbitral institutions that had declared themselves willing to administer (and that, in fact, administered) arbitrations under the UNCITRAL Arbitration Rules, in addition

to proceedings under their own rules. It was also said that the proposal to expand the role of the Permanent Court of Arbitration under the Rules, if adopted, would constitute not a mere technical adjustment, but a change in the nature of the Rules and would run contrary to the guiding principles set by the Commission, that any revision of the 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.

295. It was further said that the Permanent Court of Arbitration had been established by the Convention for the Pacific Settlement of International Disputes[28] to deal with disputes involving States and not to handle disputes arising in the context of commercial relations among private parties, which were said to be the primary focus of the UNCITRAL Arbitration Rules. Expanding the role of the Permanent Court of Arbitration, it was said, would appear as favouring the Court over other arbitral organizations, despite the Court having little experience in the area of private commercial disputes, as compared with other arbitration organizations that had jurisdiction over such cases.

296. The Commission was of the view that the establishment of any central administrative authority under the Rules would create a need for providing (in the Rules or in an accompanying document) guidance on the conditions under which such a central authority would perform its functions. The Commission agreed that the work on the revision of the Rules should not be delayed by additional work that would need to be done in that respect if the proposal to expand the role of the PCA were to be pursued.

297. In light of those policy principles, it was emphasized that the UNCITRAL Arbitration Rules should not contain a default rule, to the effect that one institution would be singled out as the default appointing authority and would be identified in the Rules as a provider of direct assistance to the parties.

298. The Commission noted that the Working Group, at its fiftieth session, agreed to request the Commission for sufficient time to complete its work on the UNCITRAL Arbitration Rules in order to bring the draft text of revised Rules to the level of maturity and quality required (A/CN.9/669, para. 120). The Commission agreed that the time required should be taken for meeting the high standard of UNCITRAL, taking account of the international impact of the Rules, and expressed the hope that the Working Group would complete its work on the revision of the UNCITRAL Arbitration Rules in their generic form, so that the final review and adoption of the revised Rules would take place at the forty-third session of the Commission, in 2010. The Commission heard a proposal that the Working Group should discuss the extent to which a reference to arbitrators intervening as conciliators should be included in a revised version of the Rules.

299. With respect to future work in the field of settlement of commercial disputes, the Commission recalled its earlier decision that the question of transparency in treaty-based investor-State arbitration should be dealt with as a matter of priority immediately after completion of the current revision of the UNCITRAL Arbitration Rules, as decided by the Commission at its forty-first session (see para. 290 above). It was reiterated that, when composing delegations to the Working Group sessions that would be devoted to that project, member States and observers should seek to

---

[28] See Carnegie Endowment for International Peace, *The Hague Conventions and Declarations of 1899 and 1907* (New York, Oxford University Press, 1915).

achieve the highest level of expertise in treaty law and treaty-based investor-State arbitration. The Commission also recalled that the issue of arbitrability and online dispute resolution should be maintained by the Working Group on its agenda, as decided by the Commission at its thirty-ninth session.[29]

300. The Commission heard an oral report on progress in the preparation of a guide to enactment and use in relation to the entire UNCITRAL Model Law on International Commercial Arbitration as amended in 2006.[30] It was recalled that, at its thirty-ninth session, the Commission had agreed that it would be useful to prepare such a guide.[31] It was also recalled that such a guide would provide a useful instrument for national legislators and other users of a major UNCITRAL standard. In addition, it would further the process of harmonization of laws. The Commission requested the Secretariat to pursue its efforts towards the preparation of the guide. It was agreed that a more substantive presentation on progress made in the preparation of the guide should be made at a future session of the Commission. (For the two forthcoming sessions of the Working Group, see subpara. 437 (b) below.)

VI. Insolvency law: progress report of Working Group V

A. Progress report of Working Group V

301. The Commission recalled that at its thirty-ninth session, in 2006, it had agreed, inter alia, that: (a) the topic of the treatment of corporate groups in insolvency was sufficiently developed for referral 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 on the substance of the proposed solutions to the problems that the Working Group would identify under that topic; and (b) post-commencement financing should initially be considered as a component of the 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.[32] The term "corporate groups" was subsequently replaced by the term "enterprise groups" (see A/CN.9/622, paras. 77-84, and A/CN.9/643).

302. At its current session, the Commission expressed its appreciation for the substantial progress made by the Working Group in considering the treatment of enterprise groups in insolvency as reflected in the reports on its thirty-fifth (Vienna, 17-21 November 2008) and thirty-sixth (New York, 18-22 May 2009) sessions (A/CN.9/666 and A/CN.9/671, respectively) and commended the Secretariat for the working papers and reports prepared for those sessions.

303. The Commission noted that the Working Group had adopted in substance a number of recommendations with respect to the domestic treatment of enterprise groups and had reached agreement on its approach to the international treatment of

---

[29] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17* (A/61/17), para. 187.

[30] United Nations publication, Sales No. E.08.V.4. See also paragraph 376 (k) below.

[31] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17* (A/61/17), para. 176.

[32] Ibid., para. 209.

such groups as reflected in the set of 15 recommendations discussed at its thirty-sixth session, a number of which had been adopted in substance. The Commission took note of the close connection between the work on the international treatment of enterprise groups and both the UNCITRAL Model Insolvency Law and the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (see para. 24 above) and emphasized the need to ensure consistency with those two texts.

304. The Commission also noted that the Working Group had agreed that the text resulting from the work on enterprise groups should form part III of the UNCITRAL Legislative Guide on Insolvency Law[33] and adopt the same format, i.e. recommendations and commentary. To that end, the commentary to accompany both the domestic and international recommendations would be prepared for consideration by the Working Group at its thirty-seventh session, in 2009, and, if necessary, at its thirty-eighth session, in 2010.

305. The Commission also expressed its appreciation for the cooperation between working groups V and VI with respect to the treatment of intellectual property in insolvency and noted that the questions raised by Working Group VI had been considered and answered by Working Group V at its thirty-sixth session (A/CN.9/671, para. 127) and noted that that information had been incorporated in the work of Working Group VI. (See para. 312 below.)

B. Eighth Multinational Judicial Colloquium

306. The Commission heard a brief report on the Eighth Multinational Judicial Colloquium, held in Vancouver, Canada, on 20 and 21 June 2009. The colloquium, organized by UNCITRAL, the International Association of Insolvency Practitioners and the World Bank, was attended by some 80 judges from around 40 States, who discussed issues of cross-border insolvency coordination and cooperation, including judicial communication. The colloquium was well received by judges, who welcomed the opportunity to further their understanding of cooperation in cross-border insolvency cases and to have contact with each other to discuss related concerns and issues. Many of the issues discussed were addressed in the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (see para. 24 above), the preparation of which was widely supported by judges as a valuable source of information on current issues and practice. The Commission noted that a short report of the colloquium would be prepared and made available on the respective websites of the three organizations.

307. The Commission expressed its satisfaction to the Secretariat for organizing the colloquium and requested the Secretariat to continue cooperating actively with the International Association of Insolvency Practitioners and the World Bank with a view to organizing further colloquiums in the future, resources permitting.

C. Future work on insolvency law

308. The question of possible future work that Working Group V might undertake on completion of the current topic on enterprise groups was raised. The Commission noted several tentative proposals, including: (a) developing a model law based on the recommendations of the UNCITRAL Legislative Guide on Insolvency Law;

---

[33] United Nations publication, Sales No. E.05.V.10.

(b) undertaking a study of the different financial instruments currently being used and how they were treated in insolvency; and (c) in light of the current financial crisis, considering the insolvency of banks and other financial institutions. It was agreed that those and other possible topics should continue to be discussed and elaborated upon in order to establish their feasibility, with a view to possible consideration of the issue of future work at the Commission's forty-third session, in 2010. (For the two forthcoming sessions of the Working Group, see subpara. 437 (d) below.)

VII. Security interests: progress report of Working Group VI

309. The Commission recalled that, during the first part of its fortieth session (Vienna, 25 June-12 July 2007), it had decided to entrust Working Group VI (Security Interests) with the preparation of an annex to the draft Guide on Secured Transactions specific to security rights in intellectual property. At that session, the Commission had emphasized the need to complete that work within a reasonable period of time.[34]

310. The Commission also recalled that, at its resumed fortieth session (Vienna, 10-14 December 2007), it had finalized and adopted the UNCITRAL Legislative Guide on Secured Transactions (the Legislative Guide) on the understanding that the annex to the Legislative Guide would be prepared as soon as possible thereafter so as to ensure that comprehensive and consistent guidance would be provided to States in a timely manner.[35]

311. At its current session, the Commission had before it the reports of Working Group VI on the work of its fourteenth (Vienna, 20-24 October 2008) and fifteenth (New York, 27 April-1 May 2009) sessions (A/CN.9/667 and A/CN.9/670, respectively). The Commission noted with satisfaction that the Working Group had completed the reading of two versions of the annex to the Legislative Guide (A/CN.9/WG.VI/WP.35 and Add.1 and A/CN.9/WG.VI/WP.37 and Add.1-4) and made significant progress (A/CN.9/667, para. 15, and A/CN.9/670, para. 16).

312. The Commission also noted with appreciation that Working Group V (Insolvency Law), at its thirty-sixth session (New York, 18-22 May 2009), had discussed, on the basis of documents A/CN.9/WG.VI/WP.37/Add.4 and A/CN.9/WG.V/WP.87, certain insolvency-related issues referred to it by Working Group VI, and approved the text referred to it by Working Group VI in document A/CN.9/WG.VI/WP.37/Add.4, paragraphs 22-40, for inclusion in the annex to the Legislative Guide (A/CN.9/671, paras. 125-127).

313. In addition, the Commission noted that, at its fourteenth session, Working Group VI discussed its future work and agreed that it should be able to complete its work on the draft supplement in time to have it submitted to the Commission for final approval and adoption at its forty-third session, in 2010 (A/CN.9/667, para. 143). Moreover, the Commission noted that, at its fourteenth and fifteenth sessions, Working Group VI had engaged in a preliminary discussion of its future work programme (A/CN.9/667, paras. 141-143, and A/CN.9/670, paras. 123-126).

---

[34] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17* (A/62/17), part I, paras. 157 and 162.

[35] Ibid., part II, paras. 99-100.

314. In that connection, it was noted that, at the fifteenth session of Working Group VI, the following topics were suggested for inclusion in the future work programme of Working Group VI: a text on security rights in securities not covered by the draft convention on substantive rules regarding intermediated securities, being prepared by the International Institute for the Unification of Private Law (Unidroit); a legislative guide on registration of security rights; a contractual guide on secured financing agreements; a contractual guide on intellectual property licensing; a model law on secured transactions, incorporating the recommendations of the Legislative Guide; and a text on franchising (A/CN.9/670, para. 124).

315. With respect to the Legislative Guide, the Commission requested the Secretariat to expedite its publication as a whole and in part (the terminology and recommendations as a separate publication). The Commission also requested the Secretariat to increase its efforts to raise the awareness of States and other interested parties with respect to the Legislative Guide and in promoting the implementation of the recommendations of that Guide by States in various ways, including by holding seminars, organizing briefing missions, preparing articles for publication and drafting or reviewing draft legislation, as well as cooperating with other organizations active in the field of secured transactions law reform.

316. With respect to the annex to the Legislative Guide (referred to subsequently as a supplement), the Commission expressed its appreciation to Working Group VI and the Secretariat for the progress achieved thus far and emphasized the importance of that supplement. It was stated that economic development involved innovation, which was in turn connected with intellectual property assets. It was also pointed out that the main assets of many small or medium-sized businesses were intellectual property assets. Thus, it was observed that it was important for economic development to facilitate secured transactions in which the encumbered asset was an intellectual property asset.

317. After discussion, the Commission, noting the interest of the international intellectual property community, requested Working Group VI to expedite its work so as to finalize the supplement to the Legislative Guide in one or two sessions and submit it to the Commission for finalization and adoption at its forty-third session, in 2010, so that the Supplement to the Guide may be offered to States for adoption as soon as possible. The Commission agreed that, if two sessions were not sufficient for the preparation of a generally acceptable and balanced text, the Working Group should be given the time necessary to achieve that result, even if that meant that the supplement to the Legislative Guide would be ready for submission to the Commission at its forty-fourth session in 2011.

318. The Commission engaged in a preliminary discussion of the future work programme of Working Group VI. As to the topics to be included in that future work programme, various views were expressed. With respect to security rights in securities not covered by the draft convention on substantive rules regarding intermediate securities, the Commission noted that, at its fortieth session in 2007, it had decided that future work should be undertaken with a view to preparing a supplement to the Guide on certain types of securities, taking into account work by other organizations, in particular Unidroit.[36] In that connection, it was generally agreed that no decision could be made before Unidroit had finalized its work on the draft convention (see para. 314 above), which it would presumably do in the fall of 2009. With respect to a legislative guide on registration of security rights in general

[36] Ibid., part I, para. 160.

security rights registries, it was stated that such work could usefully supplement the work achieved by the Commission on the Guide. With respect to a contractual guide on intellectual property licensing, it was stated that such work, if any, should be undertaken in close cooperation with the World Intellectual Property Organization. With respect to a text on franchising, some doubt was expressed as to whether it would fit into the Commission's work on secured transactions.

319. As to the process for the preparation of a future work programme for Working Group VI, the Commission agreed that, depending on the availability of time, preparatory work could be advanced through a discussion at the sixteenth session of Working Group VI. In addition, it was agreed that the Secretariat could hold an international colloquium early in 2010 with broad participation of experts from Governments, international organizations and the private sector. Moreover, the Commission left it to the Secretariat to organize an expert group meeting, if necessary, to obtain expert advice for the preparation of a paper discussing the various work topics and making suggestions. It was generally agreed that on the basis of that paper the Commission would be in a better position to consider and make a decision on the future work programme of Working Group VI at its forty-third session, in 2010.

320. In response to a question, it was noted that, should Working Group VI complete its work at its sixteenth session in the fall of 2009, it would have an opportunity to consider a possible future work programme at its seventeenth session in the spring of 2010. In that connection, it was noted that, in discussing its possible future work programme in the area of security interests at a future session, the Commission could be assisted by the detailed suggestions of Working Group VI and a paper to be prepared by the Secretariat after a colloquium and an expert group meeting, if necessary.

321. At the conclusion of its deliberations on security interests, the Commission recalled the mandate given to the Secretariat for the publication of the commentary to the United Nations Convention on the Assignment of Receivables in International Trade.[37] In that connection, it was suggested that the Secretariat could hold an expert group meeting with the participation of experts who were involved in the preparation of the Convention. The Commission also recalled its mandate for the publication of a text discussing the interrelationship of various texts on security interests prepared by the Commission, Unidroit and the Hague Conference on Private International Law.[38] (For the two forthcoming sessions of the Working Group, see subpara. 437 (e) below.)

---

[37] Ibid., *Fifty-sixth Session, Supplement No. 17* (A/56/17), para. 195. For the text of the Convention, see General Assembly resolution 56/81 of 12 December 2001, annex. For further information about the Convention, see paragraph 376 (h) below.

[38] Ibid., *Sixty-third Session, Supplement No. 17* (A/63/17), para. 384.

VIII. Possible future work in the area of transport law: commentary on the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea

A. Update on developments relating to the Convention

322. The Commission noted that, following its approval of what was then known as the draft convention on contracts for the international carriage of goods wholly or partly by sea at its forty-first session, in 2008,[39] the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea was subsequently adopted by the General Assembly in its resolution 63/122 of 11 December 2008. In that resolution, the Assembly also authorized a ceremony for the opening for signature of the Convention, to be held in Rotterdam, the Netherlands, on 23 September 2009, and called upon all Governments to consider becoming party to the Convention. In addition, the Assembly recommended that the rules embodied in the Convention be known as "the Rotterdam Rules".

323. The Commission was advised of preparations that had taken place for the signing ceremony, including the circulation of a certified true copy of the Convention by the Treaty Section of the United Nations to permanent missions in New York, accompanied by instructions advising States on how to proceed should they wish to sign the Convention. Further, the Commission noted that a note verbale had been sent to permanent missions by the UNCITRAL secretariat, reminding States of the upcoming signing ceremony on 23 September 2009. In addition, it was noted that the note verbale informed States of a colloquium to take place under the auspices of UNCITRAL and of the Comité maritime international (CMI), in conjunction with the signing ceremony. The colloquium would take place on 21 September 2009 and would feature presentations on various aspects of the Convention by key experts on the subject from around the world. Other events were planned to take place around the colloquium and the signing ceremony. Delegations were invited to consult the following web page for further information on all events and to obtain a copy of the information circulated by the Treaty Section on the requirements for signature of the Convention: http://www.rotterdamrules2009.com. It was emphasized that all States were invited to participate in both the colloquium and the signing ceremony, regardless of whether or not the State intended to sign the Convention. As stated in the note verbale, States wishing to attend were advised to notify the Secretariat of that desire and of the names of the individuals in their delegation, indicating which member of the delegation, if any, would be signing the Convention.

324. The Commission also took note that intergovernmental organizations and non-governmental organizations whose work was relevant to the subject matter covered by the Convention had been invited by the Secretariat to participate in the colloquium and related events and to attend the signing ceremony as observers. Those wishing to attend were advised to notify the Secretariat of that desire and of the names of the individuals in their delegation.

325. It was recalled that the Secretariat maintained a web page for each of its instruments once they had been approved or adopted. The Commission noted that,

---

[39] Ibid., para. 298.

in light of the rapidly growing body of information and views being published in respect of the Convention, the UNCITRAL website had expanded its web page on the Rotterdam Rules to include a selection of materials, links to other relevant web pages and an informative podcast on the Convention.

326. The Commission took note of efforts made by the Secretariat to promote the Convention. In addition to preparing the colloquium and the signing ceremony, the Secretariat had been assisting States that were considering signing the Convention by providing them with the information and support they needed to make that decision. Further, the Secretariat had prepared various materials in respect of the Convention for publication in legal journals, on websites, and other publicly accessible locations.

327. The Commission also noted that, following its forty-first session, the Secretariat had participated in a number of events in order to provide information on and to promote the Convention. In October of 2008, the Secretariat participated in the thirty-ninth conference of CMI, held in Athens. The Commission noted with interest that, at that Conference, CMI had overwhelmingly endorsed the Convention, stating that the Convention generally achieved a fair balance among the various interests in the shipping industry, and recognizing that it offered a unique opportunity to unify and update maritime law and practice on a global basis. In addition, in April 2009, the Secretariat, in collaboration with the Arab Society for Commercial and Maritime Law, CMI and other organizations, assisted in the organization of and participated in the third Arab Conference for Commercial and Maritime Law, held in Alexandria, Egypt. The two-day conference was entitled the "Rotterdam Rules 2009: Uniformity vs. Diversity of the Law of Carriage of Goods by Sea, a Euro-Arab Perspective". At the conference, the details of the Convention were examined and the issue of whether it could meet the perceived needs of Arab countries was discussed.

B. Possible future work on an explanatory note

328. The Commission then considered possible future work in respect of the Convention, in terms of the possible drafting of an explanatory note to accompany the publication of the text. It was recalled that during its deliberations on the Convention from 2002 to 2008, Working Group III (Transport Law) had considered whether certain aspects of the text should be further elaborated in a commentary or explanatory notes that could accompany the Convention upon its publication. For example, in the last draft text of the Convention that was published with footnotes (A/CN.9/WG.III/WP.101), footnote 6, which referred to article 3 on "Form requirements", includes mention of an explanatory note to the effect that any notices contemplated in the Convention that were not included in article 3 could be made by any means, including orally or by exchange of data messages that did not meet the definition of "electronic communication". No decision had been taken by the Working Group or the Commission on whether to include additional materials along with the publication of the Convention, and if so, which form those materials should take.

329. In order to assist in the consideration of that issue, the Commission had before it a note by the Secretariat (A/CN.9/679) suggesting possible models of commentary or note, if any, that should accompany the publication of the Convention. In that note, reference was made to three different styles of explanatory note that had

previously been published in conjunction with UNCITRAL conventions. It was observed that none of those notes constituted an official commentary on the convention to which they referred, and that publication of an official commentary on an instrument was extremely rare in the history of UNCITRAL. The sole example of such an official text was said to have been in connection with the original text of the unamended Convention on the Limitation Period in the International Sale of Goods.[40] However, the Commission observed that explanatory notes were regularly included in the publication of UNCITRAL conventions, often with a disclaimer along the following lines: "This note has been prepared by the Secretariat of the United Nations Commission on International Trade Law for informational purposes; it is not an official commentary on the Convention."

330. It was noted that in considering what form of note, if any, should be published along with the Convention, certain characteristics of the Rotterdam Rules were thought to be relevant. Those characteristics included the length and breadth of the Convention, its goal of harmonizing the highly disparate global regime for maritime transport, the voluminous *travaux préparatoires*, and the anticipated publication of several academic commentaries on the Convention in the coming months.

331. There was general agreement in the Commission that the text of the Convention, along with the resolution of the General Assembly adopting it, should be published by the Secretariat as a separate document. Further, there was broad support for the suggestion that the Secretariat should prepare an index to the lengthy *travaux préparatoires* that would assist readers in accessing the legislative history of the text on an article by article basis. In addition, there was some support for the preparation of materials relating to the text that would alert the reader to cross-references to other relevant provisions of the Convention.

332. Strong reservations were expressed regarding whether or not an explanatory note on the Convention should be prepared. It was observed that, while lengthy, the Rotterdam Rules were a balanced and measured text that had been the product of complex negotiations over the course of several years. It was said that the resulting text represented a carefully wrought compromise that States had specifically approved when the General Assembly had adopted the text in December 2008. Fear was expressed that it might be more difficult to understand the intricately woven agreement that had resulted in the adoption of the text if a detailed commentary were published, as it might unwittingly reopen certain issues in respect of which agreement had been particularly hard-won. It was also suggested that that danger would be exacerbated if the commentary was to be an official one on which the views of States would be sought, for example, in the context of a Working Group. Further, it was questioned whether the preparation of a detailed commentary, whether or not it was considered by a Working Group, might not inadvertently delay the ratification process, as States awaited the outcome of those discussions. In addition, the view was expressed that following the adoption of the Convention, its interpretation should be left to States and not be influenced by other actors. It was urged that in light of the expressed concerns, no commentary of any type should be published in conjunction with the text. There was support for that view.

333. It was observed that while an official and detailed commentary on the text might be unwise, the preparation by the Secretariat of a more general explanatory

---

[40] *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. See also paragraph 376 (a) below.

note, not intended to affect the interpretation of the text, could aid in the uniform application of the Convention. Further, it was thought that such a general note could assist States both in making recommendations to their legislatures as to whether or not to become party to the Convention, and in the later implementation of the Convention. There was support for that view.

334. After discussion, the Commission agreed that the Secretariat should prepare a brief introductory note to describe, in general terms, how the Convention had come into being, while avoiding entering into a discussion of substantive issues or a legal assessment; such a note could perhaps be along the lines of the note published with the United Nations Convention on Contracts for the International Sale of Goods (United Nations Sales Convention).[41] The view was expressed that it would be desirable for the Secretariat to present a draft introductory note for consideration by the Commission already at its forty-third session, subject to the availability of the relevant resources. However, given the nature of the note as purely descriptive of the provisions of the Convention, and not intended to be used to interpret their content, the Commission decided that the note should be published, without seeking further review by the Commission, as an introduction to the index to the legislative history of the text (see para. 331 above), rather than as an attachment to the text of the Convention itself.

IX. Possible future work in the area of electronic commerce

335. It was recalled that, in 2004, having completed its work on a draft convention on the use of electronic communications in international contracts, Working Group IV (Electronic Commerce) requested the Secretariat to continue monitoring various issues related to electronic commerce, including issues related to cross-border recognition of electronic signatures, and to publish the results of its research with a view to making recommendations to the Commission as to whether future work in those areas would be possible (A/CN.9/571, para. 12).

336. It was also recalled that, at its fortieth session, in 2007, the Commission requested the Secretariat to continue to follow closely legal developments in the relevant areas, with a view to making appropriate suggestions in due course.[42] At its forty-first session, in 2008, the Commission requested the Secretariat to engage actively, in cooperation with the World Customs Organization (WCO) and with the involvement of experts, in the study of the legal aspects involved in implementing a cross-border single window facility with a view to formulating a comprehensive international reference document on legal aspects of creating and managing a single window designed to handle cross-border transactions. The Commission noted that one of the benefits arising from its involvement in such a project would be the improved coordination of work between the Commission, WCO and the United Nations Centre for Trade Facilitation and Electronic Business. The Commission also requested the Secretariat to report to the Commission on the progress of that work at its next session.[43]

---

41 United Nations publication, Sales No. E.95.V.12. For further information about the Convention, see paragraph 376 (d) below.

42 *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17* (A/62/17), part I, para. 195.

43 Ibid., *Sixty-third Session, Supplement No. 17* (A/63/17), paras. 336 and 338.

337. At the current session, the Commission had before it a note by the Secretariat (A/CN.9/678) providing an update on the work relating to policy considerations and legal issues in the implementation and operation of single window facilities. In particular, the note reported on the activities of the WCO-UNCITRAL Joint Legal Task Force on Coordinated Border Management incorporating the International Single Window (the Joint Legal Task Force) as well as on other regional initiatives in this field. Moreover, the note referred to a proposal for the compilation of a comprehensive reference document aimed at facilitating the task of legislators and policymakers, in particular in developing countries, when dealing with issues relating to electronic commerce.

338. The Commission had received further proposals for future work on electronic commerce from States. One proposal suggested the preparation of legal standards on the electronic transferability of rights to goods in transit as well as on electronic documents for bills of lading, letters of credit, insurance and other trade in and transportation of goods (A/CN.9/681 and Add.1). A related proposal called for the preparation of uniform rules governing electronic transfer or negotiation of rights or documents with a view to fostering the migration of cross-border operations of this kind to the electronic environment; the suggested approach focused on the role of electronic registries and trusted third parties in these processes (A/CN.9/682). A third proposal suggested preparing a study on possible future work on the subject of online dispute resolution in cross-border electronic commerce transactions (A/CN.9/681/Add.2).

339. The Commission heard a statement from a representative of WCO on the work of the Joint Legal Task Force (see para. 411 below). The Commission also heard a statement from the Inter-Parliamentary Assembly of the Eurasian Economic Community on the structure of that body and its activities relating to electronic commerce legislation and single window facilities (see paras. 407-409 below).

340. The Commission stressed the importance of the work of the Joint Legal Task Force, and, more generally, of the legal aspects of single window facilities for trade facilitation. The desirability of focusing that work on practical outcomes, including by involving implementing bodies such as WCO, was also noted. After discussion, the Commission requested the Secretariat to remain engaged in the Joint Legal Task Force, to report periodically on its achievements and to convene a Working Group session should the progress of work warrant it (see subpara. 437 (c) below).

341. The Commission agreed on the importance of the proposals relating to future work in the fields of electronic transferable records and of online dispute resolution to promote electronic commerce, for the reasons expressed in the proposals submitted to the Commission. With respect to electronic transferable records, it was recalled that, as already noted at the Commission's forty-first session, limited elements of commonality in the different records and rights transferred would not support immediate work at the working group level.[44] Thus, it was indicated that further information was needed in order to fully assess the scope and mandate of possible future work on those issues by Working Group IV.

342. With respect to the proposal on online dispute resolution, it was suggested that further studies should identify the different groups interested by possible future standards, including consumers. It was noted in this respect that the variety of rules on consumer protection made it particularly difficult to achieve harmonization in

---

[44] Ibid., para. 337.

this field. Divergent views were expressed on the desirability of a discussion of the issue of enforcement of awards rendered in online arbitral proceedings. It was explained that practical difficulties arose from the fact that the disputes settled by such awards generally involved small monetary amounts, especially in consumer-related disputes, and from the costs of cross-border enforcement under existing instruments.

343. The Commission requested the Secretariat to prepare studies on the basis of the proposals in documents A/CN.9/681 and Add.1 and 2 and A/CN.9/682, with a view to reconsidering the matter at a future session. It further requested the Secretariat to hold colloquiums on the same issues, resources permitting.

344. The Commission was aware of the importance of providing adequate assistance to developing countries in addressing the digital divide, and of promoting the adoption of modern electronic commerce legislation. However, the Commission did not consider it had sufficient information to support the proposal to initiate the compilation of a comprehensive reference document aimed at facilitating the task of legislators and policymakers. In this respect, it was noted that, while a significant amount of information had already been made available to the public, including through the UNCITRAL website, the studies already requested by the Commission to the Secretariat fully engaged its capacity in the near future. It was therefore suggested that the proposal could be reconsidered at a later stage, subject to availability of resources and to clarification of the specific issues to be covered in such compilation.

X. Possible future work in the area of commercial fraud

345. It was recalled that the subject of commercial fraud had been considered by the Commission at its thirty-fifth to forty-first sessions, from 2002 to 2008, respectively.[45] It was further recalled that at its thirty-seventh session, in 2004, the Commission agreed that it would be useful if, wherever appropriate, examples of commercial fraud were to be discussed 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, the Commission agreed in 2004 that the preparation of lists of common features present in typical fraudulent schemes (the "indicators of commercial fraud") could be useful as educational material for participants in international trade and other potential targets of perpetrators of fraud in order to help them protect themselves from becoming victims of fraudulent schemes.[46]

346. The Commission also recalled that at its thirty-eighth session, in 2005, its attention was drawn to Economic and Social Council resolution 2004/26 of 21 July 2004, pursuant to which the United Nations Office on Drugs and Crime (UNODC) had begun its work on economic crime and identity fraud. In that same resolution, the Council recommended that the Secretary-General designate UNODC to serve as

---

[45] Ibid., *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; ibid., *Sixtieth Session, Supplement No. 17* (A/60/17), paras. 216-220; ibid., *Sixty-first Session, Supplement No. 17* (A/61/17), paras. 211-217; ibid., *Sixty-second Session, Supplement No. 17* (A/62/17), part I, paras. 196-203; and ibid., *Sixty-third Session, Supplement No. 17* (A/63/17), paras. 339-347.

[46] Ibid., *Fifty-ninth Session, Supplement No. 17* (A/59/17), para. 112.

secretariat for 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 the study useful practices, guidelines or other materials, in consultation with the secretariat of UNCITRAL.[47]

347. It was recalled that, at its forty-first session, in 2008, the Secretariat had reported both on its work on the indicators of commercial fraud,[48] and on the comments received by States after the indicators had been circulated to them. It was also recalled that, at that session, the Commission had requested the Secretariat to make such adjustments and additions as were advisable to improve the materials and to subsequently publish them as a Secretariat informational note.[49] The Commission further recalled that at that session, it had heard a report on collaborative efforts undertaken by the Secretariat with UNODC in respect of the work of UNODC on economic fraud and identity fraud and reiterated its request that the Secretariat continue to cooperate with and to assist UNODC in its work on fraud and economic crime, and to keep the Commission informed of developments in that area.[50]

348. At the current session of the Commission, the Secretariat reported that several examples of fraudulent schemes that had come to light since the beginning of the global economic crisis were being added to the indicators, which were being updated and prepared for publication and dissemination. The Commission expressed its approval and its continued support for the publication and dissemination of indicators of commercial fraud.

349. The Secretariat further reported that it had participated in all meetings of UNODC core group of experts on identity-related crime, which had been created to examine issues of economic fraud and identity fraud. Three meetings of the core group of experts had been held, in November 2007, June 2008 and January 2009, the results of which had been considered by the Commission on Crime Prevention and Criminal Justice at its eighteenth session (18 April 2008 and 16-24 April 2009), under the agenda item entitled "Economic fraud and identity-related crime".[51]

350. The Commission was informed that at its eighteenth session, the Commission on Crime Prevention and Criminal Justice had considered a number of texts on the issue of economic fraud, including: the reports of the first three meetings of the core group of experts (E/CN.15/2009/CRP.10, E/CN.15/2009/CRP.11 and E/CN.15/2009/CRP.12); a report of the Secretary-General on international cooperation in the prevention, investigation, prosecution and punishment of economic fraud and identity-related crime (E/CN.15/2009/2 and Corr.1); a note by the Secretariat, section II of which was on economic fraud and identity-related crime (E/CN.15/2009/15); a conference room paper on essential elements of criminal laws to address identity-related crime (E/CN.15/2009/CRP.9); a conference room paper on legal approaches to criminalize identity theft (E/CN.15/2009/CRP.13); and a discussion paper on identity-related crime victim issues (E/CN.15/2009/CRP.14).[52]

---

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

48 Ibid., *Sixty-third Session, Supplement No. 17* (A/63/17), paras. 339-342.

49 Ibid., paras. 343-344.

50 Ibid., paras. 345-347.

51 For the report of the session, see *Official Records of the Economic and Social Council, 2009, Supplement No. 10* (E/2009/30-E/CN.15/2009/20).

52 Ibid., chapter II.

351. The Commission was advised that two themes raised by the Commission on Crime Prevention and Criminal Justice at its eighteenth session might be of particular interest to UNCITRAL. The first theme was the prevention of economic crime and identity-related crime, and cooperation in that regard with the private sector. The second theme was international cooperation in the prevention of economic fraud and identity-related crime, particularly in terms of raising awareness of the problem and providing technical assistance. The following conclusions reached by the Commission on Crime Prevention and Criminal Justice after the thematic discussions on economic crime and identity-related crime were reported to UNCITRAL as being of possible interest:

(a) It was generally agreed that, in view of the increasing transnational nature of economic fraud and identity-related crime, it was indispensible to strengthen international cooperation mechanisms;

(b) Emphasis was placed on giving special consideration to the protection of victims of economic fraud and identity-related crime, particularly in terms of awareness-raising and educational programmes, among other issues;

(c) The education of potential victims of fraud and identity-related crime, as well as the dissemination of information to them, were said to be critical elements of crime prevention strategies;

(d) It was acknowledged that cooperation between the public and private sectors was essential in order to develop an accurate and complete picture of the problems posed by economic fraud and identity-related crime and in order to adopt and implement both preventive and reactive measures against such crime.

352. At its eighteenth session, the Commission on Crime Prevention and Criminal Justice recommended to the Economic and Social Council the adoption[53] of a draft resolution, in which the Council acknowledged the efforts of UNODC to establish, in consultation with UNCITRAL, a core group of experts on identity-related crime and bring together on a regular basis representatives from Governments, private sector entities, international and regional organizations and academia to pool experience, develop strategies, facilitate further research and agree on practical action against identity-related crime. In the draft resolution, the Commission also recommended that the Council request UNODC to collect, develop and disseminate various materials, the most relevant of which for UNCITRAL were said to be the following: materials on technical assistance for training to enhance expertise and capacity to prevent and combat economic fraud and identity-related crime; useful practices and guidelines in establishing the impact of such crimes on victims; and best practices on public-private partnerships to prevent economic fraud and identity-related crime. Finally, in the draft resolution it was requested that UNODC continue its efforts, in consultation with UNCITRAL, to promote mutual understanding and the exchange of views between public and private sector entities on issues related to economic fraud and identity-related crime, with the aim of facilitating cooperation, through the continuation of the work of the core group of experts, and to report on the outcome of its work to the Commission on Crime Prevention and Criminal Justice on a regular basis.

353. The Commission took note that certain of the actions requested of UNODC by the Commission on Crime Prevention and Criminal Justice in its draft resolution would allow ample scope for integrating the work of UNCITRAL on the indicators

---

[53] Ibid., chapter I, B, draft resolution I.

of commercial fraud as an important tool for prevention and education and as a possible component of any broader efforts by UNODC in that regard. In response to a question regarding the possibility of future work for UNCITRAL in that area, for example, the development of a code of conduct, the Commission was advised that, following the approval of the draft resolution by the Economic and Social Council, the Secretariat would consult with the UNODC secretariat regarding the possibilities for future work and collaboration, and would report on that issue to UNCITRAL at a future session of the Commission.

354. The Commission expressed its gratitude to the Secretariat for its work in the area of commercial fraud and expressed the desire that the Secretariat would continue its efforts at cooperation and collaboration with the UNODC secretariat in its work on economic fraud and identity-related crime, including by reporting to the Commission on developments at its future sessions.

355. One delegation proposed that the Commission's work in the area of commercial fraud should be extended to the area of financial fraud, in the light of the current situation and recent events in the financial market that had cross-border and international implications. It was proposed that, in the future, work on financial fraud could focus on developing further indicators of financial fraud and on identifying preventive measures. In addition, it was proposed that such work could also involve a study of measures for efficiently solving the consequences of financial fraud, with a view to preserving the integrity of the global financial market. The creation of an institutional arbitration organ was mentioned as one such possible measure. The Commission took note of those proposals.

XI. Endorsement of texts of other organizations: 2007 revision of the Uniform Customs and Practice for Documentary Credits published by the International Chamber of Commerce

356. The International Chamber of Commerce (ICC) requested the Commission to consider recommending the use in international trade of the 2007 revision of the ICC Uniform Customs and Practice for Documentary Credits (UCP 600), as it had with respect to the 1962, 1974, 1983 and 1993 versions of UCP.

357. The Commission recognized that UCP 600, which was aimed at establishing uniformity of practice in relation to dealings with documentary credits, provided successful international contractual rules governing documentary credits. Taking note of the significant changes made to the previous version of UCP, the Commission agreed to recommend the use of UCP 600, adopting the following decision:

"*The United Nations Commission on International Trade Law*,

"*Expressing* its appreciation to the International Chamber of Commerce for transmitting to it the revised text of 'Uniform Customs and Practice for Documentary Credits', which was approved by the Commission on Banking Technique and Practice of the International Chamber of Commerce on 25 October 2006, with effect from 1 July 2007,

"*Congratulating* the International Chamber of Commerce on having made a further contribution to the facilitation of international trade by bringing up to date its rules on documentary credit practice to allow for developments

in the banking, transport and insurance industries and new technological applications,

"*Noting* that 'Uniform Customs and Practice for Documentary Credits' constitutes a valuable contribution to the facilitation of international trade,

"*Commends* the use of the 2007 revision, as appropriate, in transactions involving the establishment of a documentary credit."

XII. Monitoring implementation of the New York Convention

358. 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 Convention on the Recognition and Enforcement of Foreign Arbitral Awards[54] (the New York Convention) and at considering procedural mechanisms that States had adopted for the recognition and enforcement of arbitral awards under the New York Convention.[55] A questionnaire had been circulated to States with the purpose of identifying how the New York Convention had been incorporated into national legal systems and how it was interpreted and applied. One of the central issues to be considered under that project was whether States parties had included additional requirements for recognition and enforcement of arbitral awards that were not provided for in the New York Convention. It was also recalled that the Secretariat had presented an interim report to the Commission at its thirty-eighth session, in 2005, which set out the issues raised by the replies received in response to the questionnaire circulated in connection with the project (A/CN.9/585).[56]

359. At its current session, the Commission recalled that, at its forty-first session, in 2008, it had considered a written report in respect of the project, covering implementation of the New York Convention by States, its interpretation and application, and the requirements and procedures put in place by States for enforcing an award under the New York Convention, based on replies sent by 108 States parties to the New York Convention (A/CN.9/656 and Add.1). The Commission had welcomed the recommendations and conclusions contained in the report, noting that they highlighted areas where additional work might need to be undertaken to enhance uniform interpretation and effective implementation of the New York Convention. The Commission had been generally of the view that the outcome of the project should consist in the development of a guide to enactment of the New York Convention, with a view to promoting a uniform interpretation and application of the Convention, thus avoiding uncertainty resulting from its imperfect or partial implementation and limiting the risk that practices of States diverge from the spirit of the Convention. The Commission had requested the Secretariat to study the feasibility of preparing such a guide. The Commission had also requested the Secretariat to publish on the UNCITRAL website the information collected during the project implementation, in the language in which it was received. In addition, the Commission had agreed that, resources permitting, the activities of the

---

[54] United Nations, *Treaty Series*, vol. 330, No. 4739. See also paragraph 376 (j) below.

[55] *Official Records of the General Assembly, Fiftieth Session, Supplement No. 17* (A/50/17), paras. 401-404.

[56] Ibid., *Sixtieth Session, Supplement No. 17* (A/60/17), paras. 188-191.

Secretariat in the context of its technical assistance programme could usefully include dissemination of information on the judicial interpretation of the New York Convention, which would usefully complement other activities in support of the Convention.[57]

360. At its current session, the Commission heard an oral report on the project. The Commission noted that a draft guide to enactment of the New York Convention was being planned for preparation and that information collected during the project implementation, to the extent it was confirmed to be accurate, would be published on the UNCITRAL website. The Commission urged States to provide the Secretariat with information regarding implementation of the New York Convention to ensure that the information published on the UNCITRAL website regarding that project remained up to date. The Commission noted that comments received from States on the impact in their jurisdictions of the recommendation adopted by the Commission at its thirty-ninth session, in 2006, regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the New York Convention[58] would also be published as part of the project. It was noted that States generally supported the recommendation as a means to promote a uniform and flexible interpretation, in different jurisdictions, of the writing requirement for arbitration agreements under article II, paragraph 2, of the New York Convention. The Commission noted that technical assistance activities would be designed and implemented in coordination with other international organizations to address specific issues identified during the project implementation. The Commission agreed that a more substantive presentation of the progress on the project regarding the implementation of the New York Convention should be made at a future session of the Commission.

361. The Commission recalled that the ICC Commission on Arbitration had created a task force to examine the national rules of procedure for recognizing and enforcing foreign arbitral awards on a country-by-country basis. The Commission expressed its appreciation to the ICC Commission on Arbitration and commended the Secretariat for maintaining close collaboration between the two institutions. It was noted that IBA, at its annual meeting in 2008, had invited both a representative of UNCITRAL and of the ICC Commission on Arbitration to discuss their respective projects. In view of the common features identified in the work of the Commission and ICC for the promotion of the New York Convention, the Commission expressed the wish that more opportunities for joint activities would be identified in the future. The Secretariat was encouraged to develop new initiatives in that respect.

XIII. Technical assistance and cooperation

A. Technical cooperation and assistance activities

362. The Commission had before it a note by the Secretariat (A/CN.9/675 and Add.1) describing the technical cooperation and assistance activities undertaken subsequent to the date of the note on that topic submitted to the Commission at its forty-first session, in 2008 (A/CN.9/652). 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.9/675,

---

[57] Ibid., *Sixty-third Session, Supplement No. 17* (A/63/17), paras. 353-360.

[58] Ibid., Sixty-first Session, Supplement No. 17 (A/61/17), annex II.

paragraphs 8-31. It was emphasized that legislative technical assistance, in particular to developing countries, was an activity that was not less important than the formulation of uniform rules itself. For that reason, the Secretariat was encouraged to continue to provide such assistance to the broadest extent possible and to improve its outreach to developing countries in particular.

363. The organization of technical assistance and cooperation activities on a regional basis was supported as being particularly useful. The Commission requested the Secretariat to explore the possibility of establishing a presence in regions or specific countries through, for example, having dedicated staff in United Nations field offices, collaboration with such existing field offices or establishing UNCITRAL country offices. In addition to technical assistance with respect to the use and adoption of UNCITRAL texts, it was also pointed out that many countries faced difficulties in maintaining a sustained presence in the Commission and its working groups and that they might require assistance in preparing for and participating in the work of those bodies, particularly where the topics being discussed were highly technical, to ensure they could develop the capacity to participate effectively. It was suggested that establishing channels of information to facilitate monitoring, on a continuing basis, of the work that was being done might also be useful.

364. The Commission noted that the continuing ability to respond to requests from States and regional organizations for technical cooperation and assistance activities was dependent upon the availability of funds to meet associated UNCITRAL costs. The Commission in particular noted that, despite efforts by the Secretariat to solicit new donations, funds available in the UNCITRAL Trust Fund for Symposia were very limited. Accordingly, requests for technical assistance activities had to be very carefully considered and the number of such activities limited. The Commission requested the Secretariat to explore avenues for UNCITRAL to use extrabudgetary resources in a way similar to that used by UNODC to provide technical assistance, noting that UNCITRAL should have at its disposal the means necessary to carry out technical cooperation and assistance activities.

365. The Commission appealed to all States to assist the Secretariat in identifying sources of available funding in their State or organizations that might partner with UNCITRAL to support technical cooperation and assistance activities to promote the use and adoption of UNCITRAL texts, as well as wider participation in their development.

366. The Commission also 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, or as specific-purpose contributions, in order to facilitate planning and enable the Secretariat to meet the increasing requests from developing countries and countries with economies in transition for technical assistance and cooperation activities. The Commission expressed its appreciation to Cameroon, Mexico, and Singapore for contributing to the Trust Fund since the Commission's forty-first session and to organizations that had contributed to the programme by providing funds or by hosting seminars. The Commission also expressed its appreciation to France, which had funded a junior professional officer to work in the Secretariat.

367. 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. The Commission expressed its appreciation to Austria for contributing to the UNCITRAL Trust Fund and therefore enabling travel assistance to be granted to developing countries that are members of UNCITRAL.

B. Support to the uniform interpretation of UNCITRAL texts

368. 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 8 April 2009, 83 issues of compiled case-law abstracts from the CLOUT system had been prepared for publication, dealing with 851 cases relating mainly to the United Nations Sales Convention and the UNCITRAL Model Arbitration Law, and also including some cases on the UNCITRAL Model Law on Cross-Border Insolvency.

369. It was widely agreed that the CLOUT system continued to be an important tool for promoting broader use and better understanding of the legal standards developed by UNCITRAL. It was also felt that the enhancement of the CLOUT system to disseminate case law and other legal materials in all six official languages of the United Nations was key to a more uniform interpretation and application of UNCITRAL texts and should be dealt with as a matter of priority, alongside technical assistance to law reform undertaken by UNCITRAL.

370. The Commission expressed its appreciation to the national correspondents and other contributors for their work in developing the CLOUT system. It also noted the need for a collection system that would be sustainable over time and could respond to changing circumstances. The Commission agreed that States that had appointed national correspondents should be requested to reconfirm that appointment every five years, enabling those correspondents who wished to remain actively involved to continue their work and providing an opportunity for new correspondents to join the network. In order to facilitate implementation of that provision, the term of current national correspondents would expire in 2012 and States would be asked to reconfirm the appointment of their national correspondents at that time and every five years thereafter. The Secretariat was requested to update the existing guidelines for national correspondents (see A/CN.9/SER.C/GUIDE/1/Rev.1) to reflect those changes.

371. The Commission noted the need to enhance the completeness of the collection of case law both from countries that already participate in the CLOUT system and from countries that are currently underrepresented. The Commission mandated the Secretariat to utilize all available sources of information that might supplement the information provided by the national correspondents. The Secretariat was requested to carry out that task in collaboration with national correspondents where appointed.

372. The Commission noted that the continued ability of CLOUT to provide meaningful information was dependent on the regular maintenance and development of the system. The Commission further noted that those activities were resource intensive and the Secretariat was currently stretching its available resources to ensure coordination of the system. The Commission appealed to all States to assist the Secretariat in the search for available funding at the national level to ensure coordination and expansion of the CLOUT system.

373. The Commission noted that the digest of case law on the United Nations Sales Convention had been published and that work was commencing on a revised edition

for a possible publication in 2010. It was also noted that a quarterly bulletin and an information brochure had been developed to facilitate dissemination of information on the CLOUT system.

C. Library and online resources

374. The Commission further noted developments with respect to the UNCITRAL website (www.uncitral.org), emphasizing its importance as a component of the overall UNCITRAL programme of information and technical assistance activities. The Commission expressed its appreciation for the availability of the website in the six official languages of the United Nations and encouraged the Secretariat to maintain and further upgrade the website in accordance with existing guidelines. It was noted with particular appreciation that, since the holding of the forty-first session of the Commission, the website had received over one million visits. The monitoring of news and information dealing with the activities of UNCITRAL and the availability of it on the website were welcomed.

375. The Commission took note with appreciation of developments regarding the UNCITRAL Law Library, in particular those relating to the development of online resources and audio-visual materials. It also noted developments with respect to UNCITRAL publications, including the note of the Secretariat containing the bibliography of recent writings related to the work of UNCITRAL (A/CN.9/673) and the availability of online updates to the annual document.

XIV. Status and promotion of UNCITRAL texts

376. The Commission considered the status of the conventions and model laws emanating from its work and the status of the New York Convention, on the basis of a note by the Secretariat (A/CN.9/674) and updated information available on the UNCITRAL website. The Commission noted with appreciation the information on the following treaty actions and legislative enactments received since its forty-first session regarding the following instruments:

(a) [Unamended] Convention on the Limitation Period in the International Sale of Goods, 1974 (New York)[59] (new action by Belgium; 28 States parties);

(b) Convention on the Limitation Period in the International Sale of Goods, as amended, 1980 (New York)[60] (new action by Belgium; 20 States parties);

(c) United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg)[61] (34 States parties);

(d) United Nations Convention on Contracts for the International Sale of Goods, 1980 (Vienna)[62] (new actions by Albania, Armenia, Japan and Lebanon; 74 States parties);

---

[59] *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.

[60] United Nations publication, Sales No. E.95.V.13.

[61] United Nations publication, Sales No. E.95.V.14.

[62] United Nations publication, Sales No. E.95.V.12.

(e) United Nations Convention on International Bills of Exchange and International Promissory Notes, 1988 (New York)[63] (the Convention has five States parties; it requires ten States parties for entry into force);

(f) United Nations Convention on the Liability of Operators of Transport Terminals in International Trade, 1991 (Vienna)[64] (the Convention has four States parties; it requires five States parties for entry into force);

(g) United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, 1995 (New York)[65] (eight States parties);

(h) United Nations Convention on the Assignment of Receivables in International Trade, 2001 (New York)[66] (the Convention has one State party; it requires five States parties for entry into force);

(i) United Nations Convention on the Use of Electronic Communications in International Contracts, 2005 (New York)[67] (the Convention requires three States parties for entry into force);

(j) Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York)[68] (new actions by the Cook Islands and Rwanda; 144 States parties);

(k) UNCITRAL Model Law on International Commercial Arbitration (1985, amended in 2006)[69] (new legislation based on the Model Law has been adopted in the Dominican Republic (2008), Honduras (2000), Serbia (2006) and the former Yugoslav Republic of Macedonia (2006); new legislation based on the Model Law as amended in 2006, has been adopted in Mauritius (2008), New Zealand (2007), Peru (2008) and Slovenia (2008));

(l) UNCITRAL Model Law on International Credit Transfers (1992);[70]

(m) UNCITRAL Model Law on Procurement of Goods, Construction and Services (1994)[71] (new legislation based on the Model Law has been adopted in Bangladesh, Ghana, Guyana, Madagascar, Nepal, Rwanda and Zambia);

(n) UNCITRAL Model Law on Electronic Commerce (1996)[72] (new legislation based on the Model Law has been adopted in Brunei Darussalam (2000), Cape Verde (2003) and Guatemala (2008));

(o) UNCITRAL Model Law on Cross-Border Insolvency (1997)[73] (new legislation based on the Model Law has been adopted in Mauritius (2009) and Slovenia (2008));

---

63 United Nations publication, Sales No. E.95.V.16.

64 *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.

65 United Nations publication, Sales No. E.97.V.12.

66 United Nations publication, Sales No. E.04.V.14.

67 United Nations publication, Sales No. E.07.V.2.

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

69 United Nations publication, Sales No. E.08.V.4.

70 United Nations publication, Sales No. E.99.V.11.

71 United Nations publication, Sales No. E.98.V.13.

72 United Nations publication, Sales No. E.99.V.4.

73 United Nations publication, Sales No. E.99.V.3.

(p) UNCITRAL Model Law on Electronic Signatures (2001)[74] (new legislation based on the Model Law has been adopted in Cape Verde (2003) and Guatemala (2008); legislation influenced by the principles on which the Model Law is based has been adopted in Costa Rica (2005));

(q) UNCITRAL Model Law on International Commercial Conciliation (2002)[75] (legislation influenced by the Model Law and the principles on which it is based has been enacted in the United States of America by the States of Idaho, South Dakota, Utah and Vermont, as well as by the District of Columbia).

377. With respect to model laws and legislative guides, the Commission noted that their use in and influence on the legislative work of States and intergovernmental organizations was considerably greater than suggested by the limited information available to the Secretariat and reflected in the above-mentioned note.

378. The Commission was informed and noted with appreciation, that a number of States had adopted legislation that would enable them to become a party to the United Nations Sales Convention and the United Nations Convention on the Use of Electronic Communications in International Contracts[76] and that the instruments expressing consent to be bound would be deposited with the Secretary-General in due course.

XV. Working methods of UNCITRAL

379. The Commission recalled that, at the first part of its fortieth session (Vienna, 25 June-12 July 2007), it had before it observations and proposals by France on the working methods of the Commission (A/CN.9/635) and engaged in a preliminary exchange of views on those observations and proposals. It was agreed at that session that the issue of working methods would be placed as a specific item on the agenda of the Commission at its resumed fortieth session (Vienna, 10-14 December 2007). In order to facilitate informal consultations among all interested States, the Secretariat was requested to prepare a compilation of procedural rules and practices established by UNCITRAL itself or by the General Assembly in its resolutions regarding the work of the Commission. The Secretariat was also requested to make the necessary arrangements, as resources permitted, for representatives of all interested States to meet on the day prior to the opening of the resumed fortieth session of the Commission and, if possible, during the resumed session.[77]

380. The Commission further recalled that, at its resumed fortieth session, it considered the issue of the working methods of the Commission on the basis of observations and proposals by France (A/CN.9/635), observations by the United States (A/CN.9/639) and the requested note by the Secretariat on the rules of procedure and methods of work of the Commission (A/CN.9/638 and Add.1-6). The Commission was informed about the informal consultations held on 7 December 2007 among representatives of all interested States on the rules of procedure and methods of work of the Commission. At that session, the Commission agreed that any future review should be based on the previous deliberations on the subject in the

---

[74] United Nations publication, Sales No. E.02.V.8.

[75] United Nations publication, Sales No. E.05.V.4.

[76] United Nations publication, Sales No. E.07.V.02.

[77] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17* (A/62/17), part I, paras. 234-241.

Commission, the observations by France and the United States (A/CN.9/635 and A/CN.9/639) and the note by the Secretariat (A/CN.9/638 and Add.1-6), which was considered as providing a particularly important historical overview of the establishment and evolution of the UNCITRAL rules of procedure and methods of work. The Commission also agreed that the Secretariat should be entrusted with the preparation of a working document describing current practices of the Commission as regards the application of rules of procedure and methods of work, in particular as regards decision-making and participation of non-State entities in the work of UNCITRAL, distilling the relevant information from its previous note (A/CN.9/638 and Add.1-6). That working document would be used for future deliberations on the subject in the Commission in formal and informal settings. It was understood that, where appropriate, the Secretariat should indicate its observations on the rules of procedure and methods of work for consideration by the Commission. The Commission further agreed that the Secretariat should circulate the working document to all States for comment and subsequently compile any comments it might receive, that informal consultations among all interested States might be held, if possible, before the forty-first session of the Commission, and that the working document might be discussed already at the Commission's forty-first session, time permitting.[78]

381. The Commission also recalled that, at its forty-first session, in 2008, it had before it a note by the Secretariat describing current practices of the Commission as regards decision-making, the status of observers in UNCITRAL and the preparatory work undertaken by the Secretariat (A/CN.9/653). At that session, the Commission also had before it a note by the Secretariat compiling the comments received on the note by the Secretariat (A/CN.9/653) prior to the Commission's forty-first session (A/CN.9/660 and Add.1-5). The Commission requested the Secretariat to prepare a first draft of a reference document, based on the note by the Secretariat (A/CN.9/653), for use by chairpersons, delegates and observers and by the Secretariat. It was understood that the reference document should be somewhat more normative in nature than document A/CN.9/653. While the term "guidelines" was most often used to describe the future reference document, no decision was made as to what its final form would be. The Secretariat was requested to circulate the draft reference document for comments by States and interested international organizations and to prepare a compilation of those comments for consideration by the Commission at its forty-second session. Without prejudice to other forms of consultation, the Commission decided that two days should be set aside for informal meetings to take place, with interpretation in the six official languages of the United Nations, at the beginning of the forty-second session of the Commission to discuss the draft reference document.[79]

382. At the current session, the Commission had before it a note by the Secretariat containing a first draft of a reference document (A/CN.9/676). The Commission was informed that, as requested by the Commission at its forty-first session, the draft reference document had been circulated for comments by States and interested international organizations, and that comments received by the Secretariat had been compiled in document A/CN.9/676/Add.1-9. The Commission also had before it a proposal by France (A/CN.9/680) for revisions to be made to the reference document (A/CN.9/676). Also as requested by the Commission at its

---

[78] Ibid., part II, paras. 101-107.

[79] Ibid., *Sixty-third session, Supplement No. 17* (A/63/17), paras. 373-381.

forty-first session, the Commission devoted the first two days of its current session to informal consultations on the topic of working methods.

383. The Commission expressed its appreciation for the documents and generally agreed that they provided a sound basis for formulating a set of guidelines as a reference for the chairpersons, delegates and secretariat of UNCITRAL. The subsequent discussion was based on document A/CN.9/676.

384. The Commission noted that paragraphs 1-14 and 37-43 of document A/CN.9/676 had been considered in informal consultations. After the informal consultations, possible revisions to paragraphs 11, 12 and 14 were made available for consideration by the Commission.

385. It was suggested that paragraph 11 should be revised to read as follows:

> "11. There is no established United Nations definition of consensus. However, in United Nations practice, consensus is generally understood to mean adoption of a decision without formal objection and vote; this being possible only when no delegation formally objects to a consensus being recorded, though some delegations may have reservations to the substantive matter at issue or to a part of it. The fact that consensus is recorded does not necessarily mean that there is unanimity of opinion, namely, complete agreement as to substance and a consequent absence of reservations.[12] 'Consensus' should therefore be distinguished from 'unanimity', i.e., the decision-taking by a vote wherein no negative votes are cast, albeit with abstentions. There are numerous occasions in United Nations practice where States make declarations or reservations to a matter at issue while not objecting to a decision being recorded as taken by consensus,[13] which includes a decision taken 'without a vote'.

"[12] See the legal opinion in United Nations Juridical Yearbook, 1987 (United Nations publication, Sales No. E.96.V.6), pp. 174-175, under item 5.

"[13] Ibid. The 1987 legal opinion is reproduced in a note by the Secretariat (A/CN.9/638/Add.4, para. 22). Paragraphs 16-24 of that note clarify the meaning of 'consensus' in United Nations practice. Some organs distinguish between 'consensus' and 'decision without a vote'. 'Consensus' is used simply to reflect a situation where disagreeing delegations would not have pressed their disagreement to the point where no 'decision by consensus' could be reached. In that case, disagreeing delegations could, of course, have voiced their disagreement and, if they so wished, could have had their views reflected in the records. Where delegations do not wish to be closely associated with the decision, they have on occasion had the decision recorded as taken 'without a vote'. Such a decision would have a less positive appearance and, it may be said, does not represent 'consensus' in its truest form. Other organs use the terms 'by consensus', 'without a vote' or 'by general agreement' interchangeably. In any event, as noted in the 1987 legal opinion, 'the legal status of a decision is not affected by the manner in which it is reached. Once adopted, it has the status of a legally adopted decision'."

386. It was generally agreed that the suggested revision fully reflected the discussion during the informal consultations. However, a concern was expressed with regard to whether such a paragraph, which described the practices of consensus in the United Nations at large, and thus related to United Nations bodies other than the Commission, could form part of a document produced by the Commission. The Commission took note of those reservations. After discussion, the Commission

found paragraph 11 as reproduced in paragraph 385 of the present report to be generally acceptable.

387. The Commission found the following text for paragraph 12, revised to ensure consistency with the language used in paragraph 11, to be generally acceptable:

> "12. Consensus in the Commission may reflect a complete agreement as to substance and a consequent absence of reservations. It may also be based on the substantially prevailing view, a flexible notion that does not embody a pre-defined mode of calculation and is characterized by a strong majority of opinions and the absence of formal objection and vote. Delegations may request that the decision be recorded as taken without a vote."

388. Although there was some support for deleting the last sentence or moving it to section 3 on voting, the decision was made that it should be retained in paragraph 12.

389. The Commission emphasized that the role of the chairperson included advancing negotiations, facilitating consensus and determining the existence and exact nature of the consensus. After discussion, the Commission found that a text for the chapeau of paragraph 14 along the following lines would be generally acceptable subject to possible drafting refinement, which the Secretariat was requested to consider for discussion at a future session (the content of the accompanying footnote was not discussed):

> "14. The chairperson plays an important role in facilitating and determining the existence and the exact nature of a consensus.[15] The chairperson should be committed to advancing negotiations in order to reach a widely acceptable solution. In practical terms, when a chairperson announces that it is her or his understanding that the Commission wishes to take a decision by consensus, the following scenarios are possible:

> "[15] It should be noted that the chairperson, in the exercise of her or his functions, remains under the authority of the Commission (rule 107 of the Rules of Procedure of the General Assembly), which may overrule her or his decisions by a majority of the members present and voting (rule 125 of the same rules). It is therefore recommended that, as a general rule, before the chairperson rules, she or he seeks views from the member States of the Commission."

390. It was suggested that an objecting delegation should be responsible for formulating alternative solutions. That proposal was not supported.

391. The Commission found the following text of paragraph 14, subparagraph (a), to be generally acceptable:

> "(a) If the announcement is met by silence, either by implicit or explicit expression of support, the chairperson can declare that the decision has been taken by consensus;"

392. The Commission did not have time to conclude its deliberations on paragraph 14, subparagraph (b). The following text, which did not gain consensus in the Commission, was suggested for further deliberations at a later stage:

> "(b) If an objection to the decision being recorded as taken by consensus is lodged by a member State of the Commission, the chairperson gives an opportunity to the objecting delegation to formulate the grounds for its

objection. The chairperson has a general duty to seek a consensual way out of a deadlock. If after best efforts, it is not possible to find a solution, the chairperson may wish at this stage to explain [to the objecting delegation] that a formal objection by a delegation to a decision being adopted by consensus [does not have effect akin to a veto but is to be treated as an implicit request for formal voting] [may lead to a vote]. The chairperson may wish subsequently to seek confirmation of the delegation's intention. If the formal objection is maintained, the chairperson may proceed to formal voting (see section 3 below)."

393. With respect to the first sentence, the view was expressed that the right to object to a decision being recorded as being taken by consensus should also be available to non-member States. It was recalled that the principal difference between member and non-member States of the Commission related to the right to vote. The view was expressed that, except for the right to vote, observer States should enjoy all of the rights from which member States benefited, consistent with the practice developed over years since the establishment of the Commission and the objectives of UNCITRAL to achieve the universal acceptability of its standards and the broadest participation by States. The opposite view was also expressed that the right to raise a formal objection to consensus should be available only to member States of the Commission.

394. With regard to the third sentence of subparagraph (b), concern was expressed with respect to the use of the word "veto" in the first alternative wording in square brackets. The Secretariat was requested to consider possible alternative language to reflect the impossibility of reaching a decision as a result of a formal objection being maintained by one State. It was suggested that a formal objection and a request for a vote were independent actions and that the former should not be treated as an implicit request for a vote. For that reason, the second alternative wording in square brackets was proposed.

395. It was proposed that the text should clarify the different intentions that the objecting delegation might have, which would include requesting the decision to be recorded as one taken without a vote or requesting a vote. However, it was observed that the guidelines should provide guidance to chairpersons in dealing with decision-making in the specific situation where an objecting delegation sought to maintain its objection after extensive negotiation without requesting a vote, and thereby sought to prolong the negotiation phase indefinitely. It was noted that the final sentence attempted to address such a practical difficulty. The Commission did not reach a decision on that point and the discussion was postponed.

396. The view was expressed that, in the light of the consideration of the revised paragraphs 12 and 14 (b) above, paragraph 13 of document A/CN.9/676 should also be revised.

397. The text of revised paragraphs 14 (c) to (e), 37, 39, 41 and 43, which were prepared by the Secretariat but not considered by the Commission for lack of time, read as follows:

"14. (c) If a delegation announces that it is not participating in the decision-taking but does not prevent the chairperson from stating that the decision has been adopted by consensus, the chairperson can make such a statement and then, in effect, the situation would be viewed as if such a State was not present when the decision was taken;[16]

"(d) Those delegations which do not expressly indicate that they do not participate in a consensus are deemed to have participated in it;[17]

"(e) Non-member States of the Commission and observer organizations may participate in the collective effort to achieve a generally acceptable text.[18] However, they may not raise any formal objection to a decision being recorded as taken by consensus.

"37. The secretariat has discretion in determining its working methods.[40]

"39. The secretariat may have recourse to the assistance of outside experts from different legal traditions and affiliations, such as Government officials, academics, practising lawyers, judges, bankers, arbitrators or other subject-matter experts and members of various international, regional and professional organizations.[42]

"41. When the secretariat decides to convene an expert group meeting, information about the meeting (dates and format of the meeting, topic(s) to be discussed and participants invited to the meeting) is made available to States to the extent compatible with articles 100 and 101 of the Charter of the United Nations. Conferences and colloquiums are broadly advertised, particularly through the posting of the relevant information about the events on the UNCITRAL website.

"43. As demonstrated by practice so far, the use of one working language only at expert group meetings convened by the UNCITRAL secretariat has not hampered but rather facilitated the consultation process at such meetings. Nevertheless, the UNCITRAL secretariat is committed to endeavour, resources permitting, to provide at such meetings translation and interpretation in the other working language of the Secretariat, according to its needs and the needs of participants. In addition or alternatively, as the case may be, the Secretariat may find it necessary, under certain circumstances, to provide at such meetings translation and/or interpretation into another official language of the United Nations (for example, when expert advice from a particular country or region is required and the experts coming from that country or region do not have a good command of English or French but can communicate in another official language of the United Nations). In its requests for translation and interpretation services during such meetings, the secretariat has to take into account that the requested services can only be provided on an 'as available' basis, since intergovernmental meetings, formal or informal, have priority access to translation and interpretation services.

"16 Based on the wording of the legal opinion in United Nations Juridical Yearbook, 1987 (United Nations publication, Sales No. E.96.V.6), pp. 174-175, under item 5.

"17 Ibid.

"18 Ibid.

"40 It is recalled that, under Article 100 of the Charter of the United Nations, Secretariat staff, in the performance of their duties, shall not seek or receive instructions from any Government or from any other authority external to the Organization. Each Member State of the United Nations undertakes to respect the exclusively international character of the responsibilities of the staff of the Secretariat and not to seek to influence them in the discharge of their responsibilities. It is also recalled that, under Article 101 (3) of the Charter, the necessity of securing the highest standards of efficiency, competence and integrity is the paramount consideration in the employment of the staff.

"[42] Already in its early years, the Commission envisaged that the UNCITRAL secretariat would hold consultations with the organs and organizations concerned as may be appropriate in the different phases of the work. In particular, it envisaged that studies and other preparatory documents would be prepared by the secretariat with the assistance of experts, if necessary, and budget permitting. The Commission agreed that budget and planning estimates prepared by the secretariat for subsequent years should take into account the need for obtaining the services of consultants or organizations with special expertise in matters dealt with by the Commission, in order to enable the Commission to carry out its work. See, e.g., A/8017, paras. 219-221."

XVI. Coordination and cooperation

A. General

398. The Commission heard an oral report from the Secretariat providing a brief overview of the work of international organizations related to the harmonization of international trade law. The Commission recalled that at its forty-first session, in 2008, the Secretariat had suggested that the timing of both its general annual report on the current activities of international organizations related to the harmonization and unification of international trade law, as well as its ongoing series of specialized reports on particular topics, would in the future not necessarily be published prior to the annual session of the Commission.[80] The Commission noted that the Secretariat would publish its 2009 annual report on the activities of other international organizations in the fourth quarter of 2009. It was also noted that, given the growing interest in insolvency issues that had been witnessed in the light of the current global economic crisis, the Secretariat would publish a more detailed study on insolvency-related activities.

399. It was recalled that at its thirty-seventh session, in 2004, the Commission had agreed that it should adopt a more proactive attitude, through its secretariat, in fulfilling the terms of its mandate as regards coordination activities.[81] Recalling General Assembly resolution 63/120 of 11 December 2008 (see paras. 428 and 429 below), in which the Assembly endorsed the efforts and initiatives of the Commission towards coordination of activities of international organizations in the field of international trade law, 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 Hague Conference on Private International Law, Unidroit, the Organization for Economic Cooperation and Development, the Organization of American States, the World Bank, WCO, the World Intellectual Property Organization, and WTO. 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.

400. By way of example of current efforts at coordination, the Commission noted the coordination activities listed in document A/CN.9/675, paragraphs 32-35, and in

---

[80] Ibid., para. 382.

[81] Ibid., *Fifty-ninth Session, Supplement No. 17* (A/59/17), para. 114.

particular the meetings involving the Hague Conference on Private International Law and Unidroit.

B. Reports of other international organizations

401. The Commission took note of statements made on behalf of the following international and regional organizations.

European Bank for Reconstruction and Development

402. The Commission was advised of a statement received by the Secretariat from the General Counsel of the European Bank for Reconstruction and Development (EBRD) confirming the willingness of EBRD to follow the appeal made by the General Assembly in its resolution 63/120 (para. 7 (d)) (see paras. 428 and 429 below) for regional development banks to cooperate and coordinate their activities with UNCITRAL and to support the technical assistance programme of the Commission. The General Counsel of EBRD pointed to the joint conference organized by UNCITRAL, EBRD and the World Bank entitled "Secured transactions and insolvency: reforms at a crossroads", held in Washington, D.C., on 5 and 6 May 2008 (A/CN.9/675, para. 25 (a)) as a successful example of such collaboration and cooperation.

Food and Agriculture Organization of the United Nations

403. The Commission heard a statement concerning the International Treaty on Plant Genetic Resources for Food and Agriculture,[82] which established a Multilateral System of Access and Benefit-Sharing covering the 64 most important crops for global food security and which was implemented through a standard contract, namely the Standard Material Transfer Agreement for the transfer of plant genetic resources and the sharing of benefits accruing from those transfers.

404. It was noted that the UNCITRAL secretariat had participated in expert consultations on various aspects of information technology being developed to assist with the transfer of genetic resources and the sharing of benefits arising from the use of those resources and that it had contributed expertise on developing mechanisms for dispute resolution. The Commission heard that the value of its contribution to the implementation of the Treaty was recognized by the 122 Contracting Parties to the Treaty, whose governing body had recently held its third session in Tunis from 1 to 5 June 2009. The contribution made by UNCITRAL was particularly appreciated by developing countries in need of advice on practical, efficient and cost-effective solutions to implement the Multilateral System of Access and Benefit-Sharing.

405. At its third session, the Governing Body and the Contracting Parties, in approving the procedures for the Third Party Beneficiary, thanked UNCITRAL for its excellent advice to the Secretariat (Governing Body resolution 5/2009). Contracting Parties also consolidated the basis for further collaboration by requesting the Treaty secretariat to foster cooperation with other organizations and strengthen existing cooperative arrangements with a view to developing synergies and reducing inefficiencies (Governing Body resolution 8/2009).

---

[82] Food and Agriculture Organization of the United Nations, *Report of the Conference of FAO, Thirty-first Session, Rome, 2-13 November 2001* (C 2001/REP), appendix D.

406. The Commission noted that continuing to collaborate with UNCITRAL would contribute to the implementation of the Treaty and benefit both the Food and Agriculture Organization of the United Nations and UNCITRAL.

Inter-Parliamentary Assembly of the Eurasian Economic Community

407. The Commission heard a statement concerning the Inter-Parliamentary Assembly of the Eurasian Economic Community relating, in particular, to its structure and projects that were relevant to the work of UNCITRAL. It was noted that the Assembly was involved in the formation of common external customs at the borders of the member States of the Eurasian Economic Community (Belarus, Kazakhstan, Kyrgyzstan, Russian Federation, Tajikistan and Uzbekistan) and the elaboration of unified foreign economic policies, tariffs, prices and other components of a functioning common market. It was also noted that the Assembly, a body of parliamentary cooperation of States members of the Eurasian Economic Community, was considering issues related to the harmonization of national legislation with the agreements concluded within the framework of the Assembly, in order to achieve the objectives of the Eurasian Economic Community.

408. It was explained that the work of the Inter-Parliamentary Assembly included projects to develop normative legal acts, such as draft model legislation and recommendations on the harmonization of national laws. One of its reported activities was the creation of a legal framework for electronic commerce, which was viewed from the perspective of trade facilitation and the development of a single window facility.

409. The Commission heard that model basic principles for e-commerce had been prepared for use as a framework for national legislation, on the basis, inter alia, of the UNCITRAL Model Law on Electronic Commerce,[83] with a view to improving legislation on electronic commerce and supporting the development of electronic commerce in member States. It was further indicated that the Inter-Parliamentary Assembly had taken advantage of the expertise and experience of the UNCITRAL secretariat, including by receiving suggestions on draft recommendations to be presented at the meeting of the standing committee on trade policy and international cooperation of the Assembly, to be held in Minsk in November 2009.

International Institute for the Unification of Private Law

410. The Commission heard a statement on behalf of Unidroit. Unidroit welcomed the current coordination and cooperation with UNCITRAL and reaffirmed its commitment to cooperating closely with UNCITRAL with a view to ensuring consistency and avoiding overlap and duplication in the work of the two organizations and the best use of the resources made available by the respective member States. Unidroit reported that:

(a) At the sixty-third session of the Unidroit General Assembly, held in Rome on 11 December 2008, the members of the Unidroit Governing Council were elected for the subsequent five years. The Unidroit General Assembly also approved the recommendations made by the Governing Council in respect of the Unidroit work programme for the 2009-2011 triennium, assigning the highest priority to the work on finalization of a draft convention on intermediated securities and the additional chapters of the Unidroit Principles of International Commercial

[83] See paragraph 376 (n) above.

Contracts, and to the work on a protocol on matters specific to space assets to the Convention on International Interests in Mobile Equipment (Cape Town Convention);

(b) The first session of the diplomatic conference to adopt a convention on substantive rules regarding intermediated securities took place in Geneva from 1 to 12 September 2008. The final session, to complete work on the draft convention, is to be held from 5 to 9 October 2009 in Geneva. A steering committee for drafting an official commentary to the convention had been established and the English version of the draft commentary had been posted on the Unidroit website, with the French text to become available soon;

(c) A Model Law on Leasing was completed in 2008 and formed the basis of leasing laws already developed by Jordan, Tanzania (United Republic of) and Yemen and leasing laws being developed, for example, in Afghanistan. An official commentary on the model law is being prepared by the Unidroit secretariat, in close cooperation with a group of experts, and should be finalized in the course of 2009;

(d) The working group for the preparation of a third edition of the Unidroit Principles of International Commercial Contracts held its third session in Rome from 26 to 29 May 2008 and its fourth session also in Rome from 25 to 29 May 2009. The Working Group had been considering a draft chapter on the unwinding of failed contracts, a draft chapter on illegality, a draft chapter on plurality of obligors and/or of obligees, a draft chapter on conditional obligations and a position paper with draft provisions on the termination of long-term contracts for just cause. The working group decided to temporarily set aside its work on the termination of long-term contracts for just cause and to focus only on the other four chapters, with a view to submitting them to the Governing Council for its approval in 2010;

(e) An additional area of work under the overall umbrella of the Cape Town Convention was the preparation of a draft protocol on matters specific to space assets. A steering committee was formed in 2007 to develop the draft protocol and, in view of the progress of its work, a diplomatic conference for adoption of a draft protocol might be held in 2010. A preparatory commission was established by resolution of the Luxembourg diplomatic conference in order to prepare the international registry under the Luxembourg Rail Protocol. A meeting of the Commission, co-hosted by Unidroit and the Intergovernmental Organization for International Carriage by Rail (OTIF), was held in Rome in April 2008. Another such meeting is expected to be held on 1 and 2 October 2009;

(f) Possible future work by Unidroit included (i) a protocol to the Cape Town Convention on agricultural, construction and mining equipment; (ii) a study on civil liability for satellite-based services; (iii) a proposal for a model law on the protection of cultural property; (iv) a convention on the netting of financial instruments; and (v) possible work in the area of private law and development, in particular, as regards food security and agriculture.

World Customs Organization

411. The Commission heard of the continued interest of WCO in collaborating with UNCITRAL through the Joint Legal Task Force (see para. 337 above) as a means of providing a road map for potential single window users to follow when creating a legally enabling environment. WCO indicated its intention to continue doing its best to obtain strong member involvement in analysing the policy, operational and procedural contexts of single window facilities and providing strategic guidance to

prospective single window stakeholders. That member involvement was expected to include representation from the six WCO global regions, which include all 174 members. WCO expressed its belief that, at the present stage, the process could be satisfactorily managed by face-to-face meetings at its Brussels headquarters, as well as through the various other means described in the original terms of reference of the Joint Legal Task Force, such as a shared space on the Internet.

XVII. Role of UNCITRAL in promoting the rule of law at the national and international levels

412. The Commission recalled that at its resumed fortieth session (Vienna, 10-14 December 2007) it decided to include the item "Role of UNCITRAL in promoting the rule of law" in the agenda of its forty-first session and invited all States members of UNCITRAL and observers to exchange views on this agenda item at that session. It also recalled that that decision was taken on the basis of General Assembly resolution 62/70 on the rule of law at the national and international levels, in paragraph 3 of which the General Assembly invited the Commission to comment in its report to the General Assembly on the Commission's current role in promoting the rule of law.[84] The Commission further recalled that it had transmitted the comments, as requested, to the General Assembly in its annual report on the work of its forty-first session, in 2008.[85]

413. At its current session, the Commission took note of General Assembly resolution 63/128 on the rule of law at the national and international levels. In particular, the Commission noted that in paragraph 4 of that resolution the Assembly had called upon the United Nations system to systematically address aspects of the rule of law in relevant activities and that in paragraph 6 it had encouraged the Secretary-General and the United Nations system to accord high priority to rule of law activities. The Commission also noted that, in paragraph 7 of that resolution, the Assembly had invited the Commission to continue to comment, in its reports to the Assembly, on its current role in promoting the rule of law.

414. The Commission noted that, in paragraph 10 of its resolution 63/128 the General Assembly had decided that at its sixty-fourth session, in 2009, the debates in the Sixth Committee under the agenda item on the rule of law would focus on the sub-topic "Promoting the rule of law at the international level", without prejudice to the consideration of the item as a whole. The Commission therefore decided that at its current session its comments to the General Assembly would focus on its current role in promoting the rule of law at the international level.

415. The Commission recalled the mandate given to it by the General Assembly in its resolution 2205 (XXI) of 17 December 1966 establishing UNCITRAL as the United Nations expert body in the field of international commercial law. It was stressed that, pursuant to this mandate, the Commission contributed to the progressive development and harmonization of international commercial law by formulating modern international norms and standards to support international commerce and by ensuring that these norms and standards were acceptable to States with different legal, social and economic systems, as well as to other international

---

[84] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17* (A/62/17), part II, paras. 111-113.

[85] Ibid., *Sixty-third Session, Supplement No. 17* (A/63/17), para. 386.

actors, such as multilateral donors, using such norms and standards. The Commission also promoted general awareness and greater understanding of those standards, through teaching and technical assistance, CLOUT, the UNCITRAL website and publications and by dissemination of information about international commercial law by other means.

416. It was also noted that the Commission always attached high importance to another aspect of its mandate — cooperation and coordination with international organizations, including non-governmental organizations, active in the formulation, interpretation and/or implementation of international commercial law standards. Cooperation and coordination were seen to be the means to avoid conflicting rules or interpretations and confusion as regards sources of law and thus to achieve order, clarity, efficiency and consistency in the international regulation of commerce. In that regard, the Commission recalled its numerous appeals, supported by the General Assembly, most recently in its resolution 63/120 (see para. 428 below), for relevant international and regional organizations to coordinate their rule-making and/or technical assistance activities with those of the Commission. Noting that the desired coordination and cooperation were still to be achieved, the Commission welcomed the upcoming consideration at the sixty-fifth session of the General Assembly, in 2010, of ways and means of strengthening and improving coordination and coherence in rule of law activities (see para. 420 below).

417. The Commission also promoted peaceful and independent adjudication of disputes in the context of trade and investment, including between States, respect for binding commitments, confidence in the rule of law and fair treatment by strengthening non-judicial mechanisms such as arbitration and conciliation. In that respect, the Commission recalled its ongoing project on the revision of the UNCITRAL Arbitration Rules (see paras. 286-298 above), which were widely used in many different instances, including for solving disputes involving States and international organizations, as well as ongoing and new projects with respect to the New York Convention that aimed at achieving universal recognition and enforcement of foreign arbitral awards (see paras. 358-361 above). The Commission also recalled its plans for future work in the area of investment disputes resolution that touched upon such issues of international law as State responsibilities, transparency and human rights.

418. The Commission also worked at the critical juncture between international and national rule of law by assisting States with the implementation, at the domestic level, of international norms and standards and their uniform interpretation. Noting that laws and practices of Member States in implementing international law would be considered separately by the General Assembly at its sixty-fifth session (see para. 420 below), the Commission wanted only to reiterate, at the current stage, its concern that successful continuation of its programme of technical assistance with domestic law reforms was jeopardized by the lack of sufficient resources. It recalled in this respect its request at previous sessions, as supported by the General Assembly, and repeated at the current session (see paras. 364-366 above and para. 428 below), for additional resources to be allocated to meet the increased demand from developing countries and countries with economies in transition for technical assistance with the implementation of international commercial law.

419. The Commission considered that higher awareness, understanding and use of international commercial law were as important for modern commerce and sustained economic development as for good governance, justice and legal empowerment. The Commission therefore reiterated its conviction that promotion of the rule of law in

commercial relations should be an integral part of the broader agenda of the United Nations to promote the rule of law at the national and international levels, including through the Rule of Law Coordination and Resource Group, supported by the rule of law unit in the Executive Office of the Secretary-General. The Commission was looking forward to being part of strengthened and coordinated rule of law activities of the Organization.

420. The Commission drew the attention of its member States and observers to the following sub-topics under the agenda item "Rule of law at the national and international levels" expected to be considered at the sixty-fifth and sixty-sixth sessions of the General Assembly, in 2010 and 2011: "Laws and practices of Member States in implementing international law" and "Rule of law and transitional justice in conflict and post-conflict situations".[86] Noting the relevance of its activities to the subjects identified in these sub-topics, the Commission invited its member States and observers to submit comments in writing or orally addressing the role of UNCITRAL in the relevant context, for reflection in the Commission's reports to the General Assembly in the respective years.

XVIII. International commercial arbitration moot competitions

A. General remarks

421. The Commission recalled that pursuant to proposals made at the UNCITRAL Congress in 1992,[87] and following deliberations at the Commission's twenty-sixth session, in 1993,[88] the first Willem C. Vis International Commercial Arbitration Moot was organized in Vienna by the Institute of International Commercial Law at Pace University, New York. That arbitration moot competition was conceived as an educational initiative aimed at promoting and expanding familiarity with and understanding of UNCITRAL legal texts,[89] in particular the United Nations Sales Convention[90] and the UNCITRAL works in the field of international commercial arbitration.

422. At its current session, the Commission noted with satisfaction that the Willem C. Vis International Commercial Arbitration Moot competition, which involved participants from all over the world, was a very successful educational initiative, having contributed both to the dissemination of information about UNCITRAL instruments and to the development of university courses dedicated to

---

[86] The Sixth Committee reached the understanding that comments related to the first sub-topic should address, among others, laws and practices in the domestic implementation and interpretation of international law, strengthening and improving coordination and coherence of technical assistance and capacity-building in this area, mechanisms and criteria for evaluating the effectiveness of such assistance, ways and means of advancing donor coherence and perspectives of recipient States. Comments related to the other sub-topic should address, among others, the role and future of national and international transitional justice and accountability mechanisms and informal justice systems (A/63/443, para. 7).

[87] "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).

[88] *Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17* (A/48/17), para. 312.

[89] Ibid.

[90] See footnote 47 above.

international commercial arbitration. The Commission was informed that arbitration moot competitions modelled on the Willem C. Vis International Commercial Arbitration Moot were being organized in Argentina, China (Hong Kong) (see para. 425 below) and Spain (see para. 426 below).

423. The Commission expressed its gratitude to the organizers and other sponsors of the Willem C. Vis International Commercial Arbitration Moot competition and, in particular, to the Association for the Organization and Promotion of the Willem C. Vis International Commercial Arbitration Moot and its institutional members (Pace University School of Law, United States; Queen Mary University, United Kingdom; University of Stockholm, Sweden; University of Vienna, Austrian Arbitration Association and Federal Economic Chamber, Austria) for their efforts to make it successful and hoped that the international outreach and positive impact of the moot competition would continue to grow. Special appreciation was expressed to Eric E. Bergsten, former secretary of the Commission, for developing the moot competition and giving it direction since its inception in 1993-1994. Special appreciation was also expressed to Rafael Illescas Ortiz and Pilar Perales Viscasillas for their initiative in establishing the Madrid commercial arbitration moot competition.

B. Willem C. Vis International Commercial Arbitration Moot competition

424. It was noted that the Association for the Organization and Promotion of the Willem C. Vis International Commercial Arbitration Moot had organized the Sixteenth Moot in Vienna from 2 to 9 April 2009. 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 Sixteenth Moot had been based on the United Nations Sales Convention,[91] the arbitration rules of the Institute of Arbitration of the Stockholm Chamber of Commerce[92] and the Arbitration Model Law.[93] A total of 228 teams from law schools in 57 countries had participated in the Sixteenth Moot. The best team in oral arguments was that of Victoria University of Wellington. The Seventeenth Willem C. Vis International Commercial Arbitration Moot would be held in Vienna from 26 March to 1 April 2010.

425. It was also noted that the Sixth Willem C. Vis (East) International Commercial Arbitration Moot organized by the Chartered Institute of Arbitrators East Asia Branch, and co-sponsored by the Commission had been organized in China (Hong Kong) from 23 to 29 March 2009. A total of 64 teams from 17 countries took part in the Sixth (East) Moot. The winning team in the oral arguments was from Loyola Law School Los Angeles, United States. The Seventh (East) Moot would be held in Hong Kong, China, from 15 to 21 March 2010.

C. Madrid commercial arbitration moot competition

426. It was noted that University Carlos III of Madrid, Universia and PromoMadrid had organized the first international commercial arbitration moot competition in Madrid from 22 to 26 June 2009, which had also been co-sponsored by the

---

[91] Ibid.

[92] Available at the date of this report at http://www.sccinstitute.com/?id=23719.

[93] See footnote 31 above.

Commission. The legal issues involved in the competition were the Arbitration Model Law,[94] the Model Law on International Commercial Conciliation,[95] the UNCITRAL Arbitration Rules,[96] the United Nations Sales Convention,[97] and the New York Convention.[98] A total of nine teams from law schools or master programmes of five countries had participated in the Madrid moot competition in Spanish. The best team in oral arguments was the University of Versailles Saint-Quentin-en-Yvelines, France. The second Madrid moot competition would be held in Madrid from 28 June to 2 July 2010.

XIX. Relevant General Assembly resolutions

427. The Commission took note with appreciation of those resolutions related to the work of UNCITRAL adopted by the General Assembly at its sixty-third session on the recommendation of the Sixth Committee: Assembly resolution 63/120 on the reports of UNCITRAL on the work of its resumed fortieth and forty-first sessions and Assembly resolution 63/121 of 11 December 2008 on the Legislative Guide on Secured Transactions of the United Nations Commission on International Trade Law.

428. The Commission noted that by General Assembly resolution 63/120, the Assembly had commended the Commission for the completion of the Legislative Guide on Secured Transactions and the draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea and welcomed the preparation of digests of case law and the continuous efforts of the Commission to maintain and improve its website. It also welcomed the comprehensive review undertaken by the Commission of its working methods and the discussion by the Commission of its role in promoting the rule of law at the national and international levels. The General Assembly endorsed the efforts and initiatives of the Commission towards expanding its technical assistance and cooperation programme. The Assembly appealed to relevant organizations to coordinate their legal activities with those of the Commission and appealed for contributions to the UNCITRAL trust funds.

429. The Commission noted that by its resolution 63/121, the General Assembly had requested the Secretary-General to disseminate broadly the text of the Legislative Guide on Secured Transactions, transmitting it to Governments and other interested bodies, such as national and international financial institutions and chambers of commerce. The Assembly recommended that all States give favourable consideration to the Legislative Guide when revising or adopting legislation relevant to secured transactions, and invited States that had used the Legislative Guide to advise the Commission accordingly.

430. The Commission further noted that, in considering agenda item 9, it had taken note of Assembly resolution 63/122 of 11 December 2008 on the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (see para. 322 above).

---

[94] Ibid.
[95] See footnote 84 above.
[96] See footnote 22 above.
[97] See footnote 47 above.
[98] See footnote 60 above.

XX. Other business

A. Internship programme

431. An oral report was presented on the internship programme at the UNCITRAL secretariat. While general appreciation was expressed for the programme, which is designed to give young lawyers the opportunity to become familiar with the work of UNCITRAL and to increase their knowledge of specific areas in the field of international trade law, it was observed that only a small proportion of interns were nationals of 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. That suggestion was supported.

B. Microfinance in the context of international economic development

432. The Commission heard a suggestion that it would be timely for UNCITRAL to carry out a study on microfinance in the context of international economic development, in close coordination with the main organizations already active in that field. The purpose of the study would be to identify the need for a regulatory and legal framework aimed at protecting and developing the microfinance sector so as to allow its continuous development, consistent with its purpose, which was to build inclusive financial sectors for development.

433. After discussion, the Commission requested the Secretariat, subject to the availability of resources, to prepare a detailed study including an assessment of the legal and regulatory issues at stake in the field of microfinance as well as proposals as to the form and nature of a reference document discussing the various elements required to establish a favourable legal framework for microfinance, which the Commission might in the future consider preparing with a view to assisting legislators and policymakers around the world. It was said that developing countries and countries with economies in transition were considering whether and how to regulate microfinance; thus, the creation of consensus-oriented legal instruments could prove highly valuable for countries at this stage of development of the microfinance industry. The Commission requested the Secretariat to work in conjunction with experts and to seek possible cooperation with other interested organizations for the preparation of such a study, as appropriate.

C. Evaluation of the role of the Secretariat in facilitating the work of the Commission

434. It was recalled that, as indicated to the Commission at its fortieth session,[99] the programme budget for the biennium 2008-2009 listed among the "expected accomplishments of the Secretariat" its contribution to facilitating the work of UNCITRAL. The performance measure of that expected accomplishment was the level of satisfaction of UNCITRAL with the services provided, as evidenced by a rating on a scale ranging from 1 to 5 (5 being the highest rating).[100] The

---

[99] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17* (A/62/17), part I, para. 243.

[100] Proposed programme budget for the biennium 2008-2009, Part III, International justice and law,

Commission agreed to provide feedback to the Secretariat. It was recalled that a similar question regarding the level of satisfaction of UNCITRAL with the services provided by the Secretariat had been asked at the close of the forty-first session of the Commission, in 2008.[101] At that session, it had elicited replies from seven delegations, with an average rating of 4.5.

XXI. Date and place of future meetings

A. Forty-third session of the Commission

435. The Commission approved the holding of its forty-third session in New York, from 21 June to 9 July 2010.

B. Sessions of working groups

436. At its thirty-sixth session, in 2003, the Commission agreed that: (a) working groups should normally meet for a one-week session twice a year; (b) 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) 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.[102]

1. Sessions of working groups up to the forty-third session of the Commission

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

(a) Working Group I (Procurement) would hold its seventeenth session in Vienna from 7 to 11 December 2009 and its eighteenth session in New York from 12 to 16 April 2010;

(b) Working Group II (Arbitration and Conciliation) would hold its fifty-first session in Vienna from 14 to 18 September 2009 and its fifty-second session in New York from 1 to 5 February 2010;

(c) Working Group IV (Electronic Commerce) would be authorized to hold its forty-fifth session in New York from 17 to 21 May 2010, should this be warranted by the progress of work done in cooperation with WCO (see para. 340 above);

Section 8, Legal affairs (Programme 6 of the biennial programme plan and priorities for the period 2008-2009), Subprogramme 5, Progressive harmonization, modernization and unification of the law of international trade (A/62/6 (Sect. 8), table 8.19 (d)).

[101] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17* (A/63/17), para. 392.

[102] Ibid., *Fifty-eighth Session, Supplement No. 17* (A/58/17), para. 275.

(d) Working Group V (Insolvency Law) would hold its thirty-seventh session in Vienna from 9 to 13 November 2009 and its thirty-eighth session in New York from 19 to 23 April 2010;

(e) Working Group VI (Security Interests) would hold its sixteenth session in Vienna from 2 to 6 November 2009 and its seventeenth session in New York from 8 to 12 February 2010.

Additional time

438. Tentative arrangements were made for a four-day session to be held in Vienna, from 27 to 30 October 2009 (26 October being an official holiday) and a one-week session in New York, from 24 to 28 May 2010. This time could be used to accommodate the need for a session of a working group, depending on the needs of the working groups and subject to consultation with States.

2. Sessions of working groups in 2010 after the forty-third session of the Commission

439. The Commission noted that tentative arrangements had been made for working group meetings in 2010 after its forty-third session (the arrangements were subject to the approval of the Commission at its forty-third session):

(a) Working Group I (Procurement) would hold its nineteenth session in Vienna from 11 to 15 October 2010;

(b) Working Group II (Arbitration and Conciliation) would hold its fifty-third session in Vienna from 4 to 8 October 2010;

(c) Working Group III (Transport Law) would hold its twenty-second session in Vienna from 13 to 17 December 2010;

(d) Working Group IV (Electronic Commerce) would hold its forty-sixth session in Vienna from 6 to 10 December 2010;

(e) Working Group V (Insolvency Law) would hold its thirty-ninth session in Vienna from 1 to 5 November 2010;

(f) Working Group VI (Security Interests) would hold its eighteenth session in Vienna from 8 to 12 November 2010.

Annex

List of documents before the Commission at its forty-second session

Symbol	*Title or description*
A/CN.9/663	Provisional agenda, annotations thereto and scheduling of meetings of the forty-second session
A/CN.9/664	Report of Working Group I (Procurement) on the work of its fourteenth session (Vienna, 8-12 September 2008)
A/CN.9/665	Report of Working Group II (Arbitration and Conciliation) on the work of its forty-ninth session (Vienna, 15-19 September 2008)
A/CN.9/666	Report of Working Group V (Insolvency Law) on the work of its thirty-fifth session (Vienna, 17-21 November 2008)
A/CN.9/667	Report of Working Group VI (Security Interests) on the work of its fourteenth session (Vienna, 20-24 October 2008)
A/CN.9/668	Report of Working Group I (Procurement) on the work of its fifteenth session (New York, 2-6 February 2009)
A/CN.9/669	Report of Working Group II (Arbitration and Conciliation) on the work of its fiftieth session (New York, 9-13 February 2009)
A/CN.9/670	Report of Working Group VI (Security Interests) on the work of its fifteenth session (New York, 27 April-1 May 2009)
A/CN.9/671	Report of Working Group V (Insolvency Law) on the work of its thirty-sixth session (New York, 18-22 May 2009)
A/CN.9/672	Report of Working Group I (Procurement) on the work of its sixteenth session (New York, 26-29 May 2009)
A/CN.9/673	Bibliography of recent writings related to the work of UNCITRAL
A/CN.9/674	Status of conventions and model laws
A/CN.9/675 and Add.1	Technical cooperation and assistance
A/CN.9/676	UNCITRAL rules of procedure and methods of work
A/CN.9/676/Add.1 to Add.9	UNCITRAL rules of procedure and methods of work – Comments received from Member States and interested international organizations
A/CN.9/677	Settlement of commercial disputes – UNCITRAL Arbitration Rules: Designating and appointing authorities under the UNCITRAL Arbitration Rules
A/CN.9/678	Possible future work on electronic commerce
A/CN.9/679	Possible future work in the area of transport law: Commentary or explanatory notes on the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (“Rotterdam Rules”)
A/CN.9/680	UNCITRAL rules of procedure and methods of work – Proposal by France
A/CN.9/681	Possible future work on electronic commerce – Recommendations for future work of Working Group IV (Electronic Commerce) submitted by the United States of America

Symbol	*Title or description*
A/CN.9/681/Add.1	Possible future work on electronic commerce – Proposal of the United States of America on electronic transferable records
A/CN.9/681/Add.2	Possible future work on electronic commerce – Proposal of the United States of America on online dispute resolution
A/CN.9/682	Proposal of Spain concerning the future work of Working Group IV

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

(TD/B/56/11)

Progressive development of the law of international trade: forty-second annual report of the United Nations Commission on International Trade Law

At its 1039th plenary meeting, on 25 September 2009, the Board took note of the report of UNCITRAL on its forty-second session (A/64/17).

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 forty-second session (A/64/447)

[Original: English]

Rapporteur: Mr. Jean-Cédric Janssens de Bisthoven (Belgium)

I. Introduction

1. At its 2nd plenary meeting, on 18 September 2009, the General Assembly, on the recommendation of the General Committee, decided to include in the agenda of its sixty-fourth session the item entitled "Report of the United Nations Commission on International Trade Law on the work of its forty-second session" and to allocate it to the Sixth Committee.

2. The Sixth Committee considered the item at its 6th, 22nd and 25th meetings, on 12 October and on 2 and 12 November 2009. The views of the representatives who spoke during the Committee's consideration of the item are reflected in the relevant summary records (A/C.6/64/SR.6, 22 and 25).

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 forty-second session.[1]

4. At the 6th meeting, on 12 October, the Chairperson of the United Nations Commission on International Trade Law at its forty-second session introduced the report of the Commission on the work of its forty-second session.

II. Consideration of proposals

A. Draft resolution A/C.6/64/L.10

5. At the 22nd meeting, on 2 November, the representative of Austria, on behalf of Albania, Algeria, Argentina, Armenia, Australia, Austria, Bangladesh, Belarus, Brazil, Bulgaria, Cameroon, Canada, Chile, China, the Congo, Croatia, Cyprus, the Czech Republic, the Democratic Republic of the Congo, Denmark, the Dominican Republic, Egypt, Estonia, Fiji, Finland, Gabon, Germany, Ghana, Greece, Guatemala, Hungary, Ireland, Israel, Italy, Japan, Jordan, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malta, Mexico, Morocco, the Netherlands, New Zealand, Nigeria, Norway, Paraguay, the Philippines, Poland, Portugal, the Republic of Korea, Romania, the Russian Federation, Serbia, Singapore, Slovakia, Slovenia, South Africa, Spain, 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 Venezuela (Bolivarian Republic of), subsequently joined by Afghanistan, Benin, India, Iran (Islamic Republic of), Jamaica, Latvia, Malaysia and the Republic of Moldova, introduced a draft resolution entitled "Report of the United Nations Commission on International Trade Law on the work of its forty-second session" (A/C.6/64/L.10).

---

[1] *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17* (A/64/17).

6. At its 25th meeting, on 12 November, the Committee adopted draft resolution A/C.6/64/L.10 without a vote (see para. 9, draft resolution I).

B. Draft resolution A/C.6/64/L.11

7. At the 22nd meeting, on 2 November, the representative of Austria, on behalf of the Bureau, introduced a draft resolution entitled "Practice Guide on Cross-Border Insolvency Cooperation of the United Nations Commission on International Trade Law" (A/C.6/64/L.11).

8. At its 25th meeting, on 12 November, the Committee adopted draft resolution A/C.6/64/L.11 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:

Draft resolution I
Report of the United Nations Commission on International Trade Law on the work of its forty-second 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 developing countries, would contribute significantly to universal economic cooperation among all States on a basis of equality, equity, common interest and respect for the rule of law, to the elimination of discrimination in international trade and, thereby, to peace, stability and the well-being of all peoples,

Having considered the report of the Commission on the work of its forty-second session,[2]

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

---

[2] *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17* (A/64/17).

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 forty-second session;[1]

2. *Commends* the Commission for the completion and adoption of its Practice Guide on Cross-Border Insolvency Cooperation;[3]

3. *Welcomes* the progress made by the Commission in its work on a revision of its Model Law on Procurement of Goods, Construction and Services[4] through the consideration of chapter I of the draft revised model law,[5] and encourages the Commission to complete its work on the revised model law as soon as possible;

4. *Also welcomes* the progress made by the Commission in its work on a revision of its Arbitration Rules,[6] on the preparation of a draft legislative guide on the treatment of enterprise groups in insolvency and on the preparation of a supplement to its Legislative Guide on Secured Transactions[7] dealing with security rights in intellectual property, and endorses the decision of the Commission to undertake further work in the area of arbitration, electronic commerce, transport law and commercial fraud and to consider at its forty-third session proposals for future work in the areas of insolvency and security interests, as set out in its report;

5. *Further welcomes* the decision of the Commission to request the Secretariat to hold, resources permitting, an international colloquium on electronic commerce and another international colloquium on security interests;[8]

6. *Notes with appreciation* the decision of the Commission with regard to the publication of its Legislative Guide on Secured Transactions, of a commentary on the United Nations Convention on the Assignment of Receivables in International Trade[9] and of a text discussing the interrelationship of various texts on security interests prepared by the Commission, the International Institute for the Unification of Private Law and the Hague Conference on Private International Law;[10]

7. *Also notes with appreciation* the decision of the Commission to commend the use of the 2007 revision of the Uniform Customs and Practice for

---

[3] Ibid., para. 24.

[4] Ibid., *Forty-ninth Session, Supplement No. 17* and corrigendum (A/49/17 and Corr.1), annex I.

[5] Ibid., *Sixty-fourth Session, Supplement No. 17* (A/64/17), para. 283.

[6] United Nations publication, Sales No. E.93.V.6.

[7] Adopted by the Commission at its resumed fortieth session. See *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17* (A/62/17), part two, para. 100.

[8] See *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17* (A/64/17), paras. 319 and 343.

[9] Resolution 56/81, annex.

[10] See *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17* (A/64/17), paras. 315 and 321.

Documentary Credits, published by the International Chamber of Commerce, as appropriate, in transactions involving the establishment of a documentary credit;[11]

8. *Welcomes* the progress made in the ongoing project of the Commission on monitoring the implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958,[12] and the preparation of a draft guide to enactment of the Convention to promote a uniform interpretation and application of the Convention;[13]

9. *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;

10. *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, and in that respect encourages the Secretary-General to seek partnerships with State and non State actors to increase awareness about the work of the Commission and to facilitate the effective implementation of legal standards resulting from its work;

(b) Expresses its appreciation to the Commission for carrying out technical assistance and cooperation activities, including at the country, subregional and regional levels, and for providing assistance with legislative drafting in the field of international trade law, and draws the attention of the Secretary-General to the limited resources that are made available in this field;

(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 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

---

[11] Ibid., para. 357.

[12] United Nations, *Treaty Series*, vol. 330, No. 4739.

[13] See *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17* (A/64/17), para. 360.

Commission for promotion of the rule of law at the national and international levels and for the implementation of the United Nations development agenda, including the achievement of the Millennium Development Goals;

(e) Notes the request by the Commission that the Secretariat explore the possibility of establishing a presence in regions or specific countries by, for example, having dedicated staff in United Nations field offices, collaborating with such existing field offices or establishing Commission country offices with a view to facilitating the provision of technical assistance with respect to the use and adoption of Commission texts;[14]

11. *Expresses its appreciation* to the Government whose contribution 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,[15] enabled renewal of the provision of that assistance, and appeals to Governments, the relevant bodies of the United Nations system, organizations, institutions and individuals to make voluntary 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;

12. *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-fourth 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;

13. *Welcomes*, in the light of the recent increase in membership of the Commission and the number of topics being dealt with by the Commission, the comprehensive review undertaken by the Commission of its working methods, which was started at its fortieth session, with the aim of continuing consideration of the matter during its next sessions and with a view to ensuring the high quality of the work of the Commission and international acceptability of its instruments,[16] and in this regard recalls its previous resolutions related to this matter;

14. *Also welcomes* the discussion by the Commission of its role in promoting the rule of law at the national and international levels, in particular the conviction of the Commission that the implementation and effective use of modern private law standards on international trade are essential for advancing good governance, sustained economic development and the eradication of poverty and hunger and that promotion of the rule of law in commercial relations should be an integral part of the broader agenda of the United Nations to promote the rule of law at the national and international levels, including through the Rule of Law Coordination and Resource Group, supported by the Rule of Law Unit in the Executive Office of the Secretary-General, and the fact that the Commission is looking forward to being part of strengthened and coordinated activities of the Organization and sees its role,

---

[14] Ibid., para. 363.

[15] See resolution 48/32, para. 5.

[16] See *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17* and corrigendum (A/63/17 and Corr.1), paras. 373-381.

in particular, as providing assistance to States that seek to promote the rule of law in the area of international and domestic trade and investment;[17]

15. *Further welcomes* the consideration by the Commission of the proposed strategic framework for the period 2010-2011 and its review of the proposed biennial programme plan for the progressive harmonization, modernization and unification of the law of international trade (subprogramme 5), and takes note that, while the Commission noted with satisfaction that the objectives and expected accomplishments of the Secretariat and the overall strategy for subprogramme 5 were in line with its general policy, the Commission also expressed concern that the resources allotted to the Secretariat under subprogramme 5 were insufficient for it to meet, in particular, the increased demand for technical assistance from developing countries and countries with economies in transition to meet their urgent need for law reform in the field of commercial law and urged the Secretary-General to take steps to ensure that the comparatively small amount of additional resources necessary to meet a demand so crucial to development are made available promptly;[18]

16. *Recalls* its resolutions on partnerships between the United Nations and non-State actors, in particular the private sector,[19] and its resolutions in which it encouraged 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;[20]

17. *Reiterates its request* to the Secretary-General, in conformity with its resolutions on documentation-related matters,[21] 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;

18. *Requests* the Secretary-General to continue providing summary records of the meetings of the Commission, including committees of the whole established by the Commission for the duration of its annual session, relating to the formulation of normative texts;

19. *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,[22] expresses its concern 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*;

20. *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

---

[17] Ibid., para. 386.
[18] Ibid., para. 391.
[19] Resolutions 55/215, 56/76, 58/129 and 60/215.
[20] Resolutions 59/39, 60/20 and 61/32.
[21] Resolutions 52/214, sect. B, 57/283 B, sect. III, and 58/250, sect. III.
[22] Resolution 2502 (XXIV), para. 7.

consider signing, ratifying or acceding to those conventions;

21. *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 Goods[23] and a digest of case law relating to the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law,[24] with the aim of assisting in the dissemination of information on those texts and promoting their use, enactment and uniform interpretation.

Draft resolution II
Practice Guide on Cross-Border Insolvency Cooperation of the United Nations Commission on International Trade Law

The General Assembly,

Noting that increased trade and investment leads to a greater incidence of cases where business is conducted on a global basis and where enterprises and individuals have assets and interests in more than one State,

Noting also that, where the subjects of insolvency proceedings are debtors with assets in more than one State or are members of an enterprise group with business operations and assets in more than one State, there is generally an urgent need for cross-border cooperation in, and coordination of, the supervision and administration of the assets and affairs of those debtors,

Recognizing that cooperation and coordination in cross-border insolvency cases has the potential to significantly improve the chances for rescuing financially troubled individuals and enterprise groups,

Acknowledging that familiarity with cross-border cooperation and coordination and the means by which it might be implemented in practice is not widespread and that the availability of readily accessible information on current practice with respect to cross-border coordination and cooperation has the potential to facilitate and promote that cooperation and coordination and to avoid unnecessary delay and costs,

Noting with satisfaction the completion and the adoption on 1 July 2009 of the Practice Guide on Cross-Border Insolvency Cooperation by the United Nations Commission on International Trade Law at its forty-second session,[25]

Noting that the preparation of the Practice Guide was the subject of deliberations and consultation with Governments, judges and other professionals active in the field of cross-border insolvency,

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for the completion and adoption of its Practice Guide on Cross-Border Insolvency Cooperation;[1]

---

[23] United Nations, *Treaty Series*, vol. 1489, No. 25567.

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

[25] See *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17* (A/64/17), chap. III.

2. *Requests* the Secretary-General to publish, including electronically, the text of the Practice Guide and to transmit it to Governments with the request that the text be made available to relevant authorities so that it becomes widely known and available;

3. *Recommends* that the Practice Guide be given due consideration, as appropriate, by judges, insolvency practitioners and other stakeholders involved in cross-border insolvency proceedings;

4. *Recommends also* that all States continue to consider implementation of the Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law.[26]

---

[26] Resolution 52/158, annex.

D. General Assembly resolutions 64/111, 64/112 and 64/116
Resolutions adopted by the General Assembly on the report of the Sixth Committee (A/64/447)

64/111. Report of the United Nations Commission on International Trade Law on the work of its forty-second 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 developing countries, would contribute significantly to universal economic cooperation among all States on a basis of equality, equity, common interest and respect for the rule of law, to the elimination of discrimination in international trade and, thereby, to peace, stability and the well-being of all peoples,

Having considered the report of the Commission on the work of its forty-second 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 forty-second session;[1]

2. *Commends* the Commission for the completion and adoption of its Practice Guide on Cross-Border Insolvency Cooperation;[2]

3. *Welcomes* the progress made by the Commission in its work on a revision of its Model Law on Procurement of Goods, Construction and Services[3] through the consideration of chapter I of the draft revised model law,[4] and encourages the Commission to complete its work on the revised model law as soon as possible;

---

[1] *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17* (A/64/17).

[2] Ibid., para. 24.

[3] Ibid., *Forty-ninth Session, Supplement No. 17* and corrigendum (A/49/17 and Corr.1), annex I.

[4] Ibid., *Sixty-fourth Session, Supplement No. 17* (A/64/17), para. 283.

4. *Also welcomes* the progress made by the Commission in its work on a revision of its Arbitration Rules,[5] on the preparation of a draft legislative guide on the treatment of enterprise groups in insolvency and on the preparation of a supplement to its Legislative Guide on Secured Transactions[6] dealing with security rights in intellectual property, and endorses the decision of the Commission to undertake further work in the area of arbitration, electronic commerce, transport law and commercial fraud and to consider at its forty-third session proposals for future work in the areas of insolvency and security interests, as set out in its report;

5. *Further welcomes* the decision of the Commission to request the Secretariat to hold, resources permitting, an international colloquium on electronic commerce and another international colloquium on security interests;[7]

6. *Notes with appreciation* the decision of the Commission with regard to the publication of its Legislative Guide on Secured Transactions, of a commentary on the United Nations Convention on the Assignment of Receivables in International Trade[8] and of a text discussing the interrelationship of various texts on security interests prepared by the Commission, the International Institute for the Unification of Private Law and the Hague Conference on Private International Law;[9]

7. *Also notes with appreciation* the decision of the Commission to commend the use of the 2007 revision of the Uniform Customs and Practice for Documentary Credits, published by the International Chamber of Commerce, as appropriate, in transactions involving the establishment of a documentary credit;[10]

8. *Welcomes* the progress made in the ongoing project of the Commission on monitoring the implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958,[11] and the preparation of a draft guide to enactment of the Convention to promote a uniform interpretation and application of the Convention;[12]

9. *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;

10. *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:

---

[5] United Nations publication, Sales No. E.93.V.6.

[6] Adopted by the Commission at its resumed fortieth session. See *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17* (A/62/17), part two, para. 100.

[7] See *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17* (A/64/17), paras. 319 and 343.

[8] Resolution 56/81, annex.

[9] See *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17* (A/64/17), paras. 315 and 321.

[10] Ibid., para. 357.

[11] United Nations, *Treaty Series*, vol. 330, No. 4739.

[12] See *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17* (A/64/17), para. 360.

(a) Welcomes the initiatives of the Commission towards expanding, through its secretariat, its technical assistance and cooperation programme, and in that respect encourages the Secretary-General to seek partnerships with State and non State actors to increase awareness about the work of the Commission and to facilitate the effective implementation of legal standards resulting from its work;

(b) Expresses its appreciation to the Commission for carrying out technical assistance and cooperation activities, including at the country, subregional and regional levels, and for providing assistance with legislative drafting in the field of international trade law, and draws the attention of the Secretary-General to the limited resources that are made available in this field;

(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 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 for promotion of the rule of law at the national and international levels and for the implementation of the United Nations development agenda, including the achievement of the Millennium Development Goals;

(e) Notes the request by the Commission that the Secretariat explore the possibility of establishing a presence in regions or specific countries by, for example, having dedicated staff in United Nations field offices, collaborating with such existing field offices or establishing Commission country offices with a view to facilitating the provision of technical assistance with respect to the use and adoption of Commission texts;[13]

11. *Expresses its appreciation* to the Government whose contribution 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,[14] enabled renewal of the provision of that assistance, and appeals to Governments, the relevant bodies of the United Nations system, organizations, institutions and individuals to make voluntary 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;

12. *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-fourth 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;

---

[13] Ibid., para. 363.

[14] See resolution 48/32, para. 5.

13. *Welcomes*, in the light of the recent increase in membership of the Commission and the number of topics being dealt with by the Commission, the comprehensive review undertaken by the Commission of its working methods, which was started at its fortieth session, with the aim of continuing consideration of the matter during its next sessions and with a view to ensuring the high quality of the work of the Commission and international acceptability of its instruments,[15] and in this regard recalls its previous resolutions related to this matter;

14. *Also welcomes* the discussion by the Commission of its role in promoting the rule of law at the national and international levels, in particular the conviction of the Commission that the implementation and effective use of modern private law standards on international trade are essential for advancing good governance, sustained economic development and the eradication of poverty and hunger and that promotion of the rule of law in commercial relations should be an integral part of the broader agenda of the United Nations to promote the rule of law at the national and international levels, including through the Rule of Law Coordination and Resource Group, supported by the Rule of Law Unit in the Executive Office of the Secretary-General, and the fact that the Commission is looking forward to being part of strengthened and coordinated activities of the Organization and sees its role, in particular, as providing assistance to States that seek to promote the rule of law in the area of international and domestic trade and investment;[16]

15. *Further welcomes* the consideration by the Commission of the proposed strategic framework for the period 2010-2011 and its review of the proposed biennial programme plan for the progressive harmonization, modernization and unification of the law of international trade (subprogramme 5), and takes note that, while the Commission noted with satisfaction that the objectives and expected accomplishments of the Secretariat and the overall strategy for subprogramme 5 were in line with its general policy, the Commission also expressed concern that the resources allotted to the Secretariat under subprogramme 5 were insufficient for it to meet, in particular, the increased demand for technical assistance from developing countries and countries with economies in transition to meet their urgent need for law reform in the field of commercial law and urged the Secretary-General to take steps to ensure that the comparatively small amount of additional resources necessary to meet a demand so crucial to development are made available promptly;[17]

16. *Recalls* its resolutions on partnerships between the United Nations and non-State actors, in particular the private sector,[18] and its resolutions in which it encouraged 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;[19]

17. *Reiterates its request* to the Secretary-General, in conformity with its resolutions on documentation-related matters,[20] 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

---

[15] See *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17* and corrigendum (A/63/17 and Corr.1), paras. 373-381.

[16] Ibid., para. 386.

[17] Ibid., para. 391.

[18] Resolutions 55/215, 56/76, 58/129 and 60/215.

[19] Resolutions 59/39, 60/20 and 61/32.

[20] Resolutions 52/214, sect. B, 57/283 B, sect. III, and 58/250, sect. III.

particular characteristics of the mandate and work of the Commission in implementing page limits with respect to the documentation of the Commission;

18. *Requests* the Secretary-General to continue providing summary records of the meetings of the Commission, including committees of the whole established by the Commission for the duration of its annual session, relating to the formulation of normative texts;

19. *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,[21] expresses its concern 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*;

20. *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;

21. *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 Goods[22] and a digest of case law relating to the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law,[23] with the aim of assisting in the dissemination of information on those texts and promoting their use, enactment and uniform interpretation.

64th plenary meeting
16 December 2009

---

[21] Resolution 2502 (XXIV), para. 7.

[22] United Nations, *Treaty Series*, vol. 1489, No. 25567.

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

64/112. Practice Guide on Cross-Border Insolvency Cooperation of the United Nations Commission on International Trade Law

The General Assembly,

Noting that increased trade and investment leads to a greater incidence of cases where business is conducted on a global basis and where enterprises and individuals have assets and interests in more than one State,

Noting also that, where the subjects of insolvency proceedings are debtors with assets in more than one State or are members of an enterprise group with business operations and assets in more than one State, there is generally an urgent need for cross-border cooperation in, and coordination of, the supervision and administration of the assets and affairs of those debtors,

Recognizing that cooperation and coordination in cross-border insolvency cases has the potential to significantly improve the chances for rescuing financially troubled individuals and enterprise groups,

Acknowledging that familiarity with cross-border cooperation and coordination and the means by which it might be implemented in practice is not widespread and that the availability of readily accessible information on current practice with respect to cross-border coordination and cooperation has the potential to facilitate and promote that cooperation and coordination and to avoid unnecessary delay and costs,

Noting with satisfaction the completion and the adoption on 1 July 2009 of the Practice Guide on Cross-Border Insolvency Cooperation by the United Nations Commission on International Trade Law at its forty-second session,[1]

Noting that the preparation of the Practice Guide was the subject of deliberations and consultation with Governments, judges and other professionals active in the field of cross-border insolvency,

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for the completion and adoption of its Practice Guide on Cross-Border Insolvency Cooperation;[1]

2. *Requests* the Secretary-General to publish, including electronically, the text of the Practice Guide and to transmit it to Governments with the request that the text be made available to relevant authorities so that it becomes widely known and available;

3. *Recommends* that the Practice Guide be given due consideration, as appropriate, by judges, insolvency practitioners and other stakeholders involved in cross-border insolvency proceedings;

4. *Recommends also* that all States continue to consider implementation of the Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law.[2]

64th plenary meeting
16 December 2009

---

[1] See *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17* (A/64/17), chap. III.

[2] Resolution 52/158, annex.

64/116. The rule of law at the national and international levels

The General Assembly,

Recalling its resolution 63/128 of 11 December 2008,

Reaffirming its commitment to the purposes and principles of the Charter of the United Nations and international law, which are indispensable foundations of a more peaceful, prosperous and just world, and reiterating its determination to foster strict respect for them and to establish a just and lasting peace all over the world,

Reaffirming that human rights, the rule of law and democracy are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations,

Reaffirming also the need for universal adherence to and implementation of the rule of law at both the national and international levels and its solemn commitment to an international order based on the rule of law and international law, which, together with the principles of justice, is essential for peaceful coexistence and cooperation among States,

Convinced that the advancement of the rule of law at the national and international levels is essential for the realization of sustained economic growth, sustainable development, the eradication of poverty and hunger and the protection of all human rights and fundamental freedoms, and acknowledging that collective security depends on effective cooperation, in accordance with the Charter and international law, against transnational threats,

Reaffirming the duty of all States to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes and principles of the United Nations and to settle their international disputes by peaceful means in such a manner that international peace and security, and justice are not endangered, in accordance with Chapter VI of the Charter, and calling upon States that have not yet done so to consider accepting the jurisdiction of the International Court of Justice in accordance with its Statute,

Convinced that the promotion of and respect for the rule of law at the national and international levels, as well as justice and good governance, should guide the activities of the United Nations and of its Member States,

Recalling paragraph 134 (*e*) of the 2005 World Summit Outcome,[1]

1. *Takes note* of the annual report of the Secretary-General on strengthening and coordinating United Nations rule of law activities;[2]

2. *Reaffirms* the role of the General Assembly in encouraging the progressive development of international law and its codification, and reaffirms further that States shall abide by all their obligations under international law;

3. *Stresses* the importance of adherence to the rule of law at the national level, and the need to strengthen support to Member States, upon their request, in the domestic implementation of their respective international obligations through enhanced technical assistance and capacity-building, based on greater coordination and coherence within the United Nations system and among donors, and calls for greater evaluation of the effectiveness of such activities;

4. *Calls upon* the United Nations system to systematically address, as appropriate, aspects of the rule of law in relevant activities, recognizing the

---

[1] See resolution 60/1.

[2] A/64/298.

importance of the rule of law to virtually all areas of United Nations engagement;

5. *Expresses full support* for the overall coordination and coherence role of the Rule of Law Coordination and Resource Group within the United Nations system within existing mandates, supported by the Rule of Law Unit in the Executive Office of the Secretary-General, under the leadership of the Deputy Secretary-General;

6. *Requests* the Secretary-General to submit his next annual report on United Nations rule of law activities, in accordance with paragraph 5 of resolution 63/128, taking note of paragraph 97 of the report;[2]

7. *Welcomes* the dialogue initiated by the Rule of Law Coordination and Resource Group and the Rule of Law Unit with Member States on the topic "Promoting the rule of law at the international level", and calls for the continuation of this dialogue with a view to fostering the rule of law at the international level;

8. *Encourages* the Secretary-General and the United Nations system to accord high priority to rule of law activities;

9. *Invites* the International Court of Justice, the United Nations Commission on International Trade Law and the International Law Commission to continue to comment, in their respective reports to the General Assembly, on their current roles in promoting the rule of law;

10. *Invites* the Rule of Law Coordination and Resource Group and the Rule of Law Unit to continue to interact with Member States on a regular basis, in particular in informal briefings;

11. *Stresses* the need to provide the Rule of Law Unit with the necessary funding and staff in order to enable it to carry out its tasks in an effective and sustainable manner and urges the Secretary-General and Member States to continue to support the functioning of the Unit;

12. *Decides* to include in the provisional agenda of its sixty-fifth session the item entitled "The rule of law at the national and international levels", invites Member States to focus their comments in the upcoming Sixth Committee debate on the sub-topic "Laws and practices of Member States in implementing international law",[3] without prejudice to the consideration of the item as a whole, and invites the Secretary-General to provide information on this sub-topic in his report, after seeking the views of Member States.

64th plenary meeting
16 December 2009

---

[3] See the note by the Chairman of the Sixth Committee (A/C.6/63/L.23). See also paragraph 10 of resolution 63/128 in which the sub-topic "Rule of law and transitional justice in conflict and post-conflict situations" was identified as a sub-topic for the sixty-sixth session.

Part Two

STUDIES AND REPORTS ON SPECIFIC SUBJECTS

I. PROCUREMENT

A. Report of the Working Group on Procurement on the work of its fourteenth session (Vienna, 8-12 September 2008)

(A/CN.9/664) [Original: English]

CONTENTS

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 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 to thirteenth sessions (New York, 4-8 April 2005, Vienna, 7-11 November 2005, New York, 24-28 April 2006, Vienna, 25-29 September 2006, New York, 21-25 May 2007, Vienna, 3-7 September 2007, and New York, 7-11 April 2008, respectively) (A/CN.9/575, A/CN.9/590, A/CN.9/595, A/CN.9/615, A/CN.9/623, A/CN.9/640 and A/CN.9/648), the Working Group considered the topics related to the use of electronic communications and technologies in the procurement process: (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; (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; and (c) electronic reverse auctions (ERAs), 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.

3. At its seventh, eighth, tenth, eleventh and twelfth sessions, the Working Group in addition considered the issues of abnormally low tenders (ALTs), including their early identification in the procurement process and the prevention of negative consequences of such tenders. At its thirteenth session, the Working Group discussed the drafting materials relating to electronic communications in procurement, publication of procurement-related information and abnormally low tenders, and the use of electronic reverse auctions in public procurement set out in A/CN.9/WG.I/WP.58 and A/CN.9/WG.I/WP.59 respectively, and suggested revisions to those materials.

4. At its thirteenth session, the Working Group held an in-depth consideration of the issue of framework agreements on the basis of drafting materials contained in notes by the Secretariat (A/CN.9/WG.I/WP.52 and Add.1 and A/CN.9/WG.I/WP.56) and agreed to combine the two approaches proposed in those documents, so that the Model Law, where appropriate, would address common features applicable to all types of framework agreement together, in order to avoid, inter alia, unnecessary repetition, while addressing distinct features applicable to each type of framework agreement separately.

5. At its thirteenth session, the Working Group also discussed the issue of suppliers' lists, the consideration of which was based on a summary of the prior deliberations of the Working Group on the subject (A/CN.9/568, paras. 55-68, A/CN.9/WG.I/WP.45 and A/CN.9/WG.I/WP.45/Add.1). The Working Group decided that the topic would not be addressed in the Model Law, for reasons that would be set out in the Guide to Enactment (the "Guide").

6. At its thirty-eighth session, in 2005, thirty-ninth session, in 2006, fortieth session, in 2007 and forty-first session, in 2008, 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, A/61/17, para. 192, A/62/17 (Part I), para. 170 and A/63/17, para. 299). At its thirty-ninth session, the Commission recommended that the Working Group, in updating the Model Law and the Guide, should take into account issues of conflicts of interest and should consider whether any specific provisions addressing those issues would be warranted in the Model Law (A/61/17, para. 192). At the fortieth session, the Commission recommended that the Working Group should adopt a concrete agenda for its forthcoming sessions in order to expedite progress in its work (A/62/17 (Part I), para. 170). Pursuant to that recommendation, the Working Group adopted the timeline for its deliberations at its twelfth and thirteenth sessions (A/CN.9/648, annex), and agreed to bring an updated timeline to the attention of the Commission on a regular basis. At its forty-first session, the Commission invited the Working Group to proceed expeditiously with the completion of the project, with a view to permitting the finalization and adoption of the revised Model Law, together with its Guide to Enactment, within a reasonable time.

II. Organization of the session

7. The Working Group, which was composed of all States members of the Commission, held its fourteenth session in Vienna from 8-12 September 2008. The session was attended by representatives of the following States members of the Working Group: Algeria, Belarus, Bolivia, Canada, Chile, China, Colombia, Czech Republic, Egypt, El Salvador, France, Germany, Iran (Islamic Republic of), Kenya, Latvia, Lebanon, Mexico, Morocco, Nigeria, Paraguay, Poland, Republic of Korea, Russian Federation, Senegal, Singapore, Spain, Thailand, Tunisia, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

8. The session was attended by observers from the following States: Argentina, Belgium, Bosnia and Herzegovina, Croatia, Democratic Republic of the Congo, Dominican Republic, Haiti, Indonesia, Iraq, Ireland, Lithuania, Nicaragua, Philippines, Portugal, Romania, Slovakia, Swaziland, Sweden, Turkey, United Arab Emirates and United Republic of Tanzania.

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

(a) *United Nations system*: United Nations Industrial Development Organization (UNIDO) and World Bank;

(b) *Intergovernmental organizations*: European Commission (EC), International Development Law Organization (IDLO), Organization for Economic Cooperation and Development (OECD) and World Trade Organization (WTO);

(c) *International non-governmental organizations invited by the Working Group*: American Bar Association (ABA), Forum for International Conciliation and Arbitration (FICA), International Bar Association (IBA), International Swaps and Derivatives Association (ISDA) and the European Law Student's Association (ELSA). The Working Group elected the following officers:

Chairman: Mr. Tore WIWEN-NILSSON (Sweden)[1]

Rapporteur: Sra. Ligia GONZÁLEZ LOZANO (Mexico)

10. The Working Group had before it the following documents:

(a) Annotated provisional agenda (A/CN.9/WG.I/WP.60);

(b) 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, publication of procurement-related information, electronic reverse auctions and abnormally low tenders (A/CN.9/WG.I/WP.61);

(c) Possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services — drafting materials for the use of framework agreements in public procurement (A/CN.9/WG.I/WP.62);

(d) Possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services — Guide to Enactment text addressing the use of framework agreements in public procurement (A/CN.9/WG.I/WP.63); and

(e) Possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services — Remedies, conflicts of interest and services procurement in the Model Law (A/CN.9/WG.I/WP.64).

11. 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

12. At its fourteenth session, the Working Group continued its work on the elaboration of proposals for the revision of the Model Law. The Working Group

[1] Elected in his personal capacity.

used the notes by the Secretariat referred to in paragraph 10 above as a basis for its deliberations.

13. The Working Group requested the Secretariat to revise drafting materials contained in documents A/CN.9/WG.I/WP.62, A/CN.9/WG.I/WP.63 and A/CN.9/WG.I/WP.64, reflecting the deliberations at its fourteenth session, for its consideration at the next session.

14. The Working Group considered review provisions contained in Chapter VI of the Model Law and confirmed the decision taken at its 6th session to delete the list of exceptions to the review process. It was therefore agreed that the decision to select the winning supplier or contractor through any procurement method or a tool within a procurement method (electronic reverse auctions, framework agreement procedure) would be subject to review. The Working Group agreed to revise the provisions and procedures contained in articles 53-56 of the Model Law (paras. 28-73 below).

15. The Working Group also agreed to introduce a standstill period in article 36, to apply between the identification of the successful supplier and entry into force of the procurement contract and to provide for the possible annulment of a procurement contract following certain review procedures in certain circumstances (see paras 45-55 below).

16. The Working Group considered the drafting materials relating to framework agreement procedures contained in documents A/CN.9/WG.I/WP.62 and A/CN.9/WG.I/WP.63 and suggested revisions to those materials in the light of its decision to separate provisions in the Model Law addressing open framework agreements from those addressing closed framework agreements.

17. The Working Group also discussed the issues of conflicts of interest, the consideration of which was based on a Note by the Secretariat on the subject (A/CN.9/WG.I/WP.64) and agreed to consider expanding articles 4, 15 and 54 of the Model Law to address the requirements of the United Nations Convention against Corruption on the topic, and to explain the different approaches taken in various countries in the Guide to Enactment.

IV. Consideration of proposals for the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services

A. Remedies — review provisions under the Model Law, chapter VI (A/CN.9/WG.I/WP.64, paras. 5-9)

1. Introduction

18. The Working Group recalled the decisions taken at its sixth session in regard to review provisions (A/CN.9/568, para. 112) and decided to proceed with its further deliberations by reviewing each article of Chapter VI of the Model Law.

19. In considering the optional language of the footnote accompanying Chapter VI of the Model Law, which explained that for constitutional or other considerations, enacting States might not see fit to incorporate some or all of the review provisions,

it was agreed that the entire footnote should be deleted. It was observed that such action would implement the Working Group's decision that the Model Law should be consistent with the mandatory language of article 9 (1) (e) of the United Nations Convention against Corruption, which required an effective system of review and appeal in procurement proceedings. It was decided that further guidance would be provided in the Guide to Enactment.

2. Article 52 (Right to review)

20. As regards article 52, it was noted that there were three main issues to be considered: who were the "suppliers or contractors" that could submit a review, in respect of what errors or omissions they could submit the review, and whether any steps in the procurement process should be exempted from review.

21. As regards the first issue, it was noted that the definition of "supplier or contractor" was set out in article 2 (f) of the Model Law, and provided that a "supplier or contractor" included, according to the context, any "potential party" to the procurement contract. It was observed that the general understanding of this definition would, for example, prevent entities that had been disqualified or excluded from non-open procurement methods from challenging their disqualification or exclusion.

22. It was observed that the "context" for article 2 (f) and review purposes would include the overall objectives of the review provisions: in particular, whether those objectives were to allow the procuring entity to correct any errors that it might have made, to protect the interests of the suppliers or contractors, to be a general forum for complaint in government contracting, or a combination thereof.

23. It was stated that the title of article 52 ("Right to review") indicated that the objective was to protect the interests of suppliers or contractors, but it was also observed that article 53 ("Review by procuring entity (or by approving authority)"), which was a mandatory first step in any review proceedings under Chapter VI, indicated that a further objective was to allow the procuring entity to correct its own decisions. It was acknowledged that the Model Law did not envisage a more general right on the part of any person to complain that a public authority had failed to act in the best interests of the state or its citizens, because of the requirement in article 52 (1) for loss or damage on the part of the challenging supplier or contractor. However, it was noted that other parts of an enacting State's law might allow such a challenge, and reference should be made to such a possibility in the Guide to Enactment.

24. It was suggested that the provisions should enable those that were affected by decisions taken in the procurement process, and could demonstrably sustain loss as a result, to challenge the decisions concerned. These persons could be described as "stakeholders", for example, or those who could show prejudice arising from the decisions of the procuring entity. Furthermore, and recalling that the Working Group had provisionally agreed that the choice of a procurement method should be subject to review, it was observed that entities that had been inappropriately excluded by the procuring entity from procurement proceedings should be able to challenge the exclusion. Thus, it was said, the current definition in article 2 (f) might be too narrow, because arguably only those that were continuing parties to the procurement process would be able to submit a claim for review. Consequently, it was agreed that

the definition in article 2 (f) should be broadened to refer to a potential party to the procurement "proceedings" rather than to the procurement "contract". Together with the requirement to show actual or potential loss or damage in article 52 (1), it was considered that this formulation would also prevent the scope being extended too widely, for example to subcontractors or the general public, and would assist in preventing speculative applications. It was added that the Guide to Enactment should explain the ambit of the formulation in some detail.

25. The second issue under consideration was the grounds for review. It was observed that the term "breach of duty", which could have more than one interpretation, should be replaced with a phrase more closely aligned with the UNCAC reference to a breach of the applicable rules and procedures. Accordingly, the phrase "breach of a duty imposed on the procuring entity by this Law" in article 52 (1) would be replaced with the phrase "non-compliance with the provisions of this Law".

3. Exception relating to the selection of the procurement method under article 52 (2) (a)

26. As regards the third issue, it was agreed that, in the light of the revisions to article 52 (1) above and of the Working Group's decision taken at its sixth session, the list of exceptions to the review process, some of which related to mandatory steps and others to discretionary decisions in the procurement process, should be deleted. It was observed that a decision to select the winning supplier or contractor through such an electronic reverse auction would therefore be subject to review (as was the choice of selection procedure under the principal method for the procurement of services).

27. It was also noted that the deletion of subparagraph (f) would require consequential changes to articles 27 (t) and 38 (s). It was agreed that the Guide to Enactment should explain the rationale for the deletions and their implications, including the standard of proof and scope of the jurisdiction conferred.

4. Review by the procuring entity (or by approving authority) (article 53)

28. Certain observed disadvantages of the mandatory peer review mechanism under article 53 were noted, including that where the procuring entity took no steps during the standstill period, further recourse to administrative or judicial review would be inevitable and the mechanism without benefit. It was suggested, therefore, that the mechanism should be optional rather than mandatory. Such a formulation, it was added, would also be consistent with the approach taken by the World Trade Organization's Agreement on Government Procurement ("GPA"). In addition, it was stated that submitting a complaint to the procuring entity, rather than to its head, should be permitted, and that the costs and benefits of the mechanism should be discussed in the Guide.

29. It was also suggested that the discussion in brackets in paragraph (1), referring to an approving authority, should be removed to the Guide, and that the words "or the approving authority" should be added at the end of the first sentence of article 53 (1).

30. In addition, it was agreed that article 53 (3) should be deleted, because it effectively repeated the requirement contained in the introduction to paragraph (1)

that any challenge under article 53 should be made before the procurement contract came into force.

31. As regards paragraph 4 (b), it was agreed that the word "indicate" in the English version of the Model Law should be replaced by the word "state", requiring the decision of the procuring entity to set out the corrective action that would be taken, and the words "are to be taken" should consequently be replaced with the words "shall be undertaken".

32. It was agreed that paragraph (6) should be deleted, as the procuring entity would in any event be able to present the original complaint to an administrative or judicial body. It was agreed that the Guide to Enactment could address practical issues such as the situation where the peer review found in favour of a complaining supplier on some but not all elements of its challenge, so that any subsequent complaint to an administrative or judicial body could be limited in scope.

33. It was also agreed that the Secretariat should review the text of article 53 after making the above changes, so as to ensure that the text was coherent and consistent with the rest of Chapter VI.

5. Administrative review (article 54)

34. It was queried whether the footnote to the heading to article 54 should be deleted (which provided that where the system concerned did not have a tradition of administrative review, enacting States might wish not to enact this article). It was observed that some systems were currently engaged in setting up administrative review systems, and that guidance might both be helpful and encourage the introduction of such systems, which were generally considered to be an improvement over ad hoc reviews.

35. It was recalled that UNCAC required an independent review system, and thus that the requirement for independent administrative or judicial review systems should be discussed in the Guide. It was consequently agreed that the footnote should be deleted and that guidance provided in the Guide on the notion of independence needed further elaboration. For example, a review body would not be considered independent if it reported to a minister or other head to which the procuring entity also reported. Questions of appointment would also be relevant, together with how the members could be dismissed. It was also proposed that the title of the article should be changed to "Review before an independent administrative body".

36. It was also agreed that paragraph (1) (a) would need to be amended to be consistent with the optional nature of article 53, following the changes set out above.

37. It was queried whether the time limit of 20 days set out in paragraph (1) (a) should be amended to start from the time when the supplier should "reasonably" have become aware of the circumstances giving rise to the complaint, rather than when it "should have" become so aware. It was observed that the notion of reasonableness would not be understood in the same way in all systems, and would be implicit in many systems in any event. It was therefore agreed that no reference to "reasonableness" should be included.

38. It was also noted that the administrative system in an enacting State should also address the risk of collusion and fraud in the conclusion of a procurement contract, and in this context the deadlines set out in article 43 might not be appropriate. It was observed that these issues were very important, but that the solution to them (such as the annulment of a contract) might be found in branches of the law other than the procurement legislation in the enacting State concerned. The review provisions, it was observed, were aimed at issues arising out of possible breaches of the rules and procedures set out in the Model Law, in which deadlines would be appropriate and necessary. Fraudulent and other abusive activity, which might ultimately lead to the annulment of a contract, would not need to be subject to the same time limits.

39. Noting that article 53 would become optional in accordance with the decisions of the Working Group (para. 28 above), it was agreed that in order to promote amicable settlement of disputes, the timely submission of a complaint under article 53 would suspend the deadline for submission of a request for administrative review under article 54. It was also agreed that article 54 would be amended generally so as to reflect the optional nature of article 53 as revised.

40. As regards the time limits for submission of review under articles 53 and 54, it was recalled that, in accordance with the provisions of both articles, a complaint should be submitted within 20 days from when the supplier became aware (or should have become aware) of the facts or circumstances giving rise to the complaint. These time limits were contrasted with the provisions of article 28, under which the supplier or contractor could seek clarification of the solicitation documents at any time, with the caveat that the procuring entity was required to respond only to those requests received within a "reasonable" time before the deadline for submission of tenders or other offers.

41. As regards article 54 (1), it was queried whether the deadline for a challenge to the terms of the solicitation should be aligned with the provisions of article 28, that is, until the deadline for submissions (or shortly before), a possibility that might also facilitate maximum clarity in the solicitation documents. Other challenges, such as to the results of prequalification proceedings, or to the choice of procurement method, would need to be submitted within the current 20-day deadline.

42. In response, it was stated that permitting a request for clarification under article 28 and enabling challenges under articles 53 and 54 were entirely different aspects of the procurement process, and there was therefore no need to align their provisions as regards time limits.

43. It was recalled that after the deadline for submission of tenders or other offers, the procuring entity would be able only to reject all tenders under article 12 of the Model Law, but a successful challenge might also lead to remedies such as termination of the procedure. It was observed that post-submission challenges might compromise the procurement itself if it were subsequently terminated, because at that stage the prices and details of the submitting suppliers would be publicly known. Thus, it was said, there should be no challenge to the terms of the solicitation entertained after the deadline for submissions.

44. After debate, it was decided that the deadline to a challenge to the terms of the solicitation only would be set as the deadline for submissions, and article 54 (1)

would be modified accordingly. The 20-day deadline would remain unchanged for other challenges.

45. As regards article 54 (3), it was queried whether the remedies that the administrative body could grant or recommend should include the annulment of a contract that had been awarded. It was observed that some systems prohibited the annulment of a contract that had been awarded (as did article 54 of the Model Law), but, in others, annulment was a possible remedy. The attention of the Working Group was drawn to the recent European Commission Remedies Directive that envisaged the annulment of contracts in circumstances in which there had been significant non-compliance with applicable procurement procedures (such as unjustified failure to announce the procurement), but only prior to the publication of the procurement award. Reference was also made to the financial costs and time implications of any such annulment.

46. It was observed that a procurement contract that had been properly concluded, i.e. following the applicable procedures including review procedures where relevant, should not be annulled. However, a standstill period between selection of the supplier and award of the contract could be used to ascertain whether the procedures had been followed, prior to the expiry of which the procurement contract would not come into force. Such a standstill period, it was noted, might avoid the need for any annulment as errors could be possibly corrected prior to the conclusion of the procurement contract, and it could also avoid the complication of having to set aside an executed procurement contract. However, it was recalled that there was no equivalent provision in the Model Law.

47. The Working Group was informed that in the system contemplated by the European procurement Directives, there was a 10-day mandatory standstill period between the identification of the successful supplier and the award of the contract (known in European circles as an "Alcatel standstill" following a case heard by the European Court of Justice), during which a complaint could be brought. (In addition, there was a further opportunity to challenge the procurement during a maximum period of 2 months after the award, and the possibility of challenge before the award.)

48. It was observed, on the other hand, that an "Alcatel standstill" would be undesirable as it would impose costs on the procurement and on suppliers (on both the successful and other suppliers), and delay the start of the procurement contract concerned. It was added that an "Alcatel standstill" would also introduce a degree of uncertainty into the procurement process, which was not present in the private sector. In response, it was said that these issues were unlikely to be significant in the context of a 10-day standstill period. The Working Group agreed to include transparency provisions drawing on the provisions found in the EU Directives.

49. The Working Group therefore considered two interlinked questions, first, whether the Model Law should provide for a standstill period, and, secondly, whether the Model Law should contemplate annulment of a concluded procurement contract.

50. The current text of the Model Law, it was noted, was not complete in this regard because it provided for neither annulment nor this type of standstill. It was added that the Guide could set out the benefits of an "Alcatel standstill" period,

which for costs and efficiency reasons should be a short period of up to 10 days, as per the European system.

51. It was recalled that the Working Group had decided to comply with the mandatory requirements for an effective review under UNCAC, and that an "Alcatel standstill" period might be viewed as an essential component of an effective review system. It was underscored that the standstill period would be an important tool in the fight against corruption in that it would facilitate a credible and effective system by permitting reviews before the entry into force of the contract.

52. It was also observed that the significant differences among various States indicated that there might not be one optimal solution, and some flexibility should be afforded to enacting States. Some delegates cautioned that introducing an unlimited right to annul procurement contracts could increase the risks of corruption. It was therefore suggested the possibility of annulment should be limited to exceptional circumstances. On the other hand, the difficulties of defining what should constitute those circumstances were underscored.

53. In this light, concern was also expressed that in some legal systems only a judicial body has the prerogative to annul a procurement contract, and that permitting annulment only through a lengthy judicial process could create delays and these delays could lead to the risk of fraud. In addition, it was cautioned that reliance on annulment through criminal or other branches of law might not provide a sufficiently robust system. Accordingly, it was suggested that article 54 (3) be modified to permit annulment of the procurement contract in administrative review procedures, without defining the circumstances in which annulment might be possible.

54. It was further commented that the possibility of annulment would be a necessary complement to the introduction of an effective "Alcatel standstill" period, to avoid procuring entities from permitting the standstill period to elapse without further action.

55. It was therefore agreed that an "Alcatel standstill" period should be introduced in article 36, to apply between the identification of the successful supplier and entry into force of the procurement contract. In addition, an unrestricted possibility to annul the contract would be introduced into article 54 (by deleting the qualification "other than any act or decision bringing the procurement contract into force" in paragraphs 3 (d) and (e)). Appropriate guidance regarding these provisions would be included in the Guide.

56. It was also agreed that the above changes would necessitate a change to the chapeau to paragraph (3) of article 54 to delete the word "recommend" and the accompanying footnote, so that the text would refer to the independent administrative review body being able to "grant" and not merely "recommend" the relief concerned. The Guide would explain how these provisions could be tailored to suit those systems in which a decision of a government authority, once taken, could not be overturned by that authority, but only by a judge. Further guidance for the administrative review body could address appropriate remedies, including the impact of any remedy on the procurement concerned and on future competition, on the actual or perceived integrity of the procurement process, the costs that any remedy might impose on all parties, and to encourage generally as conservative an

approach as possible (because the full extent of those costs might not be readily apparent).

57. It was observed that the annulment could refer to the decision of the procurement to select the winning tender or the procurement contract if executed, and that the laws of different states could restrict the ability of administrative body to annul a procurement contract. It was also noted that such annulment might lead to damages claims (by comparison with article 12, where there would be no liability on the part of the procuring entity). The question of the extent of damages that the administrative review body could award would be left to the enacting State, together with any question of the award of costs. It was stressed that the aim of the provisions was to provide sufficient recompense to provide an incentive to participate in the procurement process. It was noted, in this regard, that a pre-determined amount could be recommended for the Model Law with a maximum cap depending on the nature and size of procurement. In addition, even where an enacting State's administrative law might permit the award of costs, the Guide would encourage caution so as to avoid the procedures operating as disincentive to participation both in review proceedings and procurement generally, particularly where small and medium-sized enterprises were concerned. It was also observed that any fees levied for submitting complaints should be treated in similar fashion.

58. Noting that one reason for awarding costs against unsuccessful suppliers would be to discourage frivolous complaints, it was agreed that the Guide would address various mechanisms that might achieve this end.

6. Certain rules applicable to review proceedings (article 55)

59. It was noted that these rules would be amended so as to be consistent with the revised articles 53 and 54. The Working Group was also informed that the GPA contained certain procedural requirements akin to those set out in article 55 of the Model Law, and it was agreed that these requirements should be reflected in the Model Law and supporting guidance both for consistency's sake and in order to ensure the continuing relevance of the texts for all enacting States, particularly those in transition or developing countries that might become parties to the GPA. In particular, the provisions of article 18 (6) of the GPA, which set out due process requirements (such as the need for the record of the procurement to be produced to the administrative review body), should be incorporated into article 55 of the Model Law.

60. It was also suggested that the procuring entity should be obliged to produce the record of the procurement to the reviewing agency, and that article 55 should provide for such an obligation.

7. Suspension of procurement proceedings (article 56)

61. The suspension periods provided for under article 56 were considered in the light of experience that the normal time provided for review of a complaint could be up to 90 or 100 days in some systems, as compared with a period of between 7 and 30 days contemplated under article 56. In this regard, it was recalled that paragraph (4) of article 56 permitted the procuring entity to override the suspension period in cases justified on the basis of urgent public interest. It was also observed

that the 7-day suspension period might not always be extended to the full review period permitted of 30 days, perhaps for political reasons.

62. The costs and benefits of suspension were considered, including the disruption and delay that might be caused by an interruption of the procurement, whether a suspension would be effective if a procuring entity could simply wait for a suspension period to pass and then conclude the procurement contract (even where the review was still ongoing), the need to protect the rights of suppliers or contractors pending the review period, and the alternative costs that might arise if the alternative to suspension was the subsequent annulment of a procurement contract or the termination of the procurement (leading to new procurement proceedings).

63. The extent of a presumed or automatic suspension under article 56 was discussed.

64. It was agreed that the period of suspension should be aligned with the period required for the reviewing body to issue its decision.

65. As a complaint to the procuring entity under article 53 could be submitted only up to the date of submission of tenders or other offers, it was noted that a suspension might postpone the date for submissions, but would not otherwise raise consequences of significant concern. Accordingly, it was agreed that the procuring entity should be given the flexibility to decide the appropriate suspension period. It was also agreed that the procuring entity should be required to publicize the suspension or inform identified participating suppliers or contractors of its existence, as the case may be, and of the duration of the suspension where known, and of the resumption of the procurement. Procuring entities would be able to determine the most efficient manner of providing the notification or publication in the circumstances of the procurement concerned. In addition, and because a complaint would involve the conduct of the procuring entity, it was agreed that the procuring entity should not be given the power under article 53 to terminate the procurement.

66. The consequences of any suspension under article 54, it was noted, could be more severe than those in article 53, and hence such a suspension should be both regulated and approached in a conservative manner. There were two steps that the independent reviewing body would need to take: first, to assess whether the complaint was frivolous, to consider the need to preserve the rights of the supplier during the review process and to consider whether there existed any urgent public interest that would require the procurement to continue without suspension. (The second step was to conduct the review.) It was agreed that a suspension that came into effect as a result of the first step should be implemented and publicized with the minimum of delay.

67. It was observed that practical experience in one jurisdiction indicated that there were merits to an automatic suspension, which the procuring entity could override upon appropriate justification. The advantage of such a system, it was said, was that it freed the procuring entity from being required to assess the merits of a suspension. In response, it was noted that this was not the approach of the current Model Law, which provided for a presumptive suspension (article 56 (1)) and an automatic suspension (article 56 (2)).

68. After debate, it was agreed that the Model Law's approach would not be amended, so that a suspension would be granted unless urgent public interest considerations required otherwise, or unless the complaint were frivolous, and provided that the procedural requirements set out in paragraph (1), regarding the information to be submitted by the supplier, were complied with. Thus, the administrative review body would not have a general discretion to deny a suspension. The Guide, it was observed, should emphasize that the submission of a complaint would be timely if presented by the deadline set out in article 54, but it should be presented as early as possible to minimize the potential disruption to the procurement process.

69. The maximum period of suspension in a review by an independent administrative body was considered. On the one hand, it was suggested that the maximum period could be flexible, and measured by the time needed to review the complaint under article 54 (4). For example, the time needed for the review could be the "appropriate period" as assessed by the procuring entity. In support of this suggestion, it was observed that the appropriate period might vary from case to case, and should be left to the reviewing body, and no explicit minimum or maximum period would be set out in the text. In response, it was stated that the reviewing body should be under pressure to conduct its review swiftly, so a maximum period should be set out, and that the current 30-day period would generally be appropriate in the light of practical experience. After debate, it was agreed that a maximum period of 30 days would be included in the text, which could be prolonged if the circumstances concerned would justify an extension.

70. The Guide, it was further agreed, should provide sufficient detail to assist enacting States in implementing these provisions.

71. As regards paragraph (2) and the position after the procurement contract had entered into force, it was agreed that the introduction of an "Alcatel standstill" period rendered the 7-day suspension in that paragraph superfluous and it would accordingly be deleted.

72. It was noted that the "Alcatel standstill" would be counterproductive in the situation contemplated by paragraph (4), and appropriate amendments to article 36 and the review provisions would be needed.

73. In the light of the above amendments to article 56, it was proposed that the entire article could be deleted, and its provisions included in articles 53 and 54, amended to reflect the nature of the review in each case.

8. Other issues arising in Chapter VI

74. The Working Group recalled that it had agreed to implement the right of appeal (additional to the right of review) required by UNCAC. Accordingly, it was agreed that a right of appeal should be included in article 52 of the Model Law, and that flexibility should be given to enacting States to craft the mechanism of the appeals process in the light of their legal systems. In the light of possible difficulties that using the term "appeal" might involve, it was agreed that article 52 should be amended to provide that the initial review by an independent review body under article 54 (or by a judicial body under article 57 if there were no administrative body in the State concerned) could subsequently be challenged before a second or

superior body. It was also stressed that the optional review under article 53 would not constitute the initial review required by UNCAC.

B. Draft provisions to enable the use of framework agreements in public procurement under the Model Law (A/CN.9/WG.I/WP.62, paras. 3-12 and A/CN.9/WG.I/WP.63, paras. 3-35)

1. Terminology

75. It was agreed that the terms in paragraph (6) would be used for the purposes of the review of the draft provisions for the Model Law, and that the Working Group would reconsider whether to retain those terms themselves at a future date.

2. Types of framework agreement procedures and conditions for their use

Article [22 ter]. Types of framework agreement procedures and conditions for their use

76. It was observed that the Guide should encourage procuring entities to consider the totality of purchases under a framework agreement as part of control and oversight procedures.

3. Procedures for the use of framework agreements

Article [51 octies]. Commencement of a framework agreement procedure

77. It was agreed that the cross references to draft article 22 ter would be updated.

Article [51 novies]. Information to be specified when first soliciting participation in a framework agreement procedure

78. As regards paragraph (f) of article 51 novies, the notion of "multiple framework agreements" was discussed. It was observed that the reference to "multiple framework agreements" would not indicate different contractual positions between the procuring entity and the suppliers that were parties to the framework agreement, but that the agreements with individual suppliers could include minor non-material variations by example so as to protect trade secrets and other commercially sensitive information. It was agreed that the current text should be revised to reflect that only minor differences of form or terms and conditions that were of a non-material nature were permitted. It was also agreed that appropriate guidance to limit such variations should be provided in the Guide.

79. The Working Group agreed to add to paragraph (h) that a procuring entity should set out the envisaged frequency of second stage competition in the solicitation documents.

80. It was queried whether the requirement to state quantities or estimates of the purchases envisaged under the framework agreement in article 51 novies paragraph (i) would enable procuring entities to conclude framework agreements of the type described in article 22 ter (4) (b). Realistic estimates or quantities would not be known where future emergency procurement was concerned. It was therefore agreed to move the phrase "to the extent that they are known at this stage of the procurement" to the end of the paragraph.

81. The flexibility that the procuring entity would enjoy as regards actual purchases under the framework agreement (which, it was observed, might differ from the estimated quantity) would be explained in the Guide. It was also agreed that the optimum results from a commercial perspective would be obtained if suppliers were to know the likely level of orders that might be issued under the framework agreement and therefore the Guide should stress the importance of providing full information at this early stage wherever possible.

82. It was also agreed that the text would be revised to ensure that the second-stage competition could take place on the basis of lowest price tender (and not only on the basis of lowest evaluated tender), and that the Working Group would consider the terminology used at a later date.

Article [51 decies]. First stage of procurement involving framework agreements

83. It was agreed that the first stage of all framework agreement procedures would be conducted in accordance with the provisions of draft article 51 octies, that subject to any subsequent changes that the Working Group might propose to the procedures for open framework agreements, the words "under closed framework agreements" would be deleted from paragraph (1), and paragraph (2) would be deleted in its entirety.

84. As regards paragraph (3), it was agreed that parties to the framework agreement should be notified of their selection alone, and that the words "and, where relevant, their ranking" should therefore be deleted. The Guide, it was added, would address how a competitive evaluation at the first stage would operate in practice (for those framework agreements in which such a step was necessary). The Working Group agreed to consider in the context of draft article 51 undecies whether such a step would be necessary or indeed beneficial in open framework agreements.

85. As regards paragraph (4), the Working Group agreed that the current formulation should apply to closed framework agreements, and that the appropriate formulation for open framework agreements would be considered under draft article 51 undecies.

86. It was confirmed that the first stage of the procedure for closed framework agreements would be conducted as a normal tendering procedure (or other procurement method where appropriate), including competitive evaluation of the suppliers' tenders or other offers. It was recalled, in this regard, that the appropriate procurement methods for the first stage of closed framework agreements procedures would be open, unless the conditions for use of an alternative procurement method applied. It was also agreed that the use of negotiated procedures would not be appropriate.

87. It was further agreed that the resulting article 51 decies would now apply to the first stage of procurement involving closed framework agreements, and accordingly paragraph (2) of the proposed text would be deleted. It was added that a reference to the competitive evaluation of tenders would be included in article 51 decies (3) to replace the deleted notion of "ranking", and that the Guide would explain how the competitive evaluation would operate in practice.

88. As regards the publication requirements of draft paragraph (4), it was agreed that the text would remain as proposed so far as closed framework agreements were concerned. It was queried whether the requirement to disclose the names of supplier(s) or contractor(s) selected to become the party or parties to the framework agreement should also be reflected in article 14 of the Model Law. The Working Group agreed to defer its consideration of this issue to a later session.

Article [51 undecies]. Additional provisions regarding the first stage of procurement involving open framework agreements

89. The Working Group considered whether a competitive evaluation would be necessary or appropriate in the context of an open framework agreement. It was observed that a better result might be obtained if suppliers' tenders or other offers were assessed to see whether they met the minimum terms and conditions (including specifications) of the procurement. If they did meet those terms, and the suppliers were qualified, then they would be selected to be parties to the agreement (subject to capacity constraints, see para. 103 below). Competition between those suppliers would then take place at the second stage. Such a formulation, it was said, would avoid the practical difficulties that would arise in operating open framework agreements with ongoing competitive evaluation at the first stage. After discussion, it was agreed that first-stage competitive evaluation should not be provided for, and the provisions would be revised accordingly.

90. It was also agreed that the provisions in the Model Law addressing open framework agreements should be separated from those addressing closed framework agreements.

91. It was also agreed that the provisions in the Model Law addressing open framework agreement procedures would be based on the electronic operation of the procedures. However, the Guide would note that enacting States might wish to operate them in paper-based fashion (or by using a mixture of electronic and paper-based procedures). The Guide would also explain which provisions would need to be amended to accommodate paper-based or mixed systems, and provide appropriate formulations.

92. It was observed that the first stage of open framework agreements would involve the use of an open procurement method, the assessment of suppliers' qualifications, and the examination of their tenders or other offers against the terms and conditions, including specifications, of the procurement. Provided that the tenders or other offers were compliant with those terms and conditions, the suppliers would become parties to the framework agreement.

93. It was queried whether open framework agreements should be subject to a statutory maximum duration, as was required for dynamic purchasing systems by the European Union Directives. The benefits of flexibility regarding duration for open framework agreements of broad scope, and the costs of conducting new proceedings, were stressed.

94. After considering the desirability of allowing the periodic renewal of full and open competition, the need periodically to reassess the qualifications of suppliers and the responsiveness of their offers, and to assess whether framework agreements continued to reflect current market conditions, it was agreed that open framework

agreements should be concluded for a defined period. In addition, it was said, suppliers might be wary of participating in an agreement that was unlimited in time.

95. It was observed, however, that the open nature of the agreements indicated that there was not the same need to limit their duration as there was for closed framework agreements. The equivalent to article 22 ter (3) for open framework agreement procedures would therefore provide that "an open framework agreement shall be concluded for a given term" without further qualification. It was added that the considerations governing the appropriate duration of open framework agreements should be discussed in the Guide, to include the risks of excessively large orders, and the heightened risks of abuse in awarding procurement contracts consistently to the same vendors, and of lack of transparency in longer agreements. The guidance would also address, it was noted, the ability of the procuring entity to terminate the agreement in accordance with its terms (should market conditions change significantly, for example).

96. The appropriate level of flexibility that should be provided regarding the specifications for procurement under open framework agreements was discussed. It was noted that the provisions, as currently drafted, did not permit the terms and conditions of the framework agreement to be amended, but that article 22 ter 2 (a) and (d) provided limited, non-material amendments for procurement contracts issued under the framework agreement.

97. It was observed that the longer the duration of the framework agreement, the higher the degree of flexibility that would be needed, especially if applicable regulations addressing such matters as ecological or sustainable development requirements were subject to amendment during the term of the agreement. Further, it was stressed, some notion of flexibility would be necessary to ensure the effective operation of open agreements, particularly as compared with a stricter regime that would be appropriate for closed framework agreements.

98. In response, it was noted that flexibility and resultant discretion to amend specifications at either stage of the procedure might elevate the risk of abuse, and that controls would be needed to mitigate that risk. Some enacting States with higher risks of corruption, it was said, would be looking to adopt the Model Law with its transparency requirements as part of the fight against corruption, and a cautious approach was therefore urged.

99. The prevailing view was that no changes to the proposed text for the Model Law would be made, but the benefits and risks of flexibility could be discussed in detail in the Guide (with reference to article 22 ter 2 (a) and (d)).

100. It was recalled that the Working Group had previously agreed that there should be no provision for suppliers' lists in the Model Law, because of observed abuse in their operation. It was noted that one of the main differences between framework agreements and suppliers' lists was that a framework agreement would contain specifications that were sufficiently detailed that no further specifications would be needed to conduct a procurement. By comparison, suppliers' lists would not include specifications at that level. It was cautioned, therefore, that the provisions regarding specifications in open framework agreements should be sufficiently precise to ensure that the result was indeed a framework agreement and not a suppliers' list. It was agreed that the differences between the two tools and the consequences should be addressed in the Guide.

101. The Guide, it was agreed, would also address the limits to permissible amendments to the specifications for procurement contracts issued under framework agreements, for example that:

(a) Any amendment to the specifications, which under the article 22 ter 2 (a) and (d) must be limited to minor, non-material items, should be announced in advance, preferably in the solicitation documents and with reference to a possible range;

(b) The reasons for the amendment should be recorded;

(c) The meaning of the term "material" should be discussed. Any amendment that would make the tenders or other offers from any suppliers that were parties to the framework agreement non-responsive, or that would render previously non-responsive tenders responsive would be considered as a material amendment, as would any amendment that would change the status of suppliers with regards to their qualification;

(d) Any amendment that would raise concerns about competition, transparency or integrity would also be considered a material amendment.

102. As regards paragraph (2) (a), it was agreed that republication should be as frequent as practicable, reflecting the circumstances of the procurement concerned, but at the minimum of once per year, and that the procurement regulations should reflect this minimum. It was also agreed that the republication should be effected in the same place as the initial solicitation under article 51 novies. In addition, as the provisions addressed electronic procedures, the republication should specify the website address where the details set out in article 51 novies (g) could be found, and that any new joiners to the agreement would be publicized at that website. The Guide would address the issues set out in footnote 29 to A/CN.9/WG.I/WP.62. It was stressed that the procuring entity was responsible for such publication.

103. As regards paragraph (5), it was agreed that the text in square brackets would be deleted. The Guide would explain that only technological or capacity constraints could limit the number of parties to the framework agreement, and that such constraints would have to be justified in the record of the procurement (but that the extent of such constraints would not have to be set in advance).

104. It was agreed that paragraph (7) was no longer necessary in the light of the Working Group's decisions relating to the extent of first stage competition for open framework agreements, and would be deleted.

Article [51 duodecies]. Second stage of procurement involving closed framework agreements without second-stage competition

105. It was decided that paragraph (4) and the first sentence of paragraph (5) article 51 duodecies were unnecessarily detailed and should be deleted, and also to delete the word "other" from the remaining part of paragraph (5).

Article [51 terdecies]. Second stage of procurement involving closed framework agreements with second-stage competition

106. In the light of the above deletions, it was agreed that articles 51 duodecies and 51 terdecies should be consolidated. As regards paragraph (4) of article 51 terdecies, it was agreed that the square brackets should be deleted; as regards paragraph (5),

that the word "the" should be inserted before "suppliers or contractors"; as regards subparagraphs (6) (b) and (c), that the text in square brackets should be deleted and the subparagraphs consolidated; that a reference to the relative weight of the selection criteria should be included in paragraph 6 (d); and that paragraph (8) should be deleted.

107. It was also agreed that paragraph (9) should be reviewed to ensure that it would accommodate electronic reverse auctions under framework agreement procedures.

Article [51 quaterdecies]. Second stage of procurement involving open framework agreements

108. It was agreed that the text should be conformed with article 51 terdecies regarding the second stage of competition, and therefore that the articles would be identical save for the inclusion of paragraph (2) in article 51 terdecies. The need to ensure consistency among the terms used in various language versions was noted.

Article [51 quindecies]. Award of the procurement contract under a framework agreement

109. It was noted that the article might need to be revised to conform with the Working Group's consideration of the provisions governing the entry into force of the procurement contract under articles 13 and 36 in due course.

4. Further issues arising in the use of framework agreement procedures

110. It was agreed that the term "second-stage tenders" would be used to refer to tenders submitted in the second stage of framework agreement procedures.

C. Draft provisions for the Guide text to address provisions governing framework agreements in public procurement under the Model Law (A/CN.9/WG.I/WP.63)

111. Recalling the Working Group's earlier decision that the Guide should be for legislators and regulators in one composite document, the Working Group considered whether further guidance to operators should be given (as such guidance would be of a practical and not a policy-based nature).

112. The Working Group approved the scope and general level of detail in the draft Guide text, and made the following suggestions to the text:

(a) That reference to terms other than "framework agreements" to describe analogous procedures should be made in paragraph 5;

(b) That paragraph 7 should refer to lower administrative rather than transaction costs and should note that overall savings would be enhanced through second-stage competition;

(c) To replace the word "because" with the word "where" in the second sentence of paragraph 9;

(d) To introduce paragraph 10 with the qualification that should adequate precautions to guarantee competition and transparency not be taken, the results

described in that paragraph might occur;

(e) To add a reference to the commercial advantage of framework agreements that bind both parties in paragraph 20;

(f) To add that a further reason for limiting the duration of open framework agreements was to allow for the fact that suppliers' qualification status might change during the term of the agreement;

(g) To separate the descriptions in paragraph 23 of the extent to which the terms and conditions of a procurement would be set at the first stage of a framework agreement procedure;

(h) To ensure that the reference in paragraph 29 to recording the choice of a framework agreement procedure in the record of a procurement did not provide that the procuring entity should justify that choice, and to ensure that the same consideration applied to draft article 51 octies (2) in the text of the Model Law;

(i) That the reference to "low-cost items" in paragraph 30 should be replaced with a reference to "standardized and regularly used items", and that the examples given should refer to goods rather than services.

D. Discussion relating to the finalization and adoption of the revised Model Law and the Guide

113. Recalling the encouragement of the Commission at its forty-first session that the Working Group should proceed expeditiously with the completion of its reform project, with a view to permitting the finalization and adoption of the revised Model Law and Guide within a reasonable time (A/63/17, para. 307), the Working Group agreed that its first priority would be to finalize its work on the text of the Model Law. Thus, it was agreed, a complete version of the revised text of the Model Law would be presented to the Working Group for consideration at its 15th session, to be held from 9-13 February 2009, in New York. The Working Group also agreed that its aim was to submit the text, further revised to reflect the deliberations of the Working Group at the 15th session, to the Commission for consideration at its forty-second session.

114. In order to ensure the most efficient and expeditious review of the proposed revisions at the 15th session, the Working Group further agreed that an informal version of the text in its original language would be posted on the UNCITRAL website as soon as it was available, which delegates and observers could use as a basis for consultations prior to the 15th session. Finally, and in the light of the fact that the revisions would address issues both that the Working Group had considered in its substantive deliberations to date and other issues yet to be addressed in detail, the Secretariat was requested to highlight the latter revisions for the benefit of those engaged in the consultations.

115. The Working Group heard an explanation of the process of revision and consultation prior to the submission of the final revised text of the Model Law to the Commission. In this regard, it was noted that revisions to the Guide for the benefit of legislators would be drafted as the Working Group's second priority, and that the Secretariat would to the extent possible provide a working draft of such revisions to assist those attending the Commission session in considering the revised text of the

Model Law. The Commission would also be able to review the working draft of the Guide for legislators, time permitting.

E. Possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services — Conflicts of interest (A/CN.9/WG.I/WP.64, paras. 10-33)

116. As regards conflicts of interest, the Working Group considered the information provided in section III of A/CN.9/WG.I/WP.64 on the manner in which the topic was addressed in various systems. Experience from several jurisdictions was shared. In the light of the requirement of the United Nations Convention against Corruption that procurement systems should address the topic, and of differing legal norms and traditions among States, the Working Group agreed that the Model Law itself should include provisions setting out the relevant principles. It was also agreed that explanations of the policy considerations concerned would be set out in the Guide, drawing on the experience and examples discussed at this session. The principles would be included in three sections of the Model Law: first, drawing on the UNCAC provisions, as a requirement in article 4 of the text for procurement regulations to address conflicts of interest, secondly, providing in article 15 for the consequences of procurement conducted or contracts awarded under the influence of a conflict of interest, and thirdly, to address the question of review under article 54. It was agreed that these proposals will be reviewed during the 15th session of the Working Group.

B. 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, publication of procurement-related information, electronic reverse auctions and abnormally low tenders, submitted to the Working Group on Procurement at its fourteenth session

(A/CN.9/WG.I/WP.61) [Original: English]

CONTENTS

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 12 to 85 of document A/CN.9/WG.I/WP.60, which is before the Working Group at its fourteenth 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. This note has been prepared to record the Working Group's review of the draft provisions, and supporting Guide to Enactment text, on the publication of procurement-related information, the use of electronic communications in public procurement, electronic reverse auctions ("ERAs"), and the avoidance of abnormally low tenders ("ALTs"). At the thirteenth session, some drafting changes were proposed, which are recorded below so as to facilitate the Working Group's continuing review of those provisions at a future session.[1]

II. Draft provisions addressing publication of procurement-related information (A/CN.9/WG.1/WP.58, paras. 3-4)[2]

3. The Working Group at its thirteenth session considered the proposed draft article entitled "Article 5. Publicity of legal texts and information on forthcoming procurement opportunities", paragraph 3 of which reads as follows:

> "(3) Procuring entities may publish information regarding procurement opportunities from time to time. Such publication does not constitute a solicitation and does not obligate the procuring entity to issue solicitations for the procurement opportunities identified." (emphasis added)

4. The issue discussed by the Working Group was how broad the scope of the "procurement opportunities" described was intended to be. It was noted that there was no definition of "procurement opportunities" in the text or Guide to Enactment.

5. It was also recalled that the aim of the provision was to facilitate competition by making suppliers aware of procurement that might take place in the short- to medium-term, and to assist in imposing planning discipline upon procuring entities (these aims were explained in the remainder of the Guide to Enactment text addressing proposed article 5, contained in para. 4 of A/CN.9/WG.1/WP.58).

6. It was suggested that these aims should be supported by including a reference to procurement plans as an addition to "information on forthcoming procurement opportunities", and that this reference should be made in the Guide to Enactment rather than in the text of the Model Law. The guidance currently stressed the optional and non-binding nature of this publication, so that publication would be encouraged but not required by the provisions, and accordingly any such publication would not constitute any form of solicitation, and noted that there would be no remedy for suppliers should the information turn out to be inaccurate or should it change. Thus procuring entities would not run risks in publishing procurement

---

[1] A/CN.9/648, para. 15. The Working Group was reviewing documents A/CN.9/WG.1/WP.58 and A/CN.9/WG.1/WP.59. The detailed comments of the Working Group were not recorded in its Report for reasons of space and, accordingly, are reproduced in this note to assist the Working Group when it reconsiders the drafting materials. References are therefore given in the section titles in this document to assist the Working Group in locating the drafting materials concerned. Where there were no comments made to the drafting materials in documents A/CN.9/WG.1/WP.58 and A/CN.9/WG.1/WP.59, the relevant sections are omitted, but the Working Group may wish to review them when it returns to those notes in due course.

[2] The Working Group observed at its thirteenth session that the suggestions made were of a preliminary nature, and further suggestions would probably be made at a future session.

plans, which would be an important factor in encouraging such information-sharing, which was one of the aims of the provision.

7. The Working Group may wish to consider the following revised section of paragraph 6 of the proposed Guide to Enactment text, which seeks to clarify the aims of the provision as described above:

> "6. Paragraph (3) of the article enables the publication of information on forthcoming procurement opportunities and procurement plans. The legislature may consider it appropriate to highlight the benefits of publishing such information, and that procuring entities do not bind themselves by doing so. For example, publication of such information may discipline procuring entities in procurement planning, and diminish cases of "ad hoc" and "emergency" procurements and, consequently, recourses to less competitive methods of procurement. It may also enhance competition as it would enable more suppliers to learn about procurement opportunities, assess their interest in participation and plan their participation in advance accordingly. Publication of such information may also have a positive impact in the broader governance context, in particular in opening up procurement to general public review and local community participation. ..."

III. Draft provisions on the use of electronic communications in public procurement (A/CN.9/WG.1/WP.58, paras. 5-6)[3]

A. Guide to Enactment text addressing Article [5 bis]: Communications in procurement

8. At its thirteenth session, when considering draft article 5 bis, Communications in procurement, the Working Group emphasized the importance of permitting the use of more than one means of communication in procurement.

9. However, it was queried whether complete flexibility in this regard might mean that the information contained in the solicitation documents was effectively meaningless. For example, the solicitation documents might permit all possible means of communication at any stage of the process, to prevent difficulties in changing from one means to another during the procurement. In addition, it was observed that there was no suggestion that efficiency would dictate the use of one means of communication, or as few means as possible, and that the text could make this point.

10. The Working Group may therefore wish to consider the following proposals for paragraph 5 of the draft Guide to Enactment addressing article 5 bis:

> "(5) To ensure predictability and proper review, control and audit, paragraph (3) of the article requires the procuring entity to specify, when first soliciting the participation of suppliers or contractors in the procurement proceedings, all requirements of form and means of communications for a given procurement. The procuring entity has to make it clear whether one or

---

[3] The Working Group observed at its thirteenth session that the suggestions made were of a preliminary nature, and further suggestions would probably be made at a future session.

more form and means of communication can be used and, if more than one form and means can be used, which form and means is/are to be used at which stage of the procurement proceedings and with respect to which types of information or classes of information or actions. For example, special arrangements may be justifiable for submission of complex technical drawings or samples or for a proper backup when a risk exists that data may be lost if submitted only by one form or means. The procuring entity may at the outset of the procurement envisage that it may make a change in requirements of form and/or means of communications during a given procurement. This option might be justifiable, for example, in long-term procurements, such as involving framework agreements under article […] of this Law. In such case, the procuring entity, apart from reserving this possibility when first soliciting the participation of suppliers or contractors in the procurement proceedings, will be required to ensure that safeguards contained in article [5 bis (4)] are complied with in the choice of any new form and/or means of communications and that all concerned are promptly notified about the change. However, the use of several means of communication, or advising that the means may freely change during the procurement, will have implications both for the efficiency of the procurement procedure and the validity of the information regarding the means of communication, and therefore procuring entities should envisage only those means of communication and changes to them that are both justifiable and anticipated to be appropriate for the procurement concerned."

11. Finally, as the Guide to Enactment text addressing communications in procurement does not seek to encourage the use of electronic communications, in large part because of the need to discuss whether it would be appropriate to permit the procuring entity to insist on particular means in individual enacting States, it was suggested that comments about the benefits of electronic communications in procurement and the safeguards to be applied would be useful in a general introduction to electronic procurement in the Model Law.

12. In this regard, the Working Group may recall that it has agreed to include such a general introduction in the section of the Guide preceding the article-by-article remarks, to discuss the benefits and concerns arising from electronic procurement (including the use of electronic communications in procurement), the interaction between electronic procurement and electronic commerce legislation, and general approach of the revised Model Law towards regulating electronic procurement.[4] The Working Group may wish to include the following elements in the guidance concerned, so as to introduce concepts that will be discussed in detail in the article-by-article remarks (with cross references where appropriate):

(a) A discussion of the "functional equivalent approach", which allows any writing, signature, record or meeting to be made by electronic communication;

(b) A discussion of the implications of legal recognition being found in electronic commerce laws and not in the Model Law itself;

(c) A discussion of the safeguards necessary when providing for electronic communications, notably that the procuring entity's choice of communications is subject to non-discrimination provisions, that the choice is to be set out in the

[4] A/CN.9/595, paras. 18-22, A/CN.9/WG.I/WP.42, para. 13, A/CN.9/WG.I/WP.42/Add.1, para. 2. and A/CN.9/WG.I/WP.54, para. 25.

solicitation documents, and that measures to ensure authenticity, integrity and confidentiality are required;

(d) A discussion of how to achieve the benefits of electronic procurement, including both administrative efficiency during procurement and transparency and oversight gains. In this regard, the guidance could observe that the latter are best achieved where procurement, accountability and oversight systems are integrated, and where all stages of procurement from planning to contract administration are included;

(e) That the administrative efficiency benefits might not arise in all procurement equally: they are generally considered to be particularly applicable to simple procurement and of lesser impact in complex procurement.

B. Opening of tenders (A/CN.9/WG.1/WP.58, paras. 9-10)

13. At its thirteenth session, the Working Group considered the suggested Guide to Enactment text to accompany draft article 33 (2), Opening of tenders, focusing on the requirements for participants in a virtual opening of tenders to be able to follow proceedings "fully and contemporaneously", which was explained in paragraph 2 of the draft. It was suggested that the text in its current form was too long, and would benefit from a separate discussion of the terms "fully and contemporaneously", and how to address improprieties that surfaced during an auction. The proposed paragraph has accordingly been split into three and revised to read as follows:

> "2. Paragraph (2) sets out a rule that the procuring entity must permit all suppliers or contractors that have submitted tenders, or their representatives, to be present at the opening of tenders. The presence may be in person or otherwise by any means that complies with requirements of article 5 bis of the Model Law (for a discussion of the relevant requirements, see paragraphs […] of this Guide).[5] The second sentence of paragraph (2) of article 33 supplements these provisions of article [5 bis (4)] clarifying that, in the context of the opening of tenders, suppliers or contractors are deemed to have been permitted to be present at the opening of the tenders if they have been given opportunity to be fully and contemporaneously apprised of the opening of the tenders. This provision is consistent with other international instruments.
>
> The term "fully and contemporaneously" in this context means that suppliers or contractors must be given the opportunity to observe (either by hearing or reading) all and the same information given out during the opening. This opportunity must be given at the same time as any person physically present at the opening of tenders would observe or hear the information concerned,

---

[5] Article [5 bis (3) (d)] requires the procuring entity, when first soliciting the participation of suppliers or contractors in the procurement proceedings, to specify the means to be used to hold any meeting of suppliers or contractors. In accordance with article [5 bis (4)], such means must be readily capable of being utilized with those in common use by suppliers or contractors in the relevant context and must ensure that suppliers or contractors can fully and contemporaneously participate in the meeting. The Working Group may wish to consider whether a cross reference to those provisions would be sufficient, or whether they should be included in this section of the Guide, either in the paragraph or as a footnote.

subject to the time taken to upload it where it is to be read. The information concerned includes the announcements made in accordance with article 33 (3).

Suppliers must also be able to intervene where any improprieties take place, to the extent that they would be able to do so if they were physically present. The system in place therefore has to be capable of receiving and acknowledging or responding to suppliers' feedback without delay. Different methods may exist to satisfy the requirement for full and contemporaneous appraisal using information technology systems. Regardless of the method used, sufficient information about them must be communicated to suppliers or contractors well in advance to enable them to take all measures required to connect themselves to the system in order to observe opening of tenders."

14. As regards the risks to the integrity of tenders where there is an automated opening of tenders, it was observed at the thirteenth session that the final part of paragraph 4 of the Guide to Enactment text accompanying article 33 (2) should be revisited. The Working Group may wish to consider the following revised draft:

"4. … Measures should be in place to prevent the integrity of tenders from being compromised, to prevent their deletion or to prevent the destruction of the system when the system opens them. The system must also be set up in a way that provides for the traceability of all operations during the opening of tenders, including the identification of the individual that opened each tender and its components, and the date and time each was opened. It must also guarantee that the tenders opened will remain accessible only to persons authorized to acquaint themselves with their contents and data (such as to members of an evaluation committee or auditors at subsequent stages of the procurement proceedings). These and related technical issues should be addressed in procurement and other regulations to be adopted by the enacting State."

IV. Draft provisions addressing abnormally low tenders: Guide to Enactment text accompanying draft article 12 bis

15. The Working Group considered draft provisions of the Guide supporting proposed article 12 bis, Rejection of abnormally low tenders, proposals, offers, quotations or bids, at its eleventh and twelfth sessions.[6] The revised text, incorporating the suggestions made, reads as follows:

"(1) The purpose of the article is to enable the procuring entity to reject abnormally low tenders, proposals, offers, quotations or bids (henceforth referred to as "abnormally low tenders") that give rise to procuring entity's concerns as to the ability of the supplier or contractor that submitted such an abnormally low tender to perform the procurement contract. The article applies to any procurement proceedings under the Model Law, including one involving an electronic reverse auction, where risks of abnormally low tenders may be considered higher than in other procurement, particularly where the technique is new to the system concerned.

---

[6] A/CN.9/623, paras. 48, 53 and 55 and A/CN.9/640, paras. 42, 48 and 49. The Working Group observed at those sessions that the suggestions made were of a preliminary nature, and further suggestions would probably be made at a future session.

(2) The article does not require any approval of a higher administrative authority for the procuring entity to take measures referred to in the article, and nor does it oblige the procuring entity to reject an abnormally low tender.

(3) The article provides safeguards that aim to protect the legitimate interests of both parties (procuring entities, and suppliers and contractors). On the one hand, it enables the procuring entity to address possible abnormally low tenders before a procurement contract has been concluded. 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 ensue leading to higher prices and disruption to the procurement concerned. The procuring entity should therefore take steps to avoid running such a performance risk.

(4) On the other hand, the procuring entity cannot automatically reject a tender simply on the basis that the tender price appears to be abnormally low. Conferring such a right on a procuring entity would introduce the possibility of abuse, as tenders could be rejected for being abnormally low without justification, or on the basis of a purely subjective criterion. Such a risk would be acute in international procurement, where an abnormally low price in one country might be perfectly normal in another. In addition, some prices may seem to be abnormally low if they are below cost; however, selling old stock below cost, or engaging in below cost pricing to keep a workforce occupied, subject to applicable competition regulations, might be legitimate.

(5) For these reasons, the article protects suppliers and contractors against the possibility of arbitrary decisions and abusive practices by procuring entities by allowing the rejection of an abnormally low tender only when the procuring entity has concerns as to the ability of the supplier or contractor to perform the procurement contract, and by requiring those concerns to be substantiated. This, however, is without prejudice to any other applicable law that may require the procuring entity to reject the abnormally low tender, for example, if criminal acts (such as money-laundering) or illegal practices (such as non-compliance with minimum wage or social security obligations) are involved.

(6) Accordingly, subparagraphs 1 (a) to (c) of the article specify the steps that the procuring entity has to take before the abnormally low tender may be rejected, to ensure due process is followed and to ensure that the rights of the supplier or contractor concerned are preserved.

(7) First, a written request for clarification must be made to the supplier or contractor concerned seeking details of constituent elements of the submitted tender that the procuring entity considers relevant to justify the price submitted. Those details may include: the methods and economics of the manufacturing process for the goods, of the construction or of the provision of the services concerned; the technical solutions chosen and/or any exceptionally favourable conditions available to the supplier or contractor for the execution of the construction or for the supply of the goods or services; or the originality of the construction, supplies or services proposed by the supplier or contractor.

(8) The enacting State may choose to regulate which type of information the procuring entity may require for this price justification procedure. It should be

noted in this context that the assessment is whether the price is realistic (by reference to the constituent elements of the tender, such as those discussed in the preceding paragraph), and using such factors as pre-tender estimates, market prices or prices of previous contracts, where available. It might not be appropriate to request information about the underlying costs that will have been used by suppliers and contractors to determine the price itself. Since cost assessment can be cumbersome and complicated, and is also not possible in all cases, the ability of the procuring entities to assess prices on the basis of cost may be limited. In some jurisdictions, procuring entities may be barred by law from demanding information relating to cost structure, because of risks that such information could be misused.

(9) Secondly, the procuring entity should take account of the response supplied by the supplier or contractor in the price assessment. If a supplier refuses to provide information requested by the procuring entity, the refusal will not give an automatic right to the procuring entity to reject the abnormally low tender.

(10) Thirdly, and if after the price justification procedure the procuring entity continues to hold concerns about the ability of the supplier or contractor to perform the procurement contract, it must record those concerns and its reasons for holding them in the record of procurement proceedings pursuant to subparagraph (1) (c) of the article. This provision is included to ensure that any decision to reject the abnormally low tender is made on an objective basis, and before that step is taken, all information relevant to the decision is properly recorded for the sake of accountability, transparency and objectivity in the process.

(11) Only after the steps outlined in subparagraphs 1 (a) to (c) have been fulfilled may the procuring entity reject the abnormally low tender. The decision on the rejection of the abnormally low tender must be included in the record of the procurement proceedings and promptly communicated to the supplier or contractor concerned, under paragraph (2) of the article. [If the Working Group decides that an appeal against the rejection should be allowed, a matter to be decided when the Working Group considers Chapter VI of the Model Law, appropriate reference and comment would appear here]

(12) Enacting States should be aware that, apart from the measures envisaged in this article, other measures can effectively prevent the performance risks resulting from abnormally low tenders. Thoroughly assessing suppliers' qualifications (in accordance with articles 6 and 7 of the Model Law), and evaluating their tenders, proposals, offers, quotations or bids (in accordance with article 34 and its equivalent for non-tendering procurement methods) can play a particularly important role in this context. These steps in turn depend on the proper formulation of qualification requirements and the precise drafting of specifications. Procuring entities should be appropriately instructed to that end, and should be aware of the needs to compile accurate and comprehensive information about the qualifications of suppliers or contractors, including information about their past performance, and to pay due attention in evaluation to all aspects of submitted tenders, proposals, offers, quotations or bids, not only to price (such as to maintenance and replacement costs where appropriate). These steps can effectively identify performance risks.

(13) Additional measures may include: (i) promotion of awareness of the adverse effects of abnormally low tenders; (ii) provision of training, adequate resources and information to procurement officers, including reference or market prices; and (iii) allowing for sufficient time for each stage of the procurement process. To deter the submission of abnormally low tenders and promote responsible tendering on the part of suppliers and contractors, it may be desirable for procuring entities to specify in the solicitation documents or other equivalent documents that submissions may be rejected if they are abnormally low and raise concerns with the procuring entity as to the ability of the supplier or contractor to perform the procurement contract."

V. Draft provisions to enable the use of electronic reverse auctions in public procurement under the Model Law

A. Guide to Enactment text accompanying draft article 22 bis, Conditions for the use of electronic reverse auctions (A/CN.9/WG.1/WP.59, para. 3)

16. At its thirteenth session, when considering draft article 22 bis, Conditions for use of electronic reverse auctions (ERAs), the Working Group made some preliminary suggestions to the Guide to Enactment text to accompany that article. One additional comment made to the Secretariat was that there should be a general introduction to the use of ERAs before the article-by-article remarks. The Working Group may therefore wish to consider the following revised text for the introductory comments and the remarks on article 22 bis, and whether they should be retained together, or the former presented elsewhere in the Guide.

"Article 22 bis: Conditions for use of electronic reverse auctions

(1) An 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. The auction is thus a repetitive process to select a successful submission, which involves suppliers' use of electronic communications to present either new lower prices, or a lower revised submission combining the price and values for the other criteria to be used by the procuring entity in determining the successful submission.

(2) Such auctions have been increasing in use since the text of the original Model Law was adopted in 1994 (that text did not then make provision for them). Electronic technologies have facilitated the use of reverse auctions by greatly reducing the transaction costs, and by permitting the anonymity of bidding suppliers (the "bidders") to be preserved as the auctions take place virtually, rather than in person.

(3) 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 increased competition among bidders, 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 each procurement, and reducing the administrative costs by comparison with the traditional open tendering procedure).

(4) Thirdly, they can enhance transparency in the procurement process and assist in the prevention of abuse and corruption, in that information on other bids is available and the outcome of the procedure visible to participants. Information on the successive results of evaluation of submissions at every stage of the auction and the final result of the auction are made known to all bidders instantaneously and simultaneously. Each revised submission results in a ranking or re-ranking[7] of bidders using automatic evaluation methods and a mathematical formula. The Model Law allows only auctions with automatic evaluation processes, where the anonymity of the bidders, and the confidentially and traceability of the proceedings, can be preserved. Thus they are characterised by an evaluation process that is fully automated or with limited human intervention, a factor which itself can also discourage abuse and corruption.

(5) On the other hand, electronic reverse auctions can encourage an excessive focus on price, and their ease of operation can lead to their overuse and use in inappropriate situations. They may also have an anti-competitive impact in the medium and longer-term. In particular, they are more vulnerable than other procurement processes to collusive behaviour by bidders, especially in projects characterized by a small number of bidders, or in repeated bidding in which the same group of bidders participate.[*]

(6) It is common for third-party agencies to set up and administer the auction for procuring entities, and to advise on procurement strategies. Procuring entities should be aware of the possible negative implications of outsourcing of decision-making beyond government, such as to third-party software and service providers when electronic reverse auctions are held. These agencies may represent and have access to both procuring entities and bidders, raising potential organizational conflicts that may pose a serious threat to competition. All these factors in turn may negatively affect the confidence of suppliers and contractors in procurement proceedings involving electronic reverse auctions. Procuring entities may also incur overhead costs in training and facilitating suppliers and contractors in bidding through electronic reverse auctions. As a result, the procuring entity may face additional costs arising from the use of electronic reverse auctions (opportunity costs such as those arising should suppliers or contractors abandon the government market if required to bid through electronic reverse auctions) and higher prices than those they would have obtained if other procurement techniques were used. Furthermore, in the setting of an electronic auction environment, the risk of suppliers' gaining unauthorized access to competitors' commercially sensitive information may be elevated.

---

[7] The Working Group may wish to consider whether this term should be replaced by a synonym.

[*] Collusion may occur when two or more bidders work in tandem to manipulate and influence the price of an auction keeping it artificially high or share the market by artificially losing submissions or not presenting submissions. For more discussion of this matter, see paragraphs […] of this Guide.

(7) Recognizing both the potential benefits of electronic reverse auctions and the concerns over their use, the Model Law enables recourse to them subject to the safeguards contained in the conditions for use in article [22 bis] and procedural requirements in articles [51 bis to septies] of the Model Law. The following criteria are viewed as particularly important for the successful use of electronic reverse auctions, and further guidance on these criteria and the various aspects of the provisions in the Model Law is set out in the article-by-article commentary below.

(a) That clear terms and conditions and specifications must be established and made known to suppliers at the outset of procurement, together with all information regarding how the electronic reverse auction will be conducted;

(b) That electronic reverse auctions are suitable for commonly used goods and services, for which there is a competitive market, but enacting States should ensure that procuring entities are aware of both the relevant conditions for use and the circumstances in which they are appropriate;

(c) That electronic reverse auctions are suitable for procurement in which price is the determining, or a significant determining, factor;

(d) The importance of a sufficient number of participating suppliers to ensure competition;

(e) The importance of preservation of the anonymity of bidders;

(f) The critical need to allow price and objectively quantifiable non-price criteria (such as delivery times and technical considerations) to be auctioned, and to avoid the introduction of subjective elements when quantifying such criteria, so as to guard against the possibility of abuse;

(g) That electronic reverse auctions are to be a single and final round before a winner is selected, also so as to guard against abuse;

(h) That the winning price is to figure in the contract; and

(i) That the timing of the opening and criteria governing the closing of electronic reverse auctions are to be clearly specified in advance.

(8) Electronic reverse auctions under the Model Law may be conducted either as a procurement method in itself or as the final phase preceding the award of the procurement contract in other procurement methods, as and where appropriate. Using electronic reverse auctions as a phase may not be appropriate in all procurement methods envisaged under the Model Law. Whether such an option is appropriate would depend first of all on whether the conditions for the use of electronic reverse auctions specified in article [22 bis] of the Model Law and the conditions for the use of a procurement method in question are both fulfilled. For example, article 19 of the Model Law enables a procuring entity to engage in procurement by means of request for proposals where it is not feasible for the procuring entity to formulate detailed specifications. This condition is in direct contrast with the primary condition for the use of electronic reverse auction specified in article [22 bis] (1) (a) and therefore the use of electronic reverse auction in request for proposals proceedings would not comply with the requirements of the Model Law. The procedural requirements of some procurement methods

may also be in contrast with the inherent features of electronic reverse auctions. For example, in tendering proceedings, the prohibitions of negotiations with suppliers or contractors and of submission of tenders after a deadline for submission of tenders would contradict the natural course of an electronic reverse auction where suppliers or contractors are expected to present successively lower submissions.[8]

(9) Electronic reverse auctions may appropriately be used for second-stage competition in framework agreements. [cross reference to framework agreements provisions]

(10) Article [22 bis] sets out the conditions for the use of electronic reverse auctions, which are one of the principal methods to ensure the critical criteria set out above apply in practice. They are based on the notion that electronic reverse auctions are primarily intended to satisfy the needs of a procuring entity for standardized, simple and generally available goods that arise repeatedly, such as for off-the-shelf products (e.g., office supplies), commodities, standard information technology equipment, and primary building products. In these types of procurement, the determining factor is price or quantity; a complicated evaluation process is not required; no (or limited) impact from post-acquisition costs is expected; and no services or added benefits after the initial contract is completed are anticipated. The types of procurement involving multiple variables and where qualitative factors prevail over price and quantity considerations should not normally be subject to electronic reverse auctions.

(11) The requirement for detailed and precise specifications found in paragraph (1) (a) will preclude the use of this procurement technique in procurement of most services and construction, unless they are of a highly simple nature (for example, straightforward road maintenance works). In addition, and in order for an electronic reverse auction to function correctly in eliciting low but realistic prices, it is important for bidders to be fully aware of their cost structures, which is unlikely to be the case where there are many layers of sub-contractors, common in more complex construction procurement. It would also be inappropriate, for example, to use auctions in procurement of works or services entailing intellectual performance, such as design works. Depending on the circumstances prevailing in an enacting State, including the level of experience with electronic reverse auctions, an enacting State may choose to restrict the use of electronic reverse auctions to procurement of goods by excluding references to construction and services in the article.

---

[8] The Working Group may wish to consider whether the concern that the submission of revised bids is inconsistent with the general tenet of tendering proceedings also applies at least to some extent to all procurement under the Model Law other than negotiated procurement. An amendment to article 35 of the Model Law could address the concern relating to tendering proceedings, similar to that agreed by the Working Group to article 34 (1)(a) (see A/CN.9/WG.I/WP.40/Add.1, paras. 14-17, A/CN.9/590, para. 101, and A/CN.9/WG.I/WP.43/Add.1, para. 3). Thus article 35 could be amended to read as follows: “No negotiations shall take place between the procuring entity and a supplier or contractor with respect to a tender submitted by the supplier or tenderer. This prohibition does not encompass the submission of revised bids during an electronic reverse auction conducted under articles [22 bis and 51 bis et seq] of this Law. The Working Group may also consider whether a provision should be included to permit revised submissions in any procurement method using this or a similar formulation.

(12) Some jurisdictions maintain lists identifying specific goods, construction or services that may suitably be procured through electronic reverse auctions. Enacting States should be aware that maintaining such lists could prove cumbersome in practice, since it requires periodic updating as new commodities or other relevant items appear. If lists are intended to be used, it is preferable to develop illustrative lists of items suitable for acquisition through electronic reverse auctions or, alternatively, to list generic characteristics that render a particular item suitable or not suitable for acquisition through this procurement technique.

(13) In formulating detailed and precise specifications, procuring entities have to take special care in referring to objective technical and quality characteristics of the goods, construction and services procured, as required in article 16 (2) of the Model Law, so that to ensure that bidders will bid on a common basis. The use of a common procurement vocabulary to identify goods, construction or services by codes or by reference to general market defined standards is therefore desirable.

(14) Paragraph (1) (b) aims at mitigating the risks of collusion and ensuring acceptable auction outcomes for the procuring entity. It requires that there must be a competitive market of suppliers or contractors anticipated to be qualified to participate in the electronic reverse auction. This provision is included to recognize that higher risks of collusion are present in the auction setting than in other procurement methods, and therefore the maintenance of anonymity is critical. Electronic reverse auctions are therefore not suitable in markets with only a limited number of potentially qualified and independent suppliers, or in markets dominated by one or two major players, since such markets are especially vulnerable to price manipulation or other anti-competitive behaviour. Paragraph 1 (b) is also supplemented by article [51 quater (6)] that requires procuring entities in inviting suppliers or contractors to the auction to keep in mind the need to ensure effective competition during the auction. The procuring entity has the right to cancel the auction in accordance with article [51 quinquies (2)] if the number of suppliers or contractors registered to participate in the auction is insufficient to ensure effective competition during the auction. [Appropriate cross-reference to Guide text that would accompany the relevant articles].

(15) The reference in article 22 bis (1)(b) to potential suppliers anticipated to be qualified to participate in the electronic reverse auction should not be interpreted as implying that pre-qualification will necessarily be involved in procurement through electronic reverse auctions. It may be the case that, in order to expedite the process and save costs, qualifications of only the supplier or contractor that presented the accepted submission are checked. [Appropriate cross-reference to Guide text that discusses the relevant options, in particular in conjunction with article 51 septies (2)].

(16) The article is intended to apply to procurement where the award of contracts is based on either the price or the price and other criteria that are specified in the beginning of the procurement proceedings, that is, in the notice of the electronic reverse auction. The notion of an auction is that price competition is a significant (if not the only) determining factor: electronic reverse auctions are not suitable for complex procurement, in which value judgements are important. When non-price criteria are involved in the

determination of the successful submission, paragraph (1) (c) (as elsewhere in the Model Law) requires that such criteria should be transparent, objective and quantifiable (e.g., figures, percentages) and capable of expression in monetary terms. These non-price criteria should be differentiated from those elements of the specifications that determine whether or not a submission is responsive (i.e., pass/fail criteria; see article 34 (2) of the Model Law). The article requires all non-price criteria to be evaluated prior to the auction as part of the full evaluation of initial submissions, and that the results of such evaluation should be communicated in the relevant part individually and simultaneously to each supplier or contractor concerned, along with a mathematical formula that will be used during the auction for determination of the successful submission. This formula must allow each supplier or contractor concerned to determine its status vis-à-vis other suppliers prior and at any stage during the auction. These requirements intend to ensure that all criteria are transparently and objectively evaluated (through pre-disclosure of evaluation procedures, the mathematical formula and the results of evaluation of initial submissions), and that no manipulation and subjectivity (such as through a points system) can be introduced in determining the successful submission. The procuring entity should treat initial submissions received as if they were tenders or any other submissions under the Model Law, in that confidentiality and integrity should be preserved.[9]

(17) The enacting States and procuring entities should be aware however of the potential dangers of allowing non-price criteria to be used in determining the successful submission. Apart from concerns common for all procurement methods and techniques (see paragraphs … of this Guide for the relevant discussion), the enacting State should be aware of concerns arising in the specific context of electronic reverse auctions, such as: [**further detail to be added at a future session, addressing such matters variations in submissions in quality that are so significant that the auction effectively ceases to be based on a common specification, the greater the number of variable criteria, the more difficult it is for both procuring entity and suppliers to understand how varying one element will impact on the overall ranking, how to address quality criteria that are evaluation criteria (that is, not responsiveness criteria that are pass/fail) that are evaluated prior to the auction, and the need to avoid auctions in which price is auctioned separately from quality items, which have been seen to be abused in practice**].

(18) Whether price only or other award criteria are factored into procurement by electronic reverse auctions is to be decided by an enacting State in accordance with the prevailing circumstances on the ground, including its level of experience with electronic reverse auctions, and in which sector of the economy the use of electronic reverse auctions is envisaged. It is recommended that enacting States lacking experience with the use of electronic reverse auctions should introduce their use in a staged fashion as experience with the technique evolves; that is, to commence by allowing simple auctions, where price only is to be used in determining the successful

---

[9] The Working Group has previously expressed the point of view that current article 45 of the Model Law should apply to all procurement methods, and appropriate reference or cross reference should be included.

submission, and subsequently, if appropriate, to proceed to the use of more complex auctions, where award criteria include non-price criteria. The latter type of auctions would require an advanced level of expertise and experience on the part of procuring entities, such as the capacity properly to factor any non-price criteria to a mathematical formula so as to avoid introducing subjectivity into the evaluation process. Such experience and expertise in the procuring entity would be necessary even if the procuring entity outsources the conduct of the auction to private third-party service providers, because the procuring entity must still be able to supervise activities of such third-party providers properly.

(19) In order to derive maximum benefits from an electronic reverse auction, both procuring entities and suppliers need to realise the benefits from it and receive support necessary to give them confidence in the process. Therefore, if the enacting State decides to introduce this procurement technique, it should be ready to invest sufficient resources in awareness and training programs to show in as short timeframe as possible that the upcoming change is profitable and sustainable for all concerned. Otherwise, a marketplace where procurement was previously handled successfully through other procurement techniques may be abandoned, and the government investment in electronic reverse auction system may fail. Procuring entities will need to learn new job skills and undergo orientation in the electronic reverse auction and understand all its benefits and potential problems and risks. Suppliers and contractors, especially small and medium enterprises, will need to be aware and understand the changes involved in doing business with the government through an electronic reverse auction and what impacts these changes will have on their businesses. The public at large should understand benefits of introducing the new procurement technique and be confident that it will contribute to achieving the government objectives in procurement. The awareness and training program can be delivered through various channels and means, many of which may already be in place, such as regular briefings, newsletters, case studies, regular advice, help desk, easy-to-follow and readily accessible guides, simulated auctions, induction and orientation courses. The awareness and training program should include collection and analysis of feedback from all concerned, which in turn should lead to necessary adjustments in the electronic reverse auction processes.

(20) The provisions of the Model Law should not be interpreted as implying that electronic reverse auctions will be appropriate and should always be used even if all conditions of article [22 bis] are met. Enacting States may wish to specify in regulations further conditions for the use of electronic reverse auctions, such as consolidating purchases to amortize costs of setting up the system for holding the auctions, including costs of third-party software and service providers."

B. Procedures in the pre-auction and auction stages: draft articles 51 bis to septies (A/CN.9/WG.1/WP.59, para. 5)

Proposed draft text for the revised Model Law[10]

17. At its thirteenth session, when considering draft articles 51 bis to septies, Procedures in the pre-auction and auction stages, the Working Group made suggestions to the proposed Model Law text, as follows:

(a) To replace paragraph (2) of draft article 51 bis with the following text:

"(2) Where an electronic reverse auction is to be used in [other] procurement methods envisaged in this Law, the procuring entity shall include a notice that an electronic reverse auction will be held when first soliciting the participation of suppliers or contractors in the procurement proceedings in accordance with the relevant provisions of this Law;"

(b) To replace the first sentence of paragraph (2) of draft article 51 ter with the following text:

"The procuring entity may decide to impose a minimum and/or maximum on the number of suppliers or contractors to be invited to the auction on the condition that the procuring entity has satisfied itself that in doing so it would ensure that effective competition and fairness are maintained;"[11]

(c) To replace the first sentence of paragraph (4) of draft article 51 ter with the following text:

"The procuring entity may decide that the electronic reverse auction shall be preceded by an assessment as to whether the submissions are responsive;"

(d) To delete the words "to the greatest possible extent" from paragraph (6) of draft article 51 quater;

(e) To replace paragraph 1(d) of draft article 51 sexies with the following text:

"There shall be no communication between the procuring entity and the bidders or among the bidders, other than as provided for in paragraphs 1 (a) and (c) above;"

(f) To delete the words "may" and "must" from paragraph (4) of draft article 51 sexies; and

(g) To refer to "submissions" and not "submission" in paragraph 1 (b) of draft article 51 septies.

---

[10] The Working Group agreed that these suggestions were preliminary, and further suggestions would be made when the Working Group next considered the text.

[11] The Working Group also agreed to consider whether this notion should be a general obligation that applies to all procurement under the Model Law at a future session, and whether it should be set out in the text of the Model Law, or discussed in the Guide to Enactment, for all such procurement (including procurement using electronic reverse auctions).

Proposed Guide to Enactment text

18. The Working Group recalled at its twelfth and thirteenth sessions that it would consider the Guide to Enactment text to accompany draft articles 51 bis to 51 septies at a future session. It also observed at its thirteenth session that if an electronic reverse auction were cancelled for the reasons set out in paragraph 1 of draft article 51 septies, that the anonymity of the auction might be compromised, and therefore that the Guide should include commentary to encourage procuring entities to seek to avoid holding a second auction in the same procurement proceedings if the anonymity were considered to be at risk of compromise.

C. 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 framework agreements in public procurement, submitted to the Working Group on Procurement at its fourteenth session

(A/CN.9/WG.I/WP.62) [Original: English]

CONTENTS

In implementing the changes to the text of the draft convention on the carriage of goods [wholly or partly] [by sea] that were requested by the Working Group at its nineteenth session in New York in April of 2007, the Secretariat proposes corresponding drafting improvements to the text of certain provisions of the draft convention that are to be considered by the Working Group at its twentieth session. At its twentieth session, the Working Group may wish to base its consideration of those draft provisions on the text attached hereto, rather than on the text as it appeared in A/CN.9/WG.III/WP.81.

Draft article 42

1. This draft provision remains the same as it appeared in A/CN.9/WG.III/WP.81, but for corrections made to errors identified in the text of subparagraph (c). In particular, the reference to draft article 37, subparagraph 2 (a) in the first sentence has been deleted as incorrect, since subparagraph 2 of draft article 37 refers exclusively to information in the contract particulars which would be furnished by the carrier. Instead, subparagraph (c)(i) below has been substituted, such that reference is now made to contract particulars in draft article 37, paragraph 1, that are provided by the carrier. Subparagraph (c)(ii) below repeats text that appeared in the previous version of the provision, and subparagraph (c)(iii) below refers to the contract particulars in draft article 37, paragraph 2, all of which will be furnished by the carrier. The corrections to the text of subparagraph (c) are not intended to alter its meaning.

Article 42. Evidentiary effect of the contract particulars[1]

Except to the extent that the contract particulars have been qualified in the circumstances and in the manner set out in article 41:[2]

(a) A transport document or an electronic transport record that evidences receipt of the goods is prima facie evidence of the carrier's receipt of the goods as stated in the contract particulars;[3]

(b) Proof to the contrary by the carrier in respect of any contract particulars shall not be admissible when such contract particulars are included in:

(i) A negotiable transport document or a negotiable electronic transport record that is transferred to a third party acting in good faith, or

(ii) 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 and is transferred to the consignee acting in good faith.[4]

(c) Proof to the contrary by the carrier shall not be admissible against a consignee acting in good faith in respect of the following contract particulars included in a non-negotiable transport document or a non-negotiable electronic transport record:

(i) The contract particulars referred to in article 37, paragraph 1, when such contract particulars are furnished by the carrier;

(ii) The number, type and identifying numbers of the containers, but not the identifying numbers of the container seals; and

(iii) The contract particulars referred to in article 37, paragraph 2.

Draft article 44

Paragraph 1

2. In considering how best to clarify the relationship between paragraphs 1 and 2 of draft article 11 as instructed by the Working Group at its nineteenth session (see A/CN.9/621, paras. 30 to 33), the Secretariat concluded that the optimum drafting approach was to delete paragraph 2 of draft article 11 as it appeared in A/CN.9/WG.III/WP.81, so as to avoid confusion with paragraph 1, and to move the relevant text to the end of paragraph 1 of draft article 44. In addition, the text of paragraph 1 of draft article 44 was adjusted by deleting the cross-reference to paragraph 2 of draft article 11 in draft article 44. It was thought that the rule regarding the time and location of delivery would best be placed in draft article 44

---

[1] The drafting adjustments to the text are made to the provision as it appeared in para. 58 of A/CN.9/616.

[2] The contents of the chapeau of draft article 42 was located in former draft article 44, as it appeared in A/CN.9/WG.III/WP.56, which has been deleted.

[3] The Working Group may wish to note that this paragraph represents an expansion of the coverage of this principle from that set out in article IV (5)(f) of the Hague-Visby Rules.

[4] This subparagraph has been reformulated to avoid the difficult notion of conclusive evidence by using the construction of article 16 (3)(b) of the Hamburg Rules, which has, however, been expanded to include non-negotiable transport documents and electronic transport records.

in the chapter on delivery. The suggested revised text of draft paragraph 1 appears following paragraph 3 below.

Paragraph 2

3. In its consideration of how best to clarify the text of paragraph 2 of draft article 27 as instructed by the Working Group at its nineteenth session (see A/CN.9/621, paras. 209 to 212), the Secretariat concluded that it would be best to move the obligation of unloading the goods to a separate location in the text, since an agreement to unload the goods pursuant to paragraph 2 of draft article 14 would be performed by the consignee, and should thus not appear in the chapter on shipper's obligations. It is suggested that this obligation will thus be deleted from paragraph 2 of draft article 27 in the next consolidated text of the draft convention, that it will be clarified that it is the obligation of the consignee, and that it will moved to become a new paragraph 2 of draft article 44 with respect to the obligation of the consignee to accept delivery. The suggested text of draft paragraph 2 appears below.

Article 44. Obligation to accept delivery

1. When the goods have arrived at their destination, the consignee that [exercises any of its rights under] [has actively involved itself in] the contract of carriage[5] shall accept delivery of the goods at the time or within the time period and at the location agreed in the contract of carriage or, failing such agreement, at the time and location that are in accordance with the customs, practices or usages of the trade. In the absence of such agreement or of such customs, practices, or usages, the time and location of delivery are that of the unloading of the goods from the final means of transport in which they are carried under the contract of carriage.

2. When the parties have made an agreement referred to in article 14, paragraph 2, that requires the consignee to unload the goods, the consignee shall do so properly and carefully.

Draft article 49

4. In keeping with the suggested change to draft article 44, paragraph 1, the reference to "article 11, paragraph 2" in subparagraph (a) has been adjusted to refer to "article 44, paragraph 1".

5. It is suggested that the phrase "before expiration of the time referred to in article 44, paragraph 1" in subparagraph (d) be added to clarify the text to ensure, for example, the inclusion of situations in which the time for delivery in the contract of carriage is stated as a time period rather than as a particular time or date. Draft article 44, paragraph 1, has been adjusted to include a similar clarification.

6. Two changes are suggested to subparagraph (g). First, it is suggested that the meaning of the text be clarified through the addition of the phrase "becomes a holder after such delivery and who". Secondly, it is suggested that the phrase "did

---

[5] 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.

not have or could not reasonable have had" should be corrected to read "did not have and could not reasonable have had".

7. The complete text of draft article 49, which is the text as it appeared in A/CN.9/WG.III/WP.81 with the addition of the suggestions in paragraphs 4 to 6 above, appears below.

Article 49. Delivery when a negotiable transport document or negotiable electronic transport record is issued[6]

When a negotiable transport document or a negotiable electronic transport record has been issued:

(a) Without prejudice to article 44, the holder of the negotiable transport document or 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 shall deliver the goods at the time and location referred to in article 44, paragraph 1, to the holder, as appropriate:

(i) Upon surrender of the negotiable transport document and, if the holder is one of the persons referred to in article 1, subparagraph 12 (a)(i), upon proper identification; or

(ii) Upon demonstration by the holder, in accordance with the procedures referred to in article 9, subparagraph 1 (c), that it is the holder of the negotiable electronic transport record.

(b) The carrier shall refuse delivery if the conditions of subparagraph (a)(i) or (a)(ii) are not met.

(c) If 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. When a negotiable electronic transport record has been used, such electronic transport record ceases to have any effect or validity upon delivery to the holder in accordance with the procedures required by article 9, subparagraph 1 (d).

(d) If the holder does not claim delivery of the goods before expiration of the time referred to in article 44, paragraph 1, from the carrier after their arrival at the place of destination, the carrier shall so advise the controlling party or, if, after reasonable effort, it is unable to locate the controlling party, the shipper. In such event the controlling party or shipper shall give the carrier instructions in respect of the delivery of the goods. If the carrier is unable, after reasonable effort, to locate the controlling party or the shipper, the documentary shipper shall be deemed to be the shipper for purposes of this paragraph.

(e) The carrier that delivers the goods upon instruction of the controlling party or the shipper in accordance with subparagraph (d) of this article 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

---

[6] Revised text as agreed by the Working Group (A/CN.9/591, paras. 231-239, and A/CN.9/595, paras. 80-89). As a drafting improvement to avoid repetition, former subparas. (a)(i) and (ii) as set out in A/CN.9/WG.III/WP.56 have been combined to form paras. (a) and (b) in this article.

negotiable electronic transport record has demonstrated, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder.

(f) A person that becomes a holder of the negotiable transport document or the negotiable electronic transport record after the carrier has delivered the goods pursuant to subparagraph (e) of this article, but pursuant to contractual or other arrangements made before such delivery acquires rights against the carrier under the contract of carriage, other than the right to claim delivery of the goods.

(g) Notwithstanding subparagraphs (e) and (f) of this article, a holder that becomes a holder after such delivery, and who did not have and 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.

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 12 to 85 of document A/CN.9/WG.I/WP.60, which is before the Working Group at its fourteenth 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 framework agreements, in public procurement.

2. This note has been prepared pursuant to the request of the Working Group at its thirteenth session to the Secretariat to revise the draft provisions on the use of framework agreements, and those addressing types, conditions and procedures for the use of framework agreements.[7]

II. Proposed text for the Model Law

A. Terminology

3. The provisions below include certain terminology that may differ from equivalents used in procurement systems other than those based on the Model Law, and they are described here for ease of reference of the Working Group. In addition, some concepts that appear in the Model Law are described in the text differently as between procurement methods, and the Working Group may wish to consider whether the terms should be conformed for all procurement methods and techniques that will appear in the revised text.

4. For example, the "the criteria to be used ... in determining the successful tender", as described in article 27 (e) and other provisions in Chapter III, are sometimes referred to in other systems as "evaluation" or "award" criteria. However, in Chapter IV (addressing services procurement) reference is made to "ascertaining" the successful proposal pursuant to a "selection procedure". In other procurement systems, "selection" is sometimes used to refer to the identification of suppliers that are

[7] A/CN.9/648, para. 13.

qualified, whereas in the Model Law, that process is called the "evaluation" of suppliers' qualifications.

5. References are made throughout the Model Law to the "evaluation" of tenders or other submissions. "Evaluation" here refers to the competitive assessment that identifies the order in which tenders or other submissions are ranked (as distinct from an assessment as to whether they are responsive to the terms and conditions and including specifications of the procurement concerned). "Evaluation" is also used in the Model Law to refer to the assessment of suppliers' qualifications.

6. For the purposes of the draft provisions addressing framework agreements, the following terminology will be used, and the Working Group may wish to re-consider whether it is appropriate for some of these terms to be so used throughout the Model Law:

(a) "Evaluation" to mean the competitive assessment that identifies the order in which tenders or other submissions are ranked;

(b) "Examination" to mean the assessment of responsiveness;

(c) "Ranking" to mean the ordering in which tenders or other submissions are placed, the highest-ranking being the supplier that best meets the needs of the procuring entity as measured by the terms and conditions of the procurement;[8]

(d) "Selection criteria" to mean the criteria to be used in determining the successful tender or other submission, and "selection" to mean the identification of the successful party/parties to the framework agreement and the identification of the successful supplier to which a procurement contract will be awarded;

(e) "Specifications" to refer to the "nature and required technical and quality characteristics, in conformity with article 16, of the goods, construction or services to be procured, including, but not limited to, technical specifications, plans, drawings and designs as appropriate" (description taken from article 27 (d) of the Model Law); and

(f) "Tenders" to refer to the submissions at the second stage of a framework agreement procedure.[9]

B. Proposed text

"Article 22 ter. Types of framework agreement procedures and conditions for their use

(1) A framework agreement procedure is a procurement conducted in two stages: a first stage to select supplier(s) or contractor(s) to be the party or parties to a framework agreement with a procuring entity, and a second stage to award procurement contracts under the framework agreement to one or

---

[8] The Working Group has requested the Secretariat to find a synonym for this term that describes this competitive placement. The Secretariat has not yet been able to do so.

[9] The Working Group has requested the Secretariat to find a synonym for this term that is not already used for another purpose in the Model Law. The Secretariat has not yet been able to do so.

more of those supplier(s) or contractor(s).[10, 11]

(2) A framework agreement [under this Law] shall be concluded in writing[12] between the procuring entity and supplier(s) or contractor(s) and set out:

(a) The procedures and selection criteria, including the relative weight of such criteria,[13] for determining the successful supplier for procurement contracts under the framework agreement.[14] A framework agreement may provide that the relative weights of these selection criteria may vary within a range set out in the framework agreement, provided that the variation does not lead to a [material] change in the procurement as described in paragraph (d) below;[15]

(b) The specifications for the procurement;[16] and

(c) (i) Either all the terms and conditions upon which the supplier(s) or contractor(s) is or are to provide the goods, construction or services to be procured; or

---

[10] The Working Group may wish to consider whether and how to distinguish between a procurement (the totality of the purchases contemplated under a framework agreement), and each procurement (which will be represented by a procurement contract concluded under the framework agreement). There may be consequential drafting changes.

[11] The Working Group may wish to consider presenting the definitions elements of this draft text in article 2 of the Model Law, so that all definitions are located together.

[12] As per para. 66 of A/CN.9/648, the Working Group has agreed that the definition of a framework agreement should refer to a written agreement.

[13] There are two formulations of this notion in the current text of the Model Law: in article 27 (e), which is reproduced in this article, and in article 48 (4) (c), which refers to the relative weight of each such criterion. The Working Group may wish to use one consistent version throughout the revised text of the Model Law, and if so to consider whether the latter formulation is more precise than the former, and should be adopted.

[14] By comparison, article 27 (e) refers to any criteria other than price, including margin of preference, and their relative weight.

[15] See proposed text for the Guide to Enactment to address this article, contained in A/CN.9/WG.I/WP.63. The Working Group may wish to note that there is more flexibility in the equivalent provisions in article 32 of Directive 2004/18/EC (Directive 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, pp. 1 and 114 et seq, available at http://europa.eu.int/comm/internal_market/publicprocurement/legislation_en.htm, the "EC Directive"). However, concerns were expressed at the thirteenth session to the effect that greater flexibility than provided in the current draft would permit the criteria for the award of procurement contracts to be amended during the procurement, which would be both contrary to the central philosophy of the Model Law and also open to abuse.

[16] The Guide to Enactment would include a cross reference to the provisions of article 27 (d) addressing specifications. The Working Group may wish to consider whether the references to specifications in the framework agreement procedures provisions should be conformed to the longer description in art. 27 (d). (This description is set out in the terminology section, II.A, above.) So doing might avoid the difficulties of trying to separate the notions of terms and conditions and specifications, and would also promote consistency in the text of the Model Law. In this regard, the Working Group may wish to consider whether to amalgamate subparagraphs (b) and (c). See, also, the proposed text for the Guide to Enactment to address this article in A/CN.9/WG.I/WP.63, which will discuss, among other things, how to prevent these requirements becoming onerous. For example, enacting States could in their procurement regulations enable the procuring entity to annex the solicitation documents if they include this information and the legal system concerned treats annexes as an integral part of a contract.

(ii) All such terms and conditions that are known when the framework agreement is concluded, and a statement of remaining terms and conditions that are to be established through a second-stage competition;

(d) The terms and conditions of the procurement as set out in either the solicitation documents or the framework agreement or both may not be varied during the term of the framework agreement in any manner that leads to a material change in the specifications or other terms and conditions of the procurement.

(3) A framework agreement shall be concluded for a given term, which is not to exceed [the enacting State specifies a maximum] years.[17]

(4) A procuring entity may engage in a framework agreement procedure, in accordance with articles [51 octies to 51 quindecies]:

(a) Where the procuring entity intends to procure the goods, construction or services concerned on a repeated basis during the term of the framework agreement; or

(b) Where the procuring entity anticipates that by virtue of the nature of the goods, construction or services to be procured that the need for them will arise on an urgent basis during the term of the framework agreement.

(5) A closed framework agreement is an agreement to which no supplier or contractor who is not initially a party to the framework agreement may subsequently become a party.

(6) An open framework agreement is an agreement to which supplier(s) or contractor(s) in addition to the initial parties may subsequently become a party or parties.

(7) A framework agreement procedure shall be conducted in one of the following ways:

(a) A closed framework agreement procedure, in which the framework agreement is concluded with one or more suppliers or contractors, in which all the terms and conditions of the procurement are established upon the conclusion of the framework agreement, including the procedures that the procuring entity will apply to select the supplier(s) or contractor(s) to which procurement contracts under the framework agreement are to be awarded;[18]

(b) A closed framework agreement procedure, in which the framework agreement is concluded with more than one supplier or contractor,

---

[17] The preliminary conclusion of the Working Group at its thirteenth session was that there should be no term set out in the text of the Model Law, though some delegations have indicated that this issue should be discussed further.

[18] Although the final part of this paragraph may not be strictly necessary in the light of article 22 ter (2), the Working Group may wish to consider including this text, and also to explain in the Guide to Enactment that the "terms and conditions" of the procurement include the specifications, the procedures for the award of second-stage contracts and selection criteria. The wording of this paragraph is intended to demonstrate that there is no second-stage competition.

and in which not all the terms and conditions of the procurement are established upon the conclusion of the framework agreement, and a second-stage competition will be held to select the supplier(s) or contractor(s) to which procurement contracts under the framework agreement are to be awarded [and to establish the remaining terms and conditions of the procurement concerned];[19]

(c) An open framework agreement procedure, in which the framework agreement is concluded with more than one supplier or contractor, and in which not all the terms and conditions of the procurement are established upon the conclusion of the framework agreement, and a second-stage competition will be held to select the supplier(s) or contractor(s) to which procurement contracts under the framework agreement are to be awarded [and to establish the remaining terms and conditions of the procurement concerned].”[20]

“Article [51 octies]. Commencement of a framework agreement procedure

(1) Where the procuring entity intends to enter into a framework agreement, it shall:

(a) Select the type of framework agreement procedure to be conducted from among the three options set out in article 22 ter (5);

(b) Select a method to conclude the framework agreement in accordance with the provisions of Chapter II of this Law.[21]

(2) The procuring entity shall include in the record required under article 11 of this Law a statement of the grounds and circumstances upon which it relied to select the type of the framework agreement procedure specified in article 22 ter.”[22]

“Article [51 novies]. Information to be specified when first soliciting participation in a framework agreement procedure

When first soliciting the participation of suppliers or contractors in a framework agreement procedure, the procuring entity shall specify all

---

19 The Working Group may wish to consider whether the suppliers and contractors remain bound to fulfil the terms of their tenders under this closed framework procedure. For example, they could be bound for the term of the framework agreement unless the solicitation documents and framework agreement provide otherwise. While longer duration agreements may increase the security of supply for the procuring entity, there may be a correspondingly higher price.

20 In similar provisions in the EC Directive, these types of framework agreements must operate electronically, because from a practical perspective operating them non-electronically is highly complex. The Working Group decided on a preliminary basis at its thirteenth session that it would permit non-electronic frameworks of this type.

21 The application of Chapter II means that the procedure must be tendering proceedings or the services equivalent, unless the justifications for other methods apply. The Guide to Enactment will address this topic. The previous formulation required open framework agreements procedures to commence with tendering proceedings or the services equivalent, but this requirement was deleted on a preliminary basis at the previous session. The Working Group may wish to consider whether it would be appropriate to conduct an open framework agreement procedure other than using open procedures, because of the need to advertise the existence of the framework agreement for the benefit of new joiners.

22 See proposed text for the Guide to Enactment to address this article in A/CN.9/WG.I/WP.63.

information required for the procurement method chosen in accordance with article 51 octies,[23] except the quantity of items to be procured, and in addition the following information and statements:[24]

(a) That the procurement will be conducted as a framework agreement procedure;

(b) Whether the framework agreement procedure will involve a closed or an open framework agreement as described in article 22 ter (6) and (7);

(c) If the framework agreement will be an open agreement, that suppliers or contractors may apply to become parties to the framework agreement at any time during the period of its operation, subject to any maximum number of suppliers;[25]

(d) Either that only one supplier or contractor will be a party to the framework agreement, or the minimum and any maximum number of suppliers or contractors to be parties to the framework agreement;[26]

(e) If the procuring entity intends to enter into a framework agreement with more than one supplier or contractor, that the suppliers or contractors that are parties to the framework agreement will be ranked according to the selection criteria specified;

(f) The duration of the framework agreement and, to the extent that they are known at this stage of the procurement, all other terms, conditions and the form of the framework agreement. If any such term or condition or any element of form may be tailored for individual suppliers or contractors, which such term(s), condition(s) or element(s) of form;[27]

---

[23] See proposed text for the Guide to Enactment to address this article in A/CN.9/WG.I/WP.63.

[24] Since this procedure could be based on either Chapter III, IV or V of the Model Law, some information that is needed for tendering proceedings that is not strictly necessary is repeated for the sake of clarity.

[25] The Working Group may wish to consider whether, in order to provide for greater efficiency in the administration of an open framework, enacting States could alternatively provide for periodic opening of the framework agreement to new joiners (that is, at fixed times or intervals) and, if so, whether this alternative could be set out in the accompanying Guide to Enactment text.

[26] The Working Group has noted that any capacity limitations on the number of suppliers in the open system should be set out in the solicitation documents (see para. 101 of A/CN.9/648). The appropriate maximum will depend on the type of procurement and system in use, which are matters to be discussed in the Guide to Enactment. See, also, section III regarding the need for competition in the first stage of framework agreements procedures. If there is no competitive evaluation and selection of suppliers at this stage (including the elimination of responsive tenders submitted by qualified bidders), then arguably the result is a suppliers' list. There may also be risks to second-stage competition because procuring entities will wish to reduce the numbers invited to participate in the second stage, in ways that may not be transparent. The Working Group may wish to reconsider this provision and to provide for a transparent way of limiting the number of parties to the framework agreement.

[27] A/CN.9/648, para. 63. The aim of the final sentence of this paragraph is to enable the use of multiple framework agreements. This issue is discussed in the proposed text for the Guide to Enactment to address this article in A/CN.9/WG.I/WP.63, but the Working Group may wish to

(g) All information necessary to allow the effective operation of electronic framework agreements, including the equipment to be used, technical connection arrangements, the [website or other electronic address] at which the specifications, terms and conditions of the procurement, and notifications of forthcoming procurement opportunities can be accessed;[28]

(h) The nature of, and desired places and times of delivery of, the purchases envisaged under the framework agreement to the extent that they are known at this stage of the procurement;

(i) The total quantity of or the minimum or maximum quantity of the purchases envisaged under the framework agreement to the extent that they are known at this stage of the procurement, and otherwise an estimate thereof;

(j) If suppliers or contractors are to be permitted to submit tenders, proposals, offers or quotations (collectively referred to as "submissions" in this section) for only a portion of the goods, construction or services to be procured, a description of the portion or portions for which they may be submitted;

(k) The criteria to be used by the procuring entity in the selection of the supplier(s) or contractor(s) to be the party or parties to the framework agreement, including their relative weight and the manner in which they will be applied in the selection;[29]

(l) Whether the framework agreement will set out all the terms and conditions of the procurement or whether there will be second-stage competition to select the supplier or contractor to be awarded a procurement contract under the framework agreement;

(m) The procedures and criteria that the procuring entity will apply to select the supplier(s) or contractor(s) to be awarded the procurement contract, including the relative weights of the criteria and the manner in which they will be applied in the selection;

(n) If there is to be second-stage competition:

(i) All terms and conditions of the procurement that will be set out in the framework agreement;

(ii) The remaining terms and conditions, which will be subject to second-stage competition; and

(iii) If the procuring entity wishes to be able to vary the relative weights of the selection criteria during the second-stage competition, the range within which the relative weights may vary, provided that any such variation may not lead to a material change

---

consider whether the terms and conditions of the procurement might thereby be varied between parties by stealth.

[28] This paragraph was inserted as per the request of the Working Group recorded in para. 85 of A/CN.9/648.

[29] The Guide will explain that whether the selection will be based on lowest price or lowest evaluated submission has to be disclosed. See A/CN.9/WG.I/WP.63.

in the specifications or other terms and conditions of the procurement."[30]

"Article [51 decies]. First stage of procurement involving framework agreements

(1) The first stage of procurement proceedings under closed framework agreements shall be conducted in accordance with the provisions governing the procurement method selected under article 51 octies of this Law.

(2) The first stage of procurement proceedings under open framework agreements shall be conducted in accordance with the provisions governing the procurement method selected under article 51 octies of this Law, [provided that the procurement method selected must be open and competitive/which must be conducted either in accordance with Chapter III or Chapter IV of this Law.][31]

(3) The procuring entity shall select the supplier(s) or contractor(s) with which to enter into the framework agreement on the basis of the specified selection criteria, and shall promptly notify the selected supplier(s) or contractor(s) of their selection and, where relevant, their ranking.[32]

(4) The procuring entity shall promptly publish notice of the award of the framework agreement, in any manner that has been specified for the publication of contract awards under article 14 of this Law. The notice shall identify the supplier(s) or contractor(s) selected to be the party or parties to the framework agreement."[33]

"Article [51 undecies]. Additional provisions regarding the first stage of procurement involving open framework agreements

(1) The procuring entity shall, during the entire period of operation of the open framework agreement, ensure unrestricted, direct and full access to the

---

30 The Guide will address first-stage competition, and explain that whether the selection will be based on lowest price or lowest evaluated submission has to be disclosed. See A/CN.9/WG.I/WP.63.

31 See para. 90 of A/CN.9/648 and footnote 15 above.

32 As noted in the terminology section above, the Working Group may wish to change this term (see also para. 91 of A/CN.9/648). An alternative could be to place the submissions in descending order to reflect those best meeting the needs of the procuring entity.

33 The provision now requires the identities of the parties to be published in accordance with the instructions of the Working Group (para. 94 of A/CN.9/648). The Working Group may also wish to consider whether to make this information a general requirement when publishing notice of contract awards under article 14 of the current Model Law, and whether to adapt the threshold provisions. The text or Guide to Enactment could also elaborate on the minimum information to be published. For example, in respect of each contract awarded (under all procurement, including under framework agreements), either could require: (a) a brief description of the goods or services or construction procured (or reference to a tender or RFP number); (b) the identity of the supplier to whom the contract was awarded; (c) the contract price; and (d) the date, or fiscal period within which the contract was awarded. Consistency would then indicate that article 36 (6) should require all of these items, plus the address of the successful supplier, to be disclosed to the unsuccessful suppliers in any given tender. The same information could be required to be disclosed for the conclusion of a framework agreement, save for the contract price. In addition, the Working Group may wish to consider whether the remaining quantity to be procured, to the extent known, should be provided to parties to the framework agreement so that they can ascertain the extent of their standing commitment. The Guide to Enactment could also discuss this point.

specifications and terms and conditions of the agreement and to any other necessary information relevant to its operation.[34]

(2) The procuring entity shall, during the period of operation of the open framework agreement, either:

(a) Republish [the enacting State specifies the frequency of the republication, or in accordance with the procurement regulations] the initial solicitation of submissions and notice of award of the framework agreement and an invitation to present further submissions to become a party to the framework agreement in the publication or publications in which the initial solicitation was made;[35] or

(b) If the framework agreement operates electronically, maintain a copy of the initial solicitation and notice of award of the framework agreement at the [website or other electronic] address set out in [article 51 novies (g) above].

(3) Suppliers and contractors may [become a party to the open framework agreement] at any time during its operation. [Applications to become parties] shall include all information specified by the procuring entity when first soliciting participation in the procurement.

(4) The procuring entity shall examine all such submissions to become a party to the framework agreement received during the period of its operation [within a maximum of […] days] in accordance with the selection criteria set out when first soliciting participation in the framework agreement.

(5) The framework agreement shall be concluded with all [qualified] suppliers or contractors satisfying the selection criteria,[and whose submissions comply with the specifications and any other additional requirements pertaining to the framework agreement,][36] [unless technical or other capacity limitations require a maximum number of parties to the framework agreement. Any such limitations and the resultant maximum number shall be set out in the solicitation documents [or their equivalent.]][37]

---

34 The Working Group may wish to consider whether this provision implies an electronic procedure, and if so, whether to incorporate it into paragraph 2 (b), and for non-electronic procedures, introduce a new provision to require the procuring entity to provide the documents as per the article 26 of the current text of the Model Law following each republication. In addition, the provisions imply procedures that start with a public announcement — that is, those conducted under Chapters II and III of the Model Law.

35 This provision was inserted following the instruction of the Working Group at its thirteenth session — see para. 129 of A/CN.9/648. However, the Working Group may wish to consider whether the provision can be easily implemented if such notices are centralized. The Guide to Enactment would explain that where the framework agreement was paper-based, the initial notice to participate in the framework agreement should be republished periodically in the same journal in which the initial publication was made. In electronic systems, the notice would be available permanently on the relevant website and so further publication would not be necessary.

36 The Working Group may wish to consider whether the text in square brackets is superfluous.

37 See section III below for a discussion of providing for a maximum number of parties to the framework agreement at the first stage, based on a competitive evaluation and ranking. An alternative formulation could be to conclude the framework agreement with all qualified suppliers whose submissions are responsive, subject to technical and similar constraints (for all,

(6) The procuring entity shall promptly notify the suppliers or contractors whether they are to be parties to the framework agreement.

(7) Suppliers or contractors that are admitted to the framework agreement may improve their submissions at any time during the period of operation of the framework agreement, provided that they continue to comply with the terms and conditions of the framework agreement."[38]

"Article [51 duodecies]. Second stage of procurement involving closed framework agreements without second-stage competition

(1) The award of any procurement contract under a framework agreement shall be effected in accordance with its terms and conditions and the provisions of this article.[39]

(2) No procurement contract under the framework agreement shall be awarded to suppliers or contractors that were not originally parties to the framework agreement.

(3) The terms of a procurement contract awarded under the framework agreement may not materially alter or depart from any term or condition of the framework agreement.[40]

(4) If the framework agreement is entered into with one supplier or contractor, the procuring entity shall award any procurement contract to that supplier or contractor on the basis of the terms and conditions of the framework agreement by the issue of a written notice to that supplier or contractor.

(5) If the framework agreement is entered into with more than one supplier or contractor, the procuring entity shall award any procurement contract on the basis of the terms and conditions of the framework agreement by the issue of a written notice to that supplier or contractor. The procuring entity shall also promptly notify in writing all other suppliers or contractors that are parties to the framework agreement of the award of the contract, the name and address of the supplier or contractor to whom the notice has been issued and the contract price."[41]

---

or only open framework agreement procedures). See, also, para. 101 of A/CN.9/648.

[38] This provision has been inserted pursuant to the Working Group's request as per para. 104 of A/CN.9/648.

[39] This provision has been inserted pursuant to the Working Group's request as per para. 111 of A/CN.9/648.

[40] The text of the provision has been conformed to similar text in article 34 (2) (b), as per the Working Group's instructions in para. 113 of A/CN.9/648.

[41] This provision has been reformulated in accordance with the Working Group's instructions as per para. 115 of A/CN.9/648, such that the notification should include the basic details of the award, such as the contract price, and to confirm with article 51 terdecies (as per para. 116 of A/CN.9/648).

"Article [51 terdecies]. Second stage of procurement involving closed framework agreements with second-stage competition[42]

(1) The award of any procurement contract under a framework agreement shall be effected in accordance with its terms and conditions, including those governing the second-stage competition, and the provisions of this article.[43]

(2) No procurement contract under the framework agreement shall be awarded to suppliers or contractors that were not originally parties to the framework agreement.

(3) The terms of a procurement contract awarded under the framework agreement may not materially alter or depart from any term or condition of the framework agreement.

(4) Each anticipated procurement contract shall be the subject of a written invitation to tender. The procuring entity shall invite all suppliers or contractors[44] that are parties to the framework agreement, or where relevant all such suppliers and contractors [then capable of meeting the needs of the procuring entity][45] to present their tenders for the supply of the items to be procured.

(5) The procuring entity shall fix the place for and a specific date and time as the deadline for presenting the tenders. The deadline shall afford suppliers or contractors sufficient time to prepare and present their tenders.

(6) The invitation to tender shall:

(a) Restate the existing terms and conditions of the anticipated procurement contract;

(b) [To the extent not already notified in the framework agreement] set out the terms and conditions of the anticipated procurement contract that are to be subject to the second-stage competition;

[(c) Where necessary, provide further detail of the terms and conditions of the anticipated procurement contract;][46]

(d) Restate the procedures and selection criteria for the award of the anticipated procurement contract;

(e) Set out instructions for preparing tenders and the submission deadline.

---

42 The Working Group may wish to consider whether the title for this and the subsequent two articles is sufficiently wide.

43 The Working Group may wish to consider whether this formulation is sufficiently broad to encompass those terms and conditions that are not set in the framework agreement itself but are set by the second-stage competition.

44 The previous reference to "those parties" has been amended to remove any ambiguity that the framework agreement could become an open agreement (see para. 119 of A/CN.9/648).

45 This provision has been reformulated in accordance with the Working Group's instructions as per para. 119 of A/CN.9/648.

46 The Working Group may wish to consider whether the formulation would provide adequate flexibility at the second stage in framework agreement procedures with second-stage competition (greater flexibility is provided in the EC Directive).

(7) The procuring entity shall evaluate all tenders received and determine the successful tender in accordance with the selection criteria set out in the second-stage invitation to tender referred to in paragraph (4) above.[47]

(8) Subject to articles [12, 12 bis and other appropriate references] of this Law, the procuring entity shall accept the successful tender, and shall promptly notify the successful supplier or contractor that it has accepted its tender. The procuring entity shall also notify all other suppliers and contractors that submitted tenders of the name and address of the supplier or contractor whose tender was accepted and the contract price.[48]

(9)[49] Without prejudice to the provisions of article [proper cross reference to the provisions on award of contracts through electronic reverse auction] and subject to articles [12, 12 bis and other appropriate references] of this Law,[50] the procuring entity shall accept the successful submission(s), and shall promptly notify in writing the successful supplier(s) or contractor(s) accordingly. The procuring entity shall also promptly notify in writing all other suppliers and contractors that are parties to the framework agreement of the name and address of the supplier(s) or contractor(s) whose submission(s) was or were accepted and the contract price."

"Article [51 quaterdecies]. Second stage of procurement involving open framework agreements[51]

(1) The award of any procurement contract under a framework agreement shall be effected in accordance with its terms and conditions, including those governing the second-stage competition, and the provisions of this article.

(2) The terms of a procurement contract awarded under the framework agreement may not materially alter or depart from any term or condition of the framework agreement.

(3) Each anticipated procurement contract shall be the subject of a written invitation to tender. The procuring entity shall invite all suppliers or contractors that are parties to the framework agreement, or where relevant all such suppliers and contractors [then capable of meeting the needs of the procuring entity] to present their tenders for the supply of the items to be procured;

---

47 The Guide will address first-stage competition, and explain that whether the selection will be based on lowest price or lowest evaluated submission has to be disclosed. See A/CN.9/WG.I/WP.63.

48 The Guide to Enactment will cross refer to the articles concerned, which enable the procuring entity to reject all tenders, reject abnormally low tenders or otherwise cancel the procurement. Previous references to plural tenders and suppliers have been changed because this article refers to each second-stage competition in which there is one successful supplier, not to all second-stage competitions as a whole.

49 The previous para. 4 (e) has been deleted, as per para. 122 of A/CN.9/648.

50 The Guide to Enactment will explain that this reference is to permit the procuring entity to reject all tenders, to reject abnormally low tenders, or otherwise cancel the procurement.

51 Provisions relating to the second stage of framework agreements with competition have been conformed, as both types under the current formulation could be conducted electronically or in paper-based form, with the exception that paragraph (2) in article 51 quaterdecies would not apply to open framework agreements (see para. 130 of A/CN.9/648).

(4) The invitation shall:

(a) Restate the existing terms and conditions of the anticipated procurement contract;

(b) [To the extent not already notified in the framework agreement] set out the terms and conditions of the anticipated procurement contract that are to be subject to the second-stage competition;

[(c) Where necessary, provide further detail of the terms and conditions of the anticipated procurement contract;]

(d) Restate the procedures and selection criteria for the award of the anticipated procurement contract; and

(e) Set out instructions for preparing tenders.

(5) The procuring entity shall fix the place for and a specific date and time as the deadline for presenting the tenders. The deadline shall afford suppliers or contractors sufficient time to prepare and present their tenders.

(6) The procuring entity shall evaluate all tenders received and determine the successful tender in accordance with the selection criteria set out in the second-stage invitation to tender referred to in paragraph (4) above.[52]

(7) Without prejudice to the provisions of article [proper cross reference to the provisions on award of contracts through electronic reverse auction] and subject to articles [12, 12 bis and other appropriate references] of this Law, the procuring entity shall accept the successful submission(s), and shall promptly notify in writing the successful supplier(s) or contractor(s) accordingly. The procuring entity shall also promptly notify in writing all other suppliers and contractors that are parties to the framework agreement of the name and address of the supplier(s) or contractor(s) whose submission(s) was or were accepted and the contract price.

"Article [51 quindecies]. Award of the procurement contract under a framework agreement

(1) The procurement contract, on the terms and conditions of the framework agreement, comes into force when a purchase order as provided for in [articles …] or the notice of acceptance to the successful supplier(s) or contractor(s) as provided for in [articles …] is issued and dispatched to the supplier or contractor concerned.

(2) Where the contract price under the provisions of this section exceeds [the enacting State includes a minimum amount [or] the amount set out in the procurement regulations], the procuring entity shall promptly publish notice of the award of the procurement contract(s) in any manner that has been specified for the publication of contract awards under article 14 of this Law. The procuring entity shall also publish, in the same manner, [quarterly] notices of all procurement contracts issued under a framework agreement or in any other manner set out in the framework agreement."

---

[52] The Guide will explain that whether the selection will be based on lowest price or lowest evaluated submission has to be disclosed. See A/CN.9/WG.I/WP.63.

III. Further issues arising in the use of framework agreement procedures

A. First-stage competition

7. The Working Group may recall that procurement regimes with multi-supplier framework agreements vary widely as regards whether all or merely some qualified suppliers whose submissions are responsive are to be admitted to the framework agreement. For example, article 32 (2) of the EC Directive implicitly provides that the procuring entity need not conclude the framework agreement with all such suppliers, but must make a selection based on the award criteria. The Directive continues that where possible the framework agreement must be concluded with at least three suppliers.

8. In the United States, on the other hand, at the first stage submissions are assessed in terms of price, quality and the qualifications of tenderers but there is little or no exclusion of qualified suppliers whose submissions are responsive, because the emphasis is placed on second-stage competition, in which suppliers are to be given a fair opportunity to compete.[53]

9. The provisions set out above are closer to the United States model than the EC model, in that they do not envisage a competitive selection between qualified suppliers whose submissions are responsive at the first stage, and all parties that are capable of meeting the needs of the procuring entity are to be invited to compete. Although this approach will maximize the pool of suppliers available to compete at the second stage, or choices under a framework agreement procedure without second-stage competition, it means that there is no real competition at the first stage. Studies have shown two effects of this approach: first, suppliers do not provide low prices at the first stage, or otherwise do not seek to present a submission that is better than responsive; and in systems where all competition takes place at the second stage, the theoretical advantages of second-phase competition are not always present in practice and, indeed, that second-phase competition may be inadequate. Further, procuring entities may cite a practical need to limit the numbers invited to compete at the second stage (whether or not the need is real), and may resort to non-transparent means of so doing by way of exception to the normal procedures. Resisting requests for such exceptions for small, repeated procurements that are not conducted electronically may be difficult. Finally, if the same and small numbers of suppliers are regularly invited to compete at the second stage, there may be heightened risks of collusion.[54]

10. The Working Group may wish to consider the provisions relating to first-stage competition in the light of the above observations. For example, it may be considered that for closed framework agreement procedures, the advantages of real first-stage competition may outweigh the disadvantage of restricting the number of parties to the framework agreement. On the other hand, so far as open framework agreements are concerned, particularly where they operate electronically, the converse may be the case.

---

[53] For further detail, see A/CN.9/WG.I/WP.44/Add.1, paras. 17-20.

[54] For further detail, see A/CN.9/WG.I/WP.44/Add.1, paras. 36-42.

B. "Ranking"

11. If the Working Group considers that some limitation on the numbers of parties to the framework agreement should be permitted, the Working Group may wish to retain the provisions relating to evaluation of the first-stage submissions and ranking (or a similar term) of the qualified suppliers whose submissions are responsive. The Working Group may wish to provide for a minimum number of parties to avoid the risks of collusion at the second stage.

12. If there is to be no such limitation, the Working Group may consider that the administrative time and costs of evaluation of submissions (as distinct from examining them) may outweigh the benefits concerned, and decide either to remove the first-stage evaluation or to provide that it is an optional step.

D. Note by the Secretariat on possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services — Guide to Enactment text addressing the use of framework agreements in public procurement, submitted to the Working Group on Procurement at its fourteenth session

(A/CN.9/WG.I/WP.63) [Original: English]

CONTENTS

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 12 to 85 of document A/CN.9/WG.I/WP.60, which is before the Working Group at its fourteenth 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 framework agreements, in public procurement.

2. This note has been prepared pursuant to the request of the Working Group at its thirteenth session to the Secretariat to revise the draft provisions on the use of framework agreements, and those addressing types, conditions and procedures for the use of framework agreements.[1]

II. Draft Guide to Enactment text to addressing the use of framework agreements in public procurement under the Model Law

3. The text that follows is presented as a narrative description of framework agreements. The Working Group may wish to consider the level of detail of the information set out, which is greater than the guidance provided for many of the provisions of the current text of the Model Law, and also in the light of its preliminary decision that the revised Guide to Enactment should primarily be addressed at legislators and regulators, and that guidance for procuring entities and other users could be located elsewhere or as an appendix or supplement to the Guide itself. A greater level of detail in the Guide may be useful when introducing a relatively novel topic, and would avoid repetition and cross references between sources. On the other hand, the Guide to Enactment text could be more closely aligned with the text of the provisions in the Model Law if less background information were provided. The draft below also includes sub-headings, which do not normally appear in Guide to Enactment text.

A. General description of framework agreements procedures

4. Framework agreements procedures can be described as transactions to effect repeated purchases of a product or service over a period of time, which involve:

(a) The solicitation of tenders or other offers against set terms and conditions;

(b) The examination and evaluation of tenders or other offers and the assessment of suppliers' qualifications;[2]

(c) Selected suppliers and the procuring entity entering into a framework agreement on the basis of the tenders or other offers. The framework agreement sets out the terms and conditions of future purchases, and is concluded for a given duration (this is the "first stage of the procurement"); and

(d) Subsequent placing of periodic orders with the supplier(s) under the terms of the framework agreement, as particular requirements arise (which may involve a further round of competition, and is the "second stage of the procurement").

5. Framework agreements are generally used to procure products or services for which a procuring entity has a repeat need over a period of time, but does not know the exact quantities, nature or timing of its requirements. In many cases, the purchases could otherwise be made as a single lot, broken down and awarded over

---

[1] A/CN.9/648, para. 13.

[2] See A/CN.9/WG.I/WP.62, paras. 3-6 for a discussion of the terminology used here.

time. In essence, the transactions establish the main terms upon which purchases will be made (or establish the mechanism to be used to establish those terms), but do not set the remaining terms, which may include the quantities to be delivered at any particular time, and in some cases the overall quantity of the procurement and the price. Reference is made in the above description to "suppliers", but a procuring entity that wishes to conclude a framework agreement with one supplier (for example, to enhance security of supply) can do so.

6. Since the first version of the Model Law was adopted in 1994 (which did not make provision for the use of framework agreements), the use of framework agreements has increased significantly, such that in those systems that use them, a significant proportion of procurement may now be conducted in this way. Some types of framework agreement could arguably be operated without specific provision in the Model Law, but it was considered that specific provision to ensure appropriate use would be necessary to ensure that the particular issues that framework agreements raise are adequately addressed.

B. Potential benefits and concerns observed in the use of framework agreement procedures

7. The main potential benefit of using framework agreements is that framework agreements are administratively efficient because they effectively aggregate procurement proceedings. Under a framework agreement procedure, many steps in the procurement process are undertaken once for what would otherwise be a series of procurements (advertising, assessing suppliers' qualifications and examining and evaluating tenders or other submissions). With the terms and conditions established before an order is placed, purchases can be made with lower transaction costs and shorter delivery times than would be the case were each purchase tendered separately. Other noted benefits include enhancing transparency and competition for smaller procurements, which are sometimes considered at risk of abuse or failure to achieve value for money because of the less transparent and open ways in which they are often conducted (in many cases because they fall below relevant thresholds). Further, the grouping of a series of smaller procurements can amortize advertising and other costs and can facilitate oversight. Framework agreements can also ensure security of supply, and enable further costs savings to be made through centralized purchasing (that is, a central unit of one entity makes purchases for a number of units, or one entity or consortium makes purchases on behalf of several entities).

8. Thus the use of framework agreements could enhance, in particular, two objectives of the Model Law — transparency and efficiency — particularly for procurements that might otherwise fall outside many of the controls of a procurement system.

9. However, concerns that commentators have raised on the topic include that administrative efficiency may be gained at the expense of other procurement objectives. For example, the use of framework agreements simply to achieve administrative efficiencies can compromise value for money because they are not in fact the appropriate tool for the procurement concerned. Procuring entities may procure through an existing framework agreement that does not quite meet their

needs to avoid having to draft their own specifications and terms and conditions, to issue a procurement notice, to examine the qualifications of suppliers, to conduct a full examination and evaluation of tenders and so on.

10. Secondly, experience in their use has indicated significant risks to, or significantly reduced, transparency, competition and value for money in procurement conducted through framework agreements as compared with traditional procurement methods. As regards transparency, the placing of orders at the second stage can be less transparent and more open to abuse than some traditional procurement methods. As regards competition, excluding suppliers that are not parties to the framework agreement can curtail competition, particularly where a monopolistic or oligopolistic market results, and competition once the framework agreement is in place can be difficult to implement in practice. As regards value for money, observers have commented that prices may not remain current and competitive as they tend to remain fixed under a framework agreement, rather than varying with the market, procuring entities tend to overemphasize specifications or quality over price when placing orders under framework agreements and they may fail to assess price and quality sufficiently when placing a particular order. In addition, centralized purchasing entities may have an interest in keeping their fee earnings high by keeping prices high and promoting purchases that go beyond strict needs. These concerns and risks can be elevated where the framework agreements are of longer duration.

11. Thus the approach to the provisions enabling the use of framework agreement procedures under the Model Law is designed to facilitate the appropriate and beneficial use of the technique, but to discourage its use where framework agreement procedures are not in fact appropriate. For example, the procedures can be appropriate for commodity-type purchases, such as stationery, spare parts, information technology supplies and maintenance, which are normally regular purchases for which quantities may vary, and for the purchase of items from more than one source, such as electricity, and for items for which the need can sometimes arise on an emergency basis, such as medicines, and to ensure security of supply in procurement. On the other hand, complex procurement for which the terms and conditions (including specifications) vary for each purchase would not be suitable for this technique, such as large investment or capital contracts, highly technical or specialized items, and more complex services procurement.

C. The framework agreement

12. A framework agreement, depending on its terms and conditions and the law that governs agreements by procuring entities in the enacting State concerned, may be a binding contract. Nonetheless, for the purposes of article 2 (g) of the Model Law, it is not treated as a procurement contract. The procurement contract for the purposes of article 2 (g) of the Model Law is concluded at the second stage of the procedure, when the procuring entity issues an acceptance notice (that is, the procuring entity accepts the supplier's offer to supply the amount requested by the procuring entity at that stage) in accordance with article [13/36] of the Model Law. Thus the provisions regulating the use of framework agreements cover both the first and second stages of the procurement concerned.

13. The framework agreement procedure can take one of three forms:

(a) A "closed" framework agreement procedure, involving a framework agreement concluded with one or more suppliers, and in which the specification for, and all terms and conditions of, the procurement are set out in the framework agreement. As a result, there is no further competition between the suppliers at the second stage of the procurement, and the only difference of this type of framework agreement procedure as compared with traditional procurement procedures is that the items are purchased in batches over a period of time ("Type 1" framework agreements);

(b) A "closed" framework agreement procedure, involving a framework agreement concluded with more than one supplier, and which sets out the specification, and the main terms and conditions of, the procurement. A further competition among the supplier-parties to the framework agreement is required to award the procurement contract at the second stage of the procurement ("Type 2" framework agreements);

(c) An "open" framework agreement procedure, involving a framework agreement concluded with more than one supplier and involving second-stage competition between the supplier-parties ("Type 3" framework agreements). This type of framework agreement is intended to provide for commonly used, off-the-shelf goods or straightforward, recurring services that are normally purchased on the basis of the lowest price. [Add commentary on whether these agreements must operate electronically, or encourage electronic operation, so as to maximise the advantages that the system can bring, depending on the Working Group's resolution as to whether they can operate non-electronically].

14. Type 1 and 2 framework agreements are "closed" in that no suppliers or contractors can become parties to the framework agreement after the first stage of the procurement. Type 3 framework agreements are "open" to new suppliers throughout the duration of the framework agreement.

15. A Type 1 framework agreement can be concluded with one supplier, but Type 2 framework agreements that theoretically could be concluded with one supplier are considered to be at significant risk of abuse, in that they would involve inviting that one supplier to improve its offer for a particular purchase under the framework agreement. Thus Types 2 and 3 framework agreements under the Model Law must be concluded with more than one supplier.

16. The main differences between the types of framework agreement procedure at the first stage are [add commentary addressing the extent of first stage competition, depending on the Working Group's resolution of the question of whether the first stage is competitive for some or all types of framework agreement]. The procuring entity is also required to justify the choice of the type of framework agreement procedure in the record of the procurement [elaborate to address the impact of selecting the first stage level of competition]. The main differences at the second stage is that Types 2 and 3 framework agreements involve a second stage competition between all supplier-parties to the framework, or all those capable of fulfilling the need of the procuring entity at issue (the procedures for which are set out in [cross reference]).

17. There are additional provisions governing the use of Type 3 framework agreement procedures [cross-refer to relevant guidance], designed to ensure that the

framework agreements themselves remain fully open to new joiners throughout their duration, and that their existence is adequately publicised so that potential suppliers or contractors are aware of them. Thus there must be a permanent notice on a procuring entity's website of the existence of a Type 3 framework agreement that operates using electronic means [and regular re-publication of the initial notice of the framework agreement procedure for Type 3 framework agreement procedure that is not operated electronically, in each case] including all the information required when first publishing a notice to participate in the relevant procurement. Procuring entities are required to assess new joiners' qualifications and examine [and evaluate] their submissions within a reasonable time. The Model Law does not prescribe the relevant time, which enacting States should include in their legislation to accord with then prevailing circumstances in the jurisdiction concerned. [discuss improvement of offers, whether procuring entity needs to approve them, to reflect the Working Group's deliberations of the provision in article 51 undecies (7)]

18. [add provisions relating to maximum number of parties to a Type 3 framework agreement procedure, to reflect the deliberations of the Working Group].

D. Controls over the use of framework agreements procedures

19. Controls over the use of framework agreements procedures are included in the text of the Model Law to address the concerns set out above. There are conditions for the use of framework agreement procedures, and mandatory procedures for conducting them. A procuring entity that wishes to use a framework agreement procedure will be required to follow one of the procurement methods of the Model Law to select the suppliers to be parties to the framework agreement (the first stage). In addition, the procedures themselves have been drafted to ensure sufficient competition where a second round of competition is envisaged by extending the provisions of the Model Law to the second stage of the procurement. However, the Working Group has sought to avoid limiting the usefulness of framework agreements and their administrative efficiency by formulating too many conditions for their use or too many inflexible procedures.

20. Practical experience in the operation of framework agreements indicates that the value for money to be obtained through their use is maximized where procuring entities make full use of them to make their purchases, rather than conducting new procurements for the products or services concerned. Where such full use is observed, suppliers and contractors should have greater confidence that they will receive orders to supply the procuring entity, and should give their best prices and quality offers accordingly. On the other hand, the provisions do not require the procuring entity to use the framework agreement, for all subsequent purchases that could be made under it, allowing commercial considerations to dictate the extent of use. Nonetheless, the terms of the framework agreement itself may limit commercial flexibility if guaranteed minimum quantities are set out as one of its terms, though this flexibility should be set against the better pricing from suppliers.

E. Limitation on the duration of the framework agreement

21. The Model Law includes a provision to limit the duration of the framework agreements. Since no supplier or contractor may be awarded a procurement contract under the framework agreement without being a party to the framework agreement, framework agreements have a potentially anti-competitive effect. Ensuing full competition for the purchases envisaged on a periodic basis, by limiting the duration of a framework agreement and requiring subsequent purchases to be reopened for competition is generally considered to assist in limiting the anti-competitive potential. [The enacting State sets its own limit (i.e. no stated limit is set out in the Model Law itself). Practical experience in those jurisdictions that operate framework agreements indicates that the potential benefits of the technique are generally likely to arise where they are sufficiently long-lasting to enable a series of procurements to be made, such as a period of 3-5 years]. Thereafter, the anti-competitive potential may arise, and the terms and conditions of the framework agreement may no longer reflect current market conditions. As different types of product or service may change more rapidly, especially where technological developments are likely, and the appropriate period for each procurement may therefore be significantly shorter than the maximum. Enacting States are therefore encouraged to provide guidance on appropriate durations for particular procurement types, and may also wish to encourage procuring entities themselves to assess on a periodic basis during the currency of the framework agreement whether its terms and conditions remain current.

F. Transparency requirements

22. The solicitation documents for a framework agreement procedure must follow the normal rules: that is, they must set out the terms and conditions upon which suppliers are to provide the goods, construction or services to be procured, the criteria that will be used to select the successful suppliers or contractors, and the procedures for the award of procurement contracts under the framework agreement. The information required will also include the total quantity or minimum and maximum quantities for the purchases envisaged under the framework agreement, to the extent that they are known at the first stage of the procurement, failing which estimates should be provided. This information is required to enable suppliers or contractors to understand the extent of the commitment required of them, which itself will enable the submission of the best price and quality offers. Thus, the normal safeguard that all the terms and conditions of the procurement (including the specifications and whether the selection of suppliers will be based on lowest-price or lowest evaluated tender or other offer) must be pre-disclosed also applies. This information must be repeated in the framework agreement itself, or, if it is feasible and would achieve administrative efficiency, and the legal system in the jurisdiction concerned treats annexes as an integral part of a document, the solicitation documents can be annexed to the framework agreement.

23. The solicitation documents and framework agreements either set out all the terms and conditions of the procurement, with only delivery times and quantities to be set when individual purchases are made and, where necessary, also set out those other terms and conditions that will be established when individual purchases at the

second stage of the procurement [cross reference to guidance on second-stage procedures].

24. The "nature and required technical and quality characteristics, in conformity with article 16, of the goods, construction or services to be procured, including, but not limited to, technical specifications, plans, drawings and designs as appropriate" (description taken from article 27 (d) of the Model Law) are part of those terms and conditions, as are the procedures that will apply for making purchases at the second stage. Thus the solicitation documents and the framework agreement will make it clear either that there will be second-stage competition, and in respect of which terms and conditions, or make the basis upon which non-competitive second-stage purchases will be made. [Cross-refer to commentary about choosing how to allocate purchases at the second stage under Type 1 framework agreements].

25. One feature of selection that is more complex in the context of framework agreements than traditional procurement is the relative weight to be applied in the selection criteria for both stages of the procurement, if any. Particularly where longer term and centralized purchasing are concerned, there may be benefits in terms of value for money and administrative efficiency in permitting the procuring entity to set the relative weights and their precise needs only when making individual purchases (that is, at the second stage of the procedure). On the other hand, transparency considerations, objectivity in the process, and the need to prevent changes to selection criteria during a procurement are central features of the Model Law designed to prevent the abusive manipulation of selection criteria, and the use of vague and broad criteria that could be used to favour certain suppliers. Permitting changes to relative weights during the operation of a framework agreement might facilitate non-transparent or abusive changes to the selection criteria.

26. The Model Law seeks to address these competing objectives by providing that relative weights at the second stage can be varied within a pre-established range or matrix set out in the solicitation documents, and provided that the variation does not lead to a material change to the terms and conditions, including the specifications and overall selection criteria.

27. The conditions for use also require the framework agreement to be in writing, in order to ensure that the terms and conditions are set out clearly for all parties. Enacting States may wish to permit the use of individual agreements between the procuring entity and each supplier that is a party, so as to allow for minor changes in terms and conditions that may be required for intellectual property reasons, where suppliers have submitted offers for only part of the procurement, or other reasons, provided that the minor changes taken together do not constitute a material departure from the terms and conditions applicable to all suppliers or contractors. In addition, where framework agreements to which there are several supplier-parties concerned, each supplier-party will wish to know the extent of its commitment both at the outset and periodically during its operation (such as after a purchase is made under the framework agreement). Enacting States may also wish to encourage procuring entities to inform the suppliers or contractors about the extent of their commitments [add commentary about the extent/duration of commitment, and cross-refer to second-stage notice provisions]. Finally, where framework agreements are to operate electronically, the solicitation documents must contain all the information necessary to allow their effective operation (such as any technical requirements and

connection arrangements, and the website or similar address of the procuring entity where information regarding the procurement is publicized. [cross-refer to discussion of websites in e-procurement]

G. Publicity requirements

28. Concerns have been voiced that the normal publicity mechanisms under procurement systems may not apply to framework agreements (because they are not procurement contracts) and to some procurement contracts under them (if they are under the publication threshold). The Model Law addresses these concerns by providing that the conclusion of a framework agreement must be published as if it were a contract award under the Model Law.3 [add discussion of the information to be published, depending on the Working Group's decision in this regard]. In addition, where the price of a procurement contract or purchase order concluded under a framework agreement exceeds an amount to be set in each enacting State, the procuring entity must promptly publish a notice of the award. In addition, the procuring entity must publish periodic notices of all procurement contracts awarded under a framework agreement. These requirements are additional to the notifications that are to be provided to all supplier-parties to the framework agreement when a purchase is made [cross-refer to relevant provisions].

H. General conditions for use of framework agreement procedures

1. Decision to conduct a procurement using a framework agreement procedure

29. The procuring entity is required to consider whether a framework agreement procedure is appropriate for the procurement envisaged and must record the reason for using a framework agreement procedure in the mandatory record of the procurement. The Model Law provides that a procuring entity may procure through a framework agreement procedure in prescribed conditions, including where the requirement to be procured is anticipated to be recurring, or where the nature of procurement is such that the need for the items concerned is likely to arise on an urgent basis during the term of the framework agreement (for example, emergency medical procurement following a catastrophe), and to ensure security of supply. Thus, a framework agreement procedure can enhance proper procurement planning and avoid unnecessary use of "emergency" procedures in non-emergency situations. The nature of the procurement concerned will dictate whether a framework agreement procedure is appropriate for the particular procedure concerned [cross-refer to earlier commentary on the types of procurement that are and are not suitable] in addition to whether it is permitted under the Model Law, and enacting States may wish to provide guidance on the decision concerned to procuring entities.

---

[3] The Working Group has agreed that Article 14 of the Model Law, which envisages a threshold below which advertisement is not required, will be amended to accommodate framework agreements by providing that it is the aggregate amount under the framework agreement that is the relevant amount, not the amount of individual purchase orders or amount awarded to an individual supplier.

2. Requirement to follow one of the procurement methods of the Model Law at the first stage of a framework agreement procedure

30. A procuring entity that wishes to conclude a framework agreement is required to follow one of the mandated procurement procedures under the Model Law to select the supplier(s) to be parties to the envisaged framework agreement with the procuring entity: that is, to follow open procurement proceedings, so as to ensure rigorous competition at that first stage of the procurement proceedings. Thus, procuring entities should normally use the Model Law's tendering proceedings or the services equivalent as for any other procurement. In order to facilitate the use of framework agreements to protect sources of supply in limited markets, the swift and cost-effective procurement of low-cost, repeated and urgent items, such as maintenance or cleaning services, for which open tendering procurements may not be cost-effective, other methods can be used where they are justified in accordance with Chapter II of the Model Law. Since one of the other procurement methods will be used for this stage of the procurement, the provisions addressing framework agreement procedures [If the Working Group decides to require open procedures for open framework agreements, add further comment here. Add discussion of the importance of competition at the first stage, so as to ensure that the result is a framework agreement rather than a suppliers' list, including commentary on minimum and maximum numbers of parties, the basis of selection and ranking, depending on the results of the Working Group's deliberations on these issues].

31. At the end of the first stage, the provisions require the procuring entity both to notify all suppliers that have been selected to be parties to the framework agreement of their selection, and to publish a notice of the conclusion of the framework agreement (identifying those parties [add any other requirements] as if it were a procurement contract under the Model Law. In addition, where Type 3 framework agreements are concerned, the procuring entity must provide a permanent or periodic notice of the existence of the framework agreement [cross-refer to relevant commentary].

3. Second stage of the framework agreement procedure

32. The procuring entity under a Type 1 framework agreement procedure awards a procurement contract by selecting the submission of the successful supplier. Where there is more than one supplier-party to the framework agreement [add details of how that selection takes place, permitted and non-permitted methods], and the procuring entity applies the terms and conditions of the framework agreement. Safeguards are included in the provisions to ensure that the framework agreement is not materially altered at this second stage, that the supplier selected for the purchase must be a party to the framework agreement, and that purchases made under it are in accordance with its terms and conditions. There are publicity and notice provisions similar to those for framework agreements themselves, requiring in addition that the price of each purchase be disclosed to the supplier-parties to the framework agreement, but allowing smaller purchases to be grouped together for publicity purposes.

33. Under a Type 2 or Type 3 framework agreement, the provisions regulate the conduct of the second-stage competition to select the supplier for the purchase, requiring a written invitation to [tender], providing all pertinent information including the relative weight of the selection criteria in accordance with the range

set out in the solicitation documents and any more precise terms and conditions where necessary, and affording suppliers adequate time to prepare their [tenders]. The invitation to [tender] cannot vary the pre-disclosed terms and conditions of the procurement beyond fixing the relative weights, where necessary. The [tenders] must be evaluated in accordance with the criteria pre-disclosed at the first stage (subject to the fixing of any relative weight within the permitted range) and the successful supplier advised by notice of its selection. Unless the procuring entity exercises its right to reject all [tenders], reject an abnormally low [tender] or otherwise cancel the procurement, the acceptance of the successful [tender] and issue of that notice concludes the procurement contract. The same safeguards and publicity requirements apply as for Type 1 framework agreement procedures.

34. The above procedures are designed to underscore a key element required to ensure that the use of framework agreement procedures does not compromise the objectives of a procurement system: that is, to ensure effective competition at the second stage of the procurement. The need to ensure effective competition is reflected in the requirement that all supplier-parties to the framework agreement must be invited to submit tenders at the second stage, unless they have not submitted tenders for the relevant part of the procurement at the first stage, or otherwise cannot fulfil the proposed procurement contract for capacity or similar reasons, and that all supplier-parties to the framework agreement not invited to submit tenders are nonetheless notified of upcoming purchase orders under the framework agreement. This notice will allow suppliers excluded from the second-stage competition to challenge the exclusion at an early stage, before the procurement contract is concluded.

35. [address review mechanisms under article 52]

E. Note by the Secretariat on possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services — Remedies, conflicts of interest and services procurement in the Model Law, submitted to the Working Group on Procurement at its fourteenth session

(A/CN.9/WG.I/WP.64) [Original: English]

CONTENTS

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 12 to 85 of document A/CN.9/WG.I/WP.60, which is before the Working Group at its fourteenth session. The main task of the Working Group is to update and revise the Model Law, so as to take account of recent developments.

2. At its ninth session, the Working Group noted that the United Nations Convention against Corruption[1] 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 or remedies provisions and those addressing conflicts of interest went beyond the current provisions of the

[1] The text of UNCAC is available at www.unodc.org/unodc/en/treaties/CAC/index.html. UNCAC entered into force on 14 December 2005, following the ratification of its text by 30 signatories. The objectives of UNCAC are to promote, facilitate and support: (i) measures to prevent and combat corruption more efficiently and effectively, (ii) international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery, and (iii) integrity, accountability, and proper management of public affairs and property.

Model Law, and might warrant the further attention of the Working Group in due course.[2]

3. At its sixth session, the Working Group decided that it would consider additional guidance to support the principal method for the procurement of services under Chapter IV of the Model Law at a future session (see, further, paragraphs 34-37 below).

4. This note has been prepared for the Working Group's fourteenth session, to address the topics of domestic review or remedies provisions, conflicts of interest in procurement and services procurement, which the Working Group at its thirteenth session agreed would be considered by the Working Group at its fourteenth session.[3]

II. Remedies (domestic review provisions)

5. At its sixth session, the Working Group also considered the remedies provisions contained in Chapter VI of the 1994 text of the Model Law. It noted that because remedies and enforcement in procurement touched on the legality of government acts and upon the interaction of executive and the judicial branches of a particular State, the provisions of Chapter VI had been drafted to be limited to general guidance, and to be optional.

6. The Working Group decided on a preliminary basis at that session that:

(a) It would be useful to provide further guidance, probably in the Guide to Enactment, on review provisions that national laws could incorporate;

(b) Recognizing the fact that there were different systems, some of which favoured review through the courts while others favoured independent administrative review, the Working Group should leave various options open for enacting States, taking into account that the Model Law was sufficiently flexible in this regard and that the independence of the reviewer would be paramount. If there were a need for additional comments on independence, they could be reflected in the Guide;

(c) Provisions related to the judicial review process should be left for enacting States; and

(d) The list of exceptions in article 52 (2) should be deleted. However, the Guide to Enactment should indicate that enacting States might wish to exclude some matters from the review process, which could include some of those currently listed in that article and other matters. The Guide to Enactment should indicate the rationale for such exclusions and explain the implications of any exclusions, such as the risk that they might preclude effective review and control of the proper management of the procurement process.[4]

7. At its fourteenth session, the Working Group agreed to consider these issues by reference to the existing provisions of Chapter VI of the Model Law, focusing in particular on the exception relating to the selection of the procurement method

---

[2] A/CN.9/595, para. 10.
[3] A/CN.9/648, para. 17, and Annex.
[4] A/CN.9/568, paras. 102-113.

under article 52 (2) (a). This exception has been criticized on the ground that lack of accountability in respect of the selection of procurement methods is one of the areas that has led to most abuses in practice. However, concern has also been expressed within the Working Group and by commentators that allowing the choice of procurement tools within procurement methods to be subject to review (such as the use of electronic reverse auctions and framework agreements to award procurement contracts) might interfere with the proper conduct of the procurement process. In addition, the Working Group may wish to consider the impact of the filing of a review procedure on the conduct of a procurement, and whether suspension of the procurement pursuant to article 56 would always be appropriate.

8. In considering these issues, the Working Group may also recall that UNCAC article 9 (1) (d) requires procurement systems to include "[a]n 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 pursuant to this paragraph are not followed". This requirement is more stringent than the equivalent current rules of the Model Law, in that it is mandatory and not optional. The Working Group may also wish to consider a new European Union Directive relating to review procedures in procurement.[5] This Directive contains detailed provisions, a "standstill period" similar to that found in article 56 of the Model Law, and gives national courts the ability under certain conditions to set aside a signed contract, by rendering the contract "ineffective". The Directive also seeks to combat illegal direct awards of public contracts, which the European Commission considers to be the most serious infringement of EU procurement law. It also seeks to strengthen remedies through damages in addition to nullifying awards. Commentators have expressed the view that one of the express aims of the new Directive, effectiveness, means that the resulting national systems should be robust as well as harmonized. In this regard, the Working Group may wish to consider the degree of consistency between the UNCAC and EU provisions, whose review provisions are not optional, and the Model Law, whose review provisions are optional. The former provide a more recent reflection of the current approach to remedies in procurement.

9. The Working Group may also wish to consider whether the guidance to support the Model Law's review provisions should be expanded. The current guidance addresses the need for a review system, the challenges of drafting provisions of universal application, and the procedures themselves, but does not focus on other policy issues, such as the government entity in which to locate the review body, the scope or jurisdiction of the review, whether persons other than suppliers or contractors should be able to initiate a review, evidence and the standard of proof, and the remedies that the review body can order.[6] Although there would be significant variations from system to system, the Working Group may

---

[5] Directive 2007/66/EC, of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, available at http://ec.europa.eu/internal_market/publicprocurement/remedies/remedies_en.htm.

[6] For a fuller discussion of the policy choices regarding review mechanisms, see "Constructing a bid protest process: the choices that every procurement challenge system must make", Gordon. D.I., Public Contract Law Journal, Spring, 2006. The Working Group may wish to consider whether an express reference to this article might assist legislators.

consider that a discussion of these policy questions might assist those crafting legislation in individual enacting States.

III. Conflicts of interest in procurement

A. Background

10. The term "conflict of interest" is widely used in commercial and legal transactions, and is addressed in many professional codes of conduct. As noted by the International Federation of Consulting Engineers (FIDIC), however, "[d]espite international use of the term, a great deal of confusion and serious problems, both real and perceived, have materialized because there is no universally accepted definition of conflict of interest."[7]

11. Nonetheless, there is a degree of consensus on the notion of an actual conflict of interest. Conflicts of interest in procurement have been described as "circumstances or situations in which the advice, findings or recommendations under a given assignment or the selection process for the assignment in question may be influenced by extrinsic considerations stemming from another assignment or the private interest of officials in charge in the procuring entity."[8] FIDIC has a working definition of conflict of interest regarding consultants as follows: "A consultant conflict of interest (COI) is a situation in which a consultant provides biased professional advice to a client in order to obtain from that client an undue benefit for himself, herself or an affiliate and in so doing, places the consultant in a position where its own interests could prevail over the interests of the client." These provisions therefore focus on actual, rather than perceived, or potential, conflicts of interest.[9]

12. The Sigma Programme (Support for Improvement in Governance and Management, a joint initiative of the Organisation for Economic Co-operation and Development (OECD) and the European Union), on the other hand, takes a stricter view of conflicts of interest, considering them "not only the situation where in fact there is an unacceptable conflict between a public official's interests as a private citizen and his/her duty as a public official, but also those situations where there is an apparent conflict of interest or a potential conflict of interest."[10]

---

[7] See www1.fidic.org/about/statement21.asp. UNCAC does not contain a definition of the term "conflict of interest".

[8] This description was provided to the Secretariat in consultations with the World Bank.

[9] The definition is found at www1.fidic.org/about/statement21.asp.

[10] "Conflict-of-interest policies and practices in nine EU member states: a comparative review", SIGMA Paper no. 36, GOV/SIGMA(2006)1/REV1, available at www.olis.oecd.org/olis/2006doc.nsf/linkto/gov-sigma(2006)1-rev1 (the "SIGMA paper"). The SIGMA paper continues that "An apparent conflict of interest refers to a situation where there is a personal interest that might reasonably be considered by others to influence the public official's duties, even though in fact there is no such undue influence or there may not be such influence. The potential for doubt as to the official's integrity and/or the integrity of the official's organisation makes it obligatory to consider an apparent conflict of interest as a situation that should be avoided. The potential conflict of interest may exist where an official has private-capacity interests that could cause a conflict of interest to arise at some time in the future. An example is the case of a public official whose spouse would be appointed in the

13. It has also been observed that "[w]hile conflicts of interest may ultimately lead to corrupt or collusive behaviour, or to fraud by deliberate lack of disclosure of conflicting interests, they do not, by themselves, constitute corruption, collusion or fraud,"[11] and accordingly they are generally addressed as a part of the promotion of integrity. In other words, as part of the implementation of a general principle that procurement decisions should be taken in a manner that is fair, transparent, free from bias or discrimination, and unaffected by self-interest or personal gain.

14. An example of this approach is found in the OECD's "Integrity in public procurement: Good practice from A to Z", which contains guidance on the avoidance and handling of conflicts of interest situations.[12] The World Trade Organization's draft revised Agreement on Government Procurement (GPA)[13] contains the following statement of principle on conflicts of interest:

> "Conduct of Procurement
>
> "4. A procuring entity shall conduct covered procurement in a transparent and impartial manner that:
>
> "(a) Is consistent with this Agreement, using methods such as open tendering, selective tendering, and limited tendering;
>
> "(b) Avoids conflicts of interest; and
>
> "(c) Prevents corrupt practices."

15. The United Nations Convention against Corruption ("UNCAC") requires procurement systems to address, inter alia, the issue of conflicts of interest in procurement. Article 9 (1) of the text provides, in material part, as follows:

> "Each State Party shall, in accordance with the fundamental principles of its legal system, 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. Such systems, which may take into account appropriate threshold values in their application, shall address, inter alia …
>
> "(e) [w]here appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declaration of interest in particular public procurements, screening procedures and training requirements."

---

coming weeks as executive director or CEO of a company concerned by a recent decision made by the official, and the public official is aware of the spouse's appointment. The basic definition used here therefore assumes that a reasonable person, knowing all of the relevant facts, would conclude that the official's private-capacity interest could improperly influence his/her conduct or decision-making."

[11] This comment was provided to the Secretariat in consultations with the World Bank.

[12] Integrity in Public Procurement: Good Practice from A to Z (OECD, 2007). The text is available at www.oecd.org/document/60/0,3343,en_2649_34135_38561148_1_1_1_1,00.html.

[13] According to the WTO website, in December 2006, negotiators reached provisional agreement on a revision of the text of the 1994 plurilateral Agreement. The agreement of the negotiators is provisional in that it is subject to (i) a legal check; and (ii) a mutually satisfactory outcome to the other aspect of the negotiations on a new Government Procurement Agreement, namely those on an expansion of coverage (i.e. the lists of government entities whose procurement is opened up). The revised text is available at http://docsonline.wto.org/DDFDocuments/t/PLURI/GPA/W297.doc.

16. It was in the light of this requirement that the Working Group "considered the recommendation by the Commission at its thirty-ninth session that the Working Group, in updating 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 (A/61/17, para. 192). The Working Group agreed to add the issue of conflicts of interest to the list of topics to be considered in the revision of the Model Law and the Guide (A/CN.9/615, para. 11)."[14]

B. The nature of conflicts of interest in procurement

17. Examples of conflicts of interest in public procurement provided to the Secretariat include:

(a) Conflict between consulting activities and the procurement of goods or construction;

(b) Certain conflicts within consulting assignments, for example the preparation of terms of reference and participation in the resulting tenders;

(c) The execution of a project or study execution and the evaluation of the same project or study;

(d) The design of a project and the study of its impact on the environment;

(e) Advice given to both government and buyer in, for example, privatization;

(f) A conflict arising from family or other personal relationships, such as supplier fully or partly owned by a procurement official or his family, or where a consulting assignment is supervised by a relative of a key expert in the project concerned;

(g) Other situations in which the prospect of private gain may affect the objectiveness of a procurement decision.[15]

18. The Working Group has also noted that conflicts of interest can arise in particular where procurement is outsourced to commercial agencies, such as may be the case in systems that make use of procurement tools such as framework agreements (through the use of centralized purchasing agencies) and electronic reverse auctions, in connection with which the Working Group noted "that the use of ERAs had also raised a number of concerns, in particular that such use: (e) might create conflicts of interest in market players, such as software firms and 'market makers' or 'e-market operators', and fee-charging centralized purchasing agencies."[16]

---

[14] A/CN.9/623, para. 4.

[15] Examples taken from the FIDIC guidance (see footnote 1, supra), and provided to the Secretariat to the World Bank.

[16] A/CN.9/575, para. 54.

C. The requirements of UNCAC

19. The requirements of article 9 (1) (e) of UNCAC, together with provisions in its article 8 ("Codes of Conduct for Public Officials"), which require each State Party to promote (inter alia) "integrity, honesty and responsibility" among its public officials, and to endeavour to apply codes or standards of conduct,[17] are commonly considered to mean that procurement legislation or regulation should require all interests, assets, hospitality and gifts to be declared and registered. The purpose of the disclosure is to identify potential conflicts between an employee's official position and the employee's private interests, so that appropriate protections against such conflicts can be fashioned. This approach is generally the one taken by national legislatures that address conflicts of interest, that is, the use of disclosure provisions to assess whether a real rather than a potential conflict may exist, against which action can be taken.[18]

D. Approach to regulation of conflicts of interest

20. In addition to the general statements of procurement system objectives set out above, addressing the principle of integrity and avoidance of conflicts of interest in procurement, there are recent examples of enacting States passing legislation that addresses conflicts of interest as a distinct topic. In Canada, for example, conflicts of interest are addressed in the Conflict of Interest Act, which came into force on July 9, 2007.[19] The provisions applicable to procurement, contained in sections 14, 15, 35 and 36 of the Act, prohibit public servants of their relevant employing departments from entering into contracts in which family members of the public servant have an interest, as follows: "14. (1) No public office holder who otherwise has the authority shall, in the exercise of his or her official powers, duties and functions, enter into a contract or employment relationship with his or her spouse, common-law partner, child, sibling or parent." Similar provisions apply to specific categories of office-holder. The sections also prohibit public servants from engaging in outside activities, including outside employment or professional or commercial activity, holding office in a union or professional association, engaging in paid consultancies or being an active partner in a partnership. The legislation also prevents public officials from accepting employment with entities with which they

---

[17] Article 8 (5) provides that "Each State Party shall endeavour, where appropriate and in accordance with the fundamental principles of its domestic law, to establish measures and systems requiring public officials to make declarations to appropriate authorities regarding, inter alia, their outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result with respect to their functions as public officials."

[18] See, for example, the Canadian provisions available at www.tbs-sct.gc.ca/pubs_pol/dcgpubs/ContPolNotices/2007/0813_e.asp, and the Australian provisions available at www.nt.gov.au/dcis/procurement_policy/documents/policy/po7_conflict_interest.pdf.

[19] The full text of the law is available at http://laws.justice.gc.ca/en/showdoc/cs/C-36.65//20070709/en?command=search&caller=SI&search_type=all&shorttitle=conflict%20of%20interest%20act&day=9&month=7&year=2007&search_domain=cs&showall=L&statuteyear=all&lengthannual=50&length=50.

formerly had "direct and significant official dealings" "for one year from ceasing their public duties".[20]

21. In Australia, the Public Sector Employment and Management Act, Employment Instruction 13, contains a code of conduct that applies to all procurement officials (as public servants). There are criminal sanctions for breaches of legislative and procedural requirements, along with civil penalties such as dismissal from employment.[21]

22. In the United States, the Procurement Integrity Act[22] addresses conflicts of interest, and further regulation is found in the Federal Acquisition Regulations. The general principle is to avoid any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships. The provisions both place restrictions on the actions of public servants and require their official conduct to be such that they would have no reluctance to make a full public disclosure of their actions.[23]

23. The World Bank's policy on conflicts of interest is set out in paragraph 1.08 (b) of its "Guidelines: Procurement under IBRD Loans and IDA Credits" (the "Procurement Guidelines") and in paragraphs 1.9 and 4.12 of the Guidelines: Selection and Employment of Consultants by World Bank Borrowers (the "Consultant Guidelines").24 The Bank notes that the provisions, which are set out below, can be transposed or used as a set of model provisions in national legislative instruments, and are generally accepted by suppliers as sound, fair and predictable:

(a) Procurement Guidelines, section 1.8 (b), addressing eligibility or qualification: "A firm which has been engaged by the Borrower to provide consulting services for the preparation or implementation of a project, and any of its affiliates, shall be disqualified from subsequently providing goods, works, or services resulting from or directly related to the firm's consulting services for such preparation or implementation. This provision does not apply to the various firms (consultants, contractors, or suppliers) which together are performing the contractor's obligations under a turnkey or design and build contract";

(b) Consultant Guidelines, section 1.9, addressing conflict of interest: "Bank policy requires that consultants provide professional, objective, and impartial advice and at all times hold the client's interests paramount, without any consideration for future work, and that in providing advice they avoid conflicts with other assignments and their own corporate interests. Consultants shall not be hired for any

---

20 The sections are set out in full at www.tbs-sct.gc.ca/pubs_pol/dcgpubs/ContPolNotices/2007/0813_e.asp.

21 See www.nt.gov.au/dcis/procurement_policy/documents/policy/po7_conflict_interest.pdf.

22 See "Integrating Integrity and Procurement: The United Nations Convention Against Corruption and the UNCITRAL Model Procurement Law", Yukins, C. R., Public Contract Law Journal, Vol. 36, No. 3, 2007, footnote 46, citing 41 U.S.C., 423.

23 Federal Acquisition Regulation 3.101, 3.104-1 et seq. See, further, Yukins, op. cit., footnotes 46 and 47.

24 The Procurement Guidelines are available at http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,,contentMDK:20060840~pagePK:84269~piPK:60001558~theSitePK:84266,00.html, and the Consultant Guidelines at http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,,contentMDK:20060656~menuPK:93977~pagePK:84269~piPK:60001558~theSitePK:84266,00.html?.

assignment that would be in conflict with their prior or current obligations to other clients, or that may place them in a position of being unable to carry out the assignment in the best interest of the Borrower. Without limitation on the generality of the forgoing, consultants shall not be hired under the circumstances set forth below:

> "(i) Conflict between consulting activities and procurement of goods, works or services (other than consulting services covered by these Guidelines): A firm that has been engaged by the Borrower to provide goods, works, or services (other than consulting services covered by these Guidelines) for a project, and each of its affiliates, shall be disqualified from providing consulting services related to those goods, works or services. Conversely, a firm hired to provide consulting services for the preparation or implementation of a project, and each of its affiliates, shall be disqualified from subsequently providing goods, works or services (other than consulting services covered by these Guidelines) resulting from or directly related to the firm's consulting services for such preparation or implementation;
>
> "(ii) Conflict among consulting assignments: Neither consultants (including their personnel and sub-consultants) nor any of their affiliates shall be hired for any assignment that, by its nature, may be in conflict with another assignment of the consultants. As an example, consultants hired to prepare engineering design for an infrastructure project shall not be engaged to prepare an independent environmental assessment for the same project, and consultants assisting a client in the privatization of public assets shall neither purchase, nor advise purchasers of, such assets. Similarly, consultants hired to prepare Terms of Reference (TOR) for an assignment shall not be hired for the assignment in question;
>
> "(iii) Relationship with Borrower's staff: Consultants (including their personnel and sub-consultants) that have a business or family relationship with a member of the Borrower's staff (or of the project implementing agency's staff, or of a beneficiary of the loan) who are directly or indirectly involved in any part of: (i) the preparation of the TOR of the contract, (ii) the selection process for such contract, or (iii) supervision of such contract may not be awarded a contract, unless the conflict stemming from this relationship has been resolved in a manner acceptable to the Bank throughout the selection process and the execution of the contract";
>
> (iv) Consultant Guidelines, section 1.10, addressing unfair competitive advantage: "Fairness and transparency in the selection process require that consultants or their affiliates competing for a specific assignment do not derive a competitive advantage from having provided consulting services related to the assignment in question. To that end, the Borrower shall make available to all the short-listed consultants together with the request for proposals all information that would in that respect give a consultant a competitive advantage."

24. The SIGMA paper lists what it refers to as: "[T]he most important instruments to prevent and avoid conflict of interest … :

> "(a) Restrictions on ancillary employment;
>
> "(b) Declaration of personal income;

"(c) Declaration of family income;

"(d) Declaration of personal assets;

"(e) Declaration of family assets;

"(f) Declaration of gifts;

"(g) Security and control of access to internal information;

"(h) Declaration of private interests relevant to the management of contracts;

"(i) Declaration of private interests relevant to decision-making;

"(j) Declaration of private interests relevant to participation in preparing or giving policy advice;

"(k) Public disclosure of declarations of income and assets;

"(l) Restrictions and control of post-employment business or NGO activities;

"(m) Restrictions and control of gifts and other forms of benefits;

"(n) Restrictions and control of external concurrent appointments (e.g. with an NGO, political organisation, or government-owned corporation);

"(o) Recusal and routine withdrawal of public officials from public duty when participation in a meeting or making a particular decision would place them in a position of conflict);

"(p) Personal and family restrictions on property titles of private companies;

"(q) Divestment, either by the sale of business interests or investments or by the establishment of a trust or blind management agreement."[25]

25. The Working Group may wish to consider, as a first step, the question of whether any or all of the requirements of UNCAC contained in article 9 (1) (e) should be addressed in the text of the Model Law, or by way of regulations or other guidance. It may be recalled that UNCAC requires that the procurement system (and not necessarily its primary procurement legislation) should address these issues, and implementation of the relevant requirements is to be effected "in accordance with the fundamental principles of [the State Party's] legal system."

26. The Working Group may also recall that the scope of the Model Law, as described in its accompanying Guide to Enactment, is as follows: first, it is "a framework law, to be supplemented by procurement regulations to fill in the procedural details for the procedures authorized by the Model Law",[26] and it addresses the "procedures to be used by procuring entities in selecting the supplier or contractor with whom to enter into a given procurement contract".[27] Consequently, it does not address the supporting administrative structure, or other legal questions that might be found in other bodies of law (administrative, contract

---

[25] SIGMA paper, op. cit.

[26] Guide to Enactment, *A framework law to be supplemented by procurement regulations*, paragraph 12.

[27] The Guide to Enactment also states that the Model Law does not address the terms of contract for a procurement, the contract performance or implementation phase (*Introduction*, paragraph 12), including resolution of contract disputes, and by implication, the procurement planning phase.

and judicial-procedure law).[28] The Guide to Enactment states that the text "assumes that the enacting State has in place, or will put into place, the proper institutional and bureaucratic structures and human resources necessary to operate the type of procurement procedures provided for in the Model Law,"[29] which matters are accordingly not addressed in the text of the Model Law itself. The Guide to Enactment nonetheless continues with a discussion of the administrative and oversight functions that the enacting State might wish to put in place. The training of personnel is noted as an important consideration in paragraph 37 (d) of the Guide to Enactment, as an example of functions relating to the overall supervision of procurement that could be delegated to a central organ or authority (e.g., ministry of finance or of commerce, or central procurement board), or more than one such entity.

27. If the Working Group considers that the text of the Model Law should contain provisions addressing conflicts of interest, it may then wish to consider whether to formulate provisions based on the principle of integrity, such as is found in the GPA, or to provide a more rules-based approach, such as is present in the other provisions cited in the preceding paragraphs. If it chooses the latter approach, the Working Group may wish to address the level of detail for the rules concerned: for example, whether a list such as that provided in the SIGMA paper might provide useful guidance, or whether that level of detail might be more appropriate for the Guide or regulations. In addition, the Working Group may wish to make provision for a period during which a former procurement official is prohibited from accepting employment with entities whose business is linked to the official's former duties.[30]

28. The Working Group may also wish to consider the extent to which the Model Law or Guide to Enactment should address consequences for breaches of any provisions on conflict of interest. By way of example of a consequence for inappropriate actions already contained in the Model Law, the Working Group may recall the provisions of article 15 (Inducements from suppliers or contractors), which provide that, "a procuring entity shall reject a tender, proposal, offer or quotation if the supplier or contractor that submitted it offers, gives or agrees to give, directly or indirectly … an offer of employment or any other thing of service or value, as an inducement …" during the procurement process. The World Bank notes that the appropriate consequence should reflect the conflict issue concerned: for example, ineligibility of a supplier for the procurement if the conflict arises

---

[28] Guide to Enactment, *A framework law to be supplemented by procurement regulations*, paragraph 14.

[29] Guide to Enactment, paragraph 36.

[30] UNCAC article 12 (2) (e) requires States parties to prevent conflicts of interest by "imposing restrictions, as appropriate and for a reasonable period of time, on the professional activities of former public officials or on the employment of public officials by the private sector after their resignation or retirement, where such activities or employment relate directly to the functions held or supervised by those public officials during their tenure". Canada, as noted above, has similar provisions, as does the United States in 5 C.F.R., 2635.604, and as is recommended by the OECD in its "Integrity in Public Procurement". Indeed, the United States regulation is both detailed and extensive: for example, it prevents an offer of employment from a contractor to an official overseeing that contractor's business, or to the official's child (see, Yukins, op. cit., citing 18 U.S.C., 208, and referring to a compendium of U.S. statutes governing ethics in government service, see U.S. Office of Government Ethics, Compilation of Federal Ethics Laws (2004), available at www.usoge.gov/pages/laws_regs_fedreg_stats/comp_fed_ethics_laws.pdf).

during the procurement process, and ineligibility of a supplier for future procurement if the process has been completed (noting, however, that the latter is considered difficult to enforce because the legal or natural persons concerned may change).

29. As regards relationships that may give rise to conflicts, the World Bank provisions are to the effect that either the procurement official should disqualify himself from participating in the procurement process, or else the provider of services should be disqualified from being awarded the contract.[31] These relationship-based conflicts of interest cannot be mitigated, and accordingly sanctions such as those above are the only effective consequence, whereas an unfair competitive advantage given to one supplier, for example, can be remedied through disclosure of the information concerned to other suppliers.

30. UNCAC, in the provisions of its criminalization and law enforcement chapter, contains sanctions that would be appropriate for cases of corruption (articles 19-50), but the Working Group may consider that they would be of limited assistance to a conflict of interest situation per se.

31. The Working Group may alternatively, or in addition, wish to address the topic of conflicts of interest in the Guide to Enactment, for example, by expanding on the comments found in paragraphs 36 and 37 of the current text.[32] An example of additional guidance is found in the OECD's Integrity in Public Procurement,[33] which contains a chapter on "Preventing conflict of interest and corruption". It addresses the topic from a functional standpoint, and is introduced as follows. It is noted that procurement systems require: "… a clear set of values and ethical standards clarifying how to achieve these objectives. Specific ethical guidance has been developed in several countries defining clear restrictions and prohibitions for procurement officials in order to avoid conflict-of-interest situations and prevent corruption both at individual and organisational levels." Its text then addresses the following aspects of conflict-of-interest provisions: organizational aspects (separation of duties and authorizations), defining ethical standards for public officials, defining specific standards for procurement officials, applying those standards, and partnering with bidders to prevent conflict of interest and corruption. Examples are given of steps and measures taken in various OECD countries and others that were surveyed for the publication itself.

32. Guidance can also discuss, for example, appropriate terms and conditions of service, procedural controls (such as benchmarking performance, or the rotation of

---

31 The World Bank incorporates rules to this effect in its tender and contract documents. The United Kingdom's National Audit Office addressing audit-related conflicts of interest in procurement, notes as follows: "7.27 When selecting suppliers, consideration should be given to the extent to which conflicts of interest exist involving firms and the individuals they employ, and the extent to which they may affect the work being undertaken. "Chinese Walls" within the firm are not considered to be an effective way of managing conflicts alone. However, they may be used in conjunction with other methods. When drawing up contracts, contractual terms to prevent the firms increasing their conflict of interest should be considered. The Central Procurement Team should be consulted in difficult cases, in order to maintain consistency and avoid creating inappropriate precedents." (see www.nao.org.uk/manuals/procurement/chapter7.htm#conflict).

32 Paragraph 26 and footnote 29, above.

33 OECD, Integrity in Public Procurement, op. cit.

staff, to avoid the risk of inducements from lengthy incumbency), regular appraisals, and confidential reporting, and can permit the assessment of past standards of conduct when considering candidates for procurement posts. Regulations can mandate specialist training in procurement and ethical conduct.

33. Guidance at interpreting affiliations, family and other relationships, unfair competitive advantage, and whether an application should be strict or retain some flexibility may also be considered useful,34 but the Working Group may wish to consider whether reference to other publications might be a preferable solution than setting out detailed guidance in the Guide to Enactment itself, particularly in the light of the continuing developments in this aspect of procurement regulation. In this regard, the Working Group may recall that paragraph 40 of the current Guide to Enactment refers the reader to "Improving Public Procurement Systems", Guide No. 23 issued by the International Trade Centre UNCTAD/GATT (Geneva), which publication, it is noted, "discusses a variety of the institutional, staff development and training and policy issues affecting public procurement".

IV. Services procurement

34. At its sixth session, the Working Group focused on the question of whether the Model Law should be revised so as to narrow the scope of services for which the "principal method for procurement of services" provided for in articles 37-45 of the Model Law could be used. The Working Group considered that the services provisions had worked satisfactorily in practice particularly for the procurement of intellectual services (services that do not lead to measurable physical outputs, such as consulting or other professional services), but that where the procuring entity could provide quality and quantity specifications in advance of the procurement concerned, the services provisions might be less appropriate. It was also observed that considering services separately in the Model Law had led to a focus on the special characteristics of some services procurement, rather than on the common features of many procurements of goods and construction and those of services.[35]

35. At the sixth session, having considered whether (a) the use of the principal method for procurement of services should be restricted to intellectual services; (b) tendering should be the principal method for the procurement of services; and (c) whether tendering should be the second preferred alternative after the request for proposals procedure (or vice versa), the Working Group agreed on a preliminary basis that the Model Law should retain all the various options in methods for the procurement of services currently provided. Hence, the Working Group did not consider that the text of the Model Law should be revised. However, support was expressed for the provision of further guidance in the Guide to Enactment for the use of each of the three selection procedures within the services provisions, depending on the type of services at issue and the relevant circumstances. Thus, for

---

[34] Flexibility can be appropriate where the behaviour can be remedied. Thus where an unfair competitive advantage to one supplier has been given, disclosure of the relevant information to all suppliers can mitigate the concern, and further action within the procurement may not be needed (as compared to the position of the relevant procurement official, which may warrant further steps).

[35] A/CN.9/568, paras. 79-93.

example, the guidance could address the desirability of using the principal method for the procurement of services primarily for intellectual services, how to address definitions (of "intellectual services" and other services concepts), how to address projects that might comprise several stages and mixed projects, and how detailed should the guidance be, in the light of the Working Group's desire to avoid excessive prescription in the Model Law and the Guide to Enactment.

36. In addition, and in order to address some of the concerns raised at the sixth session about overuse or inappropriate use of the services provisions, the Guide could expand on the philosophy behind Chapter II of the Model Law (which requires procurement of goods and construction to be conducted using tendering proceedings, unless one of the alternative methods is justified) and how that philosophy could be applied to the procurement of services. For example, the Guide could refer to a presumption in favour of tendering for services procurement (rather than the freer choice currently available), unless the circumstances would justify the use of the more flexible services provisions. Those circumstances might include those discussed in paragraphs 88-93 of the Working Group's report of its sixth session.[36]

37. The Working Group may therefore wish to provide further guidance to the Secretariat on the question of procurement of services, drawing on its discussion at the sixth session and paragraphs 41 to 44 of a note prepared by the Secretariat for that session (A/CN.9/WG.I/WP.32), in particular as regards the level of detail of further guidance to be set out in the Guide to Enactment.

---

[36] A/CN.9/568.

F. Report of the Working Group on Procurement on the work of its fifteenth session (New York, 2-6 February 2009)

(A/CN.9/668) [Original: English]

CONTENTS

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 (A/59/17, para. 82).

2. 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 its seventh to thirteenth sessions (New York, 4-8 April 2005, Vienna, 7-11 November 2005, New York, 24-28 April 2006, Vienna, 25-29 September 2006, New York, 21-25 May 2007, Vienna, 3-7 September 2007, and New York, 7-11 April 2008, respectively) (A/CN.9/575, A/CN.9/590, A/CN.9/595, A/CN.9/615, A/CN.9/623, A/CN.9/640 and A/CN.9/648), the Working Group considered the topics related to the use of electronic communications and technologies in the procurement process. At its seventh, eighth and tenth to twelfth sessions, the Working Group in addition considered the issues of abnormally low tenders (ALTs), including their early identification in the procurement process and the prevention of negative consequences of such tenders. At its thirteenth and fourteenth (Vienna, 8-12 September 2008, A/CN.9/664) sessions, the Working Group held an in-depth consideration of the issue of framework agreements. At its thirteenth session, the Working Group also discussed the issue of suppliers' lists and decided that the topic would not be addressed in the Model Law. At its fourteenth session, the Working Group also held an in-depth consideration of the issue of remedies and enforcement and addressed the topic of conflicts of interest.

3. At its thirty-eighth to forty-first sessions, in 2005 to 2008, 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, A/61/17, para. 192, A/62/17 (Part one), para. 170, and A/63/17, para. 307). At its thirty-ninth session, the Commission recommended that the Working Group, in updating 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 (A/61/17, para. 192). At its fortieth session, the Commission recommended that the Working Group should adopt a concrete agenda for its forthcoming sessions in order to expedite progress in its work (A/62/17 (Part one), para. 170). Pursuant to that recommendation, the Working Group adopted the timeline for its deliberations at its twelfth and thirteenth sessions (A/CN.9/640 and A/CN.9/648, annex), and agreed to bring an updated timeline to the attention of the Commission on a regular basis. At its forty-first session, the Commission invited the Working Group to proceed expeditiously with the completion of the project, with a view to permitting the finalization and adoption of the revised Model Law, together with its Guide to Enactment, within a reasonable time (A/63/17, para. 307).

II. Organization of the session

4. The Working Group, which was composed of all States members of the Commission, held its fifteenth session in New York, from 2-6 February 2009. The session was attended by representatives of the following States members of the Working Group: Algeria, Austria, Belarus, Benin, Bulgaria, Canada, Chile, China, Colombia, Czech Republic, Ecuador, Egypt, France, Germany, Greece, Guatemala, Honduras, Iran (Islamic Republic of), Italy, Kenya, Mexico, Mongolia, Morocco, Nigeria, Paraguay, Poland, Republic of Korea, Senegal, Singapore, Spain, Sri Lanka, Thailand, United States of America, Venezuela (Bolivarian Republic of) and Zimbabwe.

5. The session was attended by observers from the following States: Afghanistan, Angola, Bangladesh, Belgium, Brazil, Croatia, Democratic Republic of the Congo, Holy See, Indonesia, Peru, Philippines, Qatar, Romania, Tunisia and Turkey.

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

(a) *United Nations system*: United Nations Office of Legal Affairs and World Bank;

(b) *Intergovernmental organizations*: Asian-African Legal Consultative Organization (AALCO), Caribbean Community (CARICOM), European Commission, European Space Agency (ESA), International Development Law Organization (IDLO), Organization for Economic Co-operation and Development (OECD) and Organization for Security and Co-operation in Europe (OSCE);

(c) *International non-governmental organizations invited by the Working Group*: American Bar Association (ABA), Association of the Bar of the City of New York, Forum for International Conciliation and Arbitration C.I.C (FICACIC), International Bar Association (IBA), International Federation of Consulting Engineers (FIDIC) and International Law Institute (ILI).

7. The Working Group elected the following officers:

Chairman: Mr. Jeffrey Wah Teck CHAN (Singapore)

Rapporteur: Sra. Ligia GONZÁLEZ LOZANO (Mexico)

8. The Working Group had before it the following documents:

(a) Annotated provisional agenda (A/CN.9/WG.I/WP.65);

(b) Possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services — a revised text of the Model Law (A/CN.9/WG.I/WP.66 and Add.1-5).

9. 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

10. At its fifteenth 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 referred to in paragraph 8 above as a basis for its deliberations.

11. The Working Group noted that it completed the first reading of the revised text and although a number of issues were outstanding, including the entire chapter IV, the conceptual framework was agreed upon. It also noted that further research was required for some provisions in particular in order to ensure that they were compliant with the relevant international instruments.

12. The Working Group requested the Secretariat to revise the drafting materials contained in document A/CN.9/WG.I/WP.66/Add.1-4, reflecting its deliberations at the fifteenth session, for further consideration.

IV. Consideration of proposals for the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services

A. Review of outstanding issues and a proposed new drafting approach in document A/CN.9/WG.I/WP.66 and addenda

13. The Working Group heard an introduction of document A/CN.9/WG.I/WP.66 and its addenda.

14. General support was expressed for the suggested drafting approach, which would eliminate the distinction between the procurement of goods, construction and services and instead would draw a distinction between various procurement methods based on the complexity of the procurement concerned.

15. The Working Group agreed to consider the specific issues discussed in document A/CN.9/WG.I/WP.66 in conjunction with the related provisions of the draft revised Model Law in A/CN.9/WG.I/WP.66/Add.1-4. The Working Group noted that a table setting out correlation of new proposed provisions to the provisions of the 1994 Model Law was contained in document A/CN.9/WG.I/WP.66/Add.5.

B. Review of provisions of the draft revised Model Law (A/CN.9/WG.I/WP.66/Add.1-4)

1. CHAPTER I. GENERAL PROVISIONS (A/CN.9/WG.I/WP.66, paras. 54-64, and A/CN.9/WG.I/WP.66/Add.1 and 2)

Article 1. Scope of application (A/CN.9/WG.I/WP.66, paras. 54-55)

16. The Working Group noted that the proposed article was based on article 1 of the 1994 Model Law. It considered whether the defence and national security blanket exemptions should be eliminated in a revised Model Law, with the effect that the procurement regime of the Model Law would apply to all sectors of the economy in the enacting State. The Working Group noted justifications for taking such approach in document A/CN.9/WG.I/WP.66 (paras. 54-55) in particular that not all procurement in these sectors was so sensitive or confidential as to justify blanket exemptions from the provisions of the Model Law.

17. The Working Group agreed to remove the reference to the exception in the proposed article and approved the draft article as revised at the current session. (See also para. 63 below for the suggestions made relating to this article.)

Article 2. Definitions (A/CN.9/WG.I/WP.66, paras. 62-63)

18. The Working Group noted that the proposed article was based on article 2 of the 1994 Model Law and that a number of changes were suggested to be made in the draft article, in particular the addition of several new definitions.

19. Noting the interaction of the article with other provisions of the Model Law, the Working Group decided to defer the consideration of the proposed article 2 to a later stage. This decision was without prejudice to the understanding in the Working Group that some terms would have to be considered in conjunction with the related provisions of the Model Law at the time when the Working Group considered them. (For subsequent decisions relating to article 2, see paras. 66 (c) and (d), 229, 235 and 272-274 below.)

Article 3. International obligations of this State relating to procurement [and intergovernmental agreements within (this State)]

20. The Working Group noted that the proposed article reproduced article 3 of the 1994 Model Law. The Working Group approved the draft article without change.

Article 4. Procurement regulations

Paragraph (1)

21. The Working Group noted that the paragraph reproduced article 4 of the 1994 Model Law. The Working Group approved the paragraph without change.

Paragraph (2)

22. The Working Group noted that the paragraph was new and was introduced further to the Working Group's decision taken at its fourteenth session regarding the topic of conflicts of interest (A/CN.9/664, paras. 17 and 116). It further noted that, under the proposed new text, a code of conduct as part of procurement regulations

would be subject to mandatory publication in accordance with article 5 (1) of the proposed revised Model Law.

23. The Working Group considered whether the reference to avoidance of conflicts of interest in square brackets was necessary in the Model Law so as to link the text with the requirements of the United Nations Convention Against Corruption[1] (UNCAC), or whether reference in the Guide to Enactment would be sufficient.

24. A proposal was made that the revised Model Law itself not the Guide should incorporate provisions from UNCAC that sets examples of what constituted conflicts of interest in public procurement (articles 8 and 9). An alternative view was expressed that these provisions should be put in the Guide, not the Model Law. The latter, it was proposed, should mandate a code of conduct for officers or employees of procuring entities, and should set out only the essential principles that such a code should contain. Some delegates supported that view on the ground that repeating only some provisions from UNCAC in the Model Law might distort the context in which they were set out in UNCAC and in the process some other important and relevant provisions from UNCAC might be overlooked. It was stressed at the same time that placing the provisions from UNCAC in the Guide rather than in the Model Law should avoid giving the impression that the negative effects of the conflicts of interest on transparency and accountability were underestimated.

25. Another concern was expressed that UNCAC did not deal with all cases of conflicts of interest and therefore mentioning only the examples from UNCAC in the Model Law might be misleading. The preferred option, it was said, would be for the Model Law to address the conflicts of interest in terms of general principles, leaving more detail to enacting States to regulate.

26. The Working Group agreed to replace the term "officials engaged in procurement" with the term "officers or employees of procuring entities", so as to ensure conformity with the terms used elsewhere in the Model Law (such as article 2, definition of a "procuring entity", and article 27 (u), reference to officers and employees).

27. The Working Group further agreed that the square brackets in paragraph (2) would be deleted and the following provision drafted on the basis of article 9 (1) (e) of UNCAC would be added: "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".

28. It was also agreed that the following provisions from article 8 (5) of UNCAC, which was of general rather than procurement-specific application, should be reflected in the Guide: "where appropriate, measures and systems requiring public officials to make declarations to appropriate authorities regarding, inter alia, their outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result". The understanding was that the Guide should highlight concerns expressed at the current session regarding problems with providing exhaustive provisions on conflicts of interest in the Model Law and that it would also emphasize enacting States' role in eliminating gaps in regulation and in

[1] General Assembly resolution 58/4, annex. Entered into force on 14 December 2005.

enacting measures for the effective implementation of the UNCAC relevant provisions on the conflicts of interest.

29. Referring to the practical difficulties in the proper implementation of the Model Law in some countries, some delegates stressed the importance of supplementing the provisions on conflicts of interest in the revised Model Law with the provisions in the Guide that would list measures (for example, training) that should be enacted to ensure effective implementation. It was also suggested that the Guide should point out that conflicts of interest were regulated differently in different jurisdictions.

30. The Working Group approved the paragraph as revised at the current session.

Article as a whole

31. The Working Group approved the draft article as revised at the current session.

Article 5. Publication of legal texts

32. The Working Group noted that the proposed article was as preliminarily approved by the Working Group at its twelfth session (A/CN.9/640, paras. 30-33), except for its paragraph (3), which had been set out in a separate article 6, immediately following article 5. The Working Group approved the draft article without change.

Article 6. Information on forthcoming procurement opportunities

33. The Working Group noted that the proposed article was based on draft article 5 (3) as preliminarily approved by the Working Group at its twelfth session (A/CN.9/640, para. 34).

34. The suggestion was made that, in order to avoid ambiguities as regards the intended scope of the article, the Guide should explain that the reference in the article was made to long-term general plans rather than immediately upcoming procurement opportunities. Another view was expressed that the proposed article itself should be redrafted to eliminate any ambiguities as regards its intended scope.

35. Another suggestion was to replace the word “may” with the word “shall”, in the proposed article. The opposing view was that, taking into account that the article was intended to cover indicative general information about future procurement plans only, it should remain facilitative rather than prescriptive. The Working Group recalled its previous deliberations on the same subject and noted the difficulties of regulating mandatory publication of this type of information, such as timing of original publication and amendments.

36. It was proposed that the article should be deleted entirely, since it imposed unnecessary burdens on procurement entities. The Working Group recalled its previous deliberations of a similar suggestion and its decision to retain the provisions on publication of forthcoming procurement opportunities as being important for strategic planning and transparency.

37. Noting that the ambit of the article was to address longer term procurement plans and not procurement opportunities that might arise in the short term, it was agreed that the provision should remain optional and not mandatory, and that the Guide would explain the benefits of such publication for strategic and operational

planning. It was also agreed that the Guide would emphasize that the provision should not facilitate collusion and lobbying through the effective pre-advertisement of forthcoming procurements. Accordingly, the following text was agreed to replace the first sentence of draft article 6: "Procuring entities may publish information regarding planned procurement activities for forthcoming months or years". It was agreed that the second sentence of the article would be retained without change.

38. The Working Group approved the draft article as revised at the current session.

Article 7. Rules concerning methods of procurement and type of solicitation (also A/CN.9/WG.I/WP.66, paras. 32-48 and 67-69)

39. The Working Group noted that the proposed article was new and was based on a number of provisions, in particular article 18 and other provisions of chapter II, of the 1994 Model Law. It was further noted that the article sought to provide a hierarchy of procurement methods and principles that would apply to the choice of a procurement method, technique or procedure, including the single-source procurement, and type of solicitation. The Working Group proceeded with a paragraph-by-paragraph consideration of the article.

Paragraph (1)

40. The Working Group noted that the paragraph was based on article 18 (1) of the 1994 Model Law. The Working Group approved the paragraph without change.

Paragraph (2)

41. The Working Group noted that the paragraph was based on article 18 of the 1994 Model Law.

42. The proposal was made to replace the words "the most competitive" with the words "the most efficient", taking into account in particular that public procurement might be used for achieving socioeconomic goals, such as environmental goals. It was also noted that in some procurement, competition might be cumbersome and counterproductive. The alternative view was expressed that the words "the most competitive" should be retained as reflecting the thrust of the 1994 Model Law — to encourage competition in order to guarantee efficiency and value for money.

43. The view was expressed that the proposed wording "appropriate in the circumstances of the given procurement" addressed the concern that in some procurements the factors other than maximizing competition would need to be considered. It was suggested that in order to avoid any ambiguities in this respect, the Guide should explain this intended meaning.

44. The Working Group further considered whether reference to the various techniques available within procurement methods, such as electronic reverse auctions (ERAs) and framework agreements, should be made in the paragraph. Support was expressed for adding this reference as proposed in the draft paragraph.

45. The Working Group approved the paragraph as revised at the current session.

Paragraph (3)

46. The Working Group noted that the paragraph was based on article 18 of the 1994 Model Law, and that the terms "economy and efficiency" and "economy or efficiency", not the term "economic efficiency" as proposed in the draft paragraph, were used in the 1994 Model Law (articles 20 and 48 (2)).

47. The Working Group considered whether the reference to "economic efficiency" should remain in the paragraph. The view was expressed that it should not as being superfluous in the light of the understanding reached in conjunction with paragraph (2) (see para. 43 above), which should also be applicable to paragraph (3). The view prevailed however that the reference to "economic efficiency" should be retained in the paragraph and that the square brackets should therefore be removed. The proposal to add the word "notably" before the words "for reasons of economic efficiency" was not accepted.

48. The Working Group approved the paragraph as revised at the current session.

Paragraph (4)

49. The Working Group noted that the paragraph was based on articles 18 and 19 (1) (a) of the 1994 Model Law. The Working Group approved the paragraph without change.

Paragraph (5)

50. The Working Group noted that the paragraph was based on draft article 22 bis as amended at the Working Group's twelfth session (article 42 of the proposed revised Model Law). The Working Group approved the paragraph without change.

Paragraph (6)

51. The Working Group noted that the paragraph was based on article 22 of the 1994 Model Law.

52. The proposal was made to delete the opening phrase in the chapeau of the paragraph as inviting cumbersome and costly practices. The Working Group noted that the referred phrase was included in the 1994 text in order to prevent corruption and arbitrary decisions on the side of the procuring entities when decisions to have recourse to single-source procurement were made. It was also explained that the provisions reflected practices in some procurement systems, as explained in the Guide, where higher-level approval was required for a procuring entity to use such an exceptional measure as single-source procurement. It was also explained that the provisions were in parentheses suggesting that it was up to an enacting State to decide whether these provisions should be incorporated in the national law.

53. The Working Group agreed that the opening phrase should be deleted from the chapeau but that the Guide should highlight that some jurisdictions might require procuring entities to obtain a prior approval from a higher-level authority.

54. The suggestion was made to retain in paragraph (6) only subparagraphs (c) and (d). This suggestion was not accepted on the ground that the deletion of the remaining subparagraphs would unreasonably narrow the cases justifying the recourse to single-source procurement.

55. Concern was expressed that subparagraph (a) might encourage monopolies and corruption, and negatively affect transparency and accountability in procurement practices. The Working Group noted rare and exceptional cases dealt with in the subparagraph, which nevertheless occurred in practice and should therefore be reflected in the Model Law. It was noted that the Model Law would be consistent in this respect with the provisions of the Agreement on Government Procurement of the World Trade Organization (WTO) (GPA, article XV (1) (b)).2 The Working Group agreed to retain the subparagraph without change and provide in the Guide sufficient explanations about the intended scope of the provisions and specific examples.

56. As regards subparagraph (b), the Working Group noted that the text would address the most urgent procurement, in which other methods such as competitive negotiation were impractical. The Working Group considered whether the references to catastrophic events, to unforeseeable events and lack of dilatory conduct on the part of the procuring entity should be cumulative. After debate, it was agreed that the provision in essence addressed unforeseeable events that were not caused by the conduct of the procuring entity, and that the reference to catastrophic events was superfluous and would be deleted.

57. As regards subparagraph (c), the Working Group considered whether the proviso starting from "the limited size of the proposed procurement in relation to the original procurement" should be retained. On the one hand, it was observed that the basis of this justification for single-source procurement — uniformity between successive procurements — was unrelated to the relative sizes of the original procurement (which would have been conducted through a competitive procedure) and the subsequent procurement conducted through a single-source procedure, and thus that the proviso should be deleted. On the other hand, it was stated that the law should stress the exceptional nature of such procurement and that there was potential for the abuse of the provision, and retaining the proviso would support these notions. Further, it was observed, technological advances might mean that the price of the original procurement might not remain current. Finally, it was observed that removing the proviso could, on one interpretation, in fact strengthen the obligation to conduct a new, competitive procurement procedure for a subsequent purchase. It was decided that the text should remain without change, but in order to address the concerns set out above, the Guide to Enactment should stress that the way to avoid this situation arising would be to conduct the original procurement using a framework agreement, and that where there was no framework agreement, the use of single-source procurement for any subsequent purchase should be exceptional, and should be limited both in size and in time.

58. As regards subparagraph (d), it was observed that the provision contained several elements, not all of which were considered necessary. First, the proposed proviso that single-source procurement would be justified only where other procurement methods were not appropriate meant that the reference to the commercial viability of the research and development concerned was superfluous. Secondly, it was added that the remaining justification would arise only if there was a single possible provider of the services concerned, and thus that the situation

---

2 Entered into force on 1 January 1996; available as of the date of this report at www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm.

contemplated by the subparagraph was already encompassed under subparagraph (a). Accordingly, it was agreed that subparagraph (d) should be deleted.

59. As regards subparagraph (f) of the 1994 text, proposed to be deleted, it was commented that a blanket exemption for defence procurement should not be inadvertently introduced by replacing this subparagraph with an excessively broad provision. Noting that the aim was to allow for recourse to single-source procurement only where it was justified by the nature of the procurement concerned, it was agreed that this subparagraph should be renumbered as subparagraph (e) and replaced with the following text: "In the case of procurement for the reasons of national defence or national security, where the procuring entity determines that the use of any other method of procurement is not appropriate". This formulation, it was said, would provide an appropriate balance between encouraging the use of the Model Law for defence procurement and protection of confidentiality and other concerns in such procurement. It was agreed that the Guide to Enactment would explain that the reference to "national defence or national security" was a commonly used term, but that it would not preclude the use of the provision on the basis of defence or security issues arising within a region of an enacting State.

60. As regards subparagraph (e), the Working Group took note of the issues raised in document A/CN.9/WG.I/WP.66 (paras. 45-48). The Working Group also noted the relevance of the subparagraph to the provisions of draft article 12 of the revised Model Law dealing with socioeconomic policy issues.

61. The Working Group agreed to retain the wording of article 22 (2) of the 1994 Model Law in place of subparagraph (e), with updated cross-references. It was said that the principle contained in article 22 (2) of the 1994 Model Law was a fundamental one, and the Working Group might exceed its mandate by departing from it.

62. A further proposal to delete the approval requirement in that subparagraph was not accepted. The general view was that higher-level approval for the cases specified in the subparagraph would be required given their exceptional nature.

63. Having agreed not to make specific reference in the subparagraph to serious economic emergency, the Working Group noted that the Guide would point out that States in situations of economic and financial crisis might exceptionally exempt the application of the Model Law to some procurement, through legislative measures (which would themselves receive the scrutiny of the legislature in the enacting State). Such measures, it was agreed, would affect the application of the entire Model Law, and not only its provisions regulating single-source procurement.

64. The Working Group approved subparagraph (e) and paragraph (6) as a whole, as revised at the current session.

Paragraph (7)

65. The Working Group noted that the paragraph was based on a number of provisions of the 1994 Model Law, including repetitive provisions found in articles 17, 23, 24 and 37 of the 1994 Model Law.

66. The Working Group decided:

(a) To begin subparagraph (a) with the words "without prejudice to article 24 of this Law";

(b) To limit the cross-references in subparagraph (a) to "paragraphs (3) to (5)", and to consider the inclusion of a provision addressing the issue of a notice of single-source procurement (in place of the cross-reference to paragraph (6)) at a later stage;

(c) To introduce and define in article 2 the term "open solicitation" to refer to procurement commenced by an advertisement as described in articles 24 and 37 of the 1994 Model Law;

(d) To retain the term "direct solicitation" from article 37 (3) of the 1994 Model Law and define it in article 2 of the revised Model Law as the alternative to "open solicitation";

(e) To retain in subparagraph (b) all cross-references and update them as appropriate;

(f) To delete in subparagraph (c) the reference to "international publication" and instead refer to "solicitation in accordance with article 24 (2)";

(g) To add in subparagraph (c) (ii) the following wording: "The enacting State shall establish in the procurement regulations the value threshold for the purposes of invoking the exception referred to in this paragraph."

67. The Working Group deferred the consideration of the paragraph as revised at the current session to a later date.

Paragraph (8)

68. The Working Group agreed to delete the paragraph.

Paragraph (9)

69. The Working Group noted that the paragraph was based on article 18 (4) of the 1994 Model Law, and approved the paragraph without change.

Article as a whole

70. The Working Group deferred the consideration of the draft article as revised at the current session to a later date.

Article 8. Communications in procurement

71. The Working Group noted that the proposed article was based on article 5 bis as preliminarily approved by the Working Group at its twelfth session (A/CN.9/640, paras. 17-25). The Working Group agreed to replace the cross-reference in paragraph (2) to article 7 (2) (b) with a reference to article 7 (7) (a). The Working Group approved the draft article as revised at the current session.

Article 9. Participation by suppliers or contractors

72. The Working Group noted that the proposed article reproduced article 8 of the 1994 Model Law, and approved the draft article without change.

Article 10. Qualifications of suppliers and contractors (A/CN.9/WG.I/WP.66, paras. 71-72)

73. The Working Group noted that the proposed article was based on article 6 of the 1994 Model Law and that limited amendments had been made to that text in the light of the revisions to the Model Law thus far recommended by the Working Group. The Working Group in particular noted that paragraph (2) had been amended to allow the assessment either of the qualifications of all suppliers or of the winning one alone. As regards draft new paragraph (7), the Working Group noted that it was based on article 10 of the 1994 Model Law. The Working Group recalled that, at its sixth session, it preliminarily agreed to amend article 10 in order for the legalization requirement to apply, if at all, only to a successful supplier, and to combine the amended provisions of article 10 of the 1994 text with a revised article regulating qualifications (A/CN.9/568, paras. 127-128).

74. The Working Group did not accept proposals:

(a) To delete the words "in this State" in paragraph (2) (iv); and

(b) To introduce in paragraph (2) (v) that, where a conviction had occurred, suppliers might nonetheless be treated as qualified, on the basis that they: "had proven to the satisfaction of the procuring entity that they had taken all necessary measures to prevent that the events which led to the conviction would occur again."

75. The Working Group agreed:

(a) To replace in the end of the second sentence of paragraph (4) the word "article" with the word "Law", so as to ensure, for example, that conflicts of interest could be appropriately addressed;

(b) To delete the cross-reference to article 12 (5) in paragraph (6), since the latter dealt with evaluation, not qualification, criteria;

(c) To amend the cross-reference in paragraph (7) to paragraph (6).

76. The Working Group approved the draft article as revised at the current session and requested the Secretariat to update all cross-references as appropriate.

Article 11. Rules concerning description of the subject matter of the procurement, and the terms and conditions of the procurement contract or framework agreement

77. The Working Group noted that the proposed article was based on article 16 of the 1994 Model Law and that it was linked to the proposed new definition (k).

78. The derivation of the second sentence of paragraph (3) was queried since it was apparently similar in drafting but different in meaning to the provisions of the WTO GPA, article VI (3). The latter provision sought to restrict references to trademarks or similar references. It was observed that the use of trademarks or similar terms could be of practical assistance, provided that they were followed by a generic description. A proposal was accordingly made to amend the second sentence of paragraph (3) by replacing the provision starting with the words "unless" with the following phrase: "unless the requirement or reference is also accompanied with a sufficiently precise description of the salient characteristics of the subject matter of the procurement and provided that the words such as 'or equivalent' are included." The prevailing view however was that the text of the second sentence should be

closely aligned with the provisions in the WTO GPA restricting the use of trademarks or similar references.

79. The Working Group agreed that in paragraph (3), the first sentence, the opening words should read "to the extent practicable", to allow for appropriate input-based specifications where necessary, and that the issue would be explained in the Guide; and that the second sentence should be aligned with the WTO GPA, article VI (3).

80. The Working Group approved the draft article as revised at the current session.

81. The Working Group noted that the Guide would draw the attention of enacting States to practices in some jurisdictions to require including in the solicitation documents the reference source for technical terms used (such as the European Common Procurement Vocabulary). It was reported that such practices proved to be useful in some jurisdictions.

Article 12. Rules concerning evaluation criteria (A/CN.9/WG.I/WP.66, paras. 22 (e), 26-31 and 49-50)

82. The Working Group noted that the proposed article was based on a number of provisions of the 1994 Model Law.

83. General support was expressed for the proposition in paragraph (2) (a) that evaluation criteria should relate to the subject matter of the procurement. This principle, it was said, was a cornerstone to ensure best value for money and would assist in curbing abuse. However, it was noted that other evaluation criteria referred to in the proposed article (such as paragraph (4) (d)) would not relate to the subject matter of the procurement.

84. Support was expressed for retaining paragraph 4 (d) on the condition that enacting States in the procurement regulations would regulate precisely how the criteria listed in paragraph (4) (d) should be applied in individual procurements, and the opening phrase of paragraph 5 would accordingly be repeated in paragraph 4 (d).

85. The Working Group agreed to restructure the article to provide for a general principle as per paragraph 2 (a), with exceptions for the criteria elsewhere in the article that did not relate to the subject matter. The Working Group agreed to consider whether the exceptions should be justified when reviewing the revised article.

86. Some disagreement was expressed with the suggestion made in footnote 55 of document A/CN.9/WG.I/WP.66/Add.1. The Working Group decided to defer the consideration of the issue proposed in that footnote to be reflected in the Guide to a later stage, at which the revised Guide provisions would be considered.

87. The Working Group deferred the consideration of the draft article as revised at the current session to a later date.

Article 13. Rules concerning the language of solicitation documents

88. The Working Group noted that the proposed article was based on article 17 of the 1994 Model Law. The Working Group approved the draft article, subject to the updating of cross-references. (See further para. 169 below for a subsequent decision affecting this article.)

Article 14. Securities

89. The Working Group noted that the proposed article was based on article 32 of the 1994 Model Law (which had been moved from chapter III to chapter I in order to make the rules on tender securities applicable to all procurement methods). The Working Group agreed to that approach.

90. An inquiry was made as to whether the provisions of the article should regulate the subject of securities in the context of framework agreements as well. The general view was that securities might be required in the context of framework agreements but that this subject should be regulated in the chapter dealing with framework agreements rather than in the proposed article 14. The Working Group noted the views expressed at the session that requesting the provision of securities in the context of framework agreements, because of the nature of the latter, should be regarded as an exceptional measure.

91. The Working Group approved the draft article without change.

92. The Working Group noted a suggestion that the Guide should highlight the potentially onerous nature of securities, and the negative effects of requiring suppliers or contractors to present them, the issues of mutual recognition and the right of the procuring entity to reject securities in certain cases. The Working Group agreed to defer the consideration of these issues to a later stage, at which the revised Guide provisions would be considered.

Article 15. Prequalification proceedings (A/CN.9/WG.I/WP.66, paras. 22 (a) and (b) and 57 (d)-59)

93. The Working Group noted that the proposed article consolidated a number of provisions found in several articles of the 1994 Model Law. It in addition noted that some other revisions were proposed to be made to the article, in particular to conform it to the provisions on pre-selection found in the UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects and the UNCITRAL Legislative Guide on the same subject (the "PFIPs instruments").3 The Working Group proceeded with a paragraph-by-paragraph consideration of the article.

Paragraph (1)

94. The Working Group noted that under the PFIPs instruments the prequalification was mandatory (A/CN.9/WG.I/WP.66, para. 22 (a)) and noted the reasons given for requiring prequalification in the PFIPs instruments. The Working Group considered whether provisions of the revised Model Law should provide for mandatory prequalification and, if so, in which types of procurement.

95. The Working Group expressed a preference for retaining optional prequalification. A suggestion was made that the Guide should highlight that prequalification might be used for limiting access to a specific procurement.

96. The Working Group considered the phrase "prior to the solicitation" proposed to replace the previous wording "prior to the submission of tenders, proposals or

---

[3] Available as of the date of this report at www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure.html.

offers" for the reasons explained in paragraph 58 of document A/CN.9/WG.I/WP.66. The Working Group agreed with the suggested revision.

Paragraphs (2)-(8)

97. The Working Group approved the paragraphs without change, except for paragraph 5 (f) that, as was noted, would be considered with paragraph (9) (see the paragraphs immediately below).

Paragraph (9)

98. The Working Group considered: (i) whether the procuring entity should have the right to limit the number of prequalified suppliers allowed to participate further in the procurement proceedings (referred to as pre-selection); (ii) if so, how to ensure that the pre-selection was made in an impartial and objective manner; and (iii) whether any such right should be granted only for complex procurements proposed to be covered by chapter IV of the revised Model Law, or for any procurement.

99. The Working Group noted that proposed paragraphs (5) (f) and (9) (and consequential changes in paragraphs (10) to (12) and elsewhere in the proposed revised Model Law) were included to provide for such a right. It was noted that in this respect, the revised Model Law would then be conformed to the relevant provisions of the PFIPs instruments (A/CN.9/WG.I/WP.66, paras. 22 (b) and 59).

100. Flexibility was urged on the question, supporting the inclusion of provisions permitting pre-selection. It was noted that pre-selection was commonly used in large projects or where the prequalification was utilized for testing the market. It was also suggested that without pre-selection, there would be no real difference between open tendering with prequalification and open tendering without prequalification, and prequalification might therefore impose an extra burden on procuring entities.

101. Concern was expressed that allowing pre-selection would introduce subjectivity, and the opportunity for abuse and discrimination. It was noted that many suppliers were already reluctant to participate in procurement involving prequalification, given the expense of so doing, and that permitting pre-selection might operate as a further deterrent.

102. Strong support was expressed that if there were to be provision for pre-selection, it should require objectivity and transparency in the process. It was therefore suggested that the Model Law should require disclosure in the prequalification documents of the fact that the pre-selection would take place and of all relevant information about pre-selection procedures and criteria. Doubts were expressed, however, as regards the extent to which pre-selection could be regulated so that it was carried out in an impartial and objective manner.

103. The prevailing view was that all prequalified suppliers or contractors should be allowed to present submissions. The Working Group agreed that provisions on pre-selection should not be included and that therefore paragraphs (5) (f) and (9) and consequential changes proposed to be made to other paragraphs of the draft article and elsewhere in the text should be deleted.

104. It was suggested that the Guide might highlight that the drafting of stringent prequalification requirements might in any event limit the numbers of prequalified suppliers.

Paragraph (10)

105. The Working Group agreed that, in the light of its decision not to incorporate provisions on pre-selection in the article on prequalification, the text in the square brackets would be deleted. The Working Group approved the paragraph with this change.

Paragraph (11)

106. The Working Group agreed that the word "promptly" should be added before the word "communicate", and that the text in the square brackets should be deleted. Having noted that the word "promptly" might be interpreted subjectively, the Working Group agreed that the Guide should explain that the notice ought to be given prior to the solicitation.

107. The meaning of the last phrase in the paragraph was questioned (that is, the meaning of the statement that the procuring entity did not need to provide evidence for or give reasons for the grounds for disqualification of suppliers). It was suggested that the current formulation in the light of the review provisions should be reworded, to allow for meaningful debriefing and where necessary review. The Working Group agreed with that suggestion and that the Guide should explain the reasons for the revisions made to the 1994 text, in particular that mechanisms of review were considerably strengthened in the revised Model Law.

108. With these changes, the Working Group approved the paragraph.

Paragraph (12)

109. The view was expressed that the paragraph envisaged a second qualification exercise, which was inconsistent with provisions on prequalification. A preference was expressed that the provisions should consequently appear in article 10, together with the provisions of paragraph (8) of that article, and it was agreed that any overlap in the merged provisions should be eliminated. It was also agreed that the Guide should explain the value of the provisions where qualifications had changed during the procurement process. Reference was made to the existing guidance on the issue (paragraph (3) of the commentary to article 7 of the Guide), which would be incorporated in the revised commentary to the relevant provisions of the revised Model Law.

Article as a whole

110. The Working Group approved the draft article as revised at the current session.

Article 16. Rejection of all submissions

111. The Working Group noted that the proposed article reproduced article 12 of the 1994 Model Law.

112. Support was expressed for the suggestion that the opening phrase in paragraph (1) referring to higher-level approval should be deleted, because the

benefits of the approval process might be illusory, and to avoid creating an unnecessary bureaucratic burden. It was viewed that the remedies mechanisms envisaged in the revised Model Law would provide sufficient safeguards against abuse. The Working Group agreed with that suggestion.

113. In response to an enquiry as to whether the procuring entity should be obliged to reserve the right to reject all submissions in the solicitation documents, general support was expressed for the view that there should be no such obligation. The general understanding was that the right to reject all submissions would be sufficient if provided for in the law, and a simple omission to record it in the solicitation document should not affect the right. It was proposed therefore that the phrase "if so specified in the solicitation documents" in the first sentence of paragraph (1) should be deleted. The Working Group agreed with that proposal.

114. In response to an enquiry as to whether the procuring entity should provide justifications for a decision to reject all submissions, the general view was expressed that the procuring entity should not be required to provide any justification, but should inform the suppliers or contractors concerned of the decision and grounds for it. The Working Group noted that justifications would be important where decisions involving issues of equal treatment or non-discrimination among suppliers were taken; in other cases, including in the case covered by the article, where all justify taking the decision the requirement to provide justifications would impose an unreasonable burden without clear benefit. It was agreed that this distinction should be clarified in the Guide, which should also highlight that decisions to reject all submissions would not normally be amenable to review unless abusive practices were involved.

115. The suggestion was made that the following words could be deleted in the second sentence of paragraph (1): "but is not required to justify those grounds." Another suggestion was that the words "upon request" should be deleted. The alternative view was that the sentence should be retained as it was.

116. The Working Group deferred the approval of the draft article as proposed to be revised at the current session to a later stage.

117. The Working Group agreed that references in the article and elsewhere in the revised Model Law to "solicitation or equivalent documents" should read "solicitation documents".

Article 17. Rejection of abnormally low submissions

118. The Working Group noted that the proposed article was as preliminarily agreed by the Working Group at its twelfth session (draft article 12 bis, A/CN.9/640, paras. 44-55).

119. A proposal was made that paragraph (1) should specifically reflect the occurrence of abnormally low submissions in situations of money-laundering. It was noted that the point had already been discussed at the Working Group's previous sessions and that it would be addressed in the revised Guide, as had been previously agreed.

120. The Working Group approved the draft article without change.

Article 18. Rejection of a submission on the ground of inducements from suppliers or contractors or on the ground of conflicts of interest

121. The Working Group noted that the proposed article was based on article 15 of the 1994 Model Law.

122. The Working Group agreed with the proposal that the opening phrase in paragraph (1) should be deleted. The suggestion that all similar provisions in other provisions of the Model Law should also be deleted was not accepted. The Working Group agreed to decide on the need for provisions requiring a higher-level approval on a case-by-case basis.

123. In the light of the Working Group's discussions of conflicts of interest at its fourteenth session (A/CN.9/664, para. 116), the Working Group considered whether a provision should be included in the article requiring the rejection of a submission that had been presented in circumstances indicating conflicts of interest, either on the side of the supplier or contractor or in addition where conflicts of interest was on the side of the procuring entity. The Working Group considered the following wording for paragraph (1):

> "1. A procuring entity shall reject a submission if:
>
> (a) The supplier or contractor that presented it: offers, gives or agrees to give, directly or indirectly, to any current or former officer or employee of the procuring entity or other governmental authority a gratuity in any form, an offer of employment or any other thing of service or value, as an inducement with respect to an act or decision of, or procedure followed by, the procuring entity in connection with the procurement proceedings; or
>
> (b) The supplier or contractor has gained an unfair competitive advantage as the result of a conflict of interest in violation of the standards promulgated pursuant to this Law."

124. As regards subparagraph (b) of the proposal, the point was made that conflicts of interest standards could be found not only in regulations enacted pursuant to a procurement law, but also in other areas of law. It was therefore suggested that the reference in the subparagraph should be made to conflicts of interest standards established by the enacting State, in order to encompass all applicable regulations. With this change, the proposal was accepted.

125. The Working Group approved the draft article as revised at the current session.

Article 19. Acceptance of submissions and entry into force of the procurement contract (A/CN.9/WG.I/WP.66, para. 57 (a))

126. The Working Group noted that the proposed article was based on article 36 of the 1994 Model Law, which had been amended in the light of the introduction of a standstill period (A/CN.9/664, paras. 45-55 and 72). The Working Group further noted the proposal to place the article in chapter I of the revised Model Law in lieu of article 13 of the 1994 Model Law, in order to make provisions on acceptance of the successful submission and entry into force of the procurement contract applicable to all procurement methods, and not only to tendering. The attention of the Working Group was drawn to the fact that provisions of the 1994 Model Law regulating these issues were not consistent from one procurement method to another.

The Working Group agreed to the proposed approach and proceeded with a paragraph-by-paragraph consideration of the article.

Paragraph (1)

127. The Working Group noted that the paragraph was based on the first sentence of article 36 (1) of the 1994 Model Law. The Working Group approved the paragraph without change.

Paragraph (2)

128. The Working Group noted that the paragraph was included further to the Working Group's decision to introduce provisions on a standstill period in the revised Model Law (see A/CN.9/664, paras. 45-55 and 72). The Working Group further noted that the paragraph was based on the relevant provisions of the EU Directive 2007/66/EC of 11 December 2007 (article 2a. Standstill period).4

129. It was agreed that in paragraph (2), the chapeau provisions, the phrase "decision to accept the successful submission" should be reworded, to refer to the intended decision of the procuring entity and the provisional identification of the successful submission. It was noted that this formulation would be consistent with the logic of introducing the standstill period: after the successful submission is ascertained/identified by the procuring entity, no decision to accept the successful submission should be made before the expiry of the standstill period, as reflected in paragraph (4) of the article. Consequential changes would be made elsewhere in the article and differences between language versions conformed. It was also agreed that the term "participating in the procurement proceedings" in the chapeau of the same paragraph should be reworded to refer to remaining participants, with suitable explanation in the Guide.

130. As regards paragraph 2 (b), the Working Group noted that the provisions were closely linked to proposed article 22 (3) and (4), and should be conformed as regards both — the type of information about evaluation of submissions that could be disclosed to suppliers or contractors participating in the procurement, and the stage of the procurement proceedings at which such disclosure could be made. It was stressed that it was essential for suppliers or contractors participating in the procurement to receive sufficient information about the evaluation process to make the meaningful use of the standstill period.

131. The point was made that the exceptions to the disclosure provisions in that paragraph were drafted too broadly, might inhibit transparency, and should be redrafted to refer only to confidential information. In response, it was noted that the language proposed was similar to the language found in the WTO GPA (article XVIII (4)) and the EU procurement directives.5 The Working Group agreed to consider whether to revise the wording at a future session. It was also agreed that the Guide would explain that the phrase "to impede fair competition" should be

---

[4] Available as of the date of this report at http://ec.europa.eu/internal_market/publicprocurement/legislation_en.htm#remedies.

[5] Directive 2004/17/EC, article 49 (2); and Directive 2004/18/EC, articles 35 (4), 41 (3) and 69 (2). Available as of the date of this report at http://ec.europa.eu/internal_market/publicprocurement/legislation_en.htm#remedies.

interpreted as encompassing the risks of hampering competition not only in the procurement proceedings in question but also in subsequent procurements.

132. The Working Group requested the Secretariat to supplement the provisions of paragraph 2 (c) that referred to the dispatch of the notice on a standstill period, to reflect that the dispatch should be made promptly and by reliable means. It was agreed that the same amendments should be made elsewhere in the article where reference was made to the dispatch of notices.

133. Also with respect to paragraph 2 (c), the inclusion of suggested time limits in square brackets was questioned. An alternative approach, accepted by the Working Group, would be to leave the specification of the time limits to an enacting State. The Guide, it was agreed, should point out that there were different regulations on the subject, and that even within the same jurisdiction, an enacting State might establish different time frames at various points of time depending, for example, on the level of penetration of electronic means of communication in public procurement. The Working Group agreed that the time frame should be specified in the terms of general principle, notably that the time frame should be sufficiently long to ensure that the meaningful review was possible.

134. The Working Group deferred its consideration of the paragraph as proposed to be revised at the current session to a later stage.

Paragraph (3)

135. The Working Group recalled and confirmed its decision taken at its fourteenth session that the requirement for a standstill period might be counterproductive where urgent public interest considerations required the procurement to proceed without delay (A/CN.9/664, para. 72). It requested that the different language versions be conformed in this respect.

136. The Working Group considered other cases that would justify exemptions from the application of a standstill period. In this context, it noted the relevant provisions in the EU Directive 2007/66/EC, which allowed a derogation from the standstill period for low-value procurement and in cases where prior publication of a contract notice was not required (such as negotiated procedures without the prior publication of a contract notice) (article 2b).

137. The Working Group agreed to retain the proposed exemption for low-value procurement. Noting the interaction of the provisions with proposed article 20 (3) (which exempted low-value procurement from mandatory publication of contract award notices), the Working Group, in conformity with the approach taken in that article, decided to defer the determination of an appropriate threshold for low-value procurement to an enacting State.

138. The Working Group approved the paragraph as revised at the current session.

Paragraphs (4)-(10)

139. The Working Group noted that the paragraphs were based on provisions of article 36 of the 1994 Model Law, with the consequential changes in the light of the introduction of a standstill period and the provisions on review in chapter VII of the revised Model Law.

140. The Working Group approved the paragraphs with the understanding that consequential changes would be made to these paragraphs where applicable to reflect the Working Group's decision on the dispatch of notices (see para. 132 above).

Paragraph (11)

141. The Working Group agreed that the words "as appropriate" in paragraph (11) should be amended to reflect more accurately the intended meaning that not all the provisions of the article were applicable to framework agreements.

142. In the context of footnote 21 of document A/CN.9/WG.I/WP.66/Add.2, the Working Group noted that, under the EU Directive 2007/66/EC, the requirement for a standstill period at the stage of awarding the contracts resulting from the second stage competition had been removed, because it had been considered cumbersome and undermining one of the main benefits of framework agreements — their efficiency.

143. Another view was expressed that no standstill period should apply in open framework agreements, since the electronic system through which these agreements operated should ensure sufficient transparency in the process of awarding contracts. It was noted that otherwise the swift operation of open framework agreements would be jeopardized.

144. The Working Group deferred its consideration of the paragraph to a later stage.

Article as a whole

145. The Working Group deferred the approval of the draft article as proposed to be revised at the current session to a later stage pending in particular the consideration of the revised paragraphs (2) and (11) (see paras. 134 and 144 above).

Article 20. Public notice of awards of procurement contract and framework agreement (A/CN.9/WG.I/WP.66, para. 60)

146. The Working Group noted that the proposed article was based on the provisions of article 14 of the 1994 Model Law.

147. The Working Group agreed to add in the revised article the provisions: (i) related to framework agreements; (ii) on disclosure of the name(s) of the supplier(s) or contractor(s); and (iii) on a mandatory publication of quarterly notices of all procurement contracts issued under open (but not closed) framework agreements (the view was expressed that in closed framework agreements this requirement would be cumbersome).

148. The Working Group approved the draft article as revised at the current session.

Article 21. Confidentiality

149. The Working Group noted that the proposed article was based on the provisions of article 45 of the Model Law and model provision 24 of the UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects (one of the PFIPs instruments).

150. It was queried whether the provisions in paragraph (1) would prevent the disclosure of information that was required to be announced at the public opening of tenders.

151. The Working Group accepted the proposal that the article should be redrafted to reflect that the confidentiality requirement applied also to some other information that originated from suppliers or contractors, such as information submitted by suppliers in their applications to prequalify, to be supported by commentary in the Guide.

152. The Working Group deferred its consideration of the remainder of the draft article to a later stage.

Article 22. Record of procurement proceedings (A/CN.9/WG.I/WP.66, para. 61)

153. The Working Group noted that the proposed article was based on article 11 of the 1994 Model Law.

154. It was queried whether the words "where these are known to the procuring entity" when referring to price in paragraph (1) (e) were appropriate, because it was unlikely that the information would not be known to the procuring entity. It was also highlighted that the information in the paragraph would have to appear in the final record of procurement proceedings to allow for effective review. It was noted that the chapeau of paragraph (1) referred to maintaining the record, requiring the record to be updated as information was provided. It was clarified that the provisions should be understood as requiring the procuring entity to include in the record all information listed in paragraph (1) to the extent that it was known to the procuring entity. In addition, it was pointed out that the relevant provisions from the accompanying commentary in the Guide indicated the value of having the phrase in question in the text in the light of the specific nature of some procurement. The Working Group agreed that paragraph (1) (e) should be revised to ensure the meaning was clear.

155. The Working Group agreed that paragraph (1) (k) should refer to information to be provided if the bids were rejected on the basis of violation by a bidder of the auction rules, and that further information might be added later in the Working Group's deliberations.

156. The point was made that paragraphs (1) (m) and (4) (a) should be aligned with other provisions in the Model Law.

157. The Working Group deferred the approval of the draft article to a later stage until all outstanding issues had been resolved.

2. CHAPTER II. TENDERING PROCEEDINGS (A/CN.9/WG.I/WP.66/Add.2)

Article 23. Domestic tendering

158. The Working Group noted that the proposed article was based on article 23 of the 1994 Model Law. The Working Group approved the draft article without change.

Article 24. Procedures for soliciting tenders

159. The Working Group noted that the proposed article reproduced article 24 of the 1994 Model Law, except for the provisions related to invitation to prequalify,

which had been moved to the proposed article 15 that had already been considered by the Working Group at the current session (see paras. 93-110 above). The Working Group approved the draft article without change.

Article 25. Contents of invitation to tender

160. The Working Group noted that the proposed article reproduced article 25 of the 1994 Model Law, except for the provisions related to the invitation to prequalify procedure, which were reflected in the proposed article 15 that had already been considered by the Working Group at the current session (see paras. 93-110 above).

161. The Working Group agreed to amend subparagraph (j) to refer to the modalities of submission of tenders, to allow for electronic submission, and to make equivalent changes in articles appearing later in the chapter.

162. The Working Group approved the draft article as revised at the current session.

Article 26. Provision of solicitation documents

163. The Working Group noted that the proposed article was based on article 26 of the 1994 Model Law. In the light of its decision as regards article 15 (see para. 103 above), the Working Group decided to delete the text in the square brackets.

164. The Working Group approved the draft article as revised at the current session.

Article 27. Contents of solicitation documents

165. The Working Group noted that the proposed article was based on article 27 of the 1994 Model Law and that a number of consequential changes had been made to that article, in particular to subparagraphs (d) and (e) in the light of the proposed articles 11 and 12, respectively. It was agreed that reference to the relative weight of evaluation criteria should be added to paragraph (e).

166. The Working Group approved the draft article as revised at the current session.

Article 28. Clarifications and modifications of solicitation documents

167. The Working Group noted that the proposed article was based on article 28 of the 1994 Model Law. The Working Group approved the draft article without change.

168. It was agreed that the Guide commentary accompanying the article should refer to the provisions of article 30 (2) that dealt with the extension of the deadline for presenting submissions. It was also pointed out that in the context of electronic procurement it should be made clear that any obligation of the procuring entity to debrief individual suppliers or contractors would arise to the extent that the identities of the suppliers or contractors were known to the procuring entity.

Article 29. Language of tenders

169. The Working Group noted that the proposed article was based on article 29 of the 1994 Model Law and that it was suggested that it should be merged with the proposed article 13. The Working Group agreed with that suggestion.

Article 30. Submission of tenders

170. The Working Group noted that the proposed article was based on article 30 of the 1994 Model Law, and that paragraph (5) reproduced the text as preliminarily approved by the Working Group at its twelfth session (A/CN.9/640, para. 28).

171. It was agreed that paragraph (1) and similar provisions in the proposed revised Model Law with references to "a place" should be redrafted in a technologically neutral manner. It was further agreed to insert in paragraph (1) cross-references to articles 25 (j), 27 (n) and 30 (2) and (3).

172. The Working Group approved the draft article as revised at the current session.

173. The suggestion was made and accepted by the Working Group that the Guide should discuss the nature of the receipt to be provided in accordance with paragraph (5) (b) of the proposed article, and should state that the certification of receipt provided by the procuring entity would be conclusive.

Article 31. Period of effectiveness of tenders; modification and withdrawal of tenders

174. The Working Group noted that the proposed article was based on article 31 of the 1994 Model Law.

175. In response to a proposal to delete the second sentence of paragraph (2) (a) on the basis that it was superfluous, the Working Group noted a comment by the observer of the World Bank that the provision in question was often invoked in the projects financed by the World Bank and referred to situations when the procuring entity was not able to evaluate all submissions on time and for that reason had to extend the deadline. In such situations, it was noted, suppliers might, but should not be obligated to, extend the effectiveness of their tenders and the refusal to do so should not forfeit their submission security. It was noted that the derivation and reasons for the inclusion of the provision in the Model Law should be examined.

176. The Working Group deferred its consideration of the draft article to a later stage.

Article 32. Opening of tenders

177. The Working Group noted that the proposed article was based on article 33 of the 1994 Model Law, and that paragraph (2) reproduced the text as preliminarily approved by the Working Group at its twelfth session (A/CN.9/640, para. 38). The Working Group approved the draft article without change.

178. It was agreed that the Guide should highlight that the modalities for the opening of tenders established by the procuring entity (time, place where applicable, and other factors) should allow for the presence of suppliers or contractors.

Article 33. Examination, evaluation and comparison of tenders

179. The Working Group noted that the proposed article was based on article 34 of the 1994 Model Law and that amendments were proposed to be made to paragraphs (1) (a), (2) (a), (3), (4) and (8).

180. The Working Group agreed to defer the consideration of the following suggestions made at the current session to a later stage:

(a) To narrow the broad reference to solicitation documents in paragraph (2) (a) to relevant requirements;

(b) To include in paragraph 3 (c) a reference to article 11, as proposed in footnote 79 of document A/CN.9/WG.I/WP.66/Add.2;

(c) To reconsider the use of the term "lowest evaluated tender" in paragraph 4 (b) (ii);

(d) To add the words "Where price is the only award criterion" at the beginning of paragraph 4 (b) (i), and the words "Where there are price and other award criteria" at the beginning of paragraph 4 (b) (ii).

181. The Secretariat was requested: to present these suggestions in square brackets; to research the drafting history of the provisions concerned, and the manner in which similar issues were addressed in applicable international instruments; and to report its findings when the provisions were considered.

Article 34. Prohibition of negotiations with suppliers or contractors

182. The Working Group noted that the proposed article was based on article 35 of the 1994 Model Law. The Working Group approved the draft article without change.

3. CHAPTER III. CONDITIONS FOR USE AND PROCEDURES OF RESTRICTED TENDERING, TWO-ENVELOPE TENDERING, AND REQUEST FOR QUOTATIONS (A/CN.9/WG.I/WP.66/Add.3)

Article 35. Restricted tendering (A/CN.9/WG.I/WP.66, paras. 38-40)

183. The Working Group noted that the proposed article was based on the merged articles 20 and 47 of the 1994 Model Law.

184. The Working Group considered two options presented for this article and the difference between them. The Working Group noted the reasons for proposing the second option set out in paragraphs 38-40 of document A/CN.9/WG.I/WP.66. The Working Group was invited to consider whether the Model Law, where highly complex or specialized nature procurement was involved, should require open tendering with prequalification instead of restricted tendering, to ensure transparency and objectivity.

185. Some delegates expressed a preference for option 1. The Working Group noted the possible benefits in retaining option 1 for specialized procurement, in particular that it might be the only viable option, especially for health products and pharmaceuticals, if open tendering failed.

186. Some delegates expressed a preference for option 2 as drafted, or including a reference to highly specialized products.

187. Another suggestion was to delete both options and eliminate restricted tendering as a separate procurement method from the Model Law. It was explained that experience in some jurisdictions indicated that restricted tendering opened the door to abuse and subjectivity. It was noted that open tendering with

prequalification or pre-selection might achieve the same purposes as restricted tendering in a more transparent manner.

188. Another suggestion was to use the provisions on selective tendering procedures in article X of the WTO GPA as a basis for a revision of this article of the Model Law. The Secretariat was requested to draft option 3 based on this proposal, for consideration at a later stage.

189. The Working Group agreed that, regardless of which option was retained, the opening phrase in paragraph (1), referring to higher-level approval, should be deleted.

190. The Working Group heard suggestions that the provisions referring to pre-selection of suppliers or contractors in a non-discriminatory manner should be supplemented with the examples in the Guide how such non-discrimination could be ensured in practice. In response, it was pointed out that, in procurement of highly specialized products for which the number of suppliers was limited, objective criteria were already present.

191. The suggestion was made that the provisions of paragraph (3) on the publication of a notice of restricted tendering should be expanded to specify the timing, the content and the purpose of the publication. On the other hand, it was noted that the provisions would be repetitive with those in the chapter on tendering, and a preference was expressed to address the concern through the use of an express cross-reference. The Working Group agreed with this approach.

192. The Working Group deferred its consideration of all options for the article to a later stage.

Article 36. Two-envelope tendering

193. The Working Group noted that the title of the proposed article was new, reflecting the two-stage evaluation process, whereas its text closely followed the wording of article 42 of the 1994 Model Law (request for proposals procedure without negotiation, for services procurement). It was also noted that the proposed article was in addition based on articles 19 (1) (a) (i) and 37 and the general thrust of chapter IV of the 1994 Model Law.

194. The Working Group considered the need for the article and in this respect the extent to which the method of procurement set out in the article was different from tendering (if it commenced with a public advertisement) or restricted tendering (if it commenced without such an advertisement).

195. The view was expressed that the procurement method set out in the proposed article should be retained as it indeed provided features distinct from those of tendering. In particular, it was noted that in this method two envelopes with different content were submitted simultaneously but opened sequentially: the envelope with qualitative and technical criteria being opened first and the other envelope with price being opened after the evaluation of qualitative and technical criteria had been completed.

196. Another view was that the provisions should be deleted as they had not proved useful in practice and introduced subjectivity in the form of qualitative factors in the evaluation process. It was also noted that practical difficulties would arise in

ensuring the confidentiality of price information up until the evaluation of technical and qualitative criteria was completed. In some cases, it was said, it was not possible to complete evaluation of technical and qualitative criteria without information about the price.

197. Another proposal was to delete the article but to explain in the Guide that the procedures were rare but used in practice. Another suggestion was to treat the method as variant of tendering or competitive negotiation.

198. The alternative view was that in some jurisdictions the method was used widely and had proved useful. Some delegates expressed the view that the concerns expressed about the method might not inevitably apply. A further view was that the method might not be appropriate in some procurement, for example in highly complex procurement where a complete evaluation was not possible without evaluating price and non-price criteria together. This, however, it was said, should not lead to the conclusion that the method was of no use in any procurement.

199. In response to a concern that there was flexibility in awarding the procurement contract envisaged in paragraph (6), and that the contract might be awarded in a non-transparent manner, it was noted that the manner of award would have to be specified in the solicitation documents (governed by chapter II).

200. The Working Group noted drafting suggestions to the text, in particular that some provisions, such as paragraph (6) (b) were not aligned with other provisions of the revised Model Law. It was also noted that the terms "open" and "direct" solicitations had not been defined in the revised Model Law and retaining them in the proposed article would depend on the Working Group's decision in this respect.

201. The Working Group agreed to retain the draft article but deferred its consideration to a later stage. It was agreed that the Guide should explain the intended scope of the article.

Article 37. Request for quotations

202. The Working Group noted that the proposed article was based on articles 21 and 50 of the 1994 Model Law and that the terms in square brackets in paragraph (1) had been amended as compared with the 1994 text so as to allow the use of request for quotations for all types of standardized or common procurement that was not tailored by means of specifications or technical requirements.

203. The Working Group agreed to delete in paragraph (1) the opening phrase referring to higher-level approval.

204. With respect to the reference, in paragraph (3) of the article, to a minimum number of suppliers or contractors from whom quotations were to be requested, the Working Group's attention was brought to academic comment that a minimum of five participants might be necessary to ensure effective competition. The Working Group was invited to consider therefore whether the reference to three participants, taken from the 1994 Model Law, was sufficient. In response, it was said that it was preferable that the threshold should be kept as low as possible and the reference to at least three suppliers or contractors was therefore satisfactory.

205. Concern was expressed, however, that the reference to a minimum requirement to seek quotations from at least three suppliers was qualified with the words "if

possible". It was observed that the article dealt with off-the-shelf items for which there was an established market, so that it would always be possible to seek quotations from at least three suppliers, especially in the context of electronic procurement. The suggestion was made to delete the words "if possible" since they therefore opened the possibility of abuse and subjectivity. The alternative view was that flexibility should be retained.

206. The prevailing view was to delete the words. In response to concerns expressed about the deletion, it was explained that where conditions in the market did not allow the procuring entity to utilize the procurement method in question, the procuring entity would be able to have recourse to single-source procurement. It was also noted that the Guide would explain that if, for example, only one or two quotations were received as a result of the request for quotations addressed to three or more suppliers, the procurement could nonetheless continue.

207. The Working Group agreed to delete the words "if possible". It noted that the same notion appeared in other provisions of the Model Law but that the Working Group would consider retaining them on a case-by-case basis.

208. The Working Group approved the draft article as revised at the current session and agreed to consider in due course the suggestion that the Guide should reflect the non-binding nature of quotations unlike tenders, offers or proposals.

4. CHAPTER IV. CONDITIONS FOR USE AND PROCEDURES OF TWO-STAGE TENDERING, REQUEST FOR PROPOSALS AND COMPETITIVE NEGOTIATION (A/CN.9/WG.I/WP.66, paras. 21, 22 and 70, and A/CN.9/WG.I/WP.66/Add.3)

209. The Working Group noted that two main issues to consider in the context of this chapter were: (i) whether and, if so how, to ensure consistency between the provisions of this chapter of the revised Model Law and the PFIPs instruments; and (ii) in the light of article 12 on evaluation criteria, how to ensure transparency in evaluation in procurement methods involving negotiations.

210. The Working Group had before it the following proposal for an article to merge article 40 (Request for proposals) and article 41 (Competitive negotiation):

"Article [40]. Competitive negotiation

(1) In competitive negotiation proceedings, the procuring entity shall engage in negotiations with a sufficient number of suppliers or contractors to ensure effective competition.

(2) Requests for proposals shall be addressed to as many suppliers or contractors as practicable, but to at least three, if possible.

(3) The procuring entity shall publish in a newspaper of wide international circulation or in a relevant trade publication or technical or professional journal of wide international circulation a notice seeking expressions of interest in submitting a proposal, unless for reasons of economy or efficiency the procuring entity considers it undesirable to publish such a notice; the notice shall not confer any rights on suppliers or contractors, including any right to have a proposal evaluated.

(4) The procuring entity shall establish the criteria for evaluating the proposals and determine the relative weight to be accorded to each such criterion and the manner in which they are to be applied in the evaluation of the proposals. The criteria shall concern:

(a) The relative managerial and technical competence of the supplier or contractor;

(b) The effectiveness of the proposal submitted by the supplier or contractor in meeting the needs of the procuring entity; and

(c) The price submitted by the supplier or contractor for carrying out its proposal and the cost of operating, maintaining and repairing the proposed goods or construction.

(5) A request for proposals issued by a procuring entity shall include at least the following information:

(a) The name and address of the procuring entity;

(b) A description of the procurement need including the technical and other parameters to which the proposal must conform, as well as, in the case of procurement of construction, the location of any construction to be effected and, in the case of services, the location where they are to be provided;

(c) The criteria for evaluating the proposal, expressed in monetary terms to the extent practicable, the relative weight to be given to each such criterion and the manner in which they will be applied in the evaluation of the proposal; and

(d) The desired format and any instructions, including any relevant timetables applicable in respect of the proposal.

(6) Any modification or clarification of the request for proposals, including modification of the criteria for evaluating proposals referred to in paragraph (3) of this article, shall be communicated to all suppliers or contractors participating in the request-for-proposals proceedings.

(7) The procuring entity shall treat proposals in such a manner so as to avoid the disclosure of their contents to competing suppliers or contractors.

(8) The procuring entity may engage in negotiations with suppliers or contractors with respect to their proposals and may seek or permit revisions of such proposals, provided that the following conditions are satisfied:

(a) Any negotiations between the procuring entity and a supplier or contractor shall be confidential;

(b) Subject to article [22], one party to the negotiations shall not reveal to any other person any technical, price or other market information relating to the negotiations without the consent of the other party;

(c) The opportunity to participate in negotiations is extended to all suppliers or contractors that have submitted proposals and whose proposals have not been rejected.

(9) Any requirements, guidelines, documents, clarifications or other information relative to the negotiations that are communicated by the procuring entity to a supplier or contractor shall be communicated on an equal

basis to all other suppliers or contractors engaging in negotiations with the procuring entity relative to the procurement.

(10) Negotiations between the procuring entity and a supplier or contractor shall be confidential, and, except as provided in article [22], one party to those negotiations shall not reveal to any other person any technical, price or other market information relating to the negotiations without the consent of the other party.

(11) Following completion of negotiations, the procuring entity shall request all suppliers or contractors remaining in the proceedings to submit, by a specified date, a best and final offer with respect to all aspects of their proposals. The procuring entity shall select the successful offer on the basis of such best and final offers.

(12) The procuring entity shall employ the following procedures in the evaluation of proposals:

(a) Only the criteria referred to in paragraph (3) of this article as set forth in the request for proposals shall be considered;

(b) The effectiveness of a proposal in meeting the needs of the procuring entity shall be evaluated separately from the price;

(c) The price of a proposal shall be considered by the procuring entity only after completion of the technical evaluation.

(13) Any award by the procuring entity shall be made to the supplier or contractor whose proposal best meets the needs of the procuring entity as determined in accordance with the criteria for evaluating the proposals set forth in the request for proposals, as well as with the relative weight and manner of application of those criteria indicated in the request for proposals."

211. It was explained that the proposed revised Model Law presented these two methods as distinct methods, whereas in practice requests for proposals were typically the solicitations used to launch competitive negotiations. It was explained that the proposal in the preceding paragraph merged the two articles with just one paragraph being deleted because of overlap.

212. The Working Group deferred its consideration of the entire chapter together with the draft article proposed at the current session to a later stage.

5. CHAPTER V. CONDITIONS FOR USE AND PROCEDURES OF ELECTRONIC REVERSE AUCTIONS (A/CN.9/WG.I/WP.66/Add.3)

Article 42. Conditions for use of electronic reverse auctions

213. The Working Group noted that the proposed article was based on the text amended at the Working Group's twelfth session (A/CN.9/640, paras. 56-57, and A/CN.9/WG.I/WP.59, para. 3), and that minor consequential changes had been made in the light of the proposed revisions to the Model Law.

214. The Working Group agreed to replace the reference to "goods, construction or services" with the term "the subject matter of the procurement", with the Guide explaining in which type of procurement ERAs could be used.

215. A suggestion was made to amend paragraph (2) (a) by adding reference to "standardized goods". This suggestion was subsequently withdrawn on the understanding that the issue would be discussed when the Guide provisions accompanying paragraph (2) (a) were considered. It was also suggested that the Guide might provide drafting suggestions to enacting States for regulating a simple price-only ERA.

216. The Working Group approved the draft article as revised at the current session.

Articles 43-48

217. The Working Group noted that draft articles 43 to 48 had been revised further to the Working Group's consideration of the provisions on ERAs at its twelfth session (A/CN.9/640, paras. 62-92).

218. With respect to draft article 47 (1) (c), the Working Group considered the extent of the information that this provision would require to be disclosed during the auction, in addition to the formula and the results of the initial evaluation, such as information regarding all bids including their quality scores. The Working Group further considered whether the disclosure of this information might facilitate collusion. The Working Group was invited to consider an alternative formulation that would enable the bidder to see information regarding its bid and either the leading bid or by how much the bid needs to improve to become the leader.

219. It was agreed that the wording of draft article 47 (1) (c) would be retained but the Guide would highlight risks of collusion and provide examples of existing good practice to mitigate these risks.

220. It was suggested that, in draft article 48, the term "the lowest evaluated submission" should be replaced with the term "the best evaluated submission", since in practice it was the highest or the best, not the lowest, evaluated submission that was accepted. The provisions, it was pointed out, as drafted at present, might cause unnecessary confusion. The Working Group noted that the suggested change should be considered in conjunction with other provisions of the Model Law, such as draft article 12 on evaluation criteria. It was also pointed out that the term in draft article 48 was based on the terms used in the 1994 text.

221. The Working Group noted remarks by certain commentators that procedures in which the auction was followed by traditional tendering involving the last remaining two bidders could provide good value for money. The view was expressed to the opposite. It was explained that no real competition could take place in the auction itself if subsequent tendering would take place. The Working Group decided not to consider the issue further.

222. Subject to paragraph 220 above, the Working Group approved articles 43-48.

6. CHAPTER VI. FRAMEWORK AGREEMENTS PROCEDURES (A/CN.9/WG.I/WP.66/Add.4)

223. The Working Group noted that the entire chapter on framework agreements procedures had been revised to reflect the decisions taken by the Working Group at its fourteenth session (A/CN.9/664, paras. 75-110). The revised chapter was therefore before the Working Group for the first time. The Working Group was invited to consider the order of the resultant provisions, which had been drafted to

present provisions addressing open and closed framework agreements separately (A/CN.9/664, para. 90). The Working Group was also invited to consider whether the procedures should be available for all types of procurement, including negotiated procurement or procurement where specifications were set later than at the outset of the procurement, which were effectively excluded in the current draft.

224. The view was expressed that it might be necessary to allow for negotiated procedures subsequent to the conclusion of the framework agreements. It was suggested that drafting of the provisions allowing for negotiations in the context of framework agreements should be undertaken together with chapter IV. The Working Group agreed with these suggestions.

225. The Working Group proceeded with an article-by-article consideration of the chapter. (For the decision affecting this chapter taken by the Working Group earlier at the current session, see para. 90 above.)

Article 49. Conditions for use of a framework agreement procedure

226. The Working Group noted that the proposed article was based on paragraphs 1, 4, 5, 6 and 7 of article 22 ter, which was before the Working Group at its fourteenth session (A/CN.9/WG.I/WP.62, para. 6), and which had been reordered to conform with the equivalent provisions regarding ERAs. It was also noted that the text included additional definitions.

227. Support was expressed for a proposal to delete the conditions for use in paragraph (1), on the basis that they were too restrictive and might lead to unsubstantiated complaints. The preferred option, it was said, would be to reflect the content of the provisions in the Guide.

228. The alternative view was expressed that conditions for use were important to retain since the framework agreement procedures were inherently of anticompetitive potential and open to abuse or improper use. A suggestion was made that the provisions setting out the conditions could be redrafted to include other instances where the use of framework agreements would be justifiable. It was proposed that an additional subparagraph (c) could be included that would be open-ended, subject to the justification by the procuring entity of the recourse to framework agreement procedures. Another suggestion was to retain the provisions as drafted with the explanation in the Guide that framework agreement procedures could also be used in other instances.

229. The Working Group agreed: to retain the provisions in paragraphs (1) and (3) in square brackets for further consideration at a later stage; and to reflect the content of paragraph (2) in article 2 (Definitions). Concern was expressed that there were many provisions in the chapter that required the inclusion of various decisions related to framework agreement procedures in the record of procurement proceedings. It was suggested that these provisions would be consolidated for further consideration at a later date.

Article 50. Information to be specified when first soliciting participation in a framework agreement procedure

230. The Working Group noted that the proposed article was based on draft article 51 novies, which was before the Working Group at its fourteenth session

(A/CN.9/WG.I/WP.62, para. 6), and which had been simplified by cross-referring to the mandatory provisions in proposed articles 53 (closed framework agreements) and 56 (open framework agreements). The presentation also sought to avoid unnecessary repetition, and incorporated the Working Group's decisions on the earlier draft (A/CN.9/664, paras. 78-82).

231. It was suggested that in proposed paragraph (f), the reference to evaluation criteria should apply both to open and to closed framework agreements, and thus the words "including in the case of closed framework agreements" should be deleted. It was explained, however, that no competitive evaluation took place in open framework agreements at this stage, and only responsiveness and qualifications were then ascertained. The Working Group agreed with the substance of the paragraph as drafted but it was suggested that the drafting should be revised to make the issue clearer, with suitable explanation in the Guide. It was agreed that the words "the evaluation criteria" should also be replaced with the words "any evaluation criteria".

232. With respect to subparagraph (g), the Working Group considered which information listed in articles 25 and 27 of the Model Law applicable to tendering proceedings was to be included in the solicitation documents in the context of framework agreements, and whether any information specified therein would be subject to refinement at the second stage of framework agreements without second-stage competition. The suggestion was made that the provisions as drafted were sufficient, but that the Working Group would consider any suggested changes at a later stage.

233. Subject to above changes, and to the possible inclusion of a further requirement (see para. 248 below), the Working Group approved the draft article.

Article 51. No material variation during the operation of the framework agreement

234. The Working Group noted that the proposed article was based on the description of "material variation" provided by the Working Group at its fourteenth session (A/CN.9/664, para. 101 (c) and (d)).

235. With respect to paragraph (2), the Working Group was invited to consider whether the definition of "material change" should be placed in the Model Law rather than the Guide as had been suggested at the Working Group's fourteenth session. The view was expressed that the provisions being essential should be retained in the Model Law itself and could be placed in article 2 (Definitions). The alternative view was that the provisions should be placed in the Guide.

236. Concern was expressed about the text in square brackets in the end of paragraph (2) as being excessively broad. It was suggested that the text should be removed from the Model Law but its substance reflected in the Guide as an explanation of the policy considerations underlying the definition.

237. Subject to the removal of the text in square brackets to the Guide, the Working Group agreed to retain the definition in the Model Law but in square brackets, for further consideration at a later stage, and together with any proposals that were submitted by delegates on the subject. (See para. 273 (f) below for the Working Group's subsequent decision affecting the definition of "material change".)

Article 52. First stage of a closed framework agreement procedure

238. The Working Group noted that the proposed article was based on draft articles 51 octies and decies, which were before the Working Group at its fourteenth session (A/CN.9/WG.I/WP.62, para. 6), and which had been revised implementing the Working Group's decisions regarding separating open and closed framework agreements procedures (A/CN.9/664, paras. 83-88 and 90). The Working Group approved the draft article without change.

Article 53. Minimum requirements of closed framework agreements

239. The Working Group noted that the proposed article was based on paragraphs 2 and 3 of draft article 22 ter, which was before the Working Group at its fourteenth session (A/CN.9/WG.I/WP.62, para. 6). The text had been separated into an independent article for ease of reading, and applied to closed framework agreements procedures only (A/CN.9/664, para. 90).

240. The Working Group agreed to replace reference to "the envisaged frequency" in paragraph (e) with reference to "the possible frequency".

241. With respect to paragraph (1) (c), the Working Group was invited to consider whether the situation in which some terms and conditions of the framework agreement cannot be settled at the outset was sufficiently regulated (for example, the notion of "refining" terms at the second stage without a competition). It was agreed that the text would remain as drafted, but the need for effective regulation would be discussed in the Guide.

242. With respect to paragraph (1) (f), the Working Group was invited to consider the possibility of including an alternative method of awarding the procurement contract, such as rotation, and whether such alternative methods were possible in the light of the draft evaluation criteria article (proposed article 12). The Working Group noted that the policy considerations in the Model Law on evaluation criteria would not allow alternative methods of awarding the procurement contract, and agreed that the text would remain as drafted.

243. With respect to paragraph (2), the Working Group was invited to consider whether a provision to ensure effective competition in multi-supplier agreements was required; if so, whether any minimum (3 or 5) should be included and conformed to the number in the equivalent provisions regulating requests for proposals or quotations procedures (see para. 204 above). A suggestion was made that the reference to a defined number should be deleted, and a decision on any required number left to an enacting State.

244. It was agreed that paragraph (5) should be accompanied with the provisions in the Guide highlighting the danger of closed framework agreements of long duration, in the light of their potentially anticompetitive nature.

245. The Working Group approved the draft article as revised at the current session.

Article 54. Second stage of a closed framework agreement procedure

246. The Working Group noted that the proposed article was based on draft articles 51 duodecies and terdecies, which were before the Working Group at its fourteenth session (A/CN.9/WG.I/WP.62, para. 6), and which had been consolidated

in accordance with the Working Group's decision at that session (A/CN.9/664, para. 106), and updated to reflect the provisions of chapters I and II of the proposed revised Model Law.

247. It was noted that the proposed article 54 was identical to the proposed article 57, with the exception of paragraph (2) that contained provisions pertinent only to closed framework agreement procedure. It was agreed that these articles should be merged as appropriate.

248. With respect to paragraph (4) (b), the view was expressed that information about tentative deadlines within which second-stage submissions would have to be presented was to be disclosed to suppliers or contractors in advance. That information was considered to be important for suppliers or contractors to decide whether to become parties to the framework agreement. The suggestion was made that the issue should be addressed in the context of proposed article 50 (g) to the extent it was not already covered, with explanation in the Guide that information provided was intended to be indicative rather than binding on the procuring entity.

249. Subject to paragraph 247 above, the Working Group approved the draft article.

Article 55. First stage of an open framework agreement procedure

250. The Working Group noted that the proposed article was based on draft articles 51 octies and decies, which were before the Working Group at its fourteenth session (A/CN.9/WG.I/WP.62, para. 6), and which had been revised to implement the Working Group's decisions regarding separating open and closed framework agreements procedures (A/CN.9/664, paras. 83-88 and 90).

251. It was suggested that requiring the publication of the names of the parties to the framework agreement might lead to collusion and paragraph (4) (a) should be amended accordingly. The Working Group, noting the decision taken on the matter in the context of article 20 at the current session (see paras. 146-148 above), did not accept the suggestion.

252. It was agreed that the phrase "within a maximum of […] days" would remain in paragraph (6). The understanding was that an enacting State would fill in the missing information in square brackets, as appropriate.

253. The Working Group approved the draft article as revised at the current session.

Article 56. Minimum requirements as regards open framework agreements

254. The Working Group agreed that the article should contain a reference to the duration of the open framework agreement. Reference was made in this context to footnote 16 of document A/CN.9/WG.I/WP.66/Add.4. With this change, the Working Group approved the draft article.

Article 57. Second stage of an open framework agreement procedure

255. The Working Group recalled its earlier decision that the proposed article 57 would be deleted since its content had already been reflected in article 54 (see para. 247 above).

7. CHAPTER VII. REVIEW

256. The Working Group noted that the entire chapter had been revised to reflect the decisions taken by the Working Group at its fourteenth session (A/CN.9/664, paras. 18-74). The Working Group proceeded with an article-by-article consideration of the chapter.

Article 58. Right to review

257. The Working Group approved the proposed article without change.

Article 59. Review by the procuring entity or the approving authority

258. The Working Group noted that the proposed article was based on article 53 of the 1994 Model Law, which had been revised reflecting the Working Group's decisions taken at its fourteenth session (A/CN.9/664, paras. 28-33 and 65). It was noted that paragraph (1) (b) was to be considered together with proposed article 19 (provisions on a standstill period) and article 62 (provisions on suspension of procurement proceedings).

259. It was suggested that the proposed article should be redrafted to make clearer that the review under the article was optional. It was further noted that fixing a specific number of days in paragraph (1) (b) would be inappropriate, since this number would vary from procurement to procurement. It was agreed that no specific number of days should be included in the provisions but referred to the decision by an enacting State. It was also agreed that the Guide should in this respect bring to the attention of enacting States the time period specified in the WTO GPA.

260. Subject to these changes, the Working Group approved the draft article.

Article 60. Review before an independent administrative body

261. The Working Group noted that the proposed article was based on article 54 of the 1994 Model Law, which had been revised reflecting the Working Group's decisions taken at its fourteenth session (see A/CN.9/664, paras. 35, 36, 39, 44, 53, 55 and 56).

262. The Working Group agreed:

(a) To insert a footnote to this article as suggested in footnote 38 of document A/CN.9/WG.I/WP.66/Add.4;

(b) To delete in paragraph (2) the word "original", and to explain the intended meaning of the provisions in the Guide;

(c) To delete in paragraph (2) the reference to a specific number of days, with the appropriate explanation in the Guide, in conformity with the Working Group's decision taken on the same issue in conjunction with article 59 (1) (b) (see para. 259 above);

(d) To replace in paragraph (3) the current cross-reference to paragraph 62 (5) with the cross-reference to paragraph 62 (3);

(e) To retain in paragraph (5) (f) option I only, the wording of which should be aligned with the relevant provisions of international instruments, such as

article XX (7) (c) of the WTO GPA and article XVIII (7) (b) of the provisionally agreed text of the revised WTO Agreement on Government Procurement;[6]

(f) To move option II from paragraph (5) (f) to the Guide with the explanations of the reasons for removing it, in particular that allowing for compensation of anticipatory losses proved to be highly disruptive for procurement proceedings since it provided additional incentives for complaints. It was also suggested that the Guide should explain evolution in regulations on this matter and highlight the relevant provisions of the WTO GPA and the provisionally agreed text of the revised WTO Agreement on Government Procurement;

(g) To clarify in the Guide the meaning of the term "independent administrative body", in particular whether the body should be composed of outside experts. It was noted that the Guide might highlight the disruptions to the procurement proceedings if decision-taking at the review stage lacked independence since decisions would be subject to appeal and would cause further delays.

263. It was suggested that in paragraph (3) the word "timely" should be deleted as being subjective. It was explained that no subjectivity was involved as the reference intended to indicate that the complaints were to be submitted within the time limit prescribed in paragraph (2).

264. In response to the suggestion that paragraph (5) (a) should be included in the chapeau of the paragraph, the Secretariat was requested to research the drafting history of the provisions. The Working Group decided to defer the consideration of the suggestion until after the findings of the Secretariat were considered.

265. Subject to paragraph 264 above, the Working Group approved the draft article as revised at the current session.

Article 61. Certain rules applicable to review proceedings under articles 59 and 60

266. The Working Group noted that the proposed article was based on article 55 of the 1994 Model Law, which had been revised reflecting the Working Group's discussions at the Working Group's fourteenth session (A/CN.9/664, paras. 59-60).

267. The Working Group agreed:

(a) To redraft paragraph (4), so as to remove the ambiguity in reference to "relevant documents";

(b) To consider including in paragraphs (3) and (4) exceptions to disclosure on the basis of confidentiality, with the Guide explaining that considerations of confidentiality should not impair a fair trial and a fair hearing;

(c) To clarify in the Guide that the term "participating in the procurement proceedings" could include a different pool of participants depending on the timing of the review proceedings, and further to specify that those whose submissions were rejected or disqualified might not have the right to participate in the review proceedings.

268. Subject to these changes, the Working Group approved the draft article.

---

[6] Document GPA/W/297, available as of the date of this report at www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm.

Article 62. Suspension of procurement proceedings and article 63. Judicial review

269. The Working Group noted that the proposed articles were based on articles 56 and 57 of the 1994 Model Law, respectively. The Working Group approved the draft articles without change.

8. Title of the Model Law

270. It was agreed that the title of the Model law should read "the UNCITRAL Model Law on Public Procurement".

9. Preamble

271. It was suggested that paragraph (b) of the preamble should be redrafted to indicate that the Model Law's goal was first of all to foster international trade. The proposal was to delete the words "especially where appropriate, participation by suppliers and contractors". Alternative views were expressed that the provisions as appeared in the 1994 text were important and should be retained, and that the main purpose of the Model Law was to foster the goal of the enacting States to maximize the efficiency of the public procurement processes. It was therefore noted that the priorities as reflected in the preamble were correct and the text should therefore remain unchanged.

10. Definitions

272. The Working Group noted that the proposed provisions in article 2 were to be considered together with the definitions set out in the draft articles 49 and 51 (see paras. 229 and 234-237 above) and together with the following new definitions:

> "'Open solicitation' means solicitation in … (the enacting State specifies the official gazette or other official publication in which the solicitation is to be published).
>
> 'Direct solicitation' means solicitation from [chosen/identified] supplier(s) or contractor(s)."

273. It was agreed:

(a) To place the two new definitions reproduced in the preceding paragraph in article 2 in square brackets for future consideration;

(b) To retain in subparagraph (a) of article 2 the reference to "goods, construction and services" that should be followed with the term "subject matter of the procurement" in parenthesis, which would then be used in the text of the Model Law;

(c) To explain in the Guide that the words "by any means" in subparagraph (a) of article 2 intended to indicate that procurement was carried out not only through acquisition by purchase but also by other means such as lease, and that these words should not therefore be interpreted as implying possibility of using unlawful means;

(d) To delete in subparagraph (k) of article 2 the reference to the "subject matter of the procurement";

(e) To remove the definitions in subparagraphs (l) (i) to (iii) of article 2 to the Guide;

(f) To include in article 2 the definitions contained in the proposed articles 49 and 51 as revised at the current session.

274. The Working Group approved draft article 2 as revised at the current session.

V. Other business

275. The Working Group noted that some delegates had expressed concerns with the quality of translated documents, in particular with French and Spanish versions. A complaint was voiced that some provisions of the English versions of the documents had not been translated at all, and difficulties had arisen in understanding other provisions that had been translated.

276. The Working Group heard views of some delegates that the completion of the project by the Commission's forty-second session, in 2009, should remain the desirable goal but the achievement of this goal should not jeopardize the quality of the considerations or of the resulting instrument, and should not put undue pressure on the delegates and the Secretariat.

277. The Working Group noted that the text, further revised to reflect the decisions taken at the current session, was expected to be before the Commission at its forty-second session, in July 2009. However, in the light of the revisions to be made in the text, the Working Group requested that every effort should be made to convene an additional session of the Working Group before the Commission's session in 2009, preferably in May.

278. The Working Group noted difficulties with the completion of the outstanding research and the drafting by an anticipated May session of the Working Group. As regards procurement methods involving negotiations, one delegation agreed to present a conference room paper proposing a revised chapter IV.

279. Doubt was expressed about the value of holding the May session if the results of that session were not reflected in an instrument presented to the Commission. In response, it was explained that the report of the May session could be presented to the Commission, and the revised text could be included in conference room papers that would be made available at the session. It was noted that further consultations would be held with the Bureau of the Commission regarding the advisability of holding an additional session of the Working Group and more generally regarding planning for the forty-second session of the Commission.

280. The Working Group agreed to the suggestion that the documents prepared after the current session for continuation of the discussion before the forty-second session of the Commission should be posted on the UNCITRAL website upon their availability in various language versions.

G. Note by the Secretariat on possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services — a revised text of the Model Law, submitted to the Working Group on Procurement at its fifteenth session

(A/CN.9/WG.I/WP.66 and Add.1-5) [Original: English]

CONTENTS

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 8 to 88 of document A/CN.9/WG.I/WP.65, which is before the Working Group at its fifteenth 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 fourteenth session, the Working Group agreed that its first priority would be to finalize its work on the text of the Model Law. Thus, it was agreed that a complete version of the revised Model Law would be presented to the Working Group for consideration at its next session. It also agreed that its aim was to submit the text of a revised Model Law, further revised to reflect the deliberations of the Working Group at its fifteenth session, to the Commission for consideration at its forty-second session, in 2009.[1]

3. This note has been prepared further to these decisions of the Working Group. It first provides an overview of the Working Group's work on the revision of the Model Law pursuant to the mandate given to the Working Group by the Commission, highlighting issues that have already been addressed in the work, and

[1] A/CN.9/664, para. 113.

the outstanding issues. A complete text of the revised Model Law is set out in the addenda to this note. It incorporates the amendments considered to different extent by the Working Group as of the date of this note as well as the Secretariat's drafting suggestions aimed at simplification and standardization of the Model Law pursuant to the mandate given to the Working Group by the Commission (see chapter II of this note for more details). A table indicating correlation of the articles in the revised Model Law set out in the addenda to this note to the articles of the 1994 Model Law and new articles considered by the Working Group to date is contained in the last addendum to this note.

4. As was noted at the Working Group's fourteenth session, revisions to the Guide to Enactment of the Model Law for benefit of legislators would be drafted as the Working Group's second priority, and the Secretariat would, to the extent possible, provide a working draft of a revised Guide to the Commission at its session when a revised Model Law is considered.[2]

II. Overview of the Working Group's work on the revision of the Model Law

Original mandate

5. At its thirty-seventh session, in 2004, the Commission mandated its Working Group I (Procurement) to update the Model Law, to reflect new practices, in particular those that 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, without departing from the basic principles of the Model Law. It gave the Working Group a flexible mandate to identify the issues to be addressed in its considerations (A/59/17, paras. 80-82).

List of topics

6. The Working Group began its work at its sixth session (Vienna, 30 August-3 September 2004), at which it decided to proceed with the in-depth consideration of the following topics in sequence: (a) electronic publication of procurement-related information; (b) the use of electronic communications in the procurement process; (c) controls over the use of electronic communications in the procurement process; (d) electronic reverse auctions (ERAs); (e) the use of suppliers' lists; (f) framework agreements; (g) procurement of services; (h) evaluation and comparison of tenders, and the use of procurement to promote industrial, social and environmental policies; (i) remedies and enforcement; (j) alternative methods of procurement; (k) community participation in procurement; (l) simplification and standardization of the Model Law; and (m) legalization of documents (A/CN.9/568, para. 10).

7. The Working Group continued the work at eight subsequent sessions[3] at which it added topics of abnormally low tenders (ALTs) and conflicts of interest to the list

---

[2] Ibid., para. 115.

[3] For the reports of the seventh to the fourteenth sessions of the Working Group, see A/CN.9/575, A/CN.9/590, A/CN.9/595, A/CN.9/615, A/CN.9/623, A/CN.9/640, A/CN.9/648 and A/CN.9/664.

of topics to be considered in its work (A/CN.9/575, para. 76, as regards ALTs; and A/CN.9/615, paras. 11 and 82-85, as regards conflicts of interest).

Topics considered

8. The Working Group considered and preliminarily approved the drafting proposals for the Model Law on topics (a) electronic publication of procurement-related information, (b) the use of electronic communications in the procurement process, (c) controls over the use of electronic communications in the procurement process, (d) ERAs, and ALTs. A revised text of the Model Law set out in the addenda to this note reproduces in the relevant parts the preliminarily approved draft provisions on these topics. The outstanding issues still to be considered by the Working Group in connection with these provisions are highlighted in the accompanying footnotes.

9. As regards topic (e) the use of suppliers' lists, at its thirteenth session, the Working Group decided that the topic would not be addressed in the Model Law, because the flexible provisions addressing framework agreements were sufficient to provide for the uses to which suppliers' lists might be put, and also because of the acknowledged risks that suppliers' lists raised. These reasons would be set out in the Guide to Enactment (A/CN.9/648, para. 14).

10. The drafting proposals on topic (f) framework agreements were considered by the Working Group at its twelfth to fourteenth sessions. At its fourteenth session, the Working Group requested the Secretariat to separate provisions addressing closed framework agreements from those addressing open framework agreements. The draft provisions prepared by the Secretariat pursuant to that request have been included in the revised text of the Model Law set out in the addenda to this note. The provisions are new and have replaced the drafting provisions on this topic submitted earlier.

11. The Working Group considered topic (i) remedies and enforcement at its fourteenth session. It decided to delete the list of exceptions to the review process contained in article 52 (2) of the Model Law, to revise the provisions and procedures contained in articles 53-56 of the Model Law and to introduce a standstill period in article 36 (A/CN.9/664, paras. 14-15). The draft provisions prepared by the Secretariat pursuant to these decisions have been included in the revised text of the Model Law set out in the addenda to this note. The provisions are submitted for consideration by the Working Group for the first time.

12. The Working Group discussed the issues of conflicts of interest at its fourteenth session, and agreed to consider expanding articles 4, 15 and 54 of the Model Law to address the relevant requirements of the United Nations Convention against Corruption (A/CN.9/664, para. 17). The draft provisions prepared by the Secretariat to reflect the Working Group's decisions on the topic taken at that session have been included in the revised text of the Model Law set out in the addenda to this note. The provisions are submitted for consideration by the Working Group for the first time.

Outstanding topics

13. The Working Group has not considered in depth the following topics: (g) procurement of services; (h) evaluation and comparison of tenders, and the use

of procurement to promote industrial, social and environmental policies; (j) alternative methods of procurement; (k) community participation in procurement; (l) simplification and standardization of the Model Law; and (m) legalization of documents.

14. In the following sections, the Secretariat provides information about preliminary conclusions on these topics reached at the Working Group's sixth session and, based on consultations with experts, suggests a course of action with respect to each outstanding topic. Where appropriate, the Secretariat has reflected those suggestions in the revised Model Law set out in the addenda to this note.

15. The Working Group is invited to consider the suggestions with respect to each outstanding topic and determine which of them should be implemented and at which stage, taking into account considerations of resources and time and its decision to submit the text, further revised to reflect the deliberations at its fifteenth session, to the Commission for consideration at its forty-second session, in 2009. The Working Group's attention is brought in this regard to the practice in UNCITRAL to circulate a draft instrument for comment by States and interested international organizations before the draft is considered by the Commission. The comments received are compiled and transmitted by the Secretariat to the Commission for consideration together with the draft. If such practice is followed, the Secretariat would not have time to make significant revisions to the draft text of the Model Law attached to this note after the Working Group's fifteenth session, and the comments would be considered only at the Commission session.

A. Procurement of services

16. At its sixth session, the Working Group preliminarily agreed that the Model Law should retain all the various options in methods for the procurement of services currently provided. However, the Working Group also agreed on the need to formulate guidelines in the Guide for the use of each method, depending on the type of services at issue and the relevant circumstances (A/CN.9/568, para. 93).

17. At the same time, as regards topic (j) alternative methods of procurement, the Working Group agreed to reconsider conditions for the use of some methods of procurement and the usefulness of retaining all of them (see para. 32 below). In addition, as regards topic (l) simplification and standardization of the Model Law, the Working Group agreed to consider ways of simplifying and streamlining the Model Law, in particular by removing repetitions, inconsistencies or unnecessarily detailed provisions, with the desired result being a more user-friendly Model Law where all essential elements would be preserved and presented in an improved structure and in a simpler way (see paras. 51 and 52 below).

18. The Secretariat reviewed the provisions of the Model Law taking into account these decisions of the Working Group. It found that a number of provisions of the Model Law could be streamlined, including those on alternative methods of procurement and on the procurement of services, so as to provide a cohesive and more user-friendly approach to the selection of a method of procurement other than tendering under the Model Law. The suggestions as regards alternative methods of procurement and other aspects of simplification and standardization are presented in

sections C and E, respectively. This section addresses the provisions on procurement of services under chapter IV of the Model Law.

19. The Working Group may wish to consider a degree of overlap between two of the selection procedures in the principal method for the procurement of services described in articles 42 and 43 of chapter IV and the request for proposals procedure described in article 48 in chapter V. The services selection procedure without negotiation (article 42) is identical to the request for proposals procedure if the latter proceeds without negotiations (a possible occurrence as, under article 48 (7), the request for proposals procedure contains an option, and not an obligation, to hold negotiations). The services selection procedure with simultaneous negotiations (article 43) is identical to the request for proposals procedure if the latter includes negotiation stage(s). All these three selection procedures (that is, the two services selection methods under articles 42 and 43 and the request for proposals procedure under article 48) can be used for procurement of services. In addition, in all three:

(a) Open or direct solicitation may be held;

(b) Proposals are submitted against a single set of specifications made known at the outset of the procurement and not changed subsequently;

(c) Evaluation criteria may concern the relative managerial and technical competence of the supplier or contractor; and

(d) Price is considered separately and only after completion of the technical evaluation.

20. Taking into account such a significant degree of overlap in all these three selection procedures, their presentation in the Model Law as separate selection procedures may not be justifiable.

21. The only selection procedure in chapter IV (procurement of services) distinct from the other selection procedures of the Model Law is the one described in article 44 (selection procedure with consecutive negotiations). In this connection, the Secretariat draws the Working Group's attention to a similar selection procedure included in the more recently negotiated UNCITRAL instruments on privately financed infrastructure projects (the "PFIPs instruments").[4] Taking into account that the Model Law and these latter instruments deal partly with the same issue, i.e., selection of a supplier or contractor for government contracts, the Working Group may wish to consider to which extent these instruments should be coherent in this area and, if so, how to achieve desired coherence.[5]

22. Currently, the competitive selection procedure in the PFIPs instruments is based largely on the features of the principal method for the procurement of services, in particular the selection procedure with consecutive negotiations, of the

---

[4] See model provision 17 of the UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects (2003) (the "PFIPs Model Legislative Provisions"), and recommendations 26-27 and chapter III, paragraphs 83-84, of the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects (2000) (the "PFIPs Legislative Guide").

[5] The PFIPs instruments, with respect to the selection of the concessionaire, significantly rely on the general legislative framework for the award of government contracts. They therefore extensively cross-refer to the provisions of the Model Law, and some provisions are based largely on the provisions of the Model Law (see footnote 7 of the PFIPs Model Legislative Provisions, and chapter III of the PFIPs Legislative Guide).

Model Law. The competitive selection procedure under the PFIPs instruments are different from the relevant provisions of the Model Law in several important respects:

(a) Prequalification (the PFIPs instruments refer to pre-selection) is mandatory (see model provision 6 (1)). Under article 7 (1) of the Model Law, prequalification is optional;

(b) Under the PFIPs instruments, after prequalification/pre-selection, the procuring entity may invite to participate further in the selection process either all of the pre-selected bidders or only a limited number who best meet the pre-selection criteria (the procuring entity has to disclose at the outset in the pre-selection documents which course of action it will follow) (see model provision 9). Under article 7 (6) of the Model Law, all suppliers or contractors that have been prequalified are entitled to participate further in the procurement proceedings;

(c) Under the PFIPs instruments, there are two types of procedure for requesting proposals: single-stage and two-stage procedures (see model provision 10). In a single-stage procedure under the PFIPs instruments, proposals are submitted against a single set of specifications made known at the outset of the procurement proceedings and not amended thereafter. This is common procedure in all but some procurement methods under the Model Law. A two-stage procedure under the PFIPs instruments, on the other hand, has no equivalent in the Model Law. It resembles the two-stage tendering described in article 46 of the Model Law and like the two-stage tendering is used when it is not feasible to describe in the request for proposals the characteristics of the project in a manner sufficiently detailed and precise to permit final proposals to be formulated. However, unlike the Model Law provisions on the two-stage tendering, the provisions of the PFIPs instruments on the two-stage procedures for requesting proposals (i) do not require exclusion of price in initial proposals, and (ii) allow negotiations subsequent to the submission of the proposals against the final single set of specifications;

(d) Under the PFIPs instruments, final negotiations may concern any contractual terms, except those, if any, that were stated as non-negotiable in the final request for proposals (see model provision 17). In the similar provisions of the Model Law (selection procedure with consecutive negotiations of article 44 of the Model Law), negotiations concern only price;

(e) Finally, under the PFIPs instruments, the criteria for the evaluation and comparison of proposals does not include qualifications criteria (see model provisions 7 and 14), whereas in the Model Law they include such criteria as qualifications, experience, reputation, reliability and professional and managerial competence of the supplier or contractor and of the personnel to be involved in providing services (article 39 (1) (a) mostly repeating the provisions of article 6 (1) (b) (i)).

23. Most of the remaining provisions in chapter IV (articles 37-40) repeat the identical provisions in chapter III (tendering) although some inconsistencies between them exist. The Working Group may wish to consider that removing these inconsistencies in the current revision of the Model Law would be timely and would contribute significantly to the simplification and standardization of the Model Law.

24. In the light of the above-given considerations, the Working Group may wish to consider therefore:

(a) A different way of presenting all the various options in methods for the procurement of services currently provided in the Model Law; and

(b) That the additional work should be done to conform the UNCITRAL instruments in the two areas of its work — public procurement and PFIPs.

25. The Secretariat's suggestions as regards a different way of presenting all the various options in methods for the procurement of services currently provided in the Model Law would affect the whole structure of the Model Law. They are therefore to be viewed as suggestions for simplification and standardization of the Model Law and are discussed in the respective section E below.

B. Evaluation and comparison of tenders, and the use of procurement to promote industrial, social and environmental policies

Evaluation and comparison of tenders

26. The Working Group may wish to consider formulating a single set of requirements as regards evaluation criteria building on the provisions of articles 27 (e), 34 (4), 38 (m) and 39 and provisions on evaluation criteria in the alternative methods: that they should be relevant to the subject matter of the procurement and, to the extent practicable, be objective and quantifiable, and that they have to be disclosed at the outset of the procurement together with any margins of preference, relative weights, thresholds, and the manner in which the criteria, margins, relative weights, and thresholds will be applied, so as to enable submissions to be evaluated objectively and compared on a common basis. While important for all procurement methods, these requirements are currently spread across several provisions in the Model Law that are not consistent and complete (for example, they do not obligate the procuring entity to disclose the manner in which the criteria, margins, relative weights, and thresholds will be applied).

27. If the Working Group decides that such a single set of requirements applicable to all procurement methods should be included in the Model Law, it may decide to include it in chapter I of the Model Law that currently sets out general provisions applicable to all procurement methods. The Secretariat's drafting suggestions are presented in the revised text of the Model Law set out in the addenda to this note.

The use of procurement to promote industrial, social and environmental policies

28. At its sixth session, no final decision was taken on the need for or desirability of formulating in the text of the Model Law additional control mechanisms to ensure transparency and objectivity in the use of procurement to promote other policy goals. It was agreed that the Working Group might consider formulating additional guidance on the means to enhance transparency and objectivity where other policy goals affected evaluation criteria (A/CN.9/568, para. 101).

29. At that session, the attention of the Working Group was drawn to two overlapping subparagraphs of article 34 (4) of the Model Law: subparagraph (c) (iii), dealing with non-objective factors permitted to be taken into account in determining the lowest evaluated tender; and subparagraph (d), dealing

with granting a margin of preference for domestic needs (similar provisions are found in article 39 (1) (d) and (2)). Both of them aimed at promoting the domestic economy and therefore the Working Group was invited to consider consolidating them. No decision was taken by the Working Group on this issue at that time.

30. Finally, at its sixth session, the Working Group viewed as outdated, and therefore did not exclude the possibility of reconsidering, in due course, the desirability of retaining provisions in article 34 (4) (c) (iii) that referred to the balance of payments position and foreign exchange reserves and to the counter-trade arrangements as factors to be taken into account in determining the lowest evaluated tender (similar provisions are found in article 39 (1) (d)). The Working Group's attention in this respect is drawn to provisions of article 22 (2), under which the promotion of policies specified in articles 34 (4) (c) (iii) and 39 (1) (d) may justify recourse to a single-source procurement (see further discussion in paragraphs 45-47 below).

31. The Working Group may wish to formulate its position as regards all these issues deferred since the Working Group's sixth session when it considers the relevant provisions in the revised Model Law set out in the addenda to this note.

C. Alternative methods of procurement

32. At its sixth session, the Working Group agreed to consider whether to circumscribe conditions under which the alternative methods of procurement could be used, to prevent abuse. The Working Group agreed that it might further consider eliminating some methods and presenting them in a manner that stressed their exceptional, rather than alternative, nature under the Model Law (A/CN.9/568, para. 116).

33. At its tenth session, the Working Group considered a related issue whether the current preference for tendering contained in article 18 of the Model Law should be revisited, so as to take account of evolving procurement techniques and tools (A/CN.9/615, para. 38).

34. The Secretariat reviewed the procedural aspects of all alternative methods listed in chapter V. Each alternative method is tailored to meet particular requirements in procurement. Provided that sound justifications exist for their use, alternative methods are valuable tools for procuring entities. The Working Group may therefore wish to retain all of those methods.

35. However, the Working Group may wish to consider reviewing conditions for the use of alternative procurement methods in chapter II of the Model Law. Currently, some procurement methods may be used under the same conditions, and the Model Law does not set out a hierarchy, for example by requiring the procuring entity in such situations to have recourse to the most competitive method appropriate in the given circumstances. Expert consultants and commentators have also indicated to the Secretariat that some of the existing conditions for use may not be justifiable. Each case is analysed separately below, with recommendations to the Working Group as regards possible course of action.

Two-stage tendering, request for proposals and competitive negotiation

36. Two-stage tendering, request for proposals and competitive negotiation may be used under the same conditions (see article 19 (1)). The Guide to Enactment recognizes that there is an overlap in the conditions for use of these three procurement methods and gives an enacting State the option not to enact in their procurement laws each of those three methods. However, as mentioned, procedurally, all three procurement methods are different and there is value for an enacting State in retaining all of them to accommodate different procurement needs.

37. The Working Group may wish to consider revising the guidance on this issue. If it decides to recommend that an enacting State retain all these three alternative procurement methods, it may also wish to formulate a general principle in the Model Law that the most competitive method appropriate in the given circumstances should be used in the case of overlap of the conditions for use of different procurement methods. The Secretariat's drafting suggestions are presented in the revised text of the Model Law set out in the addenda to this note.

Restricted tendering (article 20 (a)) and direct solicitation (article 37 (3) (a))

38. The provisions state that restricted tendering or direct solicitation in case of services can be used when 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. The experts consulted by the Secretariat question whether this condition fosters the objectives of the Model Law: it is based on the subjective assessment of a procuring entity, which may be a simple error or may reflect a desire to favour some suppliers or contractors over others. It is suggested, therefore, that it would be consistent with the aims and objectives of the Model Law to require the procuring entity under the conditions referred to in articles 20 (a) and 37 (3) (a) to hold open tendering with prequalification (the latter is in any event recommended by the current Guide to Enactment for goods, construction or services of a highly complex or specialized nature).

39. In addition, considering article 20 (a) together with the provisions of article 47 that sets out procedures for restricted tendering, it is not clear how the implementation of article 20 (a) works in practice. Article 47 (1) (a) requires the solicitation of tenders from all suppliers or contractors from whom the goods, construction or services to be procured are available (equivalent provisions are found in article 37 (3) (a) addressing direct solicitation in the case of services). Article 47 (2) requires a notice of the restricted tendering proceedings to be published (no equivalent provisions are found in article 37 or other provisions in chapter IV related to services). Article 47 (3) explicitly excludes the application of article 24 on open solicitation of tenders or applications to prequalify to restricted tendering. In effect, however, when a supplier or contractor expresses its interest to participate in the proceedings in response to the published notice of the restricted-tendering proceedings, the procuring entity would have to allow such a supplier or contractor to participate under article 47 (1) (a). Thus, although not intended, a notice of the restricted tendering proceedings will have in practice the effect of notice of soliciting tenders, and the difference between open and restricted tendering is therefore blurred. (It should be noted that, in the case of request for proposals through public notice, article 48 (2) explicitly states that the notice shall not confer

any rights on suppliers or contractors, including any right to have a proposal evaluated.)

40. The Working Group may wish to clarify these provisions of the Model Law. The Guide to Enactment currently provides little guidance on them and would have to be amended to reflect clearly the position of the Model Law. The Secretariat's drafting suggestions are presented in the revised text of the Model Law set out in the addenda to this note.

Single-source procurement

41. Some of the conditions for use of two-stage tendering, request for proposals and competitive negotiation, such as seeking to enter into a contract for the purpose of research, experiment, study or development (article 19 (1) (b)) and procurement involving national defence or national security (article 19 (1) (c)), may also justify recourse to single-source procurement (see article 22 (1) (e) and (f)). To prevent abuses in the use of single-source procurement, the Working Group may wish to clarify in the Model Law that recourse to single-source procurement under these overlapping conditions must be exceptional, and only in situations where the use of another procurement method is not appropriate. This would be in line with the general principle proposed in paragraphs 35 and 37 above. The Secretariat's drafting suggestions to this effect are presented in the revised text of the Model Law set out in the addenda to this note.

42. Furthermore, under article 19 (2), competitive negotiation can be used when:

> "(a) There is an urgent need for the goods, construction or services, and engaging in tendering proceedings would therefore be impractical, provided that the circumstances giving rise to the urgency were neither foreseeable by the procuring entity nor the result of dilatory conduct on its part; or,
>
> "(b) Owing to a catastrophic event, there is an urgent need for the goods, construction or services, making it impractical to use other methods of procurement because of the time involved in using those methods."

43. Similar conditions are found in article 22 (1) (b) and (c). In addition to prioritizing under these conditions recourse to competitive negotiation as the more competitive method, the Working Group may wish to consider whether it is justifiable to present the conditions as distinct and separate conditions, since both deal with an urgent and unforeseeable need for the goods, construction or services, either due to a catastrophic event or otherwise. The Secretariat's drafting suggestions are presented in the revised text of the Model Law set out in the addenda to this note.

44. The Working Group may also wish to consider article 22 (1) (a) that justifies the recourse to single-source procurement if the goods, construction or services are available only from a particular supplier or contractor. The Working Group may wish to consider that the concerns expressed in paragraph 38 above with respect to the condition for use of restricted tendering in article 20 (a) (availability of goods, construction or services only from a limited number of suppliers or contractors) equally apply to the similar condition in article 22 (1) (a). The Secretariat's drafting suggestions are presented in the revised text of the Model Law set out in the addenda to this note.

45. Finally, the Working Group may wish to reconsider the condition for use of single-source procurement listed in article 22 (2), which reads:

> "(2) Subject to approval by ... (the enacting State designates an organ to issue the approval), and following public notice and adequate opportunity to comment, a procuring entity may engage in single-source procurement when procurement from a particular supplier or contractor is necessary in order to promote a policy specified in article 34 (4) (c) (iii) or 39 (1) (d), provided that procurement from no other supplier or contractor is capable of promoting that policy."

46. The Guide to Enactment explains that this provision refers to cases of serious economic emergency in which single-source procurement would avert serious harm (for example, where an enterprise employing most of the labour force in a particular region or city is threatened with closure unless it obtains a procurement contract). While the examples given in the Guide are very specific and narrow in scope, the provisions of the Model Law themselves are drafted very broadly. By reference to provisions of article 34 (4) (c) (iii) or 39 (1) (d), they may cover any situations where procurement involves such considerations as the balance of payments position and foreign exchange reserves of an enacting State, the countertrade arrangements offered by suppliers or contractors, the extent of local content, including manufacture, labour and materials, in goods, construction or services being offered by suppliers or contractors, the economic-development potential offered by tenders, including domestic investment or other business activity, the encouragement of employment, the reservation of certain production for domestic suppliers, the transfer of technology and the development of managerial, scientific and operational skills. The list is not exhaustive since the enacting State may expand article 34 (4) (c) (iii) by including additional criteria.

47. Thus the Working Group may wish to reconsider the wording of article 22 (2) by replacing the broad references to articles 34 (4) (c) (iii) and 39 (1) (d) with the specific reference from the Guide to Enactment to cases of serious economic emergency in which single-source procurement would avert serious harm (and retain in the Guide the example given to illustrate practical situations covered by this Model Law provision). The Secretariat's drafting suggestions are presented in the revised text of the Model Law set out in the addenda to this note.

48. In addition, the Working Group may also wish to consider providing additional guidance in the Guide as regards some other aspects of the provisions. For example, the provisions refer to a public notice and an "adequate opportunity to comment", without clarifying whose comments are sought and the purpose or the effect of comments if received. The provisions are unusual for the Model Law and presumably may be linked to the role of local communities in public procurement. At its sixth session, the Working Group expressed the intention of highlighting the role of local communities in public procurement where appropriate, in particular at the procurement planning and contract implementation phases (see section D immediately below). If the Working Group decides to provide guidance as regards these provisions, the work on formulating such guidance in the revised Guide to Enactment will be deferred to a later stage, for the reasons set out in paragraph 4 above.

D. Community participation in procurement

49. At its sixth session, it was felt that most issues raised by community participation in procurement related primarily to the planning and implementation phases of a project. Given its growing importance and the possible need for enabling legislation, the Working Group agreed that it should review the provisions of the Model Law with a view to ensuring that they did not pose obstacles to the use of community participation as a requirement in project-related procurement. The Guide, it was further agreed, might provide additional guidance on the matter (A/CN.9/568, para. 122).

50. In reviewing the provisions of the Model Law in this context, the Working Group may wish to consider whether the provisions on evaluation criteria may pose obstacles to the use of community participation as a requirement in project-related procurement. Alternatively, the Working Group may wish to consider that any provisions addressing the topic should be included only in the Guide in the context of discussion of the procurement planning and contract implementation phases and as relevant to some specific provisions of the Model Law (for example, article 22 (2), see paragraph 48 above). If the Working Group decides to take this approach, the work on the relevant guidance in the revised Guide to Enactment will be deferred to a later stage for reasons set out in paragraph 4 above.

E. Simplification and standardization of the Model Law

1. Consideration in the Working Group

51. At its sixth session, the Working Group agreed that there was some room for improving the Model Law's structure and for simplifying its contents, by some reordering or by eliminating unnecessarily detailed provisions or moving them to the Guide. It was felt that the desired result should be a more user-friendly Model Law where all essential elements would be preserved and presented in an improved structure and in a simpler way. Recognizing that, in the process of introducing new topics into the Model Law, changes would inevitably have to be made in its structure, the Working Group was of the view that it would be preferable to revert to the proposals for simplification of the Model Law at a later stage (A/CN.9/568, para. 126).

52. At the following sessions, the Working Group touched upon various aspects of simplification and standardization of the Model Law, such as restructuring of the Model Law,[6] ensuring consistency in various provisions dealing with the same matters[7] and revising some articles of the Model Law on other grounds.[8] Some proposals for simplification and standardization of the Model Law involve issues of substance. The Working Group deferred taking decisions on any aspects of simplification and standardization of the Model Law until a later stage, after new procurement techniques and other substantive revisions to the Model Law had been considered.

---

[6] A/CN.9/615, paras. 37-38.
[7] A/CN.9/623, para. 102.
[8] A/CN.9/640, para. 37, A/CN.9/648, para. 94, and A/CN.9/664, paras. 75 and 88.

53. The Secretariat held extensive consultations with various experts on various aspects of the simplification and standardization of the Model Law. In the section below, the Secretariat makes suggestions as regards each aspect of simplification and standardization discussed during those consultations.

2. Suggestions collated by the Secretariat

Scope of the Model Law

54. The Working Group may wish to reconsider the scope of the Model Law, notably as regards the defence and national security blanket exemptions (article 1 (2)). First of all, not all procurement in these sectors is so sensitive as to justify blanket exemptions from the provisions of the Model Law. Where, however, sensitive issues of national interest, security or defence are involved, the Model Law may provide special treatment, such as recourse to appropriate procurement methods that ensure confidentiality in the procurement proceedings. The importance of preserving confidentially should not however be interpreted as leading necessarily to single-source procurement: the procuring entity must still seek effective competition in such cases, for example by recourse to direct solicitation from a sufficient number of suppliers or contractors (see in this regard article 37 (3) (c)). Some provisions of the Model Law are already designed to accommodate sensitive procurement involving national defence or national security (see for example, articles 19 (1) (c), 22 (1) (f), 34 (4) (c) (iv), and 39 (1) (e)). Bringing national defence and national security sectors in the general ambit of the Model Law would lead to the promotion of a harmonized procurement legal regime across various sectors in enacting States.

55. If the Working Group decides to take this approach, it would involve making a number of consequential changes to various provisions of the Model Law. This work would have to be deferred to a later date for reasons explained in paragraph 15 above. At this stage, the Working Group may wish to consider some alternative wording for article 1 in the revised Model Law set out in the addenda to this note.

General rules: chapter I

56. The Working Group deferred to a later stage its consideration of the steps described in tendering proceedings (chapter III) that might be considered to be issues that should be addressed from the perspective of general rules applicable to all procurement methods (A/CN.9/623, para. 102). This was on the understanding that any additional general rules would be located in chapter I of the Model Law.

57. The Secretariat identified the following issues that may be considered by the Working Group in this regard:

(a) Acceptance of tender and entry into force of procurement contract (article 36 in lieu of the current article 13, which is limited in scope and does not address acceptance of submissions in procurement methods other than tendering). The Secretariat's drafting suggestions are reflected in the revised Model Law set out in the addenda to this note;

(b) A single set of requirements as regards evaluation criteria (see paragraphs 26-27 above). The Secretariat's drafting suggestions are reflected in the revised Model Law set out in the addenda to this note;

(c) Optional recourse to tender securities in all procurement methods. The Secretariat's drafting suggestions are reflected in the revised Model Law set out in the addenda to this note;

(d) Prequalification proceedings: provisions relating thereto found in articles 24 and 25 should be consolidated with article 7 so that all provisions related to the prequalification proceedings are located in one place. The Secretariat's drafting suggestions are reflected in the revised Model Law set out in the addenda to this note.

58. In addition, and as regards article 7 (prequalification proceedings), the Working Group may wish to consider setting out the distinct purposes of article 7 and of article 6 in a clearer way. Currently, an overlap between the two articles exists. Article 6 (1) (a) refers to the ascertainment of the qualifications of suppliers or contractors at any stage of the procurement proceedings while article 7 (1) refers to the ascertainment of qualifications of suppliers and contractors prior to the submission of tenders. Both articles deal with specific procurement proceedings. The Working Group may wish to consider the suggested relevant changes in the revised Model Law set out in the addenda to this note.

59. Furthermore, as mentioned in section A above, the Working Group may wish to consider that article 7 and provisions on pre-selection in the PFIPs instruments should be conformed (see paragraph 22 above). The Working Group may wish to consider the suggested changes in the revised Model Law set out in the addenda to this note.

60. Additionally, at its thirteenth and fourteenth sessions, the Working Group considered revisiting at a future session the information to be published under article 14 (public notice of procurement contract awards). Particular reference was made to the disclosure of the names of supplier(s) or contractor(s) selected to become the party or parties to the procurement contract or a framework agreement (A/CN.9/648, para. 94, and A/CN.9/664, para. 88). The Working Group may wish to consider the suggested changes in the revised Model Law set out in the addenda to this note.

61. The Working Group also deferred the consideration of article 11 (record of procurement proceedings) as a whole until after all other revisions to the Model Law had been agreed upon (A/CN.9/640, para. 37) as well as article 12 (1) (A/CN.9/623, para. 36). No changes, other than consequential changes in the light of other revisions to the Model Law, are suggested to these articles at this stage pending their review by the Working Group.

62. Moreover, during the Working Group's deliberations, a view has often been voiced that some long and repetitive references commonly used in the Model Law, such as references to "tenders, proposals, offers, quotations or bids" in articles 12, 12 bis and 15, should be replaced by more generic terms that could be defined in article 2 of the Model Law (see also references to "solicitation documents and other documents for solicitation of proposals, offers or quotations"). The Working Group deferred its decision as regards any revisions to article 2 (definitions), including whether any new definitions would be justifiable (e.g. A/CN.9/664, para. 75). The

Working Group may wish to consider the suggested additional definitions for article 2 in the revised Model Law set out in the addenda to this note.

63. In addition, the Working Group may wish to consider supplementing article 2 with an expanded glossary of terminology in the Guide. If the Working Group agrees that such a glossary should be included in the Guide, this work would have to be deferred to a later stage for the reasons set out in paragraph 4 above.

64. Finally, the Working Group deferred taking decisions on changing the location of some provisions in chapter I, for example by putting provisions dealing with a similar cluster of issues, such as articles 12, 12 bis and 15, closer together. The Working Group may wish to consider the suggested structural changes in the revised Model Law set out in the addenda to this note.

Procurement methods: chapters II-V

65. As regards purely structural changes to these chapters, the Working Group decided to consider at a future time:

(a) Whether the conditions for use and procedures to be applied in particular procurement methods should appear in different chapters of the Model Law as is the case at present or should be put together;

(b) The location of new provisions on ERAs and framework agreements and consequential addition and naming of sections and renaming of titles of the existing chapters.

66. The Working Group may wish to consider the suggested structural changes in the revised Model Law set out in the addenda to this note.

67. As regards more substantive changes, the Working Group may wish to reconsider one basis on which the choice of a procurement method is currently made in the Model Law (article 18, being whether goods, works or services are procured). This approach is not always justifiable (for example, the selection procedure for services without negotiations (article 42) may be equally appropriate for procurement of more complex goods and construction). It also leads to repetitions and inconsistencies in many provisions (such as in chapters III and IV, see para. 23 above).

68. An alternative approach that would be more consistent with the aims and objectives of the Model Law and that would also significantly simplify and standardize the Model Law would be to base a choice of procurement methods on the consideration of complexity in identifying and evaluating subjects being procured, regardless whether the subject is goods, construction or services. Goods, construction or services which detailed specifications or characteristics can be formulated at the outset of the procurement and which can be evaluated through quantifiable criteria can be procured through straightforward procedures that do not involve negotiations (such as through open or restricted tendering (one-envelope system), open or restricted request for proposals without negotiation (two-envelope system, equivalent to the selection procedure in article 42 of the Model Law) and request for quotations). Procurement of more complex goods, construction or services, which specifications or characteristics have to be identified through negotiations or which cannot be evaluated through quantifiable criteria but rather by such non-quantifiable criteria as the effectiveness of a proposal or the most

satisfactory solution to the procuring entity's needs, can only be procured through procurement methods involving negotiations (two-stage tendering, open or restricted request for proposals with simultaneous or consecutive negotiations, which may involve a single stage or two stages for requesting proposals as in the PFIPs instruments, and competitive negotiation).

69. In straightforward procurement not involving negotiations, the Working Group may wish to require the procuring entity to choose the most competitive method. Thus open (international) solicitation should take place by default unless restricted or domestic tendering is justified on the grounds specified in the Model Law, as currently envisaged by the default rules in chapters I and II. In the procurement methods involving negotiations, the Working Group may consider that more discretion should be given to the procuring entity to decide which method is the most appropriate for achieving the desired outcome. Only exceptional circumstances identified in the Model Law would justify recourse to single-source procurement.

70. The revised Model Law set out in the addenda to this note follows this approach which is a more detailed application of the current principles of the Model Law. It sets out provisions for procurement methods not involving negotiations. Further work on procurement methods involving negotiations will be deferred to a later date for reasons explained in paragraph 15 above. In particular, additional work would need to be done to harmonize the Model Law provisions on procurement methods involving negotiations and the provisions of the PFIPs instruments as regards selection procedures.

F. Legalization of documents

71. At its sixth session, the Working Group noted that article 10 of the Model Law provided that if the procuring entity required the legalization of documents, it should not impose any requirements other than those provided by the general law for the type of documents in question. However, that article imposed no restrictions on the power of procuring entities to call for legalization of documents. In practice, it was said, procuring entities sometimes required the legalization of documents by all those who needed to demonstrate their qualifications to participate in a procurement procedure, which could be time-consuming and expensive for suppliers. In addition to the deterrent effect, all or part of the increased overheads for suppliers might be passed on to procuring entities. The Working Group agreed that it would be desirable to limit the power of procuring entities by requiring the procuring entity to ask legalization of documentation from a successful supplier alone. In doing so, the Working Group agreed that it could consider in due course whether article 10 could be combined with article 6 (5) (A/CN.9/568, paras. 127-128).

72. The Working Group may wish to consider the Secretariat's relevant changes in the revised Model Law set out in the addenda to this note.

A/CN.9/WG.I/WP.66/Add.1 (Original: English)

Note by the Secretariat on possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services — a revised text of the Model Law, submitted to the Working Group on Procurement at its fifteenth session

ADDENDUM

This note sets out the preamble and articles 1-15 of chapter I (General provisions) of a revised text of the Model Law. Articles 16-22 of chapter I are included in document A/CN.9/WG.I/WP.66/Add.2.

The Secretariat's comments are included in the accompanying footnotes and in square brackets in bold.

UNCITRAL MODEL LAW ON PROCUREMENT [OF GOODS, CONSTRUCTION AND SERVICES][1]

Preamble

WHEREAS the [Government] [Parliament] of ... considers it desirable to regulate procurement so as to promote the objectives of:

(a) Maximizing economy and efficiency in procurement;

(b) Fostering and encouraging participation in procurement proceedings by suppliers and contractors, especially where appropriate, participation by suppliers and contractors regardless of nationality, and thereby promoting international trade;

(c) Promoting competition among suppliers and contractors for the supply of the subject matter of the procurement;

(d) Providing for the fair and equitable treatment of all suppliers and contractors;

(e) Promoting the integrity of, and fairness and public confidence in, the procurement process; and

(f) Achieving transparency in the procedures relating to procurement,

Be it therefore enacted as follows.

---

[1] The Working Group may wish to consider whether the general distinction between goods, construction and services found in the 1994 text of the Model Law should be retained, given the draft proposals for its consideration relating to Chapters II-IV of the Model Law. These proposals address procurement procedures on the basis of the importance and extent of quality and non-quantifiable elements of procurement, in which the terms "goods, construction and services" would remain as descriptions only, rather than substantive elements of the Model Law. If the Working Group considers that the 1994 distinction is no longer required, the Guide to Enactment could discuss particular features of certain types of procurement, such as design and build construction procurement, and the procurement of non-quantifiable, specialised and licensed services. The remainder of this Note will, for convenience, refer to the subject-matter of the procurement.

CHAPTER I. GENERAL PROVISIONS[2]

Article 1. Scope of application[3]

[draft new text for consideration]

This Law applies to all procurement by procuring entities, except [(the enacting State may specify in this Law types of procurement to be excluded)].

[old text]

"(1) This Law applies to all procurement by procuring entities, except as otherwise provided by paragraph (2) of this article.

(2) Subject to the provisions of paragraph (3) of this article, this Law does not apply to:

(a) Procurement involving national defence or national security;

(b) ... (the enacting State may specify in this Law additional types of procurement to be excluded); or

(c) Procurement of a type excluded by the procurement regulations.

(3) This Law applies to the types of procurement referred to in paragraph (2) of this article where and to the extent that the procuring entity expressly so declares to suppliers or contractors when first soliciting their participation in the procurement proceedings."

Article 2. Definitions[4]

For the purposes of this Law:

(a) "Procurement" means the acquisition by any means of [subject matter of the procurement] [goods, construction or services];

(b) "Procuring entity" means:

(i) *Option I*

Any governmental department, agency, organ or other unit, or any subdivision thereof, in this State that engages in procurement, except ...; (and)

---

[2] See A/CN.9/WG.I/WP.66, paras. 54-64, for the issues to be considered in connection with this chapter.

[3] See A/CN.9/WG.I/WP.66, paras. 54-55, for the issues to be considered in connection with this article.

[4] Based on article 2 of the 1994 Model Law. See A/CN.9/WG.I/WP.66, para. 62, for the issues to be considered in connection with this article. The Working Group may also wish to consider the introduction of a glossary of main terms in the Guide to Enactment, to address descriptive rather than prescriptive or normative terms, to complement article 2 of the Model Law.

Option II

Any department, agency, organ or other unit, or any subdivision thereof, of the ("Government" or other term used to refer to the national Government of the enacting State) that engages in procurement, except ...; (and)

(ii) (The enacting State may insert in this subparagraph and, if necessary, in subsequent subparagraphs, other entities or enterprises, or categories thereof, to be included in the definition of "procuring entity");

(c) "Supplier or contractor" means, according to the context, any potential party or the party to the procurement proceedings[5] with the procuring entity;

(d) "Procurement contract" means a contract between the procuring entity and a supplier or contractor resulting from procurement proceedings;

[draft new subparagraph (e) for consideration][6]

(e) "Submission security" means a security required from suppliers or contractors by the procuring entity and provided to the procuring entity to secure the fulfilment of any obligation referred to in article [14 (1) (f)] and includes such arrangements as bank guarantees, surety bonds, stand-by letters of credit, cheques on which a bank is primarily liable, cash deposits, promissory notes and bills of exchange. For the avoidance of doubt, the term excludes any security for the performance of the contract;

[old subparagraph (h) to be deleted]

"(h) "Tender security" means a security provided to the procuring entity to secure the fulfilment of any obligation referred to in article 32 (1) (f) and includes such arrangements as bank guarantees, surety bonds, stand-by letters of credit, cheques on which a bank is primarily liable, cash deposits, promissory notes and bills of exchange;"

[old subparagraph (i) to be retained, but renumbered as subparagraph (f)]

(f) "Currency" includes monetary unit of account;

[draft new definitions for consideration][7]

(g) "Submission(s)" means tender(s), proposal(s), offer(s), quotation(s) and bid(s) referred to collectively or generically;

(h) "Solicitation" means request to supplier or contractors to present submissions;

---

[5] The reference to "the procurement proceedings" replaced the reference to "a procurement contract". The change reflects the Working Group's decision taking at its fourteenth session (A/CN.9/664, para. 24).

[6] Based on paragraph (h) of article 2 of the 1994 Model Law, which was amended in the light of article 14 below. See also A/CN.9/WG.I/WP.66, para. 57 (c).

[7] See A/CN.9/WG.I/WP.66, para. 62. In the light of these proposed new definitions, consequential changes were made everywhere as appropriate in this revised Model Law.

(i) "Successful submission" means the submission ascertained by the procuring entity to be successful in accordance with the evaluation criteria set out in the solicitation documents pursuant to article [12] of this Law;

(j) "Solicitation documents" means all documents for solicitation of submissions;[8]

(k) "Description(s) [of the subject matter of the procurement]" means the description provided in accordance with article [11] of this Law;[9]

(l) "Subject matter of the procurement" means goods, construction or services to be procured:

[(i) "Goods" means objects of every kind and description including raw materials, products and equipment and objects in solid, liquid or gaseous form, and electricity, as well as services incidental to the supply of the goods if the value of those incidental services does not exceed that of the goods themselves; (the enacting State may include additional categories of goods);

(ii) "Construction" means all work associated with the construction, reconstruction, demolition, repair or renovation of a building, structure or works, such as site preparation, excavation, erection, building, installation of equipment or materials, decoration and finishing, as well as services incidental to construction such as drilling, mapping, satellite photography, seismic investigations and similar services provided pursuant to the procurement contract, if the value of those services does not exceed that of the construction itself;

(iii) "Services" means any object of procurement other than goods or construction; (the enacting State may specify certain objects of procurement which are to be treated as services).[10]]

Article 3. International obligations of this State relating to procurement [and intergovernmental agreements within (this State)][11]

To the extent that this Law conflicts with an obligation of this State under or arising out of any

(a) Treaty or other form of agreement to which it is a party with one or more other States,

---

[8] The Working Group may wish to consider whether this term would indicate tendering proceedings, and accordingly whether a broader formulation, such as "solicitation or equivalent documents" should be used.

[9] This paragraph is based on articles 16 and 27 (d) of the 1994 Model Law.

[10] If the Working Group considers that the 1994 distinction between goods, construction and services is no longer necessary, subparagraphs (i)-(iii) can be removed from the Model Law, with appropriate discussion in the Guide to Enactment. The definitions of goods, construction and services in these subparagraphs are taken from definitions (c) to (e) in article 2 of the 1994 Model Law. If the Working Group wishes to retain definitions of these terms, the word "description" might need to be replaced in the light of draft article 11 below (based on the 1994 article 16), and the definition of construction might be amended so as to include a specific reference to incidental design or other services.

[11] Reproduces article 3 of the 1994 Model Law.

(b) Agreement entered into by this State with an intergovernmental international financing institution, or

(c) Agreement between the federal Government of [name of federal State] and any subdivision or subdivisions of [name of federal State], or between any two or more such subdivisions,

the requirements of the treaty or agreement shall prevail; but in all other respects, the procurement shall be governed by this Law.

Article 4. Procurement regulations[12]

(1) The ... (the enacting State specifies the organ or authority authorized to promulgate the procurement regulations) is authorized to promulgate procurement regulations to fulfil the objectives and to carry out the provisions of this Law.

(2) The procurement regulations shall include a code of conduct for officials engaged in procurement[,addressing, inter alia, the prevention of conflicts of interest in public procurement].[13]

Article 5. Publication of legal texts[14]

(1) Except as provided for in paragraph 2 of this article, the text of this Law, procurement regulations and other legal texts of general application in connection with procurement covered by this Law, and all amendments thereto, shall be promptly made accessible to the public and systematically maintained.

(2) Judicial decisions and administrative rulings with precedent value in connection with procurement covered by this Law shall be made available to the public and updated if need be.

Article 6. Information on forthcoming procurement opportunities[15]

Procuring entities may publish information regarding procurement opportunities from time to time. Such publication does not constitute a solicitation and does not

---

[12] Based on article 4 of the 1994 Model Law.

[13] Paragraph 2 is new and is before the Working Group for the first time. It was introduced further to the Working Group's decision taken at its fourteenth session (A/CN.9/664, paras. 17 and 116). The Working Group may wish to consider whether the reference to avoidance of conflicts of interest in square brackets is necessary in the Model Law so as to link the text with the requirements of the United Nations Convention Against Corruption, or whether reference in the Guide to Enactment would be sufficient. The Working Group will also receive a Conference Room Paper at its fifteenth session that will set out the common provisions of such codes of conduct, which the Working Group may wish to include in the Guide to assist enacting States in drafting the regulations concerned. An important feature of inclusion of a code of conduct in regulations is that it would then be subject to mandatory publication in accordance with article 5(1).

[14] Article 5 is as preliminarily approved by the Working Group at its twelfth session (A/CN.9/640, paras. 30-34), except for its paragraph (3), which is set out in a separate article 6, immediately following this article.

[15] Article 6 is based on draft article 5 (3) as preliminarily approved by the Working Group at its twelfth session (A/CN.9/640, para. 34).

obligate the procuring entity to issue solicitations for the procurement opportunities identified.

[draft new article for consideration]

Article 7. Rules concerning methods of procurement and type of solicitation[16]

(1) Except as otherwise provided by this Law, a procuring entity shall conduct procurement by means of tendering proceedings.[17]

(2) A procuring entity may use a method of procurement other than tendering in only in accordance with paragraphs (3) to (6) of this article, and shall choose the most competitive method [and technique][18] appropriate in the circumstances of the given procurement.[19]

(3) Where it is feasible to provide detailed description of the subject matter of the procurement and establish the evaluation criteria in quantifiable or monetary terms, but where the use of tendering proceedings would not be appropriate [for reasons of economic efficiency], a procuring entity may use a method of procurement referred to in chapter III of this law, provided that the conditions for the use of that method are satisfied.[20]

(4) Where it is not feasible for the procuring entity to formulate detailed description of the subject matter of the procurement and/or establish the evaluation criteria in quantifiable or monetary terms, and any other conditions for the use of that method are satisfied, a procuring entity may use a method of procurement referred to in chapter IV of this Law.[21]

(5) A procuring entity may use electronic reverse auction as a stand-alone method of procurement or in conjunction with other methods of procurement as appropriate in accordance with the provisions of chapter V of this Law, provided that the conditions for the use of electronic reverse auctions are satisfied.[22]

(6) (Subject to approval by ... (the enacting State designates an organ to issue the approval),) a procuring entity may engage in single-source procurement in the following exceptional circumstances:[23]

---

16 The article is new and before the Working Group for the first time. It is based on a number of articles of the 1994 Model Law as indicated with respect to each relevant provision.

17 Based on provisions of article 18 (1) of the 1994 Model Law. The Guide to Enactment could explain the implications of this provision, including that the procuring entity should first seek to draft both specifications and evaluation criteria when considering whether or not tendering proceedings are feasible.

18 The Working Group may wish to consider whether the Model Law should include a reference to the various tools available within procurement methods, such as electronic reverse auctions and framework agreements, should be made in this context.

19 New text. See A/CN.9/WG.I/WP.66, paras. 35, 37, 41 and 43.

20 Based on article 18 of the 1994 Model Law, referring to the chapter of the Model Law addressing simpler procurement.

21 Based on articles 18 and 19 (1) (a) of the 1994 Model Law.

22 Based on draft article 22 bis as amended at the Working Group's twelfth session (A/CN.9/640, paras. 56-57, and A/CN.9/WG.I/WP.59, para.3). See article 42 of the revised Model Law.

23 The paragraph is based on article 22 of the 1994 Model Law.

(a) The goods, construction or services are available only from a particular supplier or contractor, or a particular supplier or contractor has exclusive rights in respect of the goods, construction or services, such that no reasonable alternative or substitute exists, and the use of a competitive procurement method would therefore not be possible;"[24]

[draft new subparagraph (b) for consideration][25]

(b) There is an urgent need for the subject matter of the procurement, and engaging in tendering proceedings or any other method of procurement[26] because of the time involved in using those methods would therefore be impractical, provided that the circumstances giving rise to the urgency were owing to a catastrophic event, or otherwise neither foreseeable by the procuring entity nor the result of dilatory conduct on its part.

[old subparagraphs (b) and (c) to be deleted][27]

"(b) There is an urgent need for the goods, construction or services, and engaging in tendering proceedings or any other method of procurement would therefore be impractical, provided that the circumstances giving rise to the urgency were neither foreseeable by the procuring entity nor the result of dilatory conduct on its part;

(c) Owing to a catastrophic event, there is an urgent need for the goods, construction or services, making it impractical to use other methods of procurement because of the time involved in using those methods;"

[old subparagraphs (d) and (e) to be maintained, but renumbered as paragraphs (c) and (d)]

(c) The procuring entity, having procured goods, equipment, technology or services from a supplier or contractor, determines that additional supplies must be procured from that supplier or contractor for reasons of standardization or because of the need for compatibility with existing goods, equipment, technology or services, taking into account the effectiveness of the original procurement in meeting the needs of the procuring entity, the limited size of the proposed procurement in relation to the original procurement, the reasonableness of the price and the unsuitability of alternatives to the goods or services in question;[28]

(d) The procuring entity seeks to enter into a contract with the supplier or contractor for the purpose of research, experiment, study or development, except where the contract includes the production of goods in quantities to establish their

---

[24] Based on article 22 (1) (a) of the 1994 Model Law. As to whether the qualification relating to exclusive rights should be required, see A/CN.9/WG.I/WP.66, para. 44.

[25] See A/CN.9/WG.I/WP.66, paras. 42-43.

[26] This formulation would imply that the use of competitive negotiations under article 41 of the revised Model Law is also precluded for reasons of urgency, a point that could be stressed in the Guide to Enactment. If there is only one supplier or contractor, single source procurement is available under subparagraph (a) irrespective of the urgency of the procurement. The Guide to Enactment could also stress that the need for the subject matter refers also to the quantity needed urgently, and not just to the subject-matter of the procurement, so as to avoid open-ended procurement justified on the basis of an initial urgent need.

[27] Reproduces article 22 (1) (b) and (c) of the 1994 Model Law.

[28] Reproduces article 22 (1) (d) of the 1994 Model Law.

commercial viability or to recover research and development costs, and provided that the use of any method of procurement specified in chapter IV of this Law is not possible [or appropriate];[29] or

[old subparagraph (f) to be deleted][30]

"(f) The procuring entity applies this Law, pursuant to article 1 (3), to procurement involving national defence or national security and determines that single-source procurement is the most appropriate method of procurement."[31]

[draft new subparagraph (e) for consideration]

(e) Subject to approval by ... (the enacting State designates an organ to issue the approval), and following public notice and adequate opportunity to comment, a procuring entity may engage in single-source procurement when procurement from a particular supplier or contractor is necessary [in cases of serious economic emergency in order to avert serious economic or social harm][32] [in order to promote a policy specified in article [12 (3) (e)], provided that procurement from no other supplier or contractor is capable of promoting that policy].[33]

[draft new paragraphs (7)-(9) for consideration]

(7) (a) A procuring entity using a method of procurement other than tendering in accordance with paragraphs (3) to (6) of this article shall [use open solicitation/commence the procurement by soliciting submissions [or, where applicable, applications to prequalify] through the publication of an invitation conforming to the requirements of article [25] in ... (the enacting State specifies the official gazette or other official publication in which the notice is to be published),][34] unless:

---

[29] Based on article 22 (1) (e) of the 1994 Model Law. The last part of the subparagraph starting with the words "and provided that" was added. See A/CN.9/WG.I/WP.66, para. 41, for the reasons thereof.

[30] Reproduces article 22 (1) (f) of the 1994 Model Law.

[31] An alternative new text, which would tend to more limited inclusion of defence and similar procurement, proposed in the light of the issues raised in A/CN.9/WG.I/WP.66, para. 41, and the proposed expanded scope of article 1 (see A/CN.9/WG.I/WP.66, paras. 54-55, and article 1 above), could read as follows: "In the case of procurement involving national defence or national security, where the procuring entity determines that [the use of any other method of procurement under this Law is not possible [or appropriate]] [single-source procurement is the most appropriate method of procurement]". The wording in the second set of square brackets is based on article 22 (1) (f) of the 1994 Model Law.

[32] The text in the first set of square brackets is new. It is based on the Guide commentary to article 22 of the 1994 Model Law. See A/CN.9/WG.I/WP.66, paras. 45-47.

[33] The text in the second set of square brackets is from article 22 (2) of the 1994 Model Law. The Working Group may wish to consider various provisions in the Model Law that address non-procurement related socioeconomic policy goals, and the extent to which they should remain in their current formulation, as a separate aspect of the revisions to the Model Law.

[34] The Working Group may wish to introduce the term "open" solicitation to refer to procurement commenced by an advertisement as described in articles 24 and 37 of the 1994 Model Law, so that this shorthand term can be used in the articles addressing the various procurement methods in the Model Law. In the 1994 Model Law, the term was not used, but the term "direct solicitation" was used in article 37(3). The Working Group may wish to retain the term "direct solicitation", as the alternative to open solicitation. The Working Group may also wish to

(i) The conditions for the use of [direct solicitation] specified in articles [35, 37, 40 and 41] are present; or

(ii) [Direct solicitation] is the only means of ensuring confidentiality or is required by reason of the national interest;

provided that in using [direct solicitation], the procuring entity solicits proposals from a sufficient number of suppliers or contractors to ensure effective competition.[35]

(b) Where [direct solicitation] is used to ensure confidentiality, and where the procuring entity determines that the procedures set out in articles [6, 15 (10) as regards public disclosure, 20, 22 (2), 24, *or the provisions on public disclosure in chapter VII. Review are to be added*] of this Law should not apply, it shall include in the record of the procurement required under article [22] of this Law, a statement of the grounds and circumstances on which it relied to justify its determination;

(c) Open solicitation shall include the international publication of the invitation to present submissions [as described in article 24(2)],[36] except:

(i) Where the procurement proceedings are limited solely to domestic suppliers or contractors pursuant to article [9 (1)]; or

(ii) The procuring entity determines, in view of the low value of the subject matter of the procurement, that only domestic suppliers or contractors are likely to be interested in presenting submissions, in which case it shall include in the record of the procurement required under article [22] of this Law, a statement of the grounds and circumstances on which it relied to justify its determination.[37]

(8) A procuring entity may enter into a framework agreement in accordance with the provisions of chapter VI of this Law.[38]

(9) The procuring entity shall include in the record required under article [22] a statement of the grounds and circumstances on which it relied to justify the use of any procurement method other than tendering or the use of [direct solicitation] as referred to in paragraphs (2) to (7) of this article.[39]

---

consider whether there should be definitions of these terms in article 2 of the Model Law. For convenience, rather than repeating lengthy definitions, the remainder of this Note will use the terms “open” and “direct” solicitation.

35 Based on provisions of article 37 (3) of the 1994 Model Law.

36 The Working Group may wish to include in article 2 a definition of the term “international publication”, so as to simplify this paragraph and article 24(2).

37 Based on repetitive provisions found in articles 17 (a) and (b), 23 (a) and (b), and 37 (2) of the 1994 Model Law.

38 New text.

39 Based on article 18 (4) of the 1994 Model Law.

Article 8. Communications in procurement[40]

(1) Any document, notification, decision and other information generated in the course of a procurement and communicated as required by this Law, including in connection with review proceedings under chapter [VII] or in the course of a meeting, or forming part of the record of procurement proceedings under article [22], shall be in a form that provides a record of the content of the information and that is accessible so as to be usable for subsequent reference.

(2) Communication of information between suppliers or contractors and the procuring entity referred to in articles [14 (1)(d),[41] 15 (6) and (10),[42] 19 (4),[43] 31 (2)(a),[44] 33 (1),[45] …[46] and in the case of direct solicitation in accordance with article 7 (2) (b)[47]] may be made by means that do not provide a record of the content of the information on the condition that, immediately thereafter, confirmation of the communication is given to the recipient of the communication in a form that provides a record of the content of the information and that is accessible so as to be usable for subsequent reference.

(3) The procuring entity, when first soliciting the participation of suppliers or contractors in the procurement proceedings, shall specify:

(a) Any requirement of form;

(b) The means to be used to communicate information by or on behalf of the procuring entity to a supplier or contractor or to the public or by a supplier or contractor to the procuring entity or other entity acting on its behalf;

(c) The means to be used to satisfy all requirements under this Law for information to be in writing or for a signature; and

(d) The means to be used to hold any meeting of suppliers or contractors.

(4) The means referred to in the preceding paragraph shall be readily capable of being utilized with those in common use by suppliers or contractors in the relevant context. The means to be used to hold any meeting of suppliers or contractors shall in addition ensure that suppliers or contractors can fully and contemporaneously participate in the meeting.

---

40 The article is based on article 5 bis as preliminarily approved by the Working Group at its twelfth session (A/CN.9/640, paras. 17-25). The consequential changes have been made in paragraph (2) of this article (cross-references to other appropriate provisions of the Model Law) in the light of the revisions to this Model Law.

41 Corresponds to the previous reference to article 32 (1) (d).

42 Corresponds to the previous reference to article 7 (4) and (6).

43 Corresponds to the previous reference to article 36 (1), and the Working Group may wish to amend or remove it, depending on the finalization of the Working Group's revisions to the proposed article on the acceptance and entry into force of the procurement contract and introduction of the standstill period. The issue is whether or not a procurement contract can enter into force on the basis of, for example, a telephone call, to be followed by written confirmation. See, also, article 19(9) below (drawing on article 36(4) of the 1994 Model Law) regarding the meaning of dispatch.

44 Corresponds to the previous reference to the same article.

45 Corresponds to the previous reference to article 34 (1).

46 The missing reference is to the previous article 44 (b) to (f) (selection procedure with consecutive negotiation). It shall be updated in the light of the revisions to chapter IV.

47 Corresponds to the previous reference to articles 37 (3) and 47 (1) of the 1994 Model Law.

(5) Appropriate measures shall be put in place to secure the authenticity, integrity and confidentiality of information concerned.

Article 9. Participation by suppliers or contractors[48]

(1) Suppliers or contractors are permitted to participate in procurement proceedings without regard to nationality, except in cases in which the procuring entity decides, on grounds specified in the procurement regulations or according to other provisions of law, to limit participation in procurement proceedings on the basis of nationality.

(2) A procuring entity that limits participation on the basis of nationality pursuant to paragraph (1) of this article shall include in the record of the procurement proceedings a statement of the grounds and circumstances on which it relied.

(3) The procuring entity, when first soliciting the participation of suppliers or contractors in the procurement proceedings, shall declare to them that they may participate in the procurement proceedings regardless of nationality, a declaration which may not later be altered. However, if it decides to limit participation pursuant to paragraph (1) of this article, it shall so declare to them.

Article 10. Qualifications of suppliers and contractors[49]

(1) This article applies to the ascertainment by the procuring entity of the qualifications of suppliers or contractors at any stage of the procurement proceedings;

(2) Suppliers or contractors must meet such of the following criteria as the procuring entity considers appropriate in the particular procurement proceedings:[50]

(i) That they possess the necessary professional and technical qualifications, professional and technical competence, financial resources, equipment and other physical facilities, managerial capability, reliability, experience, ethical standards, and reputation, and the personnel, to perform the procurement contract;

(ii) That they have legal capacity to enter into the procurement contract;

(iii) That they are not insolvent, in receivership, bankrupt or being wound up, their affairs are not being administered by a court or a judicial officer, their business activities have not been suspended, and they are not the subject of legal proceedings for any of the foregoing;

---

[48] Reproduces article 8 of the 1994 Model Law.

[49] Based on article 6 of the 1994 Model Law, with consequential changes in the light of the revisions to this Model Law, and with the amendments as marked.

[50] This formulation is intended to allow the procuring entity to assess the qualifications or all suppliers or contractors, or only those of the winning supplier or contractor. The Guide to Enactment could also explain that the elements of subparagraph (i) should be addressed before the submission of tenders or other offers to avoid inappropriate pressure to accept a winning offer from a supplier that might not be qualified, particularly in procurement for items that are not available off-the-shelf. The Working Group has previously indicated that the terminology used in the Model Law, which is not always replicated in other systems, should be explained in the Guide to Enactment.

(iv) That they have fulfilled their obligations to pay taxes and social security contributions in this State;

(v) That they have not, and their directors or officers have not, been convicted of any criminal offence related to their professional conduct or the making of false statements or misrepresentations as to their qualifications to enter into a procurement contract within a period of ... years (the enacting State specifies the period of time) preceding the commencement of the procurement proceedings, or have not been otherwise disqualified pursuant to administrative suspension or debarment proceedings.

(2) Subject to the right of suppliers or contractors to protect their intellectual property or trade secrets, the procuring entity may require suppliers or contractors participating in procurement proceedings to provide such appropriate documentary evidence or other information as it may deem useful to satisfy itself that the suppliers or contractors are qualified in accordance with the criteria referred to in paragraph (1) (b).

(3) Any requirement established pursuant to this article shall be set forth in the prequalification documents, if any, and in the solicitation documents, and shall apply equally to all suppliers or contractors. A procuring entity shall impose no criterion, requirement or procedure with respect to the qualifications of suppliers or contractors other than those provided for in this article.

(4) The procuring entity shall evaluate the qualifications of suppliers or contractors in accordance with the qualification criteria and procedures set forth in the prequalification documents, if any, and in the solicitation documents.

(5) Subject to articles [9 (1) and 12 (4)], the procuring entity shall establish no criterion, requirement or procedure with respect to the qualifications of suppliers or contractors that discriminates against or among suppliers or contractors or against categories thereof on the basis of nationality, or that is not objectively justifiable.

[draft new paragraph (6) for consideration][51]

(6) Notwithstanding paragraph (5) of this article, the procuring entity may require the legalization of documentary evidence provided by the supplier or contractor presenting the successful submission to demonstrate its qualifications in procurement proceedings. In doing so, the procuring entity shall not impose any requirements as to the legalization of the documentary evidence other than those provided for in the laws of this State relating to the legalization of documents of the type in question.

(7) (a) The procuring entity shall disqualify a supplier or contractor if it finds at any time that the information submitted concerning the qualifications of the supplier or contractor was false;

(b) A procuring entity may disqualify a supplier or contractor if it finds at any time that the information submitted concerning the qualifications of the supplier or contractor was materially inaccurate or materially incomplete;

---

[51] Based on article 10 of the 1994 Model Law, which was amended pursuant to the preliminary agreement reached at the Working Group's sixth session. See A/CN.9/WG.I/WP.66, paras. 71-72. The suggestions of expert consultants have also been incorporated.

(c) Other than in a case to which subparagraph (a) of this paragraph applies, a procuring entity may not disqualify a supplier or contractor on the ground that information submitted concerning the qualifications of the supplier or contractor was inaccurate or incomplete in a non-material respect. The supplier or contractor may be disqualified if it fails to remedy such deficiencies promptly upon request by the procuring entity.

Article 11. Rules concerning description of the subject-matter of the procurement, and the terms and conditions of the procurement contract or framework agreement[52]

(1) The procuring entity shall set out in the solicitation documents the description of the subject-matter of the procurement that it will use in assessing whether a submission is responsive. No description of the subject-matter of a procurement that creates an obstacle to the participation of suppliers or contractors in the procurement proceedings, including any obstacle based on nationality, shall be included or used in the prequalification documents, if any, or in the solicitation documents.

(2) The description of the subject-matter of the procurement may include specifications, plans, drawings, designs, requirements concerning testing and test methods, packaging, marking or labelling or conformity certification, and symbols and terminology.

(3) To the extent possible, any description of the subject matter of the procurement shall be objective, functional and generic, and shall set out the relevant technical and quality characteristics or the performance characteristics of that subject matter. There shall be no requirement of or reference to a particular trade mark, name, patent, design, type, specific origin or producer unless there is also a salient, sufficiently precise and intelligible way of describing the characteristics of the subject matter of the procurement and provided that words such as "or equivalent" are included.[53]

(4) (a) Standardized features, requirements, symbols and terminology relating to the technical and quality characteristics of the subject matter of the procurement shall be used, where available, in formulating any description of the subject matter of the procurement to be included in the prequalification documents, if any, or in the solicitation documents;

(b) Due regard shall be had for the use of standardized trade terms, where available, in formulating the terms and conditions of the procurement and the contract to be entered into as a result of the procurement proceedings, and in formulating other relevant aspects of the prequalification documents, if any, or solicitation documents.

---

[52] Based on article 16 with consequential changes in the light of the new definitions proposed to be added in article 2 above. The Guide to Enactment will explain the importance of this article, because it sets out what a responsive submission will be, and could also suggest that the solicitation documents should state the reference source for technical terms used (such as the European Common Procurement Vocabulary). The Working Group may also wish to consider whether this latter element should become a mandatory requirement for the solicitation documents.

[53] The suggestions of expert consultants have been included in this paragraph.

Article 12. Rules concerning evaluation criteria[54]

(1) The procuring entity shall set out in the solicitation documents the criteria to be used by the procuring entity in evaluating submissions and determining the successful submission. Where any criteria other than price are to be used in evaluating submissions and determining the successful submission, the procuring entity shall set out in the solicitation documents the relative weight to be accorded to each evaluation criterion and the manner in which the criteria are to be applied in the evaluation.[55]

(2) The evaluation criteria shall:

(a) Relate to the subject-matter of the procurement;

(b) Include the price of the subject-matter of the procurement.

(3) The evaluation criteria and the determination of the relative weights shall be, to the extent practicable:

(a) Objective; and

(b) Quantified or expressed in monetary terms.

(3) The evaluation criteria may concern the following elements, provided that they relate to the subject matter of the procurement:

(a) A margin of preference applied pursuant to paragraph [(4)] of this article, including any ancillary or related costs;

(b) The cost of operating, maintaining and repairing goods or construction, the time for delivery of goods, completion of construction or provision of services, the functional characteristics of goods or construction, the terms of payment and of guarantees in respect of the subject matter of the procurement;

(c) [Where the procurement is conducted in accordance with chapter IV,[56] the effectiveness of the submission presented by the supplier or contractor in meeting the needs of the procuring entity and, where relevant,[57] the qualifications, experience, reputation, reliability and professional and managerial competence of

---

[54] New article. It is based on articles 27 (e), 34 (4), 38 (m), 39 and 48 (3) of the 1994 Model Law. See A/CN.9/WG.I/WP.66, paras. 26, 27 and 57 (b).

[55] The Guide to Enactment will explain that the aim of this provision is to enable supplier or contractors to assess how their submissions will be measured against each other and against the evaluation criteria. Although there are no provisions setting out the level of sub-criteria that should be disclosed, the Guide will explain that the meaning of the reference to "the manner in which [they are] to be applied" is that any sub-factors or criteria that will be applied have to be disclosed, as must any mathematical formula that will be used.

[56] This formulation assumes that the Working Group excludes article 42 of the 1994 Model Law from the revised text of the Model Law. If the Working Group wishes to include an equivalent to article 42 for procurement in which the qualifications and expertise of individuals is an evaluation criterion in Chapter III, the references in this draft would be updated.

[57] The reference "where relevant" has been inserted in order to distinguish between those criteria that might be qualification rather than evaluation criteria. The Guide to Enactment will explain the difference between qualification criteria, responsiveness criteria and evaluation criteria, noting that the same criterion cannot be used in more than one of the assessments of qualification, responsiveness and evaluation.

the supplier or contractor and of the personnel to be involved in providing the services];[58]

(d) The effect that acceptance of a submission would have on the balance of payments position and foreign exchange reserves of [this State], the countertrade arrangements offered by suppliers or contractors, the extent of local content, including manufacture, labour and materials, in goods, construction or services being offered by suppliers or contractors, the economic development potential offered by submissions, including domestic investment or other business activity, the encouragement of employment, the reservation of certain production for domestic suppliers, the transfer of technology and the development of managerial, scientific and operational skills [... (the enacting State may expand this subparagraph by including additional criteria)];[59] and

(e) National defence and security considerations.

(4) If authorized by the procurement regulations, (and subject to approval by ... (the enacting State designates an organ to issue the approval),) in evaluating and comparing submissions, a procuring entity may grant a margin of preference for the benefit of submissions for construction by domestic contractors, for the benefit of submissions for domestically produced goods or for the benefit of domestic suppliers of services. The margin of preference shall be calculated in accordance with the procurement regulations and reflected in the record of the procurement proceedings.[60]

(5) The evaluation criteria and their relative weights disclosed in accordance with this article shall be applied in the determination of the successful submission in the manner in which they have been so disclosed.[61]

Article 13. Rules concerning the language of solicitation documents[62]

The prequalification documents and solicitation documents shall be formulated in ... (the enacting State specifies its official language or languages) (and in a language customarily used in international trade except for domestic procurement under article [7 (2) (c)] of this Law).

---

[58] To be considered in conjunction with chapter IV and the PFIPs instruments. See A/CN.9/WG.I/WP.66, paras. 16-25 and 67-70.

[59] The Working Group deferred its consideration of this subparagraph. See A/CN.9/WG.I/WP.66, paras. 29-30.

[60] The Working Group deferred its consideration of this paragraph. See A/CN.9/WG.I/WP.66, para. 29.

[61] The Guide to Enactment will explain that this will be the lowest price tender, the lowest evaluated tender, or proposal that best meets the needs of the procuring entity, etc, as the case may be. The Working Group has also decided to consider this terminology as part of its review of the Model Law.

[62] This article is based on the provisions of article 17 of the 1994 Model Law, which was amended in the light of article 7 (2) (c) above.

Article 14. Securities[63]

(1) When the procuring entity requires suppliers or contractors presenting submissions to provide a security:

(a) The requirement shall apply to all such suppliers or contractors;

(b) The solicitation documents may stipulate that the issuer of the security and the confirmer, if any, of the security, as well as the form and terms of the security, must be acceptable to the procuring entity;

(c) Notwithstanding the provisions of subparagraph (b) of this paragraph, a security shall not be rejected by the procuring entity on the grounds that the security was not issued by an issuer in this State if the security and the issuer otherwise conform to requirements set forth in the solicitation or equivalent documents (, unless the acceptance by the procuring entity of such a security would be in violation of a law of this State);

(d) Prior to presenting a submission, a supplier or contractor may request the procuring entity to confirm the acceptability of a proposed issuer of a security, or of a proposed confirmer, if required; the procuring entity shall respond promptly to such a request;

(e) Confirmation of the acceptability of a proposed issuer or of any proposed confirmer does not preclude the procuring entity from rejecting the security on the ground that the issuer or the confirmer, as the case may be, has become insolvent or otherwise lacks creditworthiness;

(f) The procuring entity shall specify in the solicitation documents any requirements with respect to the issuer and the nature, form, amount and other principal terms and conditions of the required security; any requirement that refers directly or indirectly to conduct by the supplier or contractor presenting the submission shall not relate to conduct other than:

(i) Withdrawal or modification of the submission after the deadline for presenting of submissions, or before the deadline if so stipulated in the solicitation documents;

(ii) Failure to sign the procurement contract if required by the procuring entity to do so;

(iii) Failure to provide a required security for the performance of the contract after the submission has been accepted or to comply with any other condition precedent to signing the procurement contract specified in the solicitation documents.

(2) The procuring entity shall make no claim to the amount of the security, and shall promptly return, or procure the return of, the security document, after whichever of the following that occurs earliest:

(a) The expiry of the security;

---

[63] This article reproduces provisions of article 32 of the 1994 Model Law with consequential changes in the light of the proposed revisions to article 2 above.

(b) The entry into force of a procurement contract and the provision of a security for the performance of the contract, if such a security is required by the solicitation documents;

(c) The termination of the procurement proceedings without the entry into force of a procurement contract;

(d) The withdrawal of the submission prior to the deadline for presenting submissions, unless the solicitation documents stipulate that no such withdrawal is permitted.

Article 15. Prequalification proceedings[64]

(1) The procuring entity may [and in cases specified in articles … shall][65] engage in prequalification proceedings with a view towards identifying, prior to the solicitation,[66] suppliers and contractors that are qualified. The provisions of article [10] shall apply to prequalification proceedings.

(2) If the procuring entity engages in prequalification proceedings, it shall cause an invitation to prequalify to be published in ... (the enacting State specifies the official gazette or other official publication in which the invitation to prequalify is to be published). The invitation to prequalify shall also be published, in a language customarily used in international trade, in a newspaper of wide international circulation or in a relevant trade publication or technical or professional journal of wide international circulation, except in cases of domestic procurement under article [7 (2) (c)] of this Law.[67]

(3) The invitation to prequalify shall contain, at a minimum, the following information:[68]

(a) The name and address of the procuring entity;[69]

(b) A summary of the principal required terms and conditions of the procurement contract to be entered into as a result of the procurement proceedings, including the nature and quantity, and place of delivery of the goods to be supplied, the nature and location of the construction to be effected, or the nature of the services and the location where they are to be provided, as well as the desired or

---

64 Based on articles 7, 23, 24, 25 (2) and 37 (1), (2) and (4), of the 1994 Model Law. See A/CN.9/WG.I/WP.66, paras. 22, 38 and 57(d) to 59, for the issues to be considered in connection with this article. The Working Group may also wish to consider whether any requirement for a certain level of financing should be included in the prequalification invitation or documents. In addition, the Working Group may wish to consider whether the any of the qualification criteria must be assessed at a certain stage of the proceedings (such as those set out in draft article 10(2)(i) above).

65 To be considered with article 35 (restricted tendering) and chapter IV and conformed with the PFIPs instruments. See A/CN.9/WG.I/WP.66, paras. 22 (a), 38 and 59.

66 The phrase “prior to the solicitation” replaced the previous wording “prior to the submission of tenders, proposals or offers”, to make distinction with article 10 (1) on qualifications clearer. See A/CN.9/WG.I/WP.66, para. 58.

67 Paragraph (2) is new and based on articles 23, 24 and 37 (1) and (2) of the 1994 Model Law.

68 Paragraph (3) is new and based on articles 7 (3), 23, 25 (2) that in turn extensively refers to article 25 (1), and 37 (1), of the 1994 Model Law.

69 See article 25 (2) to be read together with article 25 (1) (a), and 37 (1), of the 1994 Model Law.

required time for the supply of the goods or for the completion of the construction, or the timetable for the provision of the services;[70]

(c) The criteria and procedures to be used for ascertaining the qualifications of suppliers or contractors, in conformity with article [10 (1) (b)];[71]

(d) A declaration, which may not later be altered, that suppliers or contractors may participate in the procurement proceedings regardless of nationality, or a declaration that participation is limited on the basis of nationality pursuant to article [9 (1)], as the case may be;[72]

(e) The means of obtaining the prequalification documents and the place from which they may be obtained;[73]

(f) The price, if any, charged by the procuring entity for the prequalification documents and, subsequent to prequalification, for the solicitation documents;[74]

(g) Except in cases of domestic solicitation under article [7 (2) (c)] of this Law, the currency and terms of payment for the prequalification documents and, subsequent to prequalification, for the solicitation documents;[75]

(h) Except in cases of domestic solicitation under article [7 (2) (c)] of this Law, the language or languages in which the prequalification documents are available and in which, subsequent to prequalification, the solicitation documents will be available;[76]

(i) 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.[77]

(4) The procuring entity 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 providing them to suppliers or contractors.[78]

(5) The prequalification documents shall include, at a minimum the following information:[79]

(a) Instructions for preparing and submitting prequalification applications;[80]

---

[70] See article 7 (3) (a) (ii), article 25 (2) to be read together with articles 25 (1) (b) and (c), and article 37 (1), of the 1994 Model Law.

[71] See article 25 (2) to be read together with article 25 (1) (d), of the 1994 Model Law.

[72] See article 25 (2) to be read together with article 25 (1) (e), of the 1994 Model Law.

[73] See article 25 (2) (a) and article 37 (1), of the 1994 Model Law.

[74] See article 25 (2) (b), article 25 (2) to be read together with article 25 (1) (g), and article 37 (1), of the 1994 Model Law.

[75] See article 23 for the exception, article 25 (2) (c) and article 25 (2) to be read together with article 25 (1) (h), of the 1994 Model Law.

[76] See article 23 for the exception, article 25 (2) (d) and article 25 (2) to be read together with article 25 (1) (i), of the 1994 Model Law.

[77] See article 7 (3) (a) (iv) and article 25 (2) (e), of the 1994 Model Law.

[78] See article 7 (2) and article 37 (4), of the 1994 Model Law.

[79] See article 7 (3) of the 1994 Model Law.

[80] See article 7 (3) (a) (i) of the 1994 Model Law.

(b) Any documentary evidence or other information that must be submitted by suppliers or contractors to demonstrate their qualifications;[81]

(c) The name, functional title and address of one or more officers or employees of the procuring entity who are authorized to communicate directly with and to receive communications directly from suppliers or contractors in connection with the procurement proceedings, without the intervention of an intermediary;[82]

(d) References to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings;[83]

(e) If already known, the place and deadline for presenting submissions;[84]

[(f) Whether the procuring entity intends to solicit submissions only from a limited number of prequalified suppliers or contractors upon completion of the prequalification proceedings in accordance with paragraph (9) of this article, and, if so, that number and the manner in which the selection will be carried out;][85]

(g) 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.[86]

(6) 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.[87]

(7) 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.[88]

---

[81] See article 7 (3) (a) (iii) of the 1994 Model Law.

[82] See article 7 (3) (b) (ii) to be read together with article 38 (p), of the 1994 Model Law.

[83] See article 7 (3) (b) (ii) to be read together with article 38 (s), of the 1994 Model Law.

[84] See article 25 (2) to be read together with article 25 (1) (j), of the 1994 Model Law.

[85] New text based on model provision 6 (4) (c) of the UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects. It is to be considered with paragraph 9 and with consequential changes in paragraphs 10 to 12, of this article. All these provisions together should in turn be considered with chapter IV and the PFIPs instruments. See A/CN.9/WG.I/WP.66, para. 22 (b). One aspect of this question that the Working Group may wish to consider is the extent to which such a process can be regulated so that it is carried out in an impartial and objective manner.

[86] See article 7 (3) (a) (v) of the 1994 Model Law.

[87] See article 7 (4) of the 1994 Model Law. The Working Group may wish to consider whether those criteria should be subject to a greater degree of regulation, as is the evaluation of tenders.

[88] See article 7 (5) of the 1994 Model Law.

(8) Only suppliers or contractors that have been prequalified are entitled to participate further in the procurement proceedings.[89]

[(9) Notwithstanding paragraph [8] of this article, [in procurement proceedings under chapter IV of this Law,][90] the procuring entity may, provided that it has made an appropriate statement in the prequalification documents to that effect, reserve the right to solicit submissions upon completion of the prequalification proceedings only from a limited number of suppliers or contractors that best meet the prequalification criteria. For this purpose, the procuring entity shall rate the suppliers or contractors that meet the prequalification criteria on the basis of the criteria applied to assess their qualifications and draw up the list of suppliers or contractors that will be invited to present submissions upon completion of the prequalification proceedings. In drawing up the list, the procuring entity shall apply only the manner of rating that is set forth in the prequalification documents.][91]

(10) The procuring entity shall promptly notify each supplier or contractor submitting an application to prequalify whether or not it has been prequalified [or preselected in accordance with paragraph [(9)] of this article] and shall make available to any member of the general public, upon request, the names of all suppliers or contractors that have been prequalified [or preselected].[92]

(11) The procuring entity shall upon request communicate to suppliers or contractors that have not been prequalified [or preselected in accordance with paragraph [(9)] of this article] 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.[93]

(12) The procuring entity may require a supplier or contractor that has been prequalified [or preselected in accordance with paragraph [(9)] of this article] 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.[94]

---

[89] See article 7 (6), the last sentence, of the 1994 Model Law.

[90] The Working Group may wish to consider that such an option should also exist in other methods of procurement. If so, the words in the square brackets would be deleted.

[91] New text based on model provision 9 (2) of the UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects. It is to be considered with chapter IV and the PFIPs instruments. See A/CN.9/WG.I/WP.66, para. 22 (b). The consequential changes in the square brackets are in paragraphs 5 (f) and 10 to 12 of this article. As noted in footnote 85 above, the Working Group may wish to consider objectivity and impartiality in this process, particularly in the light of the review provisions that, as currently drafted, would apply to the procuring entity's decisions in this regard.

[92] See article 7 (6) of the 1994 Model Law, without the last sentence that was placed in paragraph (8) the current draft.

[93] See article 7 (7) of the 1994 Model Law.

[94] See article 7 (8) of the 1994 Model Law.

A/CN.9/WG.I/WP.66/Add.2 (Original: English)

Note by the Secretariat on possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services — a revised text of the Model Law, submitted to the Working Group on Procurement at its fifteenth session

ADDENDUM

This note sets out articles 16-22 of chapter I (General provisions) and chapter II (Tendering proceedings) of a revised text of the Model Law. The Secretariat's comments are set out in the accompanying footnotes and in the square brackets in bold.

CHAPTER I. GENERAL PROVISIONS
(*continued*)

Article 16. Rejection of all submissions[1]

(1) (Subject to approval by ... (the enacting State designates an organ to issue the approval)), and if so specified in the solicitation or equivalent documents,[2] the procuring entity may reject all submissions at any time prior to the acceptance of a submission. The procuring entity shall upon request communicate to any supplier or contractor that presented a submission, the grounds for its rejection of all submissions, but is not required to justify those grounds.

(2) The procuring entity shall incur no liability, solely by virtue of its invoking paragraph (1) of this article, towards suppliers or contractors that have presented submissions.

(3) Notice of the rejection of all submissions shall be given promptly to all suppliers or contractors that presented submissions.

---

[1] Reproduces article 12 with consequential amendments in the light of the newly proposed definitions in article 2.

[2] The Working Group has expressed concern as to whether the second opening phrase in this article should be retained. The Working Group deferred the consideration of any amendments to this article to a future session (A/CN.9/623, para. 36).

Article 17. Rejection of abnormally low submissions[3]

(1) The procuring entity may reject a submission if the procuring entity has determined that the submitted price with constituent elements of a submission is, in relation to the subject matter of the procurement, abnormally low and raises concerns with the procuring entity as to the ability of the supplier or contractor to perform the procurement contract, provided that:

(a) The procuring entity has requested in writing from the supplier or contractor concerned details of constituent elements of a submission that give rise to concerns as to the ability of the supplier or contractor to perform the procurement contract;

(b) The procuring entity has taken account of the information supplied, if any, but continues, on a reasonable basis, to hold those concerns; and

(c) The procuring entity has recorded those concerns and its reasons for holding them, and all communications with the supplier or contractor under this article, in the record of the procurement proceedings.

(2) The decision of the procuring entity to reject a submission in accordance with this article and grounds for the decision shall be recorded in the record of the procurement proceedings and promptly communicated to the supplier or contractor concerned.

Article 18. Rejection of a submission on the ground of inducements from suppliers or contractors or on the ground of conflicts of interest[4]

1. (Subject to approval by ... (the enacting State designates an organ to issue the approval),) a procuring entity shall reject a submission if the supplier or contractor that presented it offers, gives or agrees to give, directly or indirectly, to any current or former officer or employee of the procuring entity or other governmental authority a gratuity in any form, an offer of employment or any other thing of service or value, as an inducement with respect to an act or decision of, or procedure followed by, the procuring entity in connection with the procurement proceedings.

2. The rejection of the submission under this article and the reasons therefor shall be recorded in the record of the procurement proceedings and promptly communicated to the supplier or contractor.[5]

---

[3] The article is as preliminarily agreed by the Working Group at its twelfth session (draft article 12 bis, A/CN.9/640, paras. 44-55). Consequential amendments were made in the light of the newly proposed definitions in article 2.

[4] Based on article 15 of the 1994 Model Law, which was amended in the light of the newly proposed definitions in article 2 and further to the Working Group's discussions of conflicts of interest at its fourteenth session (A/CN.9/664, para. 116). The title of the article has been amended accordingly.

[5] In the light of the Working Group's discussions of conflicts of interest at its fourteenth session (A/CN.9/664, para. 116), the Working Group may wish to consider whether a provision should be including requiring the rejection of a submission that has been presented in circumstances indicating a conflict of interest. Alternatively, the Working Group may consider that the

Article 19. Acceptance of submissions and entry into force of the procurement contract[6]

(1) Unless rejected in accordance with the provisions of this Law, the procuring entity shall accept the successful submission.[7]

(2) Except in the case of single-source procurement, the procuring entity shall promptly notify all suppliers or contractors participating in the procurement proceedings of its decision to accept the successful submission. The notice shall contain, at a minimum, the following information:[8]

(a) The name and address of the supplier or contractor presenting the successful submission;

(b) The contract price or, where necessary, a summary of other characteristics and relative advantages of the successful submission, provided that the procuring entity shall not disclose any information if its disclosure would be contrary to law, would impede law enforcement, would not be in the public interest, would prejudice legitimate commercial interests of the suppliers or contractors or would impede fair competition;[9] and

(c) The period before the entry into force of the procurement contract during which the suppliers or contractors concerned may seek review of the decisions of the procuring entity related to the ascertainment of the successful submission (the standstill period). The standstill period shall be sufficiently long, but not shorter than [10/20][10] days, to allow the suppliers or contractors concerned to seek where necessary the effective review in accordance with chapter VII of this Law, and shall run from the date of the dispatch of the notice referred to in this paragraph to all suppliers or contractors participating in the procurement proceedings.

(3) Paragraph (2) of this article shall not apply [to awards where the contract price is less than […]][11] or] where the procuring entity certifies that urgent public interest

---

supplier or contractor should not be penalised if a procurement official has a conflict of interest, but that the procurement should be cancelled and another proceeding commenced.

6 Based on article 36 of the 1994 Model Law, which was amended in the light of: (i) the introduction of a standstill period (see the relevant Working Group's discussions in A/CN.9/664, paras. 45-55 and 72); (ii) expansion of the application of the article to all methods of procurement (see A/CN.9/WG.I/WP.66, para. 57 (a)); and (iii) the newly proposed definitions in article 2 and other revisions to the Model Law. It replaces article 13 of the 1994 Model Law.

7 Based on article 36 (1), the first sentence, of the 1994 Model Law.

8 The paragraph is new and was introduced further to the Working Group's decision to introduce a standstill period in article 36 of the 1994 Model Law (see A/CN.9/664, paras. 45-55 and 72).

9 The paragraph is based on the relevant provisions of the EU Directive 2007/66/EC of 11 December 2007 (see article 2a. Standstill period). The provisions on limitations of disclosure are based on similar provisions found in several provisions of the 1994 Model Law (see e.g., article 12 (3) (a)).

10 The duration could be aligned with the provisions of articles [53 and 54] (see A/CN.9/WG.I/WP.66/Add.4). See however the relevant footnotes to articles [53 and 54] wherein the Working Group is invited to consider shortening this duration, such as to the 10-day period contemplated by EU Directive 2007/66/EC of 11 December 2007.

11 The provisions are based on article 2b of the EU Directive 2007/66/EC of 11 December 2007. The Working Group may wish to consider whether the threshold should be the same as in article [20 (3)] of the Model Law, as the draft provisions indicate. The Working Group may wish to consider the other exceptions to the standstill period. For example, the EU Directive allows derogation from the standstill period in other cases where prior publication of a contract

considerations require the procurement to proceed without a standstill period. The certification, which shall state the grounds for the finding that such urgent considerations exist, shall be made a part of the record of the procurement proceedings and shall be conclusive with respect to all levels of review under chapter VII of this Law except judicial review.[12]

(4) Upon expiry of the standstill period, or in the absence of an applicable standstill period, promptly after the successful submission was ascertained, the procuring entity shall dispatch the notice of acceptance of the successful submission to the supplier or contractor that presented that submission unless otherwise determined by the review body or ordered by a competent court.[13]

(5) Unless a written procurement contract and/or approval by a higher authority is/are required, a procurement contract in accordance with the terms and conditions of the accepted submission enters into force when the notice of acceptance is dispatched[14] to the supplier or contractor concerned, provided that the notice is dispatched while the submission is still in force.[15]

(6) Where the solicitation or equivalent documents require the supplier or contractor whose submission has been accepted to sign a written procurement contract conforming to the terms and conditions of the accepted submission:

(a) The procuring entity (the requesting ministry) and the supplier or contractor concerned shall sign the procurement contract within a reasonable period of time after the notice of acceptance is dispatched to the supplier or contractor concerned;

(b) Unless the solicitation or equivalent documents stipulate that the procurement contract is subject to approval by a higher authority, the procurement contract enters into force when the contract is signed by the supplier or contractor concerned and by the procuring entity (the requesting ministry). Between the time when the notice of acceptance is dispatched to the supplier or contractor concerned and the entry into force of the procurement contract, neither the procuring entity (the requesting ministry) nor that supplier or contractor shall take any action that interferes with the entry into force of the procurement contract or with its performance.[16]

(7) Where the solicitation or equivalent documents stipulate that the procurement contract is subject to approval by a higher authority, the procurement contract shall

---

notice is not required (such as negotiated procedures without the prior publication of a contract notice).

[12] The paragraph is new. The provisions therein reflect the Working Group's decision at its fourteenth session (A/CN.9/664, para. 72).

[13] The paragraph is new. It is based on provisions of article 36 (1) and (4) of the 1994 Model Law, with the consequential changes in the light of the introduction of a standstill period and the provisions on review in chapter VII of the revised Model Law.

[14] See the current Guide to Enactment text to article 36, paragraph 5, for the rationale behind linking the effects of legal acts under this article to dispatch rather than receipt of the notices.

[15] The paragraph is based on provisions of article 36 (4), the first sentence, of the 1994 Model Law, with the consequential changes to reflect the proposed revisions to the Model Law. The second sentence of article 36 (4) of the 1994 Model Law was placed in paragraph (9) of this article to make the rule on dispatches applicable to all notices sent by the procuring entity under this article, not only to the notice of acceptance.

[16] The paragraph is based on article 36 (2) of the 1994 Model Law, with the consequential changes in the light of the proposed revisions to the Model Law.

not enter into force before the approval is given. The solicitation or equivalent documents shall specify the estimated period of time following dispatch of the notice of acceptance that will be required to obtain the approval. A failure to obtain the approval within the time specified in the solicitation or equivalent documents shall not extend the period of effectiveness of submissions specified in the solicitation or equivalent documents or the period of effectiveness of the security required under article [14] of this Law.[17]

(8) If the supplier or contractor whose submission has been accepted fails to sign a written procurement contract, if required to do so, or fails to provide any required security for the performance of the contract, the procuring entity shall select a successful submission in accordance with the applicable provisions from among the remaining submissions that are in force, subject to the right of the procuring entity, in accordance with article [16 (1)], to reject all remaining submissions. The provisions of this article shall then apply to the supplier or contractor that presented that submission.[18]

(9) The notices under this article are dispatched when they are properly addressed or otherwise directed and transmitted to the supplier or contractor, or conveyed to an appropriate authority for transmission to the supplier or contractor, by means specified in accordance with article [8] of this Law.[19]

(10) Upon the entry into force of the procurement contract and, if required, the provision by the supplier or contractor of a security for the performance of the contract, notice of the procurement contract shall be given to other suppliers or contractors, specifying the name and address of the supplier or contractor that has entered into the contract and the contract price.[20]

(11) The provisions of this article shall apply, as appropriate, to the selection of the party or parties to the closed framework agreements in accordance with articles […] of this Law as well as to the award of procurement contracts under open and closed framework agreements in accordance with articles […] of this Law.[21]

Article 20. Public notice of awards of procurement contract and framework agreement[22]

(1) Upon the entry into force of the procurement contract or conclusion of a framework agreement, the procuring entity shall promptly publish notice of the

---

17 The paragraph is based on article 36 (3) of the 1994 Model Law, with the consequential changes in the light of the proposed revisions to the Model Law.

18 The paragraph is based on article 36 (5) of the 1994 Model Law, with the consequential changes in the light of the proposed revisions to the Model Law.

19 The paragraph is based on provisions of article 36 (4), the second sentence, of the 1994 Model Law, with the consequential changes to reflect the proposed revisions to the Model Law. The provisions were placed in a paragraph to make the rule on dispatches applicable to all notices sent by the procuring entity under this article, not only to the notice of acceptance.

20 The paragraph is based on article 36 (6) of the 1994 Model Law, with the consequential changes in the light of the proposed revisions to the Model Law.

21 The paragraph is new and based on the provisions of article 2b of the EU Directive 2007/66EC of 11 December 2007, except that the EU directive requires the standstill period only for contracts concluded under framework agreements with the second stage competition and under dynamic purchasing systems.

22 Based on article 14 of the 1994 Model Law, which was amended to reflect the revisions to the Model Law.

award of the procurement contract or the framework agreement, specifying the name of the supplier or contractor to whom the procurement contract was awarded or, in the case of the framework agreement, name(s) of the supplier(s) or contractor(s) with whom the framework agreement was concluded.[23]

(2) The procurement regulations may provide for the manner of publication of the notice required by paragraph (1).[24]

(3) Paragraph (1) is not applicable to awards where the contract price is less than [...].[25]

Article 21. Confidentiality[26]

(1) The procuring entity shall treat submissions in such a manner as to avoid the disclosure of their contents to competing suppliers or contractors.

(2) Any discussions, communications and negotiations between the procuring entity and a supplier or contractors pursuant to articles in chapter IV of this Law shall be confidential. Unless required by law or by a court order or permitted in solicitation or equivalent documents, no party to the negotiations shall disclose to any other person any technical, price or other information relating to the negotiations without the consent of the other party.

Article 22. Record of procurement proceedings[27]

(1) The procuring entity shall maintain a record of the procurement proceedings containing, at a minimum, the following information:

(a) A brief description of the subject matter of the procurement;[28]

---

[23] The paragraph is based on article 14 (1). Provisions related to framework agreements as well as provisions on disclosure of the name(s) of the supplier(s) or contractor(s) were added. See A/CN.9/WG.I/WP.66, para. 60. The Working Group may wish to include further amendments to reflect the requirements for framework agreements here or in the framework agreements provisions, such as: "Where the contract price under a framework agreement exceeds [the enacting State includes a minimum amount [or] the amount set out in the procurement regulations], the procuring entity shall promptly publish notice of the award of the procurement contract(s). The procuring entity shall also publish, in the same manner, [quarterly] notices of all procurement contracts issued under a framework agreement or in any other manner set out in the framework agreement".

[24] Reproduces article 14 (2).

[25] Reproduces article 14 (3).

[26] The article is new and based on the provisions of article 45 of the Model Law and model provision 24 of the UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects.

[27] The article is based on article 11 of the 1994 Model Law, with the consequential changes in the light of the proposed revisions to the Model Law. The Working Group deferred the consideration of article 11 of the 1994 Model Law as a whole until after all other revisions to the Model Law had been agreed upon. See A/CN.9/WG.I/WP.66, para. 61.

[28] Based on article 11 (1) (a) of the 1994 Model Law, with the consequential changes in the light of the proposed new definitions in article 2.

(b) The names and addresses of suppliers or contractors that presented submissions, and the name and address of the supplier or contractor with whom the procurement contract is entered into and the contract price;[29]

(c) The procuring entity's decision as to the means of communication to be used in the procurement proceedings;[30]

(d) Information relative to the qualifications, or lack thereof, of suppliers or contractors that presented submissions;[31]

(e) The price, or the basis for determining the price, and a summary of the other principal terms and conditions of each submission and of the procurement contract, where these are known to the procuring entity;[32]

(f) A summary of the evaluation and comparison of submissions, including the application of any margin of preference pursuant to article [12 (4)];[33]

(g) If all submissions were rejected pursuant to article [16] of this Law, a statement to that effect and the grounds therefor, in accordance with article [16 (1)];[34]

(h) If, in procurement proceedings involving methods of procurement other than tendering, those proceedings did not result in a procurement contract, a statement to that effect and of the grounds therefor;[35]

(i) The information required by articles [17 and 18], if a submission was rejected pursuant to those provisions;[36]

(j) The statement of the grounds and circumstances required under article [7 (9)];[37]

(k) In procurement proceedings involving the use of electronic reverse auctions, information about the grounds and circumstances on which the procuring entity relied to justify recourse to the auction, the date and time of the opening and

---

29 Based on article 11 (1) (b) of the 1994 Model Law, with the consequential changes in the light of the proposed new definitions in article 2. The Working Group may wish to consider the amendments to this subparagraph in the light of the provisions on framework agreements.

30 The new subparagraph is as preliminarily approved by the Working Group at its ninth session (subparagraph (b) bis, A/CN.9/595, paras. 49-51).

31 Based on article 11 (1) (c) of the 1994 Model Law, with the consequential changes in the light of the proposed new definitions in article 2.

32 Based on article 11 (1) (d) of the 1994 Model Law, with the consequential changes in the light of the proposed new definitions in article 2. The Working Group may wish to consider the amendments to this subparagraph in the light of the provisions on framework agreements.

33 Based on article 11 (1) (e) of the 1994 Model Law, with the consequential changes in the light of the proposed new definitions in article 2.

34 Based on article 11 (1) (f) of the 1994 Model Law, with the consequential changes in the light of the proposed new definitions in article 2.

35 Reproduces article 11 (1) (g) of the 1994 Model Law.

36 Based on article 11 (1) (h) of the 1994 Model Law, with the consequential changes in the light of the proposed new definitions in article 2. In addition, the subparagraph was amended to reflect the introduction of the article on the abnormally low submissions (see article 17 of the revised Model Law).

37 Based on articles 11 (1) (i), (k) and (l), which were merged in the light of provisions of the proposed new article 7.

closing of the auction and [any other information that the Working Group decides to add];[38]

[(l) In the procurement of services by means of chapter IV, the statement required under article 41 (2) of the grounds and circumstances on which the procuring entity relied to justify the selection procedure used;][39]

(m) A summary of any requests for clarification of the prequalification documents, or solicitation or equivalent documents, the responses thereto, as well as a summary of any modification of those documents;[40]

(n) Other information required to be included in the record in accordance with the provisions of this Law.[41]

(2) Subject to article [32 (3)], the portion of the record referred to in subparagraphs [(a) and (b)] of paragraph (1) of this article shall, on request, be made available to any person after a submission has been accepted or after procurement proceedings have been terminated without resulting in a procurement contract.[42]

(3) Subject to article [32 (3)], the portion of the record referred to in subparagraphs [(d) to (h), and (m)], of paragraph (1) of this article shall, on request, be made available to suppliers or contractors that presented a submission, or applied for prequalification, after a submission has been accepted or procurement proceedings have been terminated without resulting in a procurement contract. Disclosure of the portion of the record referred to in subparagraphs [(d) to (f), and (m)], may be ordered at an earlier stage by a competent court.[43]

(4) Except when ordered to do so by a competent court, and subject to the conditions of such an order, the procuring entity shall not disclose:

(a) Information if its 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;

---

38 The new subparagraph is as preliminarily approved by the Working Group at its eleventh and twelfth sessions (subparagraph (i) bis, A/CN.9/623, para. 100, and A/CN.9/640, para. 91). The Working Group is to consider whether any other information should be added in lieu of the words in the square brackets.

39 Reproduces article 11 (1) (j). To be considered together with chapter IV.

40 Based on article 11 (1) (m) of the 1994 Model Law, with the consequential changes in the light of the proposed new definitions in article 2. Further provision "to reflect information that will be required as part of the record under the revised Model Law may be necessary".

41 The Working Group may wish to include further specific provision, such as regarding framework agreements if it decides that technological constraints may limit the number of suppliers that may be admitted to an open framework agreement.

42 Based on article 11 (2) of the 1994 Model Law, with the consequential changes in the cross references and changes in the light of the proposed new definitions in article 2.

43 Based on article 11 (3), first two sentences, of the 1994 Model Law, with the consequential changes in the cross references and changes in the light of the proposed new definitions in article 2. Reflecting suggestions made at the Working Group's twelfth session (A/CN.9/640, para. 90), the remaining provisions from paragraph (3) were placed in the new paragraph (4), with the consequential renumbering of the old paragraph (4) to paragraph (5). The restructured provisions were presented to the Working Group for consideration in document A/CN.9/WG.I/WP.59. The Working Group did not consider them in detail.

(b) Information relating to the examination, evaluation and comparison of submissions, and submission prices, other than the summary referred to in paragraph [(1) (f)] of this article.[44]

(5) The procuring entity shall not be liable to suppliers or contractors for damages owing solely to a failure to maintain a record of the procurement proceedings in accordance with the present article.[45]

CHAPTER II. TENDERING PROCEEDINGS[46]

SECTION I. SOLICITATION OF TENDERS

Article 23. Domestic tendering[47]

In domestic solicitation under article [7 (2) (c)] of this Law, the procuring entity shall not be required to employ the procedures set out in articles 14 (1) (c),[48] 24 (2),[49] 25 (h) and (i),[50] and 27 (j), (k) and (s),[51] of this Law.[52]

Article 24. Procedures for soliciting tenders[53]

(1) A procuring entity shall solicit tenders by causing an invitation to tender to be published in ... (the enacting State specifies the official gazette or other official publication in which the invitation to tender is to be published).

(2) The invitation to tender shall also be published, in a language customarily used in international trade, in a newspaper of wide international circulation or in a

---

44 Based on article 11 (3), the last sentence, of the 1994 Model Law, with the consequential changes in the cross reference and changes in the light of the proposed new definitions in article 2. See the immediately preceding footnote for further information.

45 Reproduces article 11 (4) of the 1994 Model Law. The Working Group may wish to consider this provision, which was taken from article 11 (4) of the 1994 Model Law, in the light of its decisions as regards remedies and enforcement.

46 The provisions of chapter II of the 1994 Model Law were included in article 7 and the relevant articles of chapters III and IV of the revised Model Law. Chapter II reproduces the provisions of chapter III of the Model Law, except as marked to reflect the revisions made to the Model Law.

47 Based on article 23 of the 1994 text, which was amended in the light of article 7 (2) (c) of the revised Model Law. The cross-references were updated in the light of the proposed revisions to the Model Law.

48 Corresponds to the reference to article 32 (1) (c) in article 23 of the 1994 Model Law.

49 Corresponds to the reference to the same article in article 23 of the 1994 Model Law.

50 Corresponds to the references to articles 25 (1) (h) and 25 (1) (i) in article 23 of the 1994 Model Law.

51 Corresponds to the references to articles 27 (j), 27 (k) and 27 (s) in article 23 of the 1994 Model Law.

52 The references to articles 25 (2) (c) and 25 (2) (d) in article 23 of the 1994 Model Law were reflected in the relevant provisions of article 15 of the revised Model Law since they were related to prequalification.

53 Reproduces article 24 of the 1994 Model Law, except for the provisions related to invitation to prequalify, which were reflected in the relevant provisions of article 15 of the revised Model Law.

relevant trade publication or technical or professional journal of wide international circulation.[54]

Article 25. Contents of invitation to tender[55]

The invitation to tender shall contain, at a minimum, the following information:

(a) The name and address of the procuring entity;

(b) The nature and quantity, and place of delivery of goods to be supplied, the nature and location of construction to be effected, or the nature and location of services to be provided, or the appropriate combination thereof;[56]

(c) The desired or required time for the supply of goods or for the completion of construction, or the timetable for the provision of services, or appropriate combination thereof;

(d) The criteria and procedures to be used for evaluating the qualifications of suppliers or contractors, in conformity with article [10 (1) (b)];

(e) A declaration, which may not later be altered, that suppliers or contractors may participate in the procurement proceedings regardless of nationality, or a declaration that participation is limited on the basis of nationality pursuant to article [9 (1)], as the case may be;

(f) The means of obtaining the solicitation documents and the place from which they may be obtained;

(g) The price, if any, charged by the procuring entity for the solicitation documents;

(h) The currency and means of payment for the solicitation documents;

(i) The language or languages in which the solicitation documents are available;

(j) The place and deadline for the submission of tenders.

Article 26. Provision of solicitation documents[57]

The procuring entity shall provide the solicitation documents to suppliers or contractors in accordance with the procedures and requirements specified in the invitation to tender. If prequalification proceedings have been engaged in, the procuring entity shall provide a set of solicitation documents to each supplier or contractor that has been prequalified [or preselected][58] and that pays the price, if any, charged for those documents. The price that the procuring entity may charge for

---

[54] As noted in A/CN.9/WG.I/WP.66/Add.1, the Working Group may wish to include a definition of "international" publication so as to simplify the drafting of this article and 7 (7) (c).

[55] Reproduces article 25 of the 1994 Model Law, except for the provisions related to the invitation to prequalify procedure, which were reflected in the relevant provisions of article 15 of the revised Model Law. Other consequential changes were made to this article.

[56] This formulation amends slightly the 1994 text, so as to remove prescriptive references to goods, construction or services procurement, as does the revision to the following subparagraph.

[57] Reproduces article 26 of the 1994 Model Law with a change as indicated in the text.

[58] Consequential change in the light of the proposed amendments to article 15.

the solicitation documents shall reflect only the cost of providing them to suppliers or contractors.

Article 27. Contents of solicitation documents[59]

The solicitation documents shall include, at a minimum, the following information:

(a) Instructions for preparing tenders;

(b) The criteria and procedures, in conformity with the provisions of article [10], relative to the evaluation of the qualifications of suppliers or contractors and relative to the further demonstration of qualifications pursuant to article [33 (6)];

(c) The requirements as to documentary evidence or other information that must be submitted by suppliers or contractors to demonstrate their qualifications;

[draft new subparagraph (d) for consideration]

(d) The description of the subject matter of the procurement, in conformity with article [11];[60] the quantity of goods and/or services to be performed; the location where construction is to be effected or services are to be provided; and the desired or required time, if any, when goods are to be delivered, construction is to be effected or services are to be provided;

[old subparagraph (d) to be deleted]

"(d) The nature and required technical and quality characteristics, in conformity with article 16, of the goods, construction or services to be procured, including, but not limited to, technical specifications, plans, drawings and designs as appropriate; the quantity of the goods; any incidental services to be performed; the location where the construction is to be effected or the services are to be provided; and the desired or required time, if any, when the goods are to be delivered, the construction is to be effected or the services are to be provided;"

[draft new subparagraph (e) for consideration]

(e) The evaluation criteria in accordance with article [12];[61]

[old subparagraph (e) to be deleted]

"(e) The criteria to be used by the procuring entity in determining the successful tender, including any margin of preference and any criteria other than price to be used pursuant to article 34 (4) (b), (c) or (d) and the relative weight of such criteria;"

[continuation of 1994 text, with amendments as noted]

(f) The terms and conditions of the procurement contract, to the extent they

---

[59] Reproduces article 27 of the 1994 Model Law with changes as indicated in the text and updates of cross references, in the light of the proposed revisions to the Model Law.

[60] Consequential change in the light of the proposed new definition in article 2 and amendments to article 11.

[61] Consequential change in the light of the proposed new article 12.

are already known to the procuring entity, and the contract form, if any, to be signed by the parties;

(g) If alternatives to the characteristics of the subject matter of the procurement,[62] contractual terms and conditions or other requirements set forth in the solicitation documents are permitted, a statement to that effect, and a description of the manner in which alternative tenders are to be evaluated and compared;

(h) If suppliers or contractors are permitted to submit tenders for only a portion of the subject matter of the procurement,[63] a description of the portion or portions for which tenders may be submitted;

(i) The manner in which the tender price is to be formulated and expressed, including a statement as to whether the price is to cover elements other than the cost of the subject matter of the procurement itself,[64] such as any applicable transportation and insurance charges, customs duties and taxes;

(j) The currency or currencies in which the tender price is to be formulated and expressed;

(k) The language or languages, in conformity with article [29], in which tenders are to be prepared;

(l) Any requirements of the procuring entity with respect to the issuer and the nature, form, amount and other principal terms and conditions of any tender security to be provided by suppliers or contractors submitting tenders in accordance with article 14,[65] and any such requirements for any security for the performance of the procurement contract to be provided by the supplier or contractor that enters into the procurement contract, including securities such as labour and materials bonds;

(m) If a supplier or contractor may not modify or withdraw its tender prior to the deadline for the submission of tenders without forfeiting its tender security, a statement to that effect;

(n) The manner, place and deadline for the submission of tenders, in conformity with article [30];

(o) The means by which, pursuant to article [28], suppliers or contractors may seek clarifications of the solicitation documents, and a statement as to whether the procuring entity intends, at this stage, to convene a meeting of suppliers or contractors;

(p) The period of time during which tenders shall be in effect, in conformity with article [31];

(q) The place, date and time for the opening of tenders, in conformity with article [32];

(r) The procedures to be followed for opening and examining tenders;

(s) The currency that will be used for the purpose of evaluating and comparing tenders pursuant to article [33 (5)] and either the exchange rate that will be used for the conversion of tenders into that currency or a statement that the rate

---

62 Consequential change in the light of the proposed new definition in article 2.

63 Ibid.

64 Ibid.

65 Consequential change in the light of the proposed new article 14.

published by a specified financial institution prevailing on a specified date will be used;

(t) References to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings;[66]

(u) The name, functional title and address of one or more officers or employees of the procuring entity who are authorized to communicate directly with and to receive communications directly from suppliers or contractors in connection with the procurement proceedings, without the intervention of an intermediary;

(v) Any commitments to be made by the supplier or contractor outside of the procurement contract, such as commitments relating to countertrade or to the transfer of technology;

(w) Notice of the right provided under article [52] of this Law to seek review of an unlawful act or decision of, or procedure followed by, the procuring entity in relation to the procurement proceedings;

(x) If the procuring entity reserves the right to reject all tenders pursuant to article [16], a statement to that effect;

(y) Any formalities that will be required once a tender has been accepted for a procurement contract to enter into force, including, where applicable, the execution of a written procurement contract pursuant to article [19], and approval by a higher authority or the Government and the estimated period of time following the dispatch of the notice of acceptance that will be required to obtain the approval;

(z) Any other requirements established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and submission of tenders and to other aspects of the procurement proceedings.

Article 28. Clarifications and modifications of solicitation documents[67]

(1) A supplier or contractor may request a clarification of the solicitation documents from the procuring entity. The procuring entity shall respond to any request by a supplier or contractor for clarification of the solicitation documents that is received by the procuring entity within a reasonable time prior to the deadline for the submission of tenders. The procuring entity shall respond within a reasonable time so as to enable the supplier or contractor to make a timely submission of its tender and shall, without identifying the source of the request, communicate the clarification to all suppliers or contractors to which the procuring entity has provided the solicitation documents.

(2) At any time prior to the deadline for submission of tenders, the procuring entity may, for any reason, whether on its own initiative or as a result of a request for clarification by a supplier or contractor, modify the solicitation documents by

---

[66] The following phrase has been deleted in this subparagraph: “provided, however, that the omission of any such reference shall not constitute grounds for review under article 52 or give rise to liability on the part of the procuring entity”, consequent to the deletion of paragraph (2) of article 52 of the 1994 Model Law setting out the exemptions from the review (the reference to article 27 (t) was contained in subparagraph (f) of that paragraph) (see A/CN.9/664, para. 27).

[67] Reproduces article 28 of the 1994 Model Law.

issuing an addendum. The addendum shall be communicated promptly to all suppliers or contractors to which the procuring entity has provided the solicitation documents and shall be binding on those suppliers or contractors.

(3) If the procuring entity convenes a meeting of suppliers or contractors, it shall prepare minutes of the meeting containing the requests submitted at the meeting for clarification of the solicitation documents, and its responses to those requests, without identifying the sources of the requests. The minutes shall be provided promptly to all suppliers or contractors to which the procuring entity provided the solicitation documents, so as to enable those suppliers or contractors to take the minutes into account in preparing their tenders.

SECTION II. SUBMISSION OF TENDERS

Article 29. Language of tenders[68]

Tenders may be formulated and submitted in any language in which the solicitation documents have been issued or in any other language that the procuring entity specifies in the solicitation documents.

Article 30. Submission of tenders[69]

(1) The procuring entity shall fix the place for, and a specific date and time as the deadline for, the submission of tenders.

(2) If, pursuant to article [28], the procuring entity issues a clarification or modification of the solicitation documents, or if a meeting of suppliers or contractors is held, it shall, prior to the deadline for the submission of tenders, extend the deadline if necessary to afford suppliers or contractors reasonable time to take the clarification or modification, or the minutes of the meeting, into account in their tenders.

(3) The procuring entity may, in its absolute discretion, prior to the deadline for the submission of tenders, extend the deadline if it is not possible for one or more suppliers or contractors to submit their tenders by the deadline owing to any circumstance beyond their control.

(4) Notice of any extension of the deadline shall be given promptly to each supplier or contractor to which the procuring entity provided the solicitation documents.

(5) (a) A tender shall be submitted in writing, and signed, and:

(i) If in paper form, in a sealed envelope; or

(ii) If in any other form, according to requirements specified by the procuring entity, which ensure at least a similar degree of authenticity, security, integrity and confidentiality;

---

[68] Reproduces article 29 of the 1994 Model Law. The Working Group may wish to merge this article with the proposed new article 13 (article 17 of the 1994 text of the Model Law), to become a rule applicable to all submissions rather than only to tenders.

[69] Reproduces article 30 of the 1994 Model Law.

(b) The procuring entity shall provide to the supplier or contractor receipt showing the date and time when its tender was received;

(c) The procuring entity shall preserve the security, integrity and confidentiality of a tender, and shall ensure that the content of the tender is examined only after its opening in accordance with this Law.[70]

(6) A tender received by the procuring entity after the deadline for the submission of tenders shall not be opened and shall be returned to the supplier or contractor that submitted it.

Article 31. Period of effectiveness of tenders; modification and withdrawal of tenders[71]

(1) Tenders shall be in effect during the period of time specified in the solicitation documents.

(2) (a) Prior to the expiry of the period of effectiveness of tenders, the procuring entity may request suppliers or contractors to extend the period for an additional specified period of time. A supplier or contractor may refuse the request without forfeiting its submission security, and the effectiveness of its tender will terminate upon the expiry of the unextended period of effectiveness;

(b) Suppliers or contractors that agree to an extension of the period of effectiveness of their tenders shall extend or procure an extension of the period of effectiveness of submission securities provided by them or provide new submission securities to cover the extended period of effectiveness of their tenders. A supplier or contractor whose submission security is not extended, or that has not provided a new submission security, is considered to have refused the request to extend the period of effectiveness of its tender.

(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 without forfeiting its submission security. The modification or notice of withdrawal is effective if it is received by the procuring entity prior to the deadline for the submission of tenders.

---

[70] The text of paragraph (5) of this article is as preliminarily approved by the Working Group at its twelfth session (see A/CN.9/640, para. 28).

[71] Reproduces article 31 of the 1994 Model Law, with replacement of references to “tender” securities with reference to “submission” securities, given proposed new definition in draft article 2 (e).

[Article 32.Tender securities is proposed as draft article 14. Securities, and has been placed in chapter I. General provisions, in order to apply its provisions to all procurement methods][72]

SECTION III. EVALUATION AND COMPARISON OF TENDERS

Article 32. Opening of tenders[73]

(1) Tenders shall be opened at the time specified in the solicitation documents as the deadline for the submission of tenders, or at the deadline specified in any extension of the deadline, at the place and in accordance with the procedures specified in the solicitation documents.

(2) 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. Suppliers or contractors shall be deemed to have been permitted to be present at the opening of the tenders if they have been given opportunity to be fully and contemporaneously apprised of the opening of the tenders.[74]

(3) The name and address of each supplier or contractor whose tender is opened and the tender price shall be announced to those persons present at the opening of tenders, communicated on request to suppliers or contractors that have submitted tenders but that are not present or represented at the opening of tenders, and recorded immediately in the record of the tendering proceedings required by article [22].

Article 33. Examination, evaluation and comparison of tenders[75]

(1) (a) The procuring entity may ask a supplier or contractor individually for clarifications of its tender[76] 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;

(b) Notwithstanding subparagraph (a) of this paragraph, the procuring entity shall correct purely arithmetical errors that are discovered during the examination of tenders. The procuring entity shall give prompt notice of any such correction to the supplier or contractor that submitted the tender.

---

[72] See A/CN.9/WG.I/WP.66, para. 57 (c).

[73] Reproduces article 33 of the 1994 Model Law, except where marked otherwise and the consequential update of the cross reference.

[74] The text of paragraph (2) of this article is as preliminarily approved by the Working Group at its twelfth session (see A/CN.9/640, para. 38).

[75] Reproduces article 34 of the 1994 Model Law, except where marked otherwise and the consequential update of the cross reference.

[76] Previously read “The procuring entity may ask suppliers or contractors for clarifications of their tenders”.

(2) (a) Subject to subparagraph (b) of this paragraph, the procuring entity may regard a tender as responsive only if it conforms to all requirements set forth in the solicitation documents;[77]

(b) The procuring entity may regard a tender as responsive even if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set forth in the solicitation documents or if it contains errors or oversights that are capable of being corrected without touching on the substance of the tender. Any such deviations shall be quantified, to the extent possible, and appropriately taken account of in the evaluation and comparison of tenders.

(3) The procuring entity shall reject[78] a tender:

(a) If the supplier or contractor that submitted the tender is not qualified;

(b) If the supplier or contractor that submitted the tender does not accept a correction of an arithmetical error made pursuant to paragraph (1) (b) of this article;

(c) If the tender is not responsive;[79]

(d) In the circumstances referred to in articles [17 and 18].[80]

(4) (a) The procuring entity shall evaluate and compare the tenders that have not been rejected[81] in order to ascertain the successful tender, as defined in subparagraph (b) of this paragraph, in accordance with the procedures and criteria set forth in the solicitation documents. No criterion shall be used that has not been set forth in the solicitation documents;

(b) The successful tender shall be:

(i) The tender with the lowest tender price, subject to any margin of preference applied pursuant to article [12]; or

(ii) If the procuring entity has so stipulated in the solicitation documents, the lowest evaluated tender ascertained on the basis of the evaluation criteria specified in the solicitation documents pursuant to article [12].[82]

[old subparagraphs (c) and (d) were deleted in the light of the proposed new article 12]

(5) When tender prices are expressed in two or more currencies, the tender prices of all tenders shall be converted to the same currency, and according to the rate specified in the solicitation documents pursuant to article [27 (s)], for the purpose of evaluating and comparing tenders.

---

77 Previously read “tender solicitation documents”.

78 The word “reject” replaced the words “not accept” in the light of the use of the word “accept” in the Model Law in the context of the acceptance of the successful submission for the purpose of entering into the procurement contract under article 19 of the revised Model Law (article 36 of the 1994 Model Law).

79 The Working Group may wish to include a reference to proposed article 11.

80 Previously the reference was only to article 15 on inducement. The revisions cover also situations of abnormally low submissions (article 17 of the revised Model Law).

81 The words “have not been rejected” replaced the words “have been accepted.” See footnote 75.

82 Paragraph (b) was amended in the light of the proposed new article 12.

(6) Whether or not it has engaged in prequalification proceedings pursuant to article [15], the procuring entity may require the supplier or contractor submitting the tender that has been found to be the successful tender pursuant to paragraph (4) (b) of this article to demonstrate again its qualifications in accordance with criteria and procedures conforming to the provisions of article [10]. The criteria and procedures to be used for such further demonstration shall be set forth in the solicitation documents. Where prequalification proceedings have been engaged in, the criteria shall be the same as those used in the prequalification proceedings.

(7) If the supplier or contractor submitting the successful tender is requested to demonstrate again its qualifications in accordance with paragraph (6) of this article but fails to do so, the procuring entity shall reject that tender and shall select a successful tender, in accordance with paragraph (4) of this article, from among the remaining tenders, subject to the right of the procuring entity, in accordance with article [16 (1)], to reject all remaining tenders.

(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 articles [19 and 22].[83]

Article 34. Prohibition of negotiations with suppliers or contractors[84]

No negotiations shall take place between the procuring entity and a supplier or contractor with respect to a tender submitted by the supplier or contractor.

---

[83] The reference in this provision of the 1994 Model Law was only to article 11 on record of procurement proceedings. In the revised provisions, the reference to article 19 was added in the light of the proposed new article 19.

[84] Reproduces article 35 of the 1994 Model Law.

A/CN.9/WG.I/WP.66/Add.3 (Original: English)

Note by the Secretariat on possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services - a revised text of the Model Law, submitted to the Working Group on Procurement at its fifteenth session

ADDENDUM

This note sets out chapters III (Conditions for use and procedures of restricted tendering, two-envelope tendering, and request for quotations), IV (Conditions for use and procedures of two-stage tendering, request for proposals and competitive negotiation) and V (Conditions for use and procedures of electronic reverse auctions), of a revised text of the Model Law.

The Working Group may wish to consider whether its consideration of chapter IV should be conducted at this stage, for the reasons set out in document A/CN.9/WG.I/WP.66, paragraph 70.

The Secretariat's comments are set out in the accompanying footnotes.

CHAPTER III. CONDITIONS FOR USE AND PROCEDURES OF RESTRICTED TENDERING, TWO-ENVELOPE TENDERING, AND REQUEST FOR QUOTATIONS

Article 35. Restricted tendering

OPTION 1[1]

(1) (Subject to approval by ... (the enacting State designates an organ to issue the approval),) the procuring entity may, where necessary for reasons of economy and efficiency, engage in procurement by means of restricted tendering in accordance with this article, when:

(a) The subject matter of the procurement, by reason of its highly complex or specialized nature, is 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 subject matter of the procurement.

(2) (a) When the procuring entity engages in restricted tendering on the grounds referred to in paragraph 1 (a) of this article, it shall solicit tenders from all suppliers and contractors from whom the subject matter of the procurement is available;

---

[1] Based on the merged articles 20 and 47, with the consequential changes in the light of the proposed new definitions in article 2, updates of the cross-references and other changes as marked. Paragraph (1) is based on article 20 of the 1994 Model Law. Paragraphs (2)-(4) are based on article 47 of the 1994 Model Law.

(b) When the procuring entity engages in restricted tendering on the grounds referred to in paragraph 1 (b) of this article, it shall select suppliers or contractors from whom to solicit tenders in a non-discriminatory manner and it shall select a sufficient number of suppliers or contractors to ensure effective competition.

(3) The procuring entity shall cause a notice of the restricted-tendering proceeding to be published in ... (each enacting State specifies the official gazette or other official publication in which the notice is to be published). The notice shall not confer any rights on suppliers or contractors, including any right to have a tender evaluated.[2]

(4) The provisions of chapter II of this Law, except article [24], shall apply to restricted-tendering proceedings, except to the extent that those provisions are derogated from in this article.

OPTION 2[3]

(1) (Subject to approval by ... (the enacting State designates an organ to issue the approval),) the procuring entity may, where necessary for reasons of economy and efficiency, engage in procurement by means of restricted tendering in accordance with this article when the time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the subject matter of the procurement.

(2) The procuring entity shall select suppliers or contractors from whom to solicit tenders in a non-discriminatory manner and it shall select a sufficient number of suppliers or contractors to ensure effective competition.

(3) The procuring entity shall cause a notice of the restricted-tendering proceeding to be published in ... (each enacting State specifies the official gazette or other official publication in which the notice is to be published). The notice shall not confer any rights on suppliers or contractors, including any right to have a tender evaluated.

(4) The provisions of chapter II of this Law, except article [24], shall apply to restricted-tendering proceedings, except to the extent that those provisions are derogated from in this article.

---

[2] The second sentence was added in the light of the considerations raised in A/CN.9/WG.I/WP.66, para. 39. The Working Group may wish to consider the effect of this provision in conjunction with revised articles on remedies and enforcement in chapter VII of the revised Model Law.

[3] The reasons for proposing option 2 are set out in document A/CN.9/WG.I/WP.66, paras. 38-40.

[Article 36. [Two-envelope tendering][4]

(1) (Subject to approval by ... (the enacting State designates an organ to issue the approval),) the procuring entity may engage in procurement by means of two-envelope tendering in accordance with this article in order to seek proposals as to various possible means of meeting its needs and obtain the most satisfactory solution.[5]

(2) The procuring entity may seek proposals through open solicitation or in cases specified in article [35 (1)] through direct solicitation.[6]

(3) In case of open solicitation, the provisions of chapter II of this Law, except for [article 32 (2) and (3),] shall apply to the proceedings under this article, except to the extent that those provisions are derogated from in this article.[7]

(4) In case of direct solicitation, the provisions of chapter II of this Law, except for articles [24 and 32], and provisions of article [35 (2) and (3)] shall apply to the proceedings under this article, except to the extent that those provisions are derogated from in this article.[8]

(5) The procuring entity shall establish a threshold with respect to quality and technical aspects of the proposals in accordance with the evaluation criteria other than price as set out in the solicitation documents pursuant to article 12 of this Law and rate each proposal in accordance with such criteria and the relative weight and manner of application of those criteria as set forth in the solicitation documents. The procuring entity shall then compare the prices of the proposals that have attained a rating at or above the threshold.[9]

(6) The successful proposal shall then be:

(a) The proposal with the lowest price; or

(b) The proposal with the best combined evaluation in terms of the criteria other than price referred to in paragraph (5) of this article and the price.[10]]

---

[4] The proposed title of this draft article is new, reflecting the two-stage evaluation process. Its text, however, is closely based on article 42 and other relevant provisions of chapter IV of the 1994 Model Law, i.e. request for proposals procedure without negotiation for services procurement. The Working Group is invited to consider the extent to which this method of procurement is different from tendering (if it commences with a public advertisement) or restricted tendering (if it commences without such an advertisement), other than that the evaluation criteria could include the qualifications of service providers as per article 39(1) of the 1994 text. Article 42 of the 1994 Model Law requires the procuring entity to set a quality and technical threshold, which is essentially to set the responsiveness criteria, and then to compare the prices of the proposals in accordance with pre-determined evaluation criteria (including price), which the Working Group may consider equates the process with the evaluation and comparison of tenders under article 36 of the 1994 Model Law. The Working Group may therefore wish to consider whether this procedure is necessary other than for services procurement and, if so, whether the need for evaluation criteria as described above could be accommodated within other procurement methods.

[5] Based on article 19 (1) (a) (i) of the 1994 Model Law.

[6] Based on provisions of article 37 of the 1994 Model Law.

[7] Based on the thrust of chapter IV of the 1994 Model Law.

[8] Ibid.

[9] Based on article 42 (1) of the 1994 Model Law.

[10] Based on article 42 (2) of the 1994 Model Law.

Article 37. Request for quotations[11]

(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 a request for quotations in accordance with this article for the procurement of readily available [objects/items or services] that are not specially produced or provided to the particular [specifications or requirements] of the procuring entity and for which there is an established market, so long as the estimated value of the procurement contract is less than the amount set forth in the procurement regulations.[12]

(2) A procuring entity shall not divide its procurement into separate contracts for the purpose of invoking paragraph (1) of this article.

(3) The procuring entity shall request quotations from as many suppliers or contractors as practicable, but from at least three, if possible. Each supplier or contractor from whom a quotation is requested shall be informed whether any elements other than the charges for the [objects/items or services] themselves, such as any applicable transportation and insurance charges, customs duties and taxes, are to be included in the price.

(4) Each supplier or contractor is permitted to give only one price quotation and is not permitted to change its quotation. No negotiations shall take place between the procuring entity and a supplier or contractor with respect to a quotation submitted by the supplier or contractor.

(5) The successful quotation shall be the lowest-priced quotation meeting the needs of the procuring entity.[13]

---

[11] Based on articles 21 and 50 of the 1994 Model Law with changes as marked.

[12] The terms in square brackets have been amended as compared with the 1994 text so as to allow for all types of standardized or common procurement that is not tailored by means of specifications or technical requirements.

[13] Consequential change in the light of the proposed new article 19 and the proposed new definition of "successful submission" in article 2. The aim of the change is to standardize provisions of the Model Law on successful submissions, their acceptance by the procuring entity, a standstill period and entry into force of the procurement contract. The 1994 text of the Model Law is not consistent in this respect.

[CHAPTER IV. CONDITIONS FOR USE AND PROCEDURES OF TWO-STAGE TENDERINGS, REQUEST FOR PROPOSALS AND COMPETITIVE NEGOTIATION [The Working Group may wish to consider whether to review this chapter at this stage of its review of the Model Law][14]

Article 38. Conditions for use of two-stage tendering, request for proposals or competitive negotiation[15]

(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 two-stage tendering, request for proposals, or competitive negotiation, in the following circumstances:

(a) It is not feasible for the procuring entity to formulate detailed specifications for the subject-matter of the procurement, or to identify its characteristics in accordance with article [11] and, in order to obtain the most satisfactory solution to its procurement needs,

(i) It seeks tenders, proposals or offers as to various possible means of meeting its needs; and[16]

(ii) Because of the technical character or nature of the subject-matter of the procurement, it is necessary for the procuring entity to negotiate with suppliers or contractors;

(b) When the procuring entity seeks to enter into a contract for the purpose of research, experiment, study or development, except where the contract includes the production of items in quantities sufficient to establish their commercial viability or to recover research and development costs;

[draft new subparagraph (c)][17]

(c) In the case of procurement involving national defence or national security, where the procuring entity determines that the selected method is the most appropriate method of procurement; or

---

[14] The Working Group may wish to conform the provisions of this chapter and those of the PFIPs instruments. See A/CN.9/WG.I/WP.66, paras. 21, 22 and 70. Accordingly, the Working Group may wish to defer its consideration of the draft revisions until that process has been considered and conducted.

[15] Based on article 19 of the 1994 Model Law, with consequential changes in the light of the proposed revisions to the Model Law and the removal of the definitions of "goods, construction or services".

[16] "And" replaced "or."

[17] In the light of the proposed expansion of article 1. The Working Group may consider, however, that this formulation provides a ground for use of these procurement methods beyond those conferred by proposed article 7, and that accordingly, either article 7 should be revised to accommodate this formulation, or that this proposed paragraph be amended or deleted.

[old subparagraph (c) to be deleted]

"(c) When the procuring entity applies this Law, pursuant to article 1 (3), to procurement involving national defence or national security and determines that the selected method is the most appropriate method of procurement; or"

[old subparagraph (d) to be maintained]

(d) When tendering proceedings have been engaged in but no tenders were submitted or all tenders were rejected by the procuring entity pursuant to article [16 to 18 or 33 (3)], and when, in the judgement of the procuring entity, engaging in new tendering proceedings would be unlikely to result in a procurement contract.

[draft new paragraph (2)][18]

(2) (Subject to approval by ... (the enacting State designates an organ to issue the approval),) the procuring entity may engage in procurement by means of competitive negotiation also when there is an urgent need for the subject matter of the procurement, and engaging in tendering proceedings or other methods of procurement because of the time involved in using those methods would therefore be impractical, provided that the circumstances giving rise to the urgency were owing to a catastrophic event, or otherwise neither foreseeable by the procuring entity nor the result of dilatory conduct on its part.

[old paragraph (2) to be deleted]

"(2) (Subject to approval by ... (the enacting State designates an organ to issue the approval),) the procuring entity may engage in procurement by means of competitive negotiation also when

(a) There is an urgent need for the subject matter of the procurement, and engaging in tendering proceedings would therefore be impractical, provided that the circumstances giving rise to the urgency were neither foreseeable by the procuring entity nor the result of dilatory conduct on its part; or,

(b) Owing to a catastrophic event, there is an urgent need for the subject matter of the procurement, making it impractical to use other methods of procurement because of the time involved in using those methods."

Article 39. Two-stage tendering[19]

(1) The provisions of chapter II of this Law shall apply to two-stage tendering proceedings except to the extent those provisions are derogated from in this article.

(2) The solicitation documents shall call upon suppliers or contractors to submit, in the first stage of the two-stage tendering proceedings, initial tenders containing their proposals without a tender price. The solicitation documents may solicit proposals relating to the technical, quality or other characteristics of the subject matter of the procurement as well as to contractual terms and conditions of supply, and, where relevant, the professional and technical competence and qualifications of the suppliers or contractors.

---

[18] See A/CN.9/WG.I/WP.66, paras. 42-43.

[19] To be based on article 46 of the 1994 Model Law.

(3) The procuring entity may, in the first stage, engage in negotiations with any supplier or contractor whose tender has not been rejected pursuant to article [16 to 18 or 33 (3)] concerning any aspect of its tender.

(4) In the second stage of the two-stage tendering proceedings, the procuring entity shall invite suppliers or contractors whose tenders have not been rejected to submit final tenders with prices with respect to a single set of the descriptions of the subject matter of the procurement.[20] In formulating those descriptions,[21] the procuring entity may delete or modify any aspect, originally set forth in the solicitation documents, of the technical or quality characteristics of the subject matter of the procurement, and any criterion originally set forth in those documents for evaluating and comparing tenders and for ascertaining the successful tender, and may add new characteristics or criteria that conform with this Law. Any such deletion, modification or addition shall be communicated to suppliers or contractors in the invitation to submit final tenders. A supplier or contractor not wishing to submit a final tender may withdraw from the tendering proceedings without forfeiting any tender security that the supplier or contractor may have been required to provide. The final tenders shall be evaluated and compared in order to ascertain the successful tender as defined in article [33 (4) (b)].

Article 40. Request for proposals[22]

(1) Requests for proposals shall be addressed to as many suppliers or contractors as practicable, but to at least three, if possible.[23]

(2) The procuring entity shall publish in a newspaper of wide international circulation or in a relevant trade publication or technical or professional journal of wide international circulation a notice seeking expressions of interest in submitting a proposal, unless for reasons of economy or efficiency the procuring entity considers it undesirable to publish such a notice; the notice shall not confer any rights on suppliers or contractors, including any right to have a proposal evaluated.[24]

(3) The procuring entity shall establish the criteria for evaluating the proposals and determine the relative weight to be accorded to each such criterion and the manner in which they are to be applied in the evaluation of the proposals. The criteria shall concern:

---

20 The phrase “descriptions of the subject matter of the procurement” replaced the word “specifications” in the light of the proposed new definition in article 2.

21 Ibid.

22 To be revised and based on articles 43, 44 and 48 of the 1994 Model Law and conformed to the relevant provisions in the PFIPs instruments.

23 The Working Group may wish to consider the juxtaposition of this and the following article and whether the order of the articles should be revised. In addition, and in the light of academic comment that a minimum of five participants may be necessary to ensure effective competition, whether the reference to three participants is sufficient.

24 The Working Group is invited to consider the effect of this last statement in the light of the deletion of the exceptions from review. One of the exceptions in article 52 (2) of the 1994 Model Law (in subparagraph (e)) referred to a refusal by the procuring entity to respond to an expression of interest in participating in request for proposals proceedings pursuant to article 48 (2). Thus the intention of the drafters of the 1994 Model Law was to explicitly exclude these cases from review and liability on the part of the procuring entity. Similar considerations apply to the proposed new article 35 (3).

(a) The relative managerial and technical competence of the supplier or contractor;

(b) The effectiveness of the proposal submitted by the supplier or contractor in meeting the needs of the procuring entity; and

(c) The price submitted by the supplier or contractor for carrying out its proposal and the cost of operating, maintaining and repairing the proposed goods or construction.[25]

(4) A request for proposals issued by a procuring entity shall include at least the following information:[26]

(a) The name and address of the procuring entity;

(b) A description of the procurement need including the technical and other parameters to which the proposal must conform, as well as, in the case of procurement of construction, the location of any construction to be effected and, in the case of services, the location where they are to be provided;[27]

(c) The criteria for evaluating the proposal, expressed in monetary terms to the extent practicable, the relative weight to be given to each such criterion and the manner in which they will be applied in the evaluation of the proposal;[28] and

(d) The desired format and any instructions, including any relevant timetables applicable in respect of the proposal.

(5) Any modification or clarification of the request for proposals, including modification of the criteria for evaluating proposals referred to in paragraph (3) of this article, shall be communicated to all suppliers or contractors participating in the request-for-proposals proceedings.

(6) The procuring entity shall treat proposals in such a manner so as to avoid the disclosure of their contents to competing suppliers or contractors.[29]

(7) The procuring entity may engage in negotiations with suppliers or contractors with respect to their proposals and may seek or permit revisions of such proposals, provided that the following conditions are satisfied:

(a) Any negotiations between the procuring entity and a supplier or contractor shall be confidential;[30]

(b) Subject to article [22],[31] one party to the negotiations shall not reveal to any other person any technical, price or other market information relating to the negotiations without the consent of the other party;[32]

---

25 To be deleted in the light of the proposed new article 12.

26 In other provisions of the 1994 Model Law, provisions on the content of solicitation or equivalent documents are set out before requirements as regards evaluation criteria (see e.g., article 38 ad 39 of the 1994 Model Law). The point is moot however if paragraph (3) is deleted.

27 To be amended in the light of the proposed new article 11.

28 To be amended in the light of the proposed new article 12.

29 To be deleted in the light of the proposed new article 21.

30 Ibid.

31 This is a reference to the article requiring a record of the procurement.

32 Ibid.

(c) The opportunity to participate in negotiations is extended to all suppliers or contractors that have submitted proposals and whose proposals have not been rejected.

(8) Following completion of negotiations, the procuring entity shall request all suppliers or contractors remaining in the proceedings to submit, by a specified date, a best and final offer with respect to all aspects of their proposals.

(9) The procuring entity shall employ the following procedures in the evaluation of proposals:

(a) Only the criteria referred to in paragraph (3) of this article as set forth in the request for proposals shall be considered;[33]

(b) The effectiveness of a proposal in meeting the needs of the procuring entity shall be evaluated separately from the price;

(c) The price of a proposal shall be considered by the procuring entity only after completion of the technical evaluation.

(10) Any award by the procuring entity shall be made to the supplier or contractor whose proposal best meets the needs of the procuring entity as determined in accordance with the criteria for evaluating the proposals set forth in the request for proposals, as well as with the relative weight and manner of application of those criteria indicated in the request for proposals.[34]

Article 41. Competitive negotiation[35]

(1) In competitive negotiation proceedings, the procuring entity shall engage in negotiations with a sufficient number of suppliers or contractors to ensure effective competition.

(2) Any requirements, guidelines, documents, clarifications or other information relative to the negotiations that are communicated by the procuring entity to a supplier or contractor shall be communicated on an equal basis to all other suppliers or contractors engaging in negotiations with the procuring entity relative to the procurement.

(3) Negotiations between the procuring entity and a supplier or contractor shall be confidential, and, except as provided in article [22], one party to those negotiations shall not reveal to any other person any technical, price or other market information relating to the negotiations without the consent of the other party.[36]

(4) Following completion of negotiations, the procuring entity shall request all suppliers or contractors remaining in the proceedings to submit, by a specified date, a best and final offer with respect to all aspects of their proposals. The procuring entity shall select the successful offer on the basis of such best and final offers.][37]

---

33 To be revised in the light of the proposed new article 12 and how its provisions should apply in the context of negotiated procurement.

34 To be revised in the light of the proposed new article 19.

35 To be based on article 49 of the 1994 Model Law.

36 To be deleted in the light of the proposed new article 21.

37 Definition of the successful proposal should be added for the purposes of the proposed amended article 19 and the relevant proposed new definition in article 2. See, also, footnote 33 above.

CHAPTER V. CONDITIONS FOR USE AND PROCEDURES OF ELECTRONIC REVERSE AUCTIONS

Article 42. Conditions for use of electronic reverse auctions[38]

(1) A procuring entity may engage in procurement by means of an electronic reverse auction, or may use an electronic reverse auction to determine the successful submission in other methods of procurement, as appropriate, in accordance with the provisions of this chapter and under the following conditions:

(a) Where it is feasible for the procuring entity to formulate detailed and precise descriptions[39] for the [goods, construction or services/subject-matter of the procurement];[40]

(b) Where there is a competitive market of suppliers or contractors anticipated to be qualified to participate in the electronic reverse auction such that effective competition is ensured; and

(c) Where the criteria to be used by the procuring entity in determining the successful submission are quantifiable and can be expressed in monetary terms.[41]

(2) The electronic reverse auction shall be based on:

(a) Price, where the procurement contract is to be awarded to the lowest price; or

(b) Prices and other criteria to be used by the procuring entity in determining the successful submission, specified in accordance with article [12] and as set out in

---

[38] The article is as amended at the Working Group's twelfth session (A/CN.9/640, paras. 56-57, and A/CN.9/WG.I/WP.59, para.3). Minor consequential changes were made in the light of the proposed revisions to the Model Law.

[39] The word "descriptions" replaced the word "specifications" in the light of the proposed new definition in articles 2 and 11.

[40] In the light of the proposed deletion of the definition of "goods, construction or services", the Working Group may wish to refer to the "subject-matter of the procurement", noting that electronic reverse auctions would then be available for all types of procurement, including construction and services procurement. The Guide to Enactment would discuss the types of procurement in which auctions would be suitable or appropriate, and the converse. The draft text before the Working Group at its 12th session (A/CN.9/WG.I/WP.55, para. 8) indicates that some enacting States might wish to exclude construction and services procurement. The Guide also notes that auctions are particularly suitable for standardized procurement in which simpler qualitative factors can be included in the mathematical formula and suppliers can realistically revise them during the auction, and indicates that there may be further guidance on the procurement of more complex items through auctions. The Working Group may wish to include guidance to assist enacting States in interpreting this provision, which effectively excludes auctions in more procurement using alternative methods, such as requests for proposals or two-stage tendering, and to address procurement of more complex items where tenderers might have different costs bases or different knowledge about common costs, for which an auction might be appropriate in some well-developed systems.

[41] The Guide to Enactment could also discuss these qualifications in the light of the proposed new evaluation criteria article 12, focussing on the exclusion of subjective qualitative criteria in auctions procedures, rather than quality criteria per se.

the notice of the electronic reverse auction, where the procurement contract is to be awarded to the lowest evaluated submission.

(3) Where the procurement contract is awarded on the basis of the lowest evaluated submission, the electronic reverse auction shall be preceded by a full assessment of responsiveness and evaluation[42] of initial submissions in accordance with the criteria to be used by the procuring entity in determining the successful submission and the relative weight of such criteria, as specified in accordance with article [12] and as set out in the notice of the electronic reverse auction. The invitation to the electronic reverse auction shall be accompanied by the outcome of the full assessment of responsiveness and evaluation of initial submissions in accordance with the provisions of article [45 (4)].[43]

Article 43. Procedures for soliciting participation in procurement involving the use of electronic reverse auctions[44]

(1) Where an electronic reverse auction is to be used as a procurement method, the procuring entity shall cause a notice of the electronic reverse auction to be published in accordance with procedures of article [24] of this Law.

(2) Notwithstanding paragraph (1) of this article, in domestic solicitation under article [7 (2) (c)] of this Law, the procuring entity shall not be required to employ the procedures set out in articles 14 (1) (c), 24 (2), 25 (h) and (i), and 27 (j), (k) and (s), of this Law.[45]

(3) Where an electronic reverse auction is to be used in other methods of procurement as appropriate, the procuring entity shall notify suppliers and contractors when first soliciting their participation in the procurement proceedings that an electronic reverse auction will be held.

---

[42] The previous formulation referred to an "evaluation" alone, which refers, in the context of the Model Law, to the competitive evaluation of tenders; the reference to responsiveness has therefore been added in to reflect proposed new article 11 (the Working Group may consider that further reference to that article should be made). Under article 44(2) below, which permits the number of tenderers participating in the auction to be limited, there will be a competitive evaluation leading to the possible exclusion of some tenders, and in other cases, the evaluation will be conducted without rejection of tenderers.

[43] Some commentators have noted that the flexibility conferred by allowing for both price-only and price and other criteria-based auctions renders the drafting of these provisions complex, and a simpler approach might be to include a separate procedure for price-based auctions, and to limit the procurement methods in which auctions may be used to those in which, for example, the description (including specifications) is set at the outset. The Working Group may wish to consider these comments.

[44] The article is as presented in documents A/CN.9/WG.I/WP.59, para. 5, and A/CN.9/WG.I/WP.61, para. 17, further to the Working Group's considerations of the subject at its twelfth and thirteenth sessions (A/CN.9/640, paras. 62-89). Minor consequential changes were made in the light of the proposed revisions to the Model Law.

[45] This paragraph was added to reflect exceptions in cases of domestic procurement. It is similar to article 23 of the Model Law.

Article 44. Contents of the notice of the electronic reverse auction[46]

(1) The notice of the electronic reverse auction shall include, at a minimum, the following:

(a) Information referred to in article [25 (a), (d) and (e), and article 27 (d), (f), (h) to (j) and (t) to (y);]

(b) The criteria to be used by the procuring entity in determining the successful submission, including any criteria other than price to be used, the relative weights of all criteria, the mathematical formula to be used in the evaluation procedure and indication of any criteria that cannot be varied during the auction;[47]

(c) How the electronic reverse auction can be accessed, and information about the electronic equipment being used and technical specifications for connection;

(d) The manner and, if already determined, deadline by which the suppliers and contractors shall register to participate in the auction;

(e) Criteria governing the closing of the auction and, if already determined, the date and time of the opening of the auction;

(f) 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); and

(g) The rules for the conduct of the electronic reverse auction, including the information that will be made available to the bidders in the course of the auction and the conditions under which the bidders will be able to bid.

(2) The procuring entity may decide to impose a minimum and/or maximum on the number of suppliers or contractors to be invited to the auction on the condition that the procuring entity has satisfied itself that in doing so it would ensure that effective competition and fairness are maintained. In such case, the notice of the electronic reverse auction shall state such a number and, where the maximum is imposed, the criteria and procedure that will be followed in selecting the maximum number of suppliers or contractors.[48]

(3) The procuring entity may decide that the electronic reverse auction shall be preceded by prequalification. In such case, the notice of the electronic reverse auction shall contain invitation to prequalify and include information referred to in article [15 (3).]

---

[46] The article is as presented in documents A/CN.9/WG.I/WP.59, para. 5, and A/CN.9/WG.I/WP.61, para. 17, further to the Working Group's considerations of the subject at its twelfth and thirteenth sessions (A/CN.9/640, paras. 62-89). Minor consequential changes were made in the light of the proposed revisions to the Model Law.

[47] Minor amendments to this paragraph have been made to reflect the provisions of draft article 12.

[48] If the Working Group decides to include provisions on mandatory pre-qualification in some procedures in the Model Law, and to provide for a specified procedure otherwise to limit numbers participating in some procurement methods, it might wish to consider whether consistency between those procedures and procedures to limit the numbers participating in an auction procedure would be required. In addition, the Working Group may wish to consider whether the flexibility to eliminate some tenderers would render these provisions inconsistent with the general rules of some procurement methods in which there is no possibility of such exclusion and in which an auction might be a phase.

(4) The procuring entity may decide that the electronic reverse auction shall be preceded by an assessment as to whether the submissions are responsive. In such case, the notice of the electronic reverse auction shall contain invitation to present initial submissions and include information referred to in articles [25 (f) to (j) and 27 (a), (k) to (s) and (z)] and information on procedures to be used in such assessment.

(5) Where a full evaluation of initial submissions (in addition to an assessment of responsiveness) is required in accordance with the provisions of article [42 (3),] the notice of the electronic reverse auctions shall contain invitation to present initial submissions and shall include information referred to in articles [25 (f) to (j) and 27 (a), (k) to (s) and (z)] and information on procedures to be used in such evaluation.

Article 45. Invitation to participate in the electronic reverse auction[49]

(1) Except as provided for in paragraphs (2) to (4) of this article, the notice of the electronic reverse auction shall serve as an invitation to participate in the auction and shall be complete in all respects, including as regards information specified in paragraph (5) of this article.

(2) Where a limitation on the number of suppliers or contractors to be invited to the auction has been imposed in accordance with article [44 (2),] the procuring entity shall send the invitation to participate in the auction individually and simultaneously to each supplier or contractor selected corresponding to the number, and in accordance with the criteria and procedure, specified in the notice of the electronic reverse auction.

(3) Where the auction has been preceded by prequalification of suppliers or contractors in accordance with articles [15 and 44 (3),] the procuring entity shall send the invitation to participate in the auction individually and simultaneously to each supplier or contractor prequalified [or preselected] in accordance with article [15] of this Law.

(4) Where the auction has been preceded by the assessment of responsiveness or full evaluation of initial submissions in accordance with articles [26, 28 to 31, 32 (1), 33 (1) and (2) and 44 (4) and (5),] the procuring entity shall send an invitation to participate in the auction individually and simultaneously to each supplier or contractor except for those whose submission has been rejected in accordance with article [33 (3).] The procuring entity shall notify each supplier or contractor concerned on the outcome of the assessment of responsiveness or the full evaluation, as the case may be, of its respective initial submission.

(5) Unless already provided in the notice of the electronic reverse auction, the invitation to participate in the auction shall set out:

(a) The deadline by which the invited suppliers and contractors shall register to participate in the auction;

(b) The date and time of the opening of the auction;

---

[49] Ibid.

(c) The requirements for registration and identification of bidders at the opening of the auction;

(d) Information concerning individual connection to the electronic equipment being used; and

(e) All other information concerning the electronic reverse auction necessary to enable the supplier or contractor to participate in the auction.

(6) The procuring entity shall ensure that the number of suppliers or contractors invited to participate in the auction in accordance with this article is sufficient to guarantee effective competition.

Article 46. Registration to participate in the electronic reverse auction and timing of holding of the auction[50]

(1) The fact of the registration to participate in the auction shall be promptly confirmed individually to each registered supplier or contractor.

(2) If the number of suppliers or contractors registered to participate in the auction is in the opinion of the procuring entity insufficient to ensure effective competition, the procuring entity may cancel the electronic reverse auction. The fact of the cancellation of the auction shall be promptly communicated individually to each registered supplier or contractor.

(3) The auction shall not take place before expiry of adequate time after the notice of the electronic reverse auction has been issued or, where invitations to participate in the auction are sent, from the date of sending the invitations to all suppliers or contractors concerned. This time shall be sufficiently long to allow suppliers or contractors to prepare for the auction.

Article 47. Requirements during the auction[51]

(1) During an electronic reverse auction:

(a) All bidders shall have an equal and continuous opportunity to present their submissions;

(b) There shall be automatic evaluation of all submissions in accordance with the criteria and other relevant information included in the notice of the electronic reverse auction;

(c) Each bidder must instantaneously and on a continuous basis during the auction receive sufficient information allowing it to determine a standing of its submission vis-à-vis other submissions;[52]

---

[50] The article is as presented in documents A/CN.9/WG.I/WP.59, para. 5, further to the Working Group's consideration of the subject at its twelfth session (A/CN.9/640, paras. 62-89).

[51] The article is as presented in documents A/CN.9/WG.I/WP.59, para. 5, and A/CN.9/WG.I/WP.61, para. 17, further to the Working Group's consideration of the subject at its twelfth and thirteenth sessions (A/CN.9/640, paras. 62-89).

[52] The Working Group may wish to consider the extent of the information that this provision would require to be disclosed in addition to the formula and the results of the initial evaluation, such as information regarding all bids during the auction including their quality scores, and

(d) There shall be no communication between the procuring entity and the bidders or among the bidders, other than as provided for in paragraphs 1 (a) and (c) above.

(2) The procuring entity shall not disclose the identity of any bidder during the auction.

(3) The auction shall be closed in accordance with the criteria specified in the notice of the electronic reverse auction.[53]

(4) The procuring entity shall suspend or terminate the electronic reverse auction in the case of failures in its communication system that risk the proper conduct of the auction or for other reasons stipulated in the rules for the conduct of the electronic reverse auction. The procuring entity shall not disclose the identity of any bidder in the case of suspension or termination of the auction.

[draft new text for consideration]

Article 48. Requirements after the auction[54]

(1) The submission ascertained at the closure of the auction to be the lowest price or the lowest evaluated submission, as applicable, shall be the successful submission.[55]

(2) Whether or not it has engaged in prequalification proceedings pursuant to article [15], the procuring entity may require the bidder presenting the submission that has been found at the closure of the auction to be the successful submission to demonstrate again its qualifications in accordance with criteria and procedures conforming to the provisions of article [10]. If the bidder fails to do so, the procuring entity shall reject that submission. Unless the procuring entity decided, in accordance with article [16 (1)], to reject all remaining submissions, it shall select the submission that at the closure of the auction was the next lowest price or next lowest evaluated submission, provided that the bidder that presented that submission can demonstrate its qualifications if required to do so.

(3) Where it has not assessed responsiveness of initial submissions prior to the auction, the procuring entity shall assess after the auction the responsiveness of the submission that at the closure of the auction has been found to be the successful submission. The procuring entity shall reject the submission if that submission is found to be unresponsive. Unless the procuring entity decided, in accordance with article [16 (1)], to reject all remaining submissions, it shall select the submission that at the closure of the auction was the next lowest price or next lowest evaluated

---

whether this information might facilitate collusion. An alternative formulation could be to enable the bidder to see information regarding its bid and either the leading bid or by how much the bid needs to improve to become the leader.

53 The Guide to Enactment could address certain types of auction that are not currently envisaged in these provisions, and the reasons that they might not be appropriate, including auctions in which the lowest-ranking bidder is eliminated at the end of each round.

54 Consequential changes are proposed to this article in the light of the proposed new article 19.

55 Certain commentators have indicated that procedures in which the auction is followed by a traditional tender from the last remaining two bidders could provide good value for money. The Guide to Enactment could explain that the requirement for the auction phase to be the final phase that determines the winning bid excludes these types of auction.

submission, provided that this submission is found to be responsive.

(4) The procuring entity may engage in procedures described in article [17] if the submission that at the closure of the auction has been found to be the successful submission gives rise to concerns as to the ability of the bidder that presented that submission to perform the procurement contract. If the procuring entity rejects the submission on the grounds specified in article [17], it shall select the submission that at the closure of the auction was the next lowest price or next lowest evaluated submission, subject to the right of the procuring entity, in accordance with article [16 (1)], to reject all remaining submissions.

[draft text previously before the Working Group][56]

Article 51 septies. Award of the procurement contract on the basis of the results of the electronic reverse auction

(1) The procurement contract shall be awarded to the bidder that, at the closure of the auction, presented the submission with the lowest price or the lowest evaluated submission, as applicable, unless such submission is rejected in accordance with articles 12, 12 bis, 15 and [36 (…)]. In such case, the procuring entity may:

(a) Award the procurement contract to the bidder that, at the closure of the auction, presented the submission with the next lowest price or next lowest evaluated submission, as applicable; or

(b) Reject all remaining submissions in accordance with article 12 (1) of this Law; or

(c) Hold another auction under the same procurement proceedings; or

(d) Announce new procurement proceedings; or

(e) Cancel the procurement.

(2) Whether or not it has engaged in prequalification proceedings pursuant to article 7, the procuring entity may require the supplier or contractor presenting the submission that has been found to be the successful submission to demonstrate again its qualifications in accordance with criteria and procedures conforming to the provisions of article 6.

(3) Where it has not assessed responsiveness of initial submissions prior to the auction, the procuring entity shall assess after the auction the responsiveness of the submission that has been found to be the successful submission.

(4) The procuring entity may engage in procedures described in article 12 bis if the submission that has been found to be the successful submission gives rise to concerns as to the ability of the supplier or contractor to perform the procurement contract.

(5) Notice of acceptance of the submission shall be given promptly to the bidder that presented the submission that the procuring entity is prepared to accept.

---

[56] The article is as presented in documents A/CN.9/WG.I/WP.59, para. 5, and A/CN.9/WG.I/WP.61, para. 17, further to the Working Group's considerations of the subject at its twelfth and thirteenth sessions (A/CN.9/640, paras. 62-89).

(6) The name and address of the bidder with whom the procurement contract is entered into and the contract price shall be promptly communicated to other bidders.]

A/CN.9/WG.I/WP.66/Add.4 (Original: English)

Note by the Secretariat on possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services - a revised text of the Model Law, submitted to the Working Group on Procurement at its fifteenth session

ADDENDUM

This note sets out chapters VI (Framework agreements procedures) and VII (Review) of a revised text of the Model Law. The Secretariat's comments are set out in the accompanying footnotes.

CHAPTER VI. FRAMEWORK AGREEMENTS PROCEDURES

Article 49. Conditions for use of a framework agreement procedure[1]

(1) A procuring entity may engage in a framework agreement procedure in accordance with this chapter where it determines that:

(a) The need for the subject matter of the procurement will arise on a repeated basis during a given period of time; or

(b) By virtue of the nature of the subject matter of the procurement, the need for it may arise on an urgent basis during a given period of time.

(2) For the purpose of this chapter:

(a) A "framework agreement procedure" is a procurement conducted in two stages: a first stage to select supplier(s) or contractor(s) to be the party or parties to a framework agreement with a procuring entity, and a second stage to award a procurement contract under the framework agreement to a supplier or contractor party to the framework agreement;

(b) A "framework agreement" is an agreement between the procuring entity and the selected supplier(s) or contractor(s) concluded upon completion of the first stage of the framework agreement procedure;

---

[1] Based on paras 1, 4, 5, 6 and 7 of Article 22 ter, before the Working Group at its fourteenth session (A/CN.9/WG.I/WP.62, para. 6), reordered to conform with the equivalent provisions regarding electronic reverse auctions, and including additional definitions to implement the Working Group's decision to provide for open and closed framework agreements separately (A/CN.9/664, para. 90). The Working Group may wish to consider the order of the resultant provisions, which have been drafted to present provisions addressing both types of frameworks separately from those applying to one or other type. Further, the Working Group may wish to consider whether the procedures should be available for all types of procurement, including negotiated procurement or procurement where specifications are set later than at the outset of the procurement, which are effectively excluded in the current draft.

(c) A "closed framework agreement" is a framework agreement to which no supplier or contractor who is not initially a party to the framework agreement may subsequently become a party;

(d) An "open framework agreement" is a framework agreement to which supplier(s) or contractor(s) in addition to the initial parties may subsequently become a party or parties;

(e) A "framework agreement procedure with second stage competition" is a framework agreement procedure in which certain terms and conditions of the procurement, which cannot be established with sufficient precision when the framework agreement is concluded, are to be established or refined through second-stage competition; and

(f) A "framework agreement procedure without second stage competition" is a framework agreement procedure without a second-stage competition to establish or refine the terms and conditions of the procurement.

(3) The procuring entity shall include in the record required under article [22] of this Law a statement of the grounds and circumstances upon which it relied to justify the recourse to a framework agreement procedure.

Article 50. Information to be specified when first soliciting participation in a framework agreement procedure[2]

When first soliciting the participation of suppliers or contractors in a framework agreement procedure, the procuring entity shall specify:

(a) The name and address of the procuring entity;

(b) That the procurement will be conducted as a framework agreement procedure;

(c) The type of the framework agreement to be concluded from those described in article 49;

(d) All minimum information required to be included in the framework agreement in accordance with article [53] or [56], as applicable;

(e) In framework agreements with more than one supplier or contractor, any minimum or maximum number of suppliers or contractors that will be parties to the framework agreement;

(f) The procedures and criteria to be used by the procuring entity in the selection of the parties to the framework agreement, including in the case of closed framework agreements, the evaluation criteria, their relative weight and the manner in which they will be applied in the selection and whether the selection will be based on the lowest price or lowest evaluated submission;

---

[2] Based on draft article 51 novies, before the Working Group at its fourteenth session (A/CN.9/WG.I/WP.62, para. 6), simplified by cross referring to the mandatory provisions in articles 53 (closed framework agreements) and 56 (open framework agreements) and to avoid unnecessary repetition, and incorporating the Working Group's decisions on that draft (A/CN.9/664, paras. 78-82).

(g) In closed framework agreements procedures, the information referred to in article 25 (e)-(j) and article 27 (a)-(c) and (g)-(z), unless such information will be established in a second-stage competition.[3]

Article 51. No material variation during the operation of the framework agreement

(1) During the operation of the framework agreement, no amendment to the terms and conditions of the procurement, including variation of the relative weight of the evaluation criteria, shall be permitted if it leads to a material change in the description of the subject matter of the procurement or all other terms and conditions of the procurement established when first soliciting the participation of suppliers or contractors in a framework agreement procedure in accordance with article 50.

[(2) A "material change in the description of the subject matter of the procurement or all other terms and conditions of the procurement" means any amendment that would make the submissions from any suppliers or contractors parties to the framework agreement non-responsive, that would render previously non-responsive submissions responsive, that would change the status of suppliers or contractors with regard to their qualification[, or that would raise concerns about competition, transparency or integrity].][4]

Article 52. First stage of a closed framework agreement procedure[5]

(1) The procuring entity shall select the type of framework agreement and procedure to be conducted from among the options set out in article 49 (2).

(2) The procuring entity shall select the party or parties to a closed framework agreement with a procuring entity:

(a) By means of tendering proceedings in accordance with provisions of chapter II of this Law except to the extent that those provisions are derogated from in this article and article [54]; or

(b) By means of a method of procurement of chapter III under the conditions of article [7 (3)] of this Law and in accordance with the relevant provisions of chapter III except to the extent that those provisions are derogated from in this

---

[3] The Working Group may wish to consider the extent of the information required in solicitation under articles 25 and 27 of the Model Law during tendering proceedings, and whether any information specified therein would be subject to refinement at the second stage of framework agreements without second-stage competition.

[4] See A/CN.9/664, para. 101 (c) and (d), in which the Working Group considered that this description could be located in the Guide to Enactment.

[5] New article applying to closed framework agreements procedures only (A/CN.9/664, para. 90), based on article 51 octies before the Working Group at its fourteenth session (A/CN.9/WG.I/WP.62, para. 6), updated to reflect amended provisions in Chapters I, II and III of the revised Model Law, and draft article 51 decies, before the Working Group at its fourteenth session (A/CN.9/WG.I/WP.62, para. 6), implementing the Working Group's decisions regarding separating open and closed framework agreements procedures (A/CN.9/664, paras. 83-88 and 90).

article and article [54];[6]

(c) In the case of a framework agreement concluded with one supplier or contractor, in addition to the methods of procurement specified in subparagraphs (a) and (b) of this paragraph, by means of single-source procurement under the conditions of article [7 (6) (a) and (c) to (f)].

(3) The procuring entity shall include in the record required under article 22 of this Law a statement of the grounds and circumstances upon which it relied to justify the selection of the type of closed framework agreement set out in article 49 (2) and upon which it relied to justify the use of any method of procurement other than tendering for the selection of the party or parties to a closed framework agreement with the procuring entity.

(4) The procuring entity shall select the supplier(s) or contractor(s) with which to enter into the framework agreement on the basis of the specified selection criteria, including the relative weights of such criteria and the manner of their application and shall promptly notify the selected supplier(s) or contractor(s) of their selection.[7]

Article 53. Minimum requirements of closed framework agreements[8]

(1) A closed framework agreement entered into under this Law shall be concluded in writing between the procuring entity and supplier(s) or contractor(s) and shall set out:

(a) The duration of the framework agreement;[9]

(b) The description of the subject matter of the procurement[10] and all other terms and conditions of the procurement established when the framework agreement is concluded;

(c) To the extent that they are known, estimates of the terms and conditions of the procurement that cannot be established with sufficient precision when the framework agreement is concluded;[11]

(d) Where a closed framework agreement concluded with more than one supplier or contractor, that there will be a second-stage competition to award a procurement contract under the framework agreement, and a statement of the terms and conditions that are to be established or refined through second-stage competition;

---

6 See A/CN.9/664, para. 86.

7 The Working Group may wish to consider whether this paragraph could alternatively be incorporated into draft article 19 (Acceptance of submissions and entry into force of the procurement contract).

8 Based on paras 2 and 3 of Article 22 ter before the Working Group at its fourteenth session (A/CN.9/WG.I/WP.62, para. 6), separated into an independent article for ease of reading, and applying to closed framework agreements procedures only (A/CN.9/664, para. 90).

9 A/CN.9/664, paras. 94-95.

10 The word “description” has replaced the word “specifications” in the light of the proposed new definition in articles 2 and 11.

11 The Working Group may wish to consider whether the situation in which some terms and conditions of the framework agreement cannot be settled at the outset is sufficiently regulated (for example, the notion of “refining” terms at the second stage without a competition).

(e) The procedures for and the envisaged frequency of any second-stage competition;

(f) Whether the award of a procurement contract under the framework agreement will be based on the lowest price or lowest evaluated tender […];[12]

(g) Evaluation procedures and criteria, including the relative weight of such criteria and the manner in which they will be applied, in accordance with article [12] of this Law, during any second-stage competition. The framework agreement may specify a range within which the relative weights of the evaluation criteria may be varied during second-stage competition, provided that any such variation does not lead to a material variation in the procurement as described in article [51].

(2) A closed framework agreement may be concluded with one supplier or contractor or with [more than one supplier or contractor] [at least [three] suppliers or contractors].[13]

(3) A closed framework agreement with more than one supplier or contractor shall be concluded as one agreement between all parties unless the procuring entity determines that it is in the interests of either party that separate agreements with each supplier or contractor party to the framework agreement be concluded. Any variation in the terms and conditions of the separate agreements for a given procurement shall be minor, be of a non-material nature and concern only those provisions that justify the conclusion of separate agreements. The procuring entity shall include in the record required under article [22] a statement of the grounds and circumstances on which it relied to justify the conclusion of separate agreements.[14]

(4) If the procuring entity is to maintain a closed framework agreement electronically, the framework agreement shall in addition to information specified elsewhere in this article contain all information necessary to allow the effective operation of the electronic framework agreement, including information on how the electronic framework agreement and notifications of forthcoming procurement contracts under the framework agreement can be accessed, the electronic equipment being used, and technical specifications for connection.[15]

(5) The duration of a closed framework agreement shall not exceed [the enacting State specifies a maximum] years.[16]

---

[12] The Working Group has considered the possibility of including an alternative method of awarding the procurement contract, such as rotation. The Working Group may wish to consider whether the inclusion of such alternative methods could be included in the light of the draft evaluation criteria article (article 12).

[13] The Working Group may wish to consider whether a provision to ensure effective competition in multiple supplier agreements is required and, if so, whether any minimum such as that for requests for proposals or quotations procedures should be included.

[14] A/CN.9/664, para. 78.

[15] New paragraph included to conform to other electronic procurement provisions.

[16] On the other hand, the Guide to Enactment would explain that the duration of an open framework agreement is not limited under the Model Law, but that a duration must be set in accordance with the provisions of this article.

Article 54. Second stage of a closed framework agreement procedure[17]

(1) The award of any procurement contract under a framework agreement shall be effected in accordance with its terms and conditions and the provisions of this article.

(2) No procurement contract under the framework agreement shall be awarded to suppliers or contractors that were not originally parties to the framework agreement.

(3) The terms of a procurement contract awarded under the framework agreement may not materially alter or depart from any term or condition of the framework agreement.

(4) Where the framework agreement provides for second-stage competition:

(a) Each anticipated procurement contract shall be the subject of a written invitation to tender. The procuring entity shall invite all suppliers or contractors that are parties to the framework agreement, or where relevant all such suppliers and contractors then capable of meeting the needs of the procuring entity, to present their tenders for the supply of the items to be procured;

(b) The procuring entity shall fix the place for and a specific date and time as the deadline for presenting the tenders. The deadline shall afford the suppliers or contractors sufficient time to prepare and present their tenders;

(c) The invitation to tender shall:

(i) Restate the existing terms and conditions of the anticipated procurement contract, set out the terms and conditions that are to be subject to the second-stage competition and provide further detail of the terms and conditions where necessary;

(ii) Restate the procedures and selection criteria for the award of the anticipated procurement contract (including their relative weight and the manner of their application), and including the information referred to in article 27 (q) to (s) and (x) to (z);

(iii) Set out instructions for preparing second-stage tenders, including information specified in article 27 (g) to (p), and the submission deadline;

(d) The procuring entity shall evaluate all tenders received and determine the successful tender in accordance with the evaluation criteria and the procedures set out in the invitation to tender;[18]

(e) The procuring entity shall accept the successful tender in accordance with article 19.

(5) The procuring entity shall promptly notify in writing all suppliers or contractors that are parties to the framework agreement of the award of the contract,

---

[17] Based on draft articles 51 duodecies and terdecies, before the Working Group at its fourteenth session (A/CN.9/WG.I/WP.62, para. 6), consolidated in accordance with the Working Group's decision at that session (A/CN.9/664, para. 106), and updated to reflect revised draft Chapters I and II of the Model Law.

[18] The Working Group may wish to consider whether additional cross references to the provisions of Chapter II addressing the selection of the winning supplier should be included.

the name and address of the supplier or contractor to whom the notice has been issued and the contract price.

(6) Where the contract price exceeds [the enacting State includes a minimum amount [or] the amount set out in the procurement regulations], the procuring entity shall promptly publish notice of the award of the procurement contract(s) in any manner that has been specified for the publication of contract awards under article 20 of this Law. The procuring entity shall also publish, in the same manner, [quarterly] notices of all procurement contracts issued under a framework agreement or in any other manner set out in the framework agreement.[19]

Article 55. First stage of an open framework agreement procedure[20]

(1) The procuring entity shall establish and maintain an open framework agreement in electronic form.[21]

(2) To establish an open framework agreement, the procuring entity shall publish a notice of the open framework agreement procedure, in accordance with article 24.[22] The notice shall contain the information specified in article [50].

(3) The procuring entity shall, during the entire period of operation of the open framework agreement, ensure unrestricted, direct and full access to the specifications and terms and conditions of the agreement and to any other necessary information relevant to its operation.

(4) The procuring entity shall, during the period of operation of the open framework agreement, either:

(a) Republish as frequently as practicable, but at least once annually, the initial notice of the open framework agreement procedure, a notice of the award of [or the parties to] a framework agreement and an invitation to present further submissions to become a party to the framework agreement in the publication or publications in which the initial publication was made; or

(b) Maintain a copy of the published information at the website or other electronic address set out in the initial notice.

(5) Suppliers and contractors may apply to become a party or parties to the open framework agreement at any time during its operation. Applications to become

---

[19] The Working Group may alternatively wish to consider including this provision in draft article 20 of the revised Model Law. The provisions of draft articles 19, 20 and 22 may need to be revised following the Working Group's finalization of the framework agreements procedures.

[20] New article applying to open framework agreements procedures only (A/CN.9/664, para. 90), based on article 51 octies before the Working Group at its fourteenth session (A/CN.9/WG.I/WP.62, para. 6), updated to reflect amended provisions in Chapters I, II and III of the revised Model Law, and draft article 51 decies, before the Working Group at its fourteenth session (A/CN.9/WG.I/WP.62, para. 6), implementing the Working Group's decisions regarding separating open and closed framework agreements procedures (A/CN.9/664, paras. 83-88 and 90).

[21] See A/CN.9/664, para. 91.

[22] The Working Group may wish to incorporate a cross reference to article 23 (domestic tendering).

parties shall include all information specified by the procuring entity in the notice of the open framework agreement procedure.

(6) The procuring entity shall examine all such submissions to become a party to the framework agreement received during the period of its operation [within a maximum of […] days] in accordance with the description set out in the notice of the open framework agreement procedure.

(7) The framework agreement shall be concluded with all qualified suppliers or contractors whose submissions are responsive unless technical or other capacity limitations require a maximum number of parties to the framework agreement, and provided that the procuring entity includes in the record required under article [22] of this Law a statement of the grounds and circumstances upon which it relied to justify the imposition of such a limitation.[23]

(8) The procuring entity shall promptly notify the suppliers or contractors whether they have been selected to be parties to the framework agreement.

(9) The procuring entity shall include in the record required under article [22] of this Law a statement of the grounds and circumstances upon which it relied to justify the establishment of the open framework agreement.

Article 56. Minimum requirements as regards open framework agreements[24]

An open framework agreement shall provide for second stage competition for the award of a procurement contract under the agreement and shall in addition contain at a minimum:

(a) The description of the subject matter of the procurement and all other terms and conditions of the procurement known when the open framework agreement is established;

(b) Any terms and conditions that may be refined through second-stage competition;

(c) The language or languages of the open framework agreement and all information about the electronic operation of the agreement, including how the agreement and notifications of forthcoming procurement contracts under the agreement can be assessed, electronic equipment used and the technical arrangements and specifications;

(d) If any limitation on a number of suppliers or contractors parties to the agreement is imposed, a maximum number of suppliers or contractors that may enter into the framework agreement;

(e) The terms and conditions for suppliers or contractors to be admitted to the open framework agreement, including:

---

[23] See A/CN.9/664, para. 103.

[24] This article is new, and adapts the equivalent provisions for closed framework agreements contained in article 53 above. The Working Group may wish to consider whether this procedure should be available for all types of procurement, or the more standardized low-value items, such as are provided for in Chapter III of the revised Model Law.

(i) An explicit statement that suppliers or contractors may apply to become parties to the framework agreement at any time during the period of its operation, subject to any maximum number of suppliers, if any;

(ii) The information specified in article 25 (e), and article 27 (b), (c), (t), (u), (w) and (z); and

(iii) Instructions for preparing and submitting indicative tenders, including the information referred to in article 27 (i) to (k);

(f) The procedures and the envisaged frequency of second-stage competition;

(g) Whether the award of a procurement contract under the framework agreement will be based on the lowest price or lowest evaluated tender;[25]

(h) The evaluation procedures and criteria to be applied during the second-stage competition, including the relative weight of the evaluation criteria and the manner in which they will be applied, in accordance with article [12] of this Law. The framework agreement may specify a range within which the relative weights of the evaluation criteria may be varied during second-stage competition, provided that any such variation does not lead to a material variation in the procurement as described in article [51].

Article 57. Second stage of an open framework agreement procedure[26]

(1) The award of any procurement contract under a framework agreement shall be effected in accordance with its terms and conditions and the provisions of this article.

(2) (a) Each anticipated procurement contract shall be the subject of a written invitation to tender. The procuring entity shall invite all suppliers or contractors that are parties to the framework agreement, or where relevant all such suppliers and contractors then capable of meeting the needs of the procuring entity, to present their tenders for the supply of the items to be procured;

(b) The procuring entity shall fix the place for and a specific date and time as the deadline for presenting the tenders. The deadline shall afford the suppliers or contractors sufficient time to prepare and present their tenders;

(c) The invitation to tender shall:

(i) Restate the existing terms and conditions of the anticipated procurement contract, set out the terms and conditions that are to be subject to the second-stage competition and provide further detail of the terms and conditions where necessary;

(ii) Restate the procedures and selection criteria for the award of the anticipated procurement contract (including their relative weight and the

---

[25] See footnote 12 above.

[26] Based on draft articles 51 duodecies and terdecies, before the Working Group at its fourteenth session (A/CN.9/WG.I/WP.62, para. 6), consolidated in accordance with the Working Group's decision at that session (A/CN.9/664, para. 106), and updated to reflect revised draft Chapters I and II of the Model Law.

manner of their application), and including the information referred to in article 27 (q) to (s) and (x) to (z);

(iii) Set out instructions for preparing second-stage tenders, including information specified in article 27 (g) to (p), and the submission deadline;

(d) The procuring entity shall evaluate all tenders received and determine the successful tender in accordance with the evaluation criteria and the procedures set out in the invitation to tender;[27]

(e) The procuring entity shall accept the successful tender in accordance with article 19.

(3) The procuring entity shall promptly notify in writing all suppliers or contractors that are parties to the framework agreement of the award of the contract, the name and address of the supplier or contractor to whom the notice has been issued and the contract price.

(4) Where the contract price exceeds [the enacting State includes a minimum amount [or] the amount set out in the procurement regulations], the procuring entity shall promptly publish notice of the award of the procurement contract(s) in any manner that has been specified for the publication of contract awards under article [20] of this Law. The procuring entity shall also publish, in the same manner, [quarterly] notices of all procurement contracts issued under a framework agreement or in any other manner set out in the framework agreement.[28]

CHAPTER VII. REVIEW[29]

Article 58. Right to review[30]

Any supplier or contractor that claims to have suffered, or that may suffer, loss or injury due to non-compliance with the provisions of this Law[31] may seek review in accordance with articles 58 to 63 and challenge in appropriate bodies in accordance with applicable law any decisions taken as a result of such a review.[32]

Article 59. Review by the procuring entity or the approving authority[33]

(1) A supplier or contractor entitled under article 58 to seek review may submit a

---

27 The Working Group may wish to consider whether additional cross references to the provisions of Chapter II addressing the selection of the winning supplier should be included.

28 The Working Group may alternatively wish to consider including this provision in draft article 20 of the revised Model Law.

29 A footnote accompanying this chapter has been deleted reflecting the Working Group's decision taken at its fourteenth session (see A/CN.9/664, para. 19).

30 The article was revised reflecting the Working Group's decisions taken at its fourteenth session (see A/CN.9/664, paras. 25, 26 and 74).

31 The phrase "due to non-compliance with the provisions of this Law" has replaced the phrase "due to a breach of a duty imposed on the procuring entity by this Law", reflecting the Working Group's decision taken at its fourteenth session (see A/CN.9/664, para. 25).

32 See A/CN.9/664, para. 74, for the reasons of including the reference to the right to challenge.

33 The article was revised reflecting the Working Group's decisions taken at its fourteenth session (see A/CN.9/664, paras. 28-33 and 65).

complaint to the procuring entity or where applicable to the approving authority. The complaints shall be submitted in writing provided that:

(a) Complaints as regards the terms of solicitation shall be submitted no later than the deadline for presenting the submissions;

(b) All other complaints arising from the procurement proceedings shall be submitted before the entry into force of the procurement contract within [20][34] days of when the supplier or contractor submitting the complaint became aware of the circumstances giving rise to the complaint or of when that supplier or contractor should have become aware of those circumstances, whichever is earlier.

(2) Unless the complaint is resolved by mutual agreement of the parties, the procuring entity or the approving authority as appropriate shall, within 30 days after the submission of the complaint, issue a written decision. The decision shall:

(a) State the reasons for the decision; and

(b) If the complaint is upheld in whole or in part, state[35] the corrective measures that shall be undertaken.[36]

(3) If the procuring entity or the approving authority does not issue a decision by the time specified in paragraph (2) of this article, the supplier or contractor submitting the complaint or the procuring entity as the case may be is entitled immediately thereafter to institute proceedings under article 60 or 61. Upon the institution of such proceedings, the competence of the procuring entity or the approving authority to entertain the complaint ceases.

Article 60. Review before an independent administrative body[37, 38]

(1) A supplier or contractor entitled under article 58 to seek review may submit a

---

34 The Working Group may wish to shorten this time-limit in the light of the provisions on the standstill period in the proposed article 19. This time-limit together with article 56 provisions on suspension of procurement proceedings may lead to unreasonably long duration of standstill periods, which would have to run for at least 20 days.

35 The word "state" replaced the word "indicate" pursuant to the Working Group's decision taken at its fourteenth session (see A/CN.9/664, para. 31).

36 The words "shall be undertaken" replaced the words "are to be taken" pursuant to the Working Group's decision taken at its fourteenth session (see A/CN.9/664, para. 31).

37 The article was revised reflecting the Working Group's decisions taken at its fourteenth session (see A/CN.9/664, paras. 35, 36, 39, 44, 53, 55 and 56).

38 The current title of the article replaced the title "administrative review". A footnote accompanying article 54 (referring to the optional nature of the article depending on the legal traditions of enacting States) was deleted. These changes reflect the Working Group's decisions taken at its fourteenth session (see A/CN.9/664, para. 35). The Working Group may wish to reinstate a footnote to this article that would read as follows:

"* States where hierarchical administrative review of administrative actions, decisions and procedures is not a feature of the legal system may omit article 61 and provide only for judicial review (article 64), on the condition that in the enacting State exists an effective system of judicial review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the procurement rules and procedures of this Law are not followed, in compliance with the requirements of the United Nations Convention against Corruption."

complaint to [insert name of administrative body].

(2) The complaints shall be submitted in writing within [20] days of when the supplier or contractor submitting the complaint became aware of the circumstances giving rise to the [original] complaint or of when that supplier or contractor should have become aware of those circumstances, whichever is earlier, provided that the complaints as regards the terms of solicitation shall be submitted no later than the deadline for presenting the submissions.

(3) The timely submission of a complaint under article 60 shall suspend the time period for submission of a complaint under this article for the whole duration of the actual proceedings under article 59 up to the maximum period required for the procuring entity or the approving authority as the case may be to take a decision in accordance with article 59 (2) and communicate such decision to the supplier or contractor in accordance with article 62 (5).

(4) Upon receipt of a complaint, the [insert name of administrative body] shall give notice of the complaint promptly to the procuring entity and to the approving authority where applicable.

(5) The [insert name of administrative body] may grant[39] one or more of the following remedies, unless it dismisses the complaint:

(a) Declare the legal rules or principles that govern the subject-matter of the complaint;

(b) Prohibit the procuring entity from acting or deciding unlawfully or from following an unlawful procedure;

(c) Require the procuring entity that has acted or proceeded in an unlawful manner, or that has reached an unlawful decision, to act or to proceed in a lawful manner or to reach a lawful decision;

(d) Annul in whole or in part an unlawful act or decision of the procuring entity;[40]

(e) Revise an unlawful decision by the procuring entity or substitute its own decision for such a decision;[41]

(f) Require the payment of compensation for

Option I

Any reasonable costs incurred by the supplier or contractor submitting the complaint in connection with the procurement proceedings as a result of an unlawful act or decision of, or procedure followed by, the procuring entity;

Option II

Loss or injury suffered by the supplier or contractor submitting the complaint in connection with the procurement proceedings;

---

[39] See A/CN.9/664, para. 56, for the preference expressed at the Working Group's fourteenth session to use the word "grant" instead of "recommend" in this provision.

[40] See A/CN.9/664, para. 55, for the decision at the Working Group's fourteenth session to amend this provision of the Model Law by deleting the reference to "other than any act or decision bringing the procurement contract into force".

[41] Ibid., as regards deletion of a similar reference in this provision.

(g) Order that the procurement proceedings be terminated;

(h) Annul the procurement contract that entered into force unlawfully[42] and, if notice of the procurement contract award has been published, order the publication of notice of the annulment of the award.

(6) The [insert name of administrative body] shall within 30 days issue a written decision concerning the complaint, stating the reasons for the decision and the remedies granted, if any.

(7) The decision shall be final unless an action is commenced under article 63.

Article 61. Certain rules applicable to review proceedings under articles 59 and 60[43]

(1) Promptly after the submission of a complaint under article 60 or article 61, the review body shall notify all suppliers or contractors participating in the procurement proceedings to which the complaint relates as well as any governmental authority whose interests are or could be affected of the submission of the complaint and of its substance.

(2) Any such supplier or contractor or governmental authority has the right to participate in the review proceedings. A supplier or contractor or the governmental authority that fails to participate in the review proceedings is barred from subsequently making the same type of claim.

(3) The participants to the review proceedings shall have access to all proceedings and shall have the right to be heard prior to a decision of the review body being made on the complaint, the right to be represented and accompanied, and the right to request that the proceedings take place in public and that witnesses be presented.[44]

(4) In the cases of the review by the approving authority or the [insert name of administrative body], the procuring entity shall provide timely to the review body all relevant documents, including the record of the procurement proceedings.[45]

(5) A copy of the decision of the review body shall be furnished within five days after the issuance of the decision to the participants to the review proceedings. In addition, after the decision has been issued, the complaint and the decision shall be promptly made available for inspection by the general public, provided, however, that no information shall be disclosed if its 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.

(6) Any decision by the review body and the grounds and circumstances therefor

---

[42] Added pursuant to the Working Group's decision at its fourteenth session (A/CN.9/664, paras. 53-55).

[43] The article was revised pursuant to the discussions at the Working Group's fourteenth session (A/CN.9/664, paras. 59-60).

[44] The paragraph is based on article XVIII (6) of the revised Agreement on Government Procurement, as discussed at the Working Group fourteenth session (A/CN.9/664, para. 59).

[45] This paragraph has been added pursuant to the relevant point made at the Working Group's fourteenth session (see A/CN.9/664, para. 60).

shall be made part of the record of the procurement proceedings.[46]

Article 62. Suspension of procurement proceedings[47]

(1) The timely submission of a complaint suspends the procurement proceedings for a period to be determined by the review body:[48]

(a) Provided that the complaint is not frivolous and contains a declaration the contents of which, if proven, demonstrate that the supplier or contractor will suffer irreparable injury in the absence of a suspension, it is probable that the complaint will succeed and the granting of the suspension would not cause disproportionate harm to the procuring entity or to other suppliers or contractors;

(b) Unless the procuring entity certifies that urgent public interest considerations require the procurement to proceed. The certification, which shall state the grounds for the finding that such urgent considerations exist and which shall be made a part of the record of the procurement proceedings, is conclusive with respect to all levels of review except judicial review.[49]

(2) The review body may extend the originally determined period of suspension in order to preserve the rights of the supplier or contractor submitting the complaint or commencing the action pending the disposition of the review proceedings, provided that the total period of suspension shall not exceed the period required for the review body to take decision in accordance with article 60 or 61 as applicable.[50]

(3) The decision on the suspension or the extension of the suspension shall be promptly communicated to all participants to the review proceedings, indicating the duration of suspension or extension.[51] Where the decision was taken not to suspend the procurement proceedings on the grounds indicated in paragraph (1) of this article, the review body shall notify the supplier or contractor concerned about that decision and the grounds therefor.

Article 63. Judicial review

The [insert name of court or courts] has jurisdiction over actions pursuant to article 58 and petitions for judicial review of decisions made by review bodies, or of the failure of those bodies to make a decision within the prescribed time-limit, under article 59 or 60.

---

46 The paragraph was added based on the provisions of article 56 (5) of the Model Law.

47 The article was revised to reflect the Working Group's discussions at its fourteenth session (A/CN.9/664, paras. 61-73). Although a proposal was made to delete the article and include the relevant provisions in articles 53 and 54 as appropriate, the Secretariat in avoidance of repetitions in articles 53 and 54 retained the provisions, which are equally applicable to review proceedings under both article 53 and article 55, in a separate article.

48 The provisions reflect the Working Group's decision at its fourteenth session (A/CN.9/664, para. 65).

49 The provisions in both subparagraphs reflect the Working Group's decisions at its fourteenth session (A/CN.9/664, para. 68).

50 The provisions reflect the Working Group's decision at its fourteenth session that the period of suspension should be aligned with the period required for the review body to issue its decision (a maximum being 30 days) (A/CN.9/664, paras. 64 and 69).

51 The provisions were added further to the Working Group's decision at its fourteenth session (A/CN.9/664, para. 65).

A/CN.9/WG.I/WP.66/Add.5 (Original: English)

Note by the Secretariat on possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services - a revised text of the Model Law, submitted to the Working Group on Procurement at its fifteenth session

ADDENDUM

This note sets out a table indicating correlation of the articles in the revised Model Law to the articles of the 1994 Model Law and new articles considered by the Working Group to date.

Article in the revised Model Law	**Corresponding provisions in the 1994 Model Law**	**New provisions considered by the Working Group**
Chapter I. GENERAL PROVISIONS	**Chapter I. GENERAL PROVISIONS**	
Article 1. Scope	Article 1. Scope	
Article 2. Definitions	Article 2. Definitions	
Article 3. International obligations of this State relating to procurement [and intergovernmental agreements within (this State)]	Article 3. International obligations of this State relating to procurement [and intergovernmental agreements within (this State)]	
Article 4. Procurement regulations	Article 4. Procurement regulations	
Article 5. Publicity of legal texts	Article 5. Public accessibility of legal texts	Article 5 as preliminarily approved by the Working Group at its twelfth session (A/CN.9/640, paras. 30-34), except for its paragraph (3), which was included in a separate article 6 (see below).
Article 6. Information on forthcoming procurement opportunities		Article 5. Publication of legal texts Paragraph (3)
Article 7. Rules concerning methods of procurement and type of solicitation (new provisions, based on 1994 text)	Articles 18, 17 (a) and (b), 19 (1) (a), 22, 23 (a) and (b), and 37 (2) and (3) (c), and the Guide commentary to article 22 (basis of new provisions)	

Article in the revised Model Law	Corresponding provisions in the 1994 Model Law	New provisions considered by the Working Group
Article 8. Communications in procurement	Replaced article 9. Form of communications	Article 5 bis as preliminarily approved by the Working Group at its twelfth session (A/CN.9/640, paras. 17-25).
Article 9. Participation by suppliers or contractors	Article 8. Participation by suppliers or contractors	
Article 10. Qualifications of suppliers and contractors	Article 6. Qualifications of suppliers and contractors Article 10. Rules concerning documentary evidence provided by suppliers or contractors	
Article 11. Rules concerning description of the subject matter of the procurement	Article 16. Rules concerning description of goods, construction or services	
Article 12. Rules concerning evaluation criteria (new provisions based on 1994 text)	Articles 27 (e), 34 (4), 38 (m), 39 and 48 (3) (basis of new provisions)	
Article 13. Rules concerning the language of solicitation or equivalent documents	Article 17. Language	
Article 14. Securities	Article 32. Tender securities	
Article 15. Prequalification proceedings	Article 7. Prequalification proceedings. Also articles 23, 24 and 25, provisions related to prequalification	
Article 16. Rejection of all submissions	Article 12. Rejection of all tenders, proposals, offers or quotations	
Article 17. Rejection of abnormally low submissions		Based on article 12 bis as preliminarily agreed by the Working Group at its twelfth session (A/CN.9/640, paras. 44-55).
Article 18. Rejection of a submission on the ground of inducements from suppliers or contractors or on the ground of conflicts of interest	Article 15. Inducements from suppliers or contractors	Conflicts of interest (A/CN.9/664, para. 116)

Article in the revised Model Law	**Corresponding provisions in the 1994 Model Law**	**New provisions considered by the Working Group**
Article 19. Acceptance of submissions and entry into force of the procurement contract	Article 13. Entry into force of the procurement contract Article 36. Acceptance of tender and entry into force of procurement contract	Standstill period (A/CN.9/664, paras. 45-55 and 72)
Article 20. Public notice of awards of procurement contract and framework agreement	Article 14. Public notice of procurement contract awards	
Article 21. Confidentiality (new text, based on 1994 Model Law)	Article 45 (basis of new provisions)	
Article 22. Record of procurement proceedings	Article 11. Record of procurement proceedings	Paragraph (1) (b) bis as preliminarily approved by the Working Group at its ninth session (A/CN.9/595, para. 49), Paragraph (1) (i) bis, as preliminarily approved by the Working Group at its eleventh and twelfth sessions (A/CN.9/623, para. 100, and A/CN.9/640, para. 91 Restructuring of paragraph (3) as suggested at the Working Group's twelfth session (A/CN.9/640, para. 90). The Working Group did not consider in detail the restructured provisions presented in document A/CN.9/WG.I/WP.59.
	Chapter II. METHODS OF PROCUREMENT AND THEIR CONDITIONS FOR USE was deleted (articles 18 and 22 were reflected in new article 7, the remaining articles are in the relevant provisions of chapters III and IV)	
Chapter II. TENDERING PROCEEDINGS	**Chapter III. TENDERING PROCEEDINGS**	
Articles 23-31	Articles 23-31, with consequential changes.	

Article in the revised Model Law	Corresponding provisions in the 1994 Model Law	New provisions considered by the Working Group
	Article 32. Tender securities became article 14. Securities and placed in chapter I. General provisions, in order to make it applicable to all procurement methods	
Articles 32-34	Articles 33-35, with consequential changes.	
	Article 36. Acceptance of tender and entry into force of procurement contract became article 19 and placed in chapter I. General provisions, in order to make it applicable to all procurement methods	
CHAPTER III. CONDITIONS FOR USE AND PROCEDURES OF RESTRICTED TENDERING, TWO-ENVELOPE TENDERING, AND REQUEST FOR QUOTATIONS	Chapter II, articles 20 and 21; article 42 and other relevant provisions of chapter IV; and chapter V, articles 47 and 50.	
[CHAPTER IV. CONDITIONS FOR USE AND PROCEDURES OF TWO-STAGE TENDERINGS, REQUEST FOR PROPOSALS AND COMPETITIVE NEGOTIATION] **[may be deferred]**	Chapter II, article 19; articles 43 and 44 and other relevant provisions of chapter IV; chapter V, articles 46, 48 and 49; and relevant provisions from the PFIPs instruments.	
CHAPTER V. CONDITIONS FOR USE AND PROCEDURES OF ELECTRONIC REVERSE AUCTIONS	New	Articles 22 bis and 51 bis to septies (see A/CN.9/WG.I/WP.59, A/CN.9/WG.I/WP.61, para. 17, and A/CN.9/640, paras. 56-89), with consequential changes.
CHAPTER VI. FRAMEWORK AGREEMENTS PROCEDURES	New	Articles 22 ter and 51 octies to quindecies (see A/CN.9/WG.I/WP.62, and A/CN.9/664, paras. 75-110), with consequential changes

Article in the revised Model Law	Corresponding provisions in the 1994 Model Law	New provisions considered by the Working Group
CHAPTER VII. REVIEW	Chapter VI as revised at the Working Group's fourteenth session (A/CN.9/664, paras. 19-74)	

H. Report of the Working Group on Procurement on the work of its sixteenth session (New York, 26-29 May 2009) (A/CN.9/672) [Original: English]

CONTENTS

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 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 to thirteenth sessions (New York, 4-8 April 2005, Vienna, 7-11 November 2005, New York, 24-28 April 2006, Vienna, 25-29 September 2006, New York, 21-25 May 2007, Vienna, 3-7 September 2007, and New York, 7-11 April 2008, respectively) (A/CN.9/575, A/CN.9/590, A/CN.9/595, A/CN.9/615, A/CN.9/623, A/CN.9/640 and A/CN.9/648), the Working Group considered the topics related to the use of electronic communications and technologies in the

procurement process: (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; (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; and (c) electronic reverse auctions (ERAs), 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 procedural aspects of ERAs.

3. At its seventh, eighth and tenth to twelfth sessions, the Working Group in addition considered the issues of abnormally low tenders (ALTs), including their early identification in the procurement process and the prevention of negative consequences of such tenders.

4. At its thirteenth and fourteenth (Vienna, 8-12 September 2008) sessions, the Working Group held an in-depth consideration of the issue of framework agreements. At its thirteenth session, the Working Group also discussed the issue of suppliers' lists and decided that the topic would not be addressed in the Model Law, for reasons that would be set out in the Guide to Enactment. At its fourteenth session, the Working Group also held an in-depth consideration of the issue of remedies and enforcement and addressed the topic of conflicts of interest.

5. At its fifteenth session (New York, 2-6 February 2009), the Working Group completed the first reading of the revised text of the Model Law except for its chapter IV. It noted that further research was required for some provisions in particular in order to ensure that they were compliant with the relevant international instruments.

6. At its thirty-eighth to forty-first sessions, in 2005 to 2008, respectively, 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, A/61/17, para. 192, A/62/17, Part one, para. 170, and A/63/17, para. 307). At its thirty-ninth session, the Commission recommended that the Working Group, in updating the Model Law and the Guide to its Enactment (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 (A/61/17, para. 192). At its fortieth session, the Commission recommended that the Working Group should adopt a concrete agenda for its forthcoming sessions in order to expedite progress in its work (A/62/17, Part one, para. 170). At its forty-first session, the Commission invited the Working Group to proceed expeditiously with the completion of the project, with a view to permitting the finalization and adoption of the revised Model Law, together with its Guide to Enactment, within a reasonable time (A/63/17, para. 307).

II. Organization of the session

7. The Working Group, which was composed of all States members of the Commission, held its sixteenth session in New York, from 26-29 May 2009. The

session was attended by representatives of the following States members of the Working Group: Austria, Belarus, Bulgaria, Cameroon, Canada, China, Czech Republic, Egypt, France, Germany, Greece, Guatemala, Honduras, Iran (Islamic Republic of), Italy, Kenya, Madagascar, Mexico, Morocco, Pakistan, Paraguay, Republic of Korea, Russian Federation, Senegal, South Africa, Spain, United Kingdom of Great Britain and Northern Ireland, United States of America, and Venezuela (Bolivarian Republic of).

8. The session was attended by observers from the following States: Afghanistan, Bangladesh, Belgium, Croatia, Holy See, Indonesia, Jordan, Philippines, Sweden and Turkey.

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

(a) *United Nations system*: the World Bank and the World Trade Organization;

(b) *Intergovernmental organizations*: European Commission and Organization for Economic Cooperation and Development;

(c) *Invited international non-governmental organizations*: American Bar Association, Forum for International Commercial Arbitration C.I.C (FICACIC), International Bar Association, International Federation of Consulting Engineers (FIDIC), International Law Institute, and Union Internationale des Avocats.

10. The Working Group elected the following officers:

Chairman: Mr. Tore WIWEN-NILSSON[1] (Sweden)

Rapporteur: Sra. Ligia GONZÁLEZ LOZANO (Mexico)

11. The Working Group had before it the following documents:

(a) Annotated provisional agenda (A/CN.9/WG.I/WP.67);

(b) Possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services — drafting history of some provisions of the 1994 Model Law and the treatment of the issues raised by some of those provisions in international instruments regulating public procurement (A/CN.9/WG.I/WP.68 and Add.1);

(c) Possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services — a revised text of the Model Law (A/CN.9/WG.I/WP.69 and Add.1-5).

12. 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.

---

[1] Elected in his personal capacity.

6. Adoption of the report of the Working Group.

III. Deliberations and decisions

13. At its sixteenth session, the Working Group continued its work on the elaboration of proposals for the revision of the Model Law. The Working Group considered proposals for article 40 of the revised Model Law dealing with a proposed new procurement method — competitive dialogue. The Working Group agreed on the principles on which the provisions should be based and on much of the text as reflected in this report, and requested the Secretariat to review the provisions in order to align the text with the rest of the Model Law. The Secretariat was also entrusted with drafting new provisions for chapter I, such as on requests for expression of interest and cancellation of the procurement, for consideration at a later stage. The Working Group also requested the Secretariat to amend some provisions of chapter I, such as on the record of procurement proceedings, confidentiality, evaluation criteria, and public notice of procurement contract awards, and provisions of chapter II on clarifications and modifications of solicitation documents, in the light of the provisions on competitive dialogue.

IV. Consideration of proposals for the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services

A. Proposals for chapter IV of the revised Model Law (procurement methods involving negotiations)

1. Introduction of a proposal

14. The Working Group had before it a proposal for chapter IV of the revised Model Law submitted by delegations of Austria, France, the United Kingdom and the United States of America, entitled “Article 40. Request for Proposals with Competitive Negotiations”.

15. One of the sponsoring delegations, in introducing the proposal, stated that it built on the proposal, presented to the Working Group at its previous session, which merged articles 48 and 49 of the 1994 Model Law. It was recalled that the Working Group had decided at that session to defer the consideration of chapter IV to a later stage (A/CN.9/668, paras. 209-212). The proposal, it was said, was intended to be a basis for the Working Group’s deliberations on competitive negotiations.

16. It was recalled that the 1994 Model Law contained provisions on competitive negotiations (article 49), but they were considered to be insufficiently regulated to ensure transparency and the equal treatment of participants. In view of the potential economic gains of competitive negotiations in the procurement of complex works and services, the sponsoring delegations stressed the need for the Model Law to allow for the use of this procurement method. The proponents acknowledged that competitive negotiations presupposed significant discretion on the part of procuring entities in decision-making, and therefore it raised higher risks of corruption and abuse than might be present in other less flexible procedures. However, it was

reported that the value of this procurement method had resulted in benefits to the procuring entity in enabling it to obtain the best solution to its procurement needs, and thus that there would be advantages to developed and developing countries alike in its use. It was also stressed that the opportunity cost of not providing for such negotiations should be taken into account.

17. It was pointed out that since the use of this procurement method involved elevated risks of corruption and abuse, an adequate regulatory framework would be required and in addition there should be in place an appropriate supporting institutional framework consisting of, inter alia: anti-bribery provisions and institutions; an independent audit function; active civil society (including oversight by mass media); a political system that was responsive in cases of abuse; a robust remedies system to allow redress; effective conflict-of-interest regulations; and a procurement workforce that was highly trained and professionalized. In other words, it was emphasized, there was a need for good governance and a high standard of administration.

18. The importance of preserving the necessary flexibility and discretion on the part of the procuring entity in the use of the procurement method, which would enhance the benefits of the procedure, was stressed. It was generally considered that, at the same time, safeguards against abuse or improper use of this procurement method should be built in. It was pointed out that the safeguards might take different forms, such as: (a) requiring public notification of the essential decisions taken in the beginning, during and at the end of the procurement proceedings, such as modification of criteria or specifications; (b) specifying conditions for use; (c) imposing a minimum number of participants with whom negotiations should be held; (d) establishing the format of negotiations (should for example both concurrent and consecutive negotiations be permitted? It was noted that the sponsoring delegations considered that concurrent negotiations ensured the most beneficial outcome and equal treatment, and so were preferable); (e) regulating procedures for best and final offers (BAFOs), including whether one or several rounds of BAFOs should be allowed; (f) setting out rules on specifications and evaluation criteria, including the extent of permitted modifications; and (g) comprehensive record-keeping.

19. It was mentioned that while it was necessary to build minimum safeguards in the use of this procurement method, it was also necessary to recognize that procedural safeguards alone would not be sufficient unless they were supported by an appropriate institutional and regulatory framework, as detailed in paragraph 17 above. The experience of the World Bank, as an institution that provided technical assistance in reform of procurement systems, was reported in this respect. That experience indicated that putting in place the institutional frameworks and safeguards that were a prerequisite for the use of this method had proved to be among the most difficult reforms to implement. In response, it was noted that robust safeguards against improprieties in procurement were required with respect to all procurement methods, and that there had been significant reform towards introducing necessary safeguards in some States in recent years.

20. A point was made that, in considering aspects of this procurement method, the context in which it would be dealt with in the Model Law should not be overlooked, namely that competitive negotiations would be one of the tools available to the procuring entity. It was explained that, under the revised Model Law, the procuring

entity would be under an obligation to choose the procurement method best suited to the given circumstances. It was further elaborated that since competitive negotiations normally involved cumbersome and time-consuming procedures, they should therefore be utilized only when appropriate, and not for simple items that were usually procured through tendering. They would be appropriate, it was said, for procurement in which a tailor-made solution would be needed (an example was given of an information technology system for the archiving of legal records, which needed long-term accessibility), and where technical excellence was an issue.

21. On the other hand, it was noted that the proposal would not address all situations in which negotiations might be needed, such as those referred to in article 19 (1) (d) and (2) of the 1994 Model Law, particularly in the context of urgent procurement. It was also stressed that the revised Model Law should specify conditions for use of each procurement method involving negotiations.

22. It was noted that the proposed procurement method often involved the following stages: (a) an optional request for expressions of interest (RFI); (b) publication of solicitation terms, rules of procedure and, if prequalification were involved, prequalification terms; (c) some form of prequalification or pre-selection, especially when it was expected that more than the optimum number of candidates would express interest in participating; (d) issuance of the request for proposal (RFP) to those candidates that were selected for negotiations; (e) concurrent competitive dialogue; (f) completion of negotiations with the request for BAFOs; and (g) award.

23. It was explained that the RFI was intended to be optional in order to investigate when necessary how the market could respond to the needs of the procuring entity. It was further noted that the RFI did not impose any obligation on the procuring entity to proceed with the procurement nor did it give any right on the suppliers or contractors that responded to the RFI. Concern was expressed that in some jurisdictions the term RFI was used to describe a mandatory stage triggering competitive negotiations. To avoid confusion, it was suggested that a different term should be used in the proposal. (On the same subject, see further paras. 38-44 below.)

24. It was further explained that, at the stage at which the solicitation terms, the rules of procedure and (if prequalification were involved) the prequalification terms were published, the procuring entity's needs would be defined as a rule in general terms (as performance/output indicators). It was noted that the needs would normally be refined through negotiations, but, in some cases, it was possible to be more specific from the outset. It was stated that the evaluation criteria and relative weight of each criterion, on the other hand, had to be defined and could not be varied throughout the process.

25. It was added that holding prequalification to assess the competencies and eligibility of suppliers or contractors to meet the needs of the procuring entity before negotiations started would normally be considered to be good practice. In this context, it was noted, prequalification might involve pre-selection in the sense that the top-ranking three or five suppliers were selected for negotiations from among the pre-qualified candidates. However, it was stressed that the procuring entity would have from the outset to reserve this possibility and to disclose the criteria and procedure for pre-selection, which should be objective and non-

discriminatory. As regards the optimum number of participants, it was observed that negotiating with more than five candidates had proved to be very cumbersome and unworkable in practice, that this number would normally be the maximum number of participants, and that a desirable minimum would be three participants. A suggestion was made that determining the maximum number of suppliers with which the procuring entity would negotiate should be left to the procuring entity.

26. It was further explained that the RFP was issued to all suppliers admitted to the negotiations; time would be allowed for them to prepare their proposals; and after proposals were submitted, negotiations would take place concurrently with all remaining participants. It was noted that negotiations were as a rule held by a committee composed of the same people for each supplier, to ensure consistent results. In addition to efficiency, this use of committees was considered to be a valuable anti-corruption measure. The importance of equal treatment of all participants at the negotiations stage was stressed. It was noted that equal treatment in practice meant, for example, that the same topic was considered with the participants concurrently for the same amount of time.

27. It was explained that competitive negotiations might involve several rounds or phases of negotiations by the end of which specifications could be refined and participants would be given a chance to modify their proposals in the light of both the refined specifications, and the questions and comments put forward by the negotiating committee during negotiations. Some participants might decide not to participate further in negotiations, or they might be excluded from further negotiations by the procuring entity if they were considered to be unable to respond to the needs of the procuring entity. Upon completion of the negotiations, the remaining participants would be given an equal chance to present BAFOs on the basis of their proposals.

28. In response to a query as to whether price was subject to negotiation, it was stated that a preliminary price would be given in all cases at the initial stage, and the final price was always included in the BAFO. While the primary focus of negotiations typically was on technical aspects, in some cases it was not possible to separate price and non-price criteria. The option to negotiate on price should not be excluded, it was said, especially in situations where the market conditions allowed and even encouraged the procuring entity to use it as a negotiating factor. In no case, it was stressed, however, should disclosure of price and any other commercially sensitive information from one supplier to another occur.

29. In response to a query, the sponsoring delegations confirmed that the tenet of the proposal was consistent with the WTO Government Procurement Agreement (GPA) and the provisional 2006 GPA,[2] but that the provisions permitting reductions of the number of participants would be considered in detail when the Working Group addressed the relevant parts of the proposal. It was noted that some requirements of the current GPA were not included in the provisional 2006 GPA and this indicated desire to facilitate the use of negotiations in procurement.

30. In response to another query, it was explained that the proposal was not intended to replace the provisions on remedies of the Model Law. Therefore, it was

---

[2] Document GPA/W/297, available as of the date of this report at www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm.

noted, complaints from suppliers or contractors excluded from the process were to be dealt with in accordance with the applicable provisions of the Model Law.

2. Consideration of the proposal by the Working Group

31. The Working Group proceeded with a paragraph-by-paragraph consideration of the proposal, noting that it was based on a synthesis of national provisions and not an international text.

Paragraph (1)

32. The proposed paragraph (1), which addressed the conditions for use of the procedure, read as follows:

> "(1) [Subject to approval by … (the enacting State may designate an authority to issue the approval)], a procuring entity may engage in procurement by means of a request for proposals (RFP) with competitive negotiations if it is not feasible for the procuring entity to formulate a detailed description of, or specifications for, the subject matter of the procurement, as:
>
> (a) Due to the technical nature of the subject matter of the procurement it will be necessary for the procuring entity to invite rounds of proposals from vendors with a view to negotiating price or technical improvements;
>
> (b) The nature or state of development of the relevant sector of suppliers or contractors is largely unknown or such that the procuring entity would first require substantial input from the sector before being able to finalize the specifications or description of the subject matter of the procurement;
>
> (c) The subject matter of the procurement or the delivery method chosen by the procuring entity is [complex and] has many aspects, and is likely to require a high degree of customization;
>
> (d) The subject matter of the procurement is [complex and] dynamic and the term of the contract sufficiently long, such that the specifications are likely to change over the term of the contract [to reflect technological advances]; or
>
> (e) The relevant sector of suppliers or contractors does not have a [uniform] [similar] approach to pricing or delivery of the subject matter of the procurement."

33. As regards the conditions for use of this procedure:

(a) The need for setting out conditions for use in the Model Law (rather than the Guide to Enactment) was stressed as a critical safeguard for use of the procedure. In this regard, it was noted that the conditions should reflect the types of procurement for which the procedure would be appropriate;

(b) The need for approval from a higher authority (placed in square brackets in the chapeau) was queried, as was whether the authority's role should extend to supervision of the procedure. The sponsoring delegations stressed the need for an independent agency, which could bar the use of competitive negotiations if the appropriate institutional framework, capacity and integrity within the procuring entity were not available, based on the criteria set out in paragraph 17 above. Other delegations queried whether this approval requirement, which might be costly and

cumbersome, would be justified. They also queried whether the role of the agency would be to assess the administration and governance standards in the State concerned, or to assess those of the procuring entity, or the justification for recourse to competitive negotiations on a case-by-case basis. In this regard, concern was expressed that the approving agency would in reality have to rely on the expertise of the procuring entity as regards the choice of this procedure, and thus the safeguard might be illusory. On the other hand, it was said that removing the approval requirement might undermine open tendering as the primary procurement method, and also might operate as a disincentive to enact the procedure at all. After debate, it was agreed to include the approval requirement in square brackets as an option for the legislator, with the Guide explaining the importance of this safeguard and the need in addition for effective oversight of the procedure;

(c) It was queried whether reference in the chapeau provisions should be made to a "detailed" description of the subject matter of the procurement, and to "detailed" specifications (being part of that description). On the one hand, it was stated that avoiding the term might lead to overuse of the method where it was not justified (simply avoiding appropriate preparation for the procurement); on the other hand, it was commented that the procuring entity would need some level of detail simply in order to issue a basic functional description, and therefore that the qualifier did not bring any real clarification to the basic question of whether or not it was "feasible" to draft appropriate description and specifications. Other delegations considered that if functional specifications, rather than technical specifications, could be drafted, there would be no need to use a method that sought to define solutions through the procedure itself. Agreeing that in any event the description should be sufficiently precise to elicit offers that responded to needs of procuring entity, but that the requirement for specifications needed for tendering would still not be met, the Working Group deferred its final consideration of this question;

(d) As regards the detailed conditions for use in subparagraphs (a) to (e) of the proposed text, it was suggested that these conditions might not all be consistent among themselves and with the overarching requirement in the chapeau, and that the list was not (and could not be) exhaustive. It was queried whether: (i) subparagraph (a) could in fact permit negotiations on price and technical improvements, rather than negotiating solutions; (ii) in subparagraph (b) the procedure might be one in which information to assist in drafting specifications was given to the procuring entity, and did not involve negotiations per se; and (iii) the situation described in subparagraph (a) of the proposed text might be more suitable for ERAs, in subparagraph (b) for two-stage tendering, and in subparagraph (d) for framework agreements (as regards this provision, it was also noted that allowing changes in specifications might deviate from the basic principles of the Model Law). In addition, some considered that the scope of subparagraph (e) was not clear. The interaction between the proposed paragraph (1) and the proposed paragraph (13) was also questioned. In the light of such queries, it was agreed that the paragraph would be reformulated to set out general conditions for use, based on those in article 19 (1) (a) of the 1994 Model Law (but also allowing for some non-technical reasons that might not allow a precise formulation of the description). It was also agreed that some or all of the subparagraphs of the proposal would be included in the Guide as examples of situations in which the procedure could be appropriate.

34. The Working Group had before it a revised proposal for paragraph (1) reading:

"**Conditions for use**

[Subject to approval by … (the enacting State may designate an authority to issue the approval)], a procuring entity may engage in procurement by means of a request for proposals (RFP) with competitive negotiations if it is not feasible for the procuring entity to formulate a sufficiently comprehensive description, in order to obtain the most satisfactory solution to its procurement needs."

35. Support was expressed for the proposed text. The Working Group's understanding was that the Guide would explain that the proposed text would include the possibility that the procuring entity could consider more than one solution. It was also understood that the Guide would draw to the attention of enacting States that the proposed procurement method would not address the type of negotiations that sought only technical improvements and price reductions.

36. The observer from the World Bank queried whether the Guide would explain the scope of this procurement method, i.e. whether it would be limited to the procurement of some types of services, and whether it would also apply to the procurement of goods and construction. It was confirmed that the Guide would provide examples of appropriate types of goods, construction and services to which this method would apply.

37. Concern was expressed that the conditions for use of this procurement method would overlap with those for two-stage tendering. The Working Group agreed to defer its consideration of this issue and of two-stage tendering to a later stage. (On the same subject, see, further paras. 50 and 63 to 66 below).

Paragraph (2)

38. The proposed paragraph (2) read as follows:

"(2) A procuring entity shall issue a request for expressions of interest (RFI) before issuing a request for proposals from suppliers or contractors, to identify the minimum number of suppliers or contractors from whom it must request proposals according to paragraph (3). A notice seeking expressions of interest must be published in a newspaper or relevant trade publication or relevant technical or professional journal of wide international circulation."

39. It was queried whether issue of an RFI should be mandatory or optional. Noting that the aim might be to investigate the market concerned, it was agreed that it should be optional. Consequently, it was agreed that the word "shall" in the first sentence would be replaced with the word "may", and that the text after the comma in that sentence would be deleted. Further, the second sentence would start with "Any notice". A proposal to replace the first sentence with the phrase "a procuring entity may launch the competitive negotiation process by issuing a notice of RFI" was not accepted. However, it was suggested instead that the reference to "before issuing a request …" could be replaced by the phrase "before commencing competitive negotiations".

40. It was also agreed, in consequence, that responding to such a notice should not confer any rights on suppliers, nor impose an obligation on the procuring entity to proceed with the solicitation, and wording to such effect drawn from

article 48 (2) of the 1994 text and draft revised article 6 would be included. As regards the wording of the notice requirement, the need for consistency with similar provisions in the Model Law (including as to whether an open solicitation would always be appropriate), and technological neutrality were emphasized.

41. The Working Group had before it the revised text for paragraph (2) reading:

> "[**Request for expression of interest**
>
> (2) A procuring entity [may] issue a request for expression of interest (RFI) [as part of the planning process] before [initiating a procurement under this Law] [launching a competitive negotiation procedure]. [The purpose of this RFI may be …] Any notice seeking expression of interest must be published in a newspaper or relevant trade publication or relevant technical or professional journal of wide international circulation. [Neither the notice nor any response shall confer any rights on suppliers or contractors, including any right to have a proposal evaluated; nor does the notice obligate the procuring entity to issue a solicitation.]"

42. The Working Group noted that the notion of an RFI, as it was proposed, was a new concept in the Model Law. It was considered that one purpose of the RFI, investigating whether the market could respond to the procuring entity's needs before any procurement procedure was initiated, would be relevant not only to the procurement method in question but to all procurement methods. Support was therefore expressed for including in the revised Model Law a stand-alone provision allowing the procuring entity to investigate market conditions before launching any procurement. The provision, it was said, should set out the purposes of an RFI and build on the proposal in paragraph 41 above. The suggestion was also made that the provision should contain a definition of an RFI.

43. The point was made that the location of the provision would depend on the purposes it sought to fulfil: if the purpose was to seek assistance of the market to finalize specifications, then the inclusion of the provision in chapter IV was appropriate; if the purpose on the other hand was to investigate market conditions in general before for example choosing the appropriate procurement method, the provision should be located in chapter I, for instance in the proposed revised article 6, and should be applicable to all procurement methods. Another suggestion was to include the provisions in the Guide accompanying article 6.

44. The Working Group deferred the decision on the provision and its location in the revised Model Law, but agreed that it should remain an optional procedure, should not confer any rights on suppliers or contractors and should not impose any obligation on the procuring entity (see further paras. 54-55, 70 and 73 below).

Paragraph (3)

45. The Working Group had before it the following paragraph:

> "(3) Requests for proposals must be issued to as many suppliers or contractors as practicable, but to not fewer than three."

46. In introducing the paragraph, a sponsoring delegation noted that the minimum number of suppliers from whom the procuring entity would be obliged to request proposals could vary, but should not be large. It was proposed that the Guide should explain the disadvantages and difficulties of negotiating with a large number of

participants. Support was expressed for three suppliers or contractors as the appropriate minimum. However, it was queried what the options for the procuring entity would be if that minimum could not be ensured. Further support was therefore expressed for reinstating the provisions from article 48 (1) of the 1994 Model Law that referred to addressing RFP to at least three suppliers or contractors "if possible".

47. The view was expressed that a public notice of the procurement and its terms and conditions should precede the stage described in the proposed paragraph (3).

Subsequent paragraphs on the basis of draft article 39 in document A/CN.9/WG.I/WP.69/Add.4

48. The Working Group continued with its consideration of aspects of the proposed procurement method on the basis of draft article 39 as reproduced in A/CN.9/WG.I/WP.69/Add.4. The Working Group's understanding was that the procurement method described in that article did not intend to replace article 46 on two-stage tendering of the 1994 Model Law, but rather to replace articles 48 and 49 (on request for proposals and competitive negotiations).

49. The view was expressed that request for proposals without negotiations (envisaged as an option in article 48 of the 1994 Model Law) should be preserved in the revised Model Law as a separate procurement method, since it was used in some jurisdictions and had proved to be useful. The Working Group deferred its consideration of this issue, including whether this procurement method should be included in chapter III as a method alternative to tendering rather than in chapter IV.

50. It was noted that, although the same conditions for use would apply to the proposed procurement method and two-stage tendering, one main difference between these two procurement methods would be the extent to which, and manner in which, the number of participants could be limited. While restricting the participation might be necessary for a negotiated procedure, it was observed that the proposal provided excessive discretion and insufficient objectivity in limiting the numbers of suppliers. Conversely, two-stage tendering under the 1994 provisions provided that all qualified suppliers whose tenders were not rejected would be entitled to participate. Consequently, it was stressed that an understanding of the basis upon which the current proposal had been drafted (as compared with the similar 1994 provisions) would be critical, in order to ensure coherence in the proposal.

51. It was the understanding of the Working Group that provisions setting out conditions for use of this procurement method (see para. 34 above) should be located at the beginning of the draft article. It was also suggested that the order and drafting of the provisions that would follow the conditions for use would depend on the decision of the Working Group on how to deal with the notion of RFI as discussed in paragraphs 38-44 above. Notwithstanding this, it was agreed that the chronology of the process should be clearly reflected in the article as a whole, as follows: first, a public notice of the procurement (which might take the form of an invitation to pre-qualify) including certain minimum information; second, the issue of an RFP to participating suppliers or contractors (which would include more detailed information); third, negotiations; and, fourthly, the request for BAFOs.

52. It was agreed that paragraph (1) of draft article 39 should be deleted and its substance should be reflected in the Guide.

53. The location of paragraph (2) of draft article 39 was discussed, and it was suggested that it should follow paragraph (3) of that article, unless the provisions that would appear earlier in the article indicated otherwise. Another suggestion, which ultimately gained support, was to delete the paragraph and reflect its substance later in the text. It was pointed out in particular that when prequalification or some type of pre-selection (as the term was understood in the UNCITRAL PFIPs instruments[3]) was involved, the prequalification or pre-selection documents would regulate the issue of which suppliers or contractors would receive the RFP, i.e. how the numbers of such suppliers or contractors would be limited.

54. It was suggested that the option given to the procuring entity in paragraph (3) of draft article 39 (to decide not to publish a notice seeking expressions of interest) should be deleted. In the light of the distinct meaning agreed to be attached to an RFI (see paras. 38-44 above), and in order to avoid confusion, it was agreed, that paragraph (3) would require and regulate "the first notice of the procurement." The Working Group considered which minimum information should be included in such a notice on the basis of the following proposal:

> "(…) The procuring entity shall publish in a newspaper of wide international circulation or in a relevant trade publication or technical or professional journal of wide international circulation the first notice soliciting submittals of proposals. The notice must set out, at least:
>
> (a) The subject matter of the procurement in detail appropriate to ensure maximum practicable market participation by potential vendors;
>
> (b) What the procedure will consist of [here describe intended stages ending with competitive negotiations, including, if the procuring entity intends to limit the number of offerors, a statement to that effect];
>
> (c) The means of obtaining the solicitation documents and the place from which they may be obtained;
>
> (d) The fee (if any) to obtain the solicitation documents; and
>
> (e) The deadline for submitting responses."

55. The Working Group agreed to consider at a later stage whether these provisions could be merged with the provisions on RFI as envisaged in this session (see paras. 38-44 above), and if so, a cross-reference in the article on competitive negotiations to those RFI provisions would suffice. The Working Group's understanding was that regardless of what form the first notice of the procurement took, it should be a public document, and should contain minimum information about the procurement procedures (including pre-selection if it were envisaged), all applicable qualification and evaluation criteria, and a description of the subject matter of the procurement. It was also agreed that an RFP, issued later in the process, would contain more detailed information. It was suggested that any

---

[3] The UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects and the UNCITRAL Legislative Guide on the same subject, available as of the date of this report at www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure.html.

provisions on pre-selection included in the Model Law should be aligned with the UNCITRAL PFIPs instruments.

56. A query was made about the nature of the criteria that the procuring entity would be able to use to limit the number of suppliers or contractors to whom an RFP could be addressed. It was stressed that these criteria should be non-discriminatory.

57. The Working Group agreed to replace paragraph (4) of draft article 39 with the following text:

> "The procuring entity shall establish criteria for evaluating the proposals in accordance with article 12". (See however further para. 90 below.)

58. The Working Group considered the following wording to be inserted before paragraph (4) of draft article 39:

> "(…) The solicitation documents must set out the process by which the procuring entity will determine which suppliers or contractors will sufficiently meet the qualification criteria in order to pass into the competitive negotiation phase. Where there is more than a sufficient number of suppliers or contractors suitable to be selected to participate in the negotiations, the procuring entity may limit the number of suppliers or contractors which it intends to invite to participate in the negotiations provided that the solicitation documents specify:
>
> (a) The objective and non-discriminatory criteria to be applied in order to limit the number of suppliers or contractors in accordance with this paragraph; and
>
> (b) The minimum number of suppliers or contractors, which shall be not less than three, [if possible,] which the procuring entity intends to invite to participate in the negotiations and, where appropriate, the maximum number."

59. It was suggested that paragraph (5) (c) of draft article 39 should be replaced with the following wording:

> "(c) The criteria for evaluating the proposal in accordance with article 12, expressed in monetary terms to the extent practicable, the relative weight to be given to each such criterion and the manner in which they will be applied in the evaluation of the proposal."

60. It was suggested that paragraphs (6) to (13) of draft article 39 should be replaced with the following wording:

> "(…) Any modification or clarification of the request for proposals, including modification of the criteria for evaluating proposals referred to in paragraph (__) of this article, shall be communicated to all suppliers or contractors participating in the proceedings. Such modifications or clarifications must be in writing and must be given to all prospective suppliers or contractors to whom a request for proposals was issued under paragraph (__) sufficiently before the submission deadline to allow the suppliers or contractors to address them in their proposals.
>
> (…) Consistent with the provisions of article 21, a procuring entity must keep confidential all submissions, information and documents provided by a supplier or contractor to the procuring entity, or obtained by the procuring entity, during the procurement process unless the supplier or contractor

consents to their disclosure, they are in the public domain or are required to be disclosed by law.

(…) The procuring entity shall engage in negotiations with suppliers or contractors with respect to their proposals and may seek or permit revisions of such proposals, provided that the opportunity to participate in negotiations is extended to all suppliers or contractors that have submitted proposals and whose proposals have not been rejected.

(…) Competitive negotiations must be concurrent (that is, by conducting negotiations separately but roughly simultaneously with every supplier or contractor qualified for competitive negotiations after the prequalification stage).

(…) Any requirements, guidelines, documents, clarifications or other information relative to the negotiations that are communicated by the procuring entity to a supplier or contractor shall be communicated on an equal basis to all other suppliers or contractors engaging in negotiations with the procuring entity relative to the procurement.

(…) Following the negotiations the procuring entity must request all suppliers or contractors with whom it has negotiated to submit a best and final offer in respect of the solutions or solution identified through the negotiation process. The request must be in writing, must specify the date and time by which offers must be submitted. Based upon the evaluation criteria, the procuring entity must determine [which supplier or contractor it will recommend be awarded [to which supplier or contractor it will award] the procurement contract on the basis of the best and final offers.]"

61. The understanding in the Working Group was that the proposed text (which would replace draft article 39) envisaged a procurement method that would apply to the procurement of complex goods, works and services. A further understanding was that the proposed procurement method did not apply to cases when negotiations were required because of urgency (i.e., the conditions for use stipulated in article 19 (2) of the 1994 Model Law) or when there was an insufficient competitive base. It was suggested that article 49 of the 1994 Model Law, containing provisions on flexible competitive negotiations, should be retained in the revised Model Law to accommodate those situations. It was also pointed out that provisions on framework agreements added to the Model Law would also aim at dealing with this type of situation.

62. Support was expressed for adding the new proposed procurement method in the revised Model Law. It was suggested that in order to avoid confusion over terminology and the choice of procurement methods in those States that enacted their procurement legislation on the basis of the 1994 Model Law, the revised Model Law should use a distinct term to identify this new procurement method and should set out clear guidance on when it could be used. In subsequent discussion, it was agreed to refer to the proposed procurement method as "competitive dialogue."

63. In response to a concern that it was not clear in which situations competitive dialogue rather than two-stage tendering would be used, the suggestion was made that the revised Model Law should take a "toolbox approach" and give discretion to the procuring entity to choose among all available tools, as appropriate for the situation in hand. It was emphasized that this approach was not intended to

undermine the primacy of open tendering and thus would be appropriate only with respect to methods alternative to tendering (chapter III of the revised Model Law) or distinct from tendering as involving negotiations (chapter IV of the revised Model Law). The Working Group also noted that in two-stage tendering, suppliers or contractors in the end bid against one single solution while in competitive dialogue the procuring entity would evaluate BAFOs submitted with respect to each individual supplier's proposal. It was therefore suggested that this distinction — the feasibility of formulating a single set of specifications after negotiations — could become a criterion upon which the choice between competitive dialogue and two-stage tendering should be made.

64. Concern was expressed that competitive dialogue involved a risk of disclosure of commercially sensitive information, such as price. It was reiterated that the Guide should emphasize that this procedure should not be used in the absence of sufficient capacity to provide adequate safeguards against this and other risks of improprieties inherent in this procurement method (see paras. 16-19 above). Two-stage tendering, while aimed at accommodating similar situations as competitive dialogue, it was said, provided better safeguards against abuse by following open tendering principles with marginal modifications. It was noted that two-stage tendering would allow the procuring entity, through the examination of technical proposals and optional negotiations with any supplier that submitted acceptable technical proposals, to finalize the specifications that the procuring entity had not been able to formulate adequately at the outset of the procurement.

65. Support was thus expressed for retaining two-stage tendering as a separate procurement method in the revised Model Law. It was said that the method had stood the test of time and was successfully used for procurement for example of information technology systems and infrastructure. Concern was expressed that if this method were deleted, enacting States that had concerns about the integrity of their procurement systems and would be reluctant to allow the use of competitive dialogue would not have any alternative.

66. The Working Group reiterated its understanding that the proposed procurement method was not intended to replace two-stage tendering.

67. The observer from the World Bank explained that the Bank might have difficulty with using the proposed procurement method for quantifiable (or non-intellectual) types of services and intellectual services that might be more appropriately procured through consecutive rather than simultaneous negotiations. It was also emphasized that transparency was a paramount consideration, and that it might be desirable to establish a threshold for the use of the method.

68. In response to these concerns, it was pointed out that the conditions for use of competitive dialogue might mitigate concerns over its inappropriate use, by effectively preventing its use to procure items that should be procured through tendering. It was also reiterated that the Guide text accompanying provisions of the Model Law on competitive dialogue should also contain necessary explanations of the conditions for use and procedures.

69. The Working Group noted the similarities between steps in open tendering and competitive dialogue. The major differences were noted to arise at the stage of the provision of solicitation documents (competitive dialogue allowed limiting the number of suppliers to whom the RFP was provided) and at the negotiations stage.

The Working Group was invited to consider which aspects of proposals should be allowed to be negotiated in competitive dialogue, only technical and quality aspects or price in addition.

3. Consideration of the revised proposal by the Working Group

Paragraphs (1)-(3)

70. The Working Group proceeded with the consideration of the following aspects of the revised proposal:

> "(1) *Conditions for Use*. [Subject to approval by … (the enacting State may designate an authority to issue the approval)], a procuring entity may engage in procurement by means of a request for proposals (RFP) with competitive dialogue if it is not feasible for the procuring entity to formulate a sufficiently comprehensive description, in order to obtain the most satisfactory solution to its procurement needs.
>
> [(2) *Requests for Expression of Interest*. A procuring entity may issue a request for expressions of interest (RFI) as part of the planning process before initiating a procurement under this Law. Any notice seeking expressions of interest must be published in a newspaper or relevant trade publication or relevant technical or professional journal of wide international circulation. Neither the notice nor any response shall confer any rights on suppliers or contractors, including any right to have a proposal evaluated; nor does the notice obligate the procuring entity to issue a solicitation.]
>
> (3) The procuring entity shall publish in a newspaper of wide international circulation or in a relevant trade publication or technical or professional journal of wide international circulation the first notice soliciting submittals of proposals. The notice must set out, at least:
>
> (a) The subject matter of the procurement in detail appropriate to ensure maximum practicable market participation by potential vendors;
>
> (b) What the procedure will consist of [here describe intended stages ending with competitive negotiations, including, if the procuring entity intends to limit the number of offerors, a statement to that effect];
>
> (c) The means of obtaining the solicitation documents and the place from which they may be obtained;
>
> (d) The fee (if any) to obtain the solicitation documents; and
>
> (e) The deadline for submitting responses."

71. It was suggested that in paragraph (1) a reference to "complex procurement" should be added. The prevailing view was that the paragraph should not make such a reference.

72. It was suggested that in paragraphs (2) and (3) and elsewhere in the Model Law in similar context, the reference to "a contracts bulletin" should be added. The alternative view was that this reference could be made in the revised Guide as an example of publications where the relevant notices were usually published.

73. The prevailing view was that paragraph (2) should be removed from the provisions on competitive dialogue and be discussed separately at a later stage.

74. It was suggested that some aspects reflected in the last sentence of the proposed paragraph (2) should be repeated in the chapeau provisions of paragraph (3). In particular, it was noted that responses to the first public notice of the solicitation might reveal that it would not be feasible or desirable to carry out the procurement as advertised. In such situations, it was said, the procuring entity should have the right to cancel the procurement. The point was made that this proposition was valid not only to competitive dialogue but to all procurement methods in the Model Law. The suggestion was made therefore that the provisions to that effect should be reflected in chapter I, preferably with the provisions enabling rejection of all submissions (draft article 16).

75. It was further suggested that paragraph (3) should provide the possibility for the procuring entity to reduce the number of participants during competitive dialogue, and consequently that the first notice of solicitation should alert suppliers or contractors as to this possibility. The suggestion was therefore that the provisions should remain as they were, and that the procuring entity should be able to reduce the number of participants in the procurement process only through prequalification.

76. Some delegates recognized that there might be circumstances justifying exclusions of suppliers or contractors during dialogue, such as on the basis that they were not any longer qualified (for example in the case of bankruptcy) or were not responsive to the needs of the procuring entity (for example materially deviating during dialogue from key elements that were identified as non-negotiable at the outset of the procurement).

77. At the same time, it was recognized that giving the right to the procuring entity to exclude during the dialogue stage suppliers or contractors without imposing some conditions might lead to abusive practices. The Working Group noted the provisions in international instruments, such as the GPA and the United Nations Convention Against Corruption (New York, 31 October 2003) (UNCAC),[4] requiring disclosure of the criteria for exclusion from the outset of the procurement. It was agreed that the Model Law should impose an equivalent obligation.

78. A query was made as to whether termination of competitive dialogue with some suppliers or contractors would be possible on the basis of criteria other than qualification or the responsiveness of their proposals to the needs of the procuring entity. Reference in this context was made to the provisions of article 44 (e) of the 1994 Model Law, which permitted terminating negotiations with a supplier if it became apparent to the procuring entity that the further negotiations would not result in a procurement contract. The Working Group noted the distinct circumstances in which article 44 (e) applied — consecutive negotiations on price only — that allowed exclusion on a relatively objective basis (the price alone).

79. Support was expressed for allowing the procuring entity to terminate competitive dialogue with suppliers or contractors that in the view of the procuring entity would not have a realistic chance of being awarded the contract. It was recognized that this approach would allow both sides to avoid wasting time and resources. It was stated that competition might be substantially reduced in future similar procurements if suppliers or contractors incurred unnecessary costs, which could turn out to be very high in this type of procurement.

---

[4] General Assembly resolution 58/4.

80. On the other hand, concern was expressed that this approach was inherently subjective and would undermine transparency, objectivity and fairness in the process. It was explained that competitive dialogue would involve constant modification of solutions and it would be unfair to eliminate any supplier only because at some stage of dialogue a solution appeared not acceptable to the procuring entity. The point was reiterated that the most objective, transparent and fair way of reducing the number of participants would be through prequalification alone, but that other criteria pertaining to responsiveness might be considered at a later date.

81. The Working Group after deliberations agreed to replace in the chapeau provisions of paragraph (3) reference to "the first notice soliciting submittals of proposals" with reference to "the first notice soliciting participation in the procurement", in order to extend the requirement of the minimum content of the notice to both RFI or an invitation to pre-qualify, as applicable. It was noted that a similar change might be necessary throughout the Model Law where the same considerations applied. It was also agreed that paragraph 3 (b) should be replaced with the following wording: "(b) what the procedure will consist of [here describe the intended stages of competitive dialogue, including if the procuring entity intends to limit or reduce the number of proponents, a statement to that effect, and criteria it intends to use]."

Paragraph (4)

82. The Working Group considered the following paragraph:

> "[4] As an optional matter, the procuring entity may pre-qualify suppliers or contractors before engaging in negotiations in accordance with articles 10 and 15, regarding prequalification."

83. The suggestion was made that these provisions should appear earlier in the text, according to the chronology in the process. Another suggestion was to delete the paragraph. Yet another suggestion was to move the paragraph and replace its text with the text that would permit the procuring entity to start the procurement process with either RFI, invitation to pre-qualify or both or neither. It was agreed that a future draft would be presented at a later stage, to align the provisions with other methods in the Model Law.

Paragraph (5)

84. The Working Group considered the following paragraph:

> "[5] The solicitation documents must set out the process by which the procuring entity will determine which suppliers or contractors will sufficiently meet the qualification criteria in order to pass into the competitive negotiation phase. Where there is more than a sufficient number of suppliers or contractors suitable to be selected to participate in the negotiations, the procuring entity may limit the number of suppliers or contractors which it intends to invite to participate in the negotiations provided that the solicitation documents specify:
>
> (a) The objective and non-discriminatory criteria to be applied in order to limit the number of suppliers or contractors in accordance with this paragraph; and

(b) The minimum number of suppliers or contractors, which shall be not less than three, [if possible,] which the procuring entity intends to invite to participate in the negotiations and, where appropriate, the maximum number."

85. The suggestion was made to add: (i) in the end of the first sentence in the chapeau provisions, the phrase "and, where appropriate to pass from one stage to another stage within that phase"; and (ii) in the end of paragraph (b), the words "at the start of the phase and at each stage within the phase." The view was expressed that these amendments were too detailed for the Model Law to regulate, and it would be more appropriate to address stages and phases of competitive dialogue in the Guide.

86. Another suggestion was to delete some provisions in the proposed paragraph so that the entire paragraph would read as follows: "The solicitation documents must set out the minimum number of suppliers or contractors, which shall be not less than three, [if possible,] which the procuring entity intends to invite to participate in the negotiations and, where appropriate, the maximum number." This suggestion was not supported, since the provisions proposed to be deleted set out procedures not found in any other provisions of the Model Law. Support was thus expressed for retaining the provisions, but aligning them with similar provisions found in the UNCITRAL PFIPs instruments relating to prequalification and pre-selection, and ensuring that all methods of limiting or reducing numbers were addressed.

87. The Working Group agreed that paragraphs (3) and (5) of the revised proposal should be aligned. In this regard, the difference between the paragraphs was noted: whereas paragraph (3) dealt with the content of the first notice of the procurement, which by nature was supposed to be brief and contain only the minimum essential information about the procurement, paragraph (5) dealt with the content of the RFP that should contain all the required information about the procurement, including elaboration of the information contained in the notice. The Working Group decided to defer its consideration on whether the provisions in both paragraphs should also refer to elimination of solutions.

88. It was also agreed that the term "competitive negotiation" should be replaced throughout the article with the term "competitive dialogue" in the light of the Working Group's decision to use that latter term when referring to this new procurement method (see para. 62 above).

89. It was agreed that the phrase in the chapeau provisions reading "the process by which suppliers or contractors will sufficiently meet the qualification criteria in order to pass into the competitive negotiation phase" should be replaced with the following phrase: "the process by which suppliers or contractors will pass into the competitive dialogue phase."

Paragraph (6)

90. The Working Group considered and agreed to delete the following paragraph:

"[6] The procuring entity shall establish the criteria for evaluating the proposals in accordance with article 12."

Paragraph (7)

91. The Working Group considered the following paragraph:

"[7] A request for proposals issued by a procuring entity shall include at least the following information:

(a) The name and address of the procuring entity;

(b) A description of the procurement need including the technical and other parameters to which the proposal must conform, as well as, in the case of procurement of construction, the location of any construction to be effected and, in the case of services, the location where they are to be provided;

(c) The criteria for evaluating the proposal in accordance with article 12, expressed in monetary terms to the extent practicable, the relative weight to be given to each such criterion and the manner in which they will be applied in the evaluation of the proposal; and

(d) The desired format and any instructions, including any relevant timetables applicable in respect of the proposal."

92. It was agreed that: (i) subparagraph (c) should be amended to read "the criteria for evaluating the proposal"; and (ii) the word "proposal" in the end of subparagraph (d) should be replaced with the words "procurement process".

93. The suggestion was made that the provisions should allow for meaningful review of complaints by aggrieved suppliers, by providing for formal notification to suppliers of the procuring entity's decision to terminate negotiations and grounds for that decision.

Paragraph (8)

94. The Working Group considered the following paragraph:

"[8] Any modification or clarification of the request for proposals, including modification of the criteria for evaluating proposals referred to in paragraph (…) of this article, shall be communicated to all suppliers or contractors participating in the proceedings. Such modifications or clarifications must be in writing and must be given to all prospective suppliers or contractors to whom a request for proposals was issued under paragraph (…) sufficiently before the submission deadline to allow the suppliers or contractors to address them in their proposals."

95. The suggestion was made that the word "initial" should be added before the word "proposals" in the end of the paragraph and that the word "prospective" should be deleted. Another suggestion was that the entire paragraph should be redrafted to accommodate modification or clarification at any stage in competitive dialogue, whether at the instigation of the procuring entity or of the supplier. Support was expressed for the suggestion to add the words "at the same time" after the word "communicated".

96. The Working Group noted that similar provisions were contained in article 28 of the 1994 Model Law, and the Working Group might consider at a future date how to deal with these repetitive provisions in a consistent way in the revised Model Law.

97. The point was made that if there were changes in evaluation criteria or modifications resulting in a substantive change to what was originally published, those changes would not be acceptable unless they were notified in the same manner as the original notice. In response to that concern, it was proposed that the words "within the stated scope of the procurement" should be added in the provision in order to limit the extent to which evaluation and other essential criteria of the procurement could be changed. Concern was expressed that the proposed wording would address only a change in the subject matter of the procurement and not a change in evaluation criteria.

98. Reference was made to the existing provisions in the 1994 Model Law (article 48 (5)) that were restated in the proposed text. The Working Group also noted that article 28 of the 1994 Model Law dealt similarly with the same subject. Both provisions were based on the premise that modifications were communicated only to those to whom the solicitation documents were provided. It was questioned whether this premise should be changed throughout the revised Model Law.

99. A proposal to restrict permissible changes to minor changes did not gain support. It was emphasized that more flexibility should be preserved, but that the Model Law should not permit fundamental changes in the solicitation documents. The Working Group recalled its preliminary decision at the previous session to add a definition of "material change" to article 2. Support was expressed that the proposed paragraph should be redrafted to align its content with that definition, and that the same principle should be applied to all procurement methods.

Paragraph (9)

100. The Working Group considered the following paragraph:

> "[9] Negotiations between the procuring entity and a supplier or contractor shall be confidential, and, except as provided in article […], one party to those negotiations shall not reveal to any other person any technical, price or other market information relating to the negotiations without the consent of the other party."

101. It was noted that the provisions were based on article 49 (3) of the 1994 Model Law. The Working Group recalled that it considered a draft article 21 that would appear in chapter I and would deal with the confidentiality provisions applicable to all procurement methods. The need for provisions on confidentiality in the article on competitive dialogue in the light of the proposed article 21 was queried. It was suggested that the provisions should be deleted, but the proposed article 21 should be modified explicitly to refer to competitive dialogue. Another view was that provisions on confidentiality should appear in the proposed article because of their special importance in the context of competitive dialogue.

102. The view prevailed that repetitions in the Model Law should be avoided, and thus a cross-reference to article 21 as amended would suffice. In the light of particular concerns about confidentiality in competitive dialogue, it was agreed that the Guide should highlight the importance of preserving the confidentiality of the dialogue.

Paragraph (10)

103. The Working Group considered the following paragraph:

> "[10] The procuring entity shall engage in negotiations with suppliers or contractors with respect to their proposals and may seek or permit revisions of such proposals, provided that the opportunity to participate in negotiations is extended to all suppliers or contractors that have submitted proposals and whose proposals have not been rejected."

104. It was proposed that the Model Law or the Guide should require the procuring entity to maintain a comprehensive written record of the dialogue with each supplier and to provide a copy of that record at the end of each phase of the dialogue to the supplier or contractor concerned. It was suggested that this obligation should be incorporated in draft article 22 of the proposed revised Model Law (which dealt with the record of procurement proceedings). Another view was that the point should be reflected in the Guide not in the Model Law, as a guide to best practice.

105. It was suggested that the phrase "whose proposals have not been rejected" should be replaced with the phrase "that have passed into the competitive dialogue phase according to the procedures set out in the solicitation documents." Concern was expressed that the provision should reflect the fact that the group of suppliers entering the dialogue at the first phase might change throughout the process. Consequently, it was suggested that the text in question should be redrafted to convey reference to "remaining participants".

Paragraph (11)

106. The Working Group considered the following paragraph:

> "(11) Competitive negotiations must be concurrent (that is, by conducting negotiations separately but simultaneously with every supplier or contractor qualified for competitive negotiations after the prequalification stage)."

107. The Working Group's understanding was that the phrase "qualified for competitive negotiations after the prequalification stage" would be changed in the light of outcome of the previous deliberations on the same subject in the Working Group (see paras. 82 and 83 above).

108. A suggestion was made to replace the word "simultaneously" with the words "in parallel" or "practicably simultaneously". Concern was expressed that the proposed terms and suggested alternatives implied that dialogue was conducted at the same time with all suppliers or contractors, which would presuppose that different procurement officials or negotiating committees composed of different procurement officials were engaged in dialogues. Such a stance, it was said, was undesirable as it would lead to the unequal treatment of suppliers. The suggestion was made that the Guide would explain the meaning behind the term "simultaneous" or "concurrent" with reference to the key features of the intended type of negotiations.

109. Support was expressed for the following revised wording: "Competitive dialogue must be concurrent (that is by conducting dialogues separately but in parallel with every supplier or contractor …)". Another suggestion, which also gained support, was to replace the text with the text reading: "Competitive dialogue

must be concurrent," and to explain in the Guide the meaning of the term "concurrent". It was suggested that the Guide in this respect should draw a distinction between negotiations that had to be held with all suppliers or contractors before the award of the procurement contract, and consecutive negotiations, in which the procurement contract could be awarded upon completion of the dialogue with any supplier or contractor.

110. Support was expressed that the provisions in the Model Law as revised should be supplemented by the statement: "Competitive dialogue must be conducted by the same procurement official or by a committee composed of the same people." Addition of such a statement, it was said, would avoid any ambiguity in the terms "concurrent" or "simultaneous" negotiations. The other view was that the proposed addition addressed procedural aspects that could more appropriately be dealt with in the Guide.

Paragraph (12)

111. The Working Group considered the following paragraph:

> "(12) There shall be no modifications to the evaluation criteria after the initial proposals are submitted. Any other modification shall be within the stated scope of the procurement. Any requirements, guidelines, documents, clarifications or other information relative to the negotiations that are communicated by the procuring entity to a supplier or contractor [but which are not specific or exclusive to that supplier or contractor] shall be communicated on an equal basis to all other suppliers or contractors engaging in negotiations with the procuring entity relative to the procurement."

112. In introducing the proposed paragraph, it was explained that its intended scope was different from the proposed paragraph discussed in paragraphs 94-99 above. The Working Group noted that while that latter paragraph dealt with the modifications to the RFP before the proposals were submitted, the current paragraph dealt with modifications after submission. The importance of the provisions in the light of the flexible nature of competitive dialogue was emphasized. It was explained that the aim was to ensure that, while variation in technical aspects were permissible within the stated scope of the procurement, changes in evaluation criteria were not allowed after the proposals were submitted.

113. The Working Group's understanding was that the wording of the first two sentences of the proposal would be aligned to the outcome of the Working Group's earlier deliberations on permissible deviations (see para. 99 above).

114. Support was expressed for a revised wording of the proposal, reading: "After the initial proposals are submitted, any modification shall be within the stated scope of the procurement; provided however that there shall be no modifications to the qualification or evaluation criteria[, or to the criteria used to define the competitive group]."

115. The suggestion to add the notion that only those modifications that were justified in the light of negotiations did not gain support. It was explained that some changes might need to be made in the light of circumstances not related to negotiations (such as administrative measures).

116. Support was expressed for including in the provisions confidentiality requirements, with reference to article [21] of the revised Model Law as appropriate.

Paragraph (13)

117. The Working Group considered the following paragraph:

> "(13) Following the negotiations, the procuring entity must request all suppliers or contractors with whom it has negotiated to submit a best and final offer in respect of the solutions or solution identified through the dialogue process. The request must be in writing, must specify the date and time by which offers must be submitted. Any award by the procuring entity shall be [based upon the best and final offers, and shall be] made to the supplier or contractor whose proposal best meets the needs of the procuring entity as determined in accordance with the criteria for evaluating the proposals set forth in the request for proposals, as well as with the relative weight and manner of application of those criteria indicated in the request for proposals."

118. Support was expressed for the use of the term "final offer" instead of "best and final offer". The latter was considered to be misleading since it was the procuring entity who determined the best offer on the basis of the evaluation of final offers. The alternative view was that the latter was the term used in the 1994 Model Law and widely known in public procurement. The prevailing view was that references to "a best and final offer" and "the best and final offers" should be replaced with reference to "their best and final offers" indicating that offers were best and final with respect to each supplier's proposal.

Possible new paragraph in the end of the proposed article

119. The suggestion was made that a separate paragraph should be added in the proposed article referring to the publication of the procurement contract award. The Working Group in this respect recalled that proposed article 20 dealt with the subject of the public notice of procurement contract awards, and a cross-reference to that article could be sufficient. The Working Group agreed to examine in the context of draft article 20 whether the latter adequately covered the content of information that had to be published upon the award of the procurement contract through the competitive dialogue.

Article as a whole

120. The Secretariat was requested to align the text of the proposed article on competitive dialogue with the rest of the Model Law.

V. Other business

121. The Working Group was briefed about the upcoming consideration of the revised Model Law during the Commission's forty-second session (Vienna, 29 June-17 July 2009). It was noted that the Commission would consider the agenda item on procurement from 2 to 10 July. The Commission was expected to consider in plenary policy issues, such as the fulfilment of the mandate by the Working

Group, an enlarged scope of the Model Law and treatment of socioeconomic policies in the revised Model Law. It was also expected that provisions of the revised Model Law would be examined by the Committee of the Whole.

122. The Working Group noted that the Commission would have before it for the consideration of the item, in addition to the reports of the Working Group's fourteenth to sixteenth sessions, all documents that were submitted by the Secretariat to the Working Group at the current session. The Secretariat was also expecting to prepare a conference room paper for the Commission that would incorporate revised provisions related to chapter IV of the Model Law.

123. The observer from the World Bank stated that the Bank had followed the discussions of the Working Group with great interest. Observing that the Model Law was a very important tool for the Bank in technical assistance to developing countries on procurement reform, the Bank looked forward to further progress in promoting transparency, open competition, non-discrimination and accountability. While its position on competitive negotiations and the rationale therefore, it was said, remained the same at present as in 1994, the Bank would consider new procurement methods and other innovations in procurement.

VI. Adoption of the report of the Working Group

124. The Working Group adopted this report subject to confirmation of the exact text of the proposed article 40 in all languages.

I. Note by the Secretariat on possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services — drafting history of some provisions of the 1994 Model Law and the treatment of the issues raised by some of those provisions in international instruments regulating public procurement, submitted to the Working Group on Procurement at its sixteenth session

(A/CN.9/WG.I/WP.68 and Add.1) [Original: English]

CONTENTS

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 8 to 89 of document A/CN.9/WG.I/WP.67, which is before the Working Group at its sixteenth 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 fifteenth session, the Working Group completed the first reading of the proposed revised Model Law contained in a note by the Secretariat (A/CN.9/WG.I/WP.66/Add.1-4). It noted that, although a number of issues were outstanding, including the entire chapter IV, the conceptual framework was agreed

upon. It also noted that further research was required for some provisions in particular in order to ensure that they were compliant with the relevant international instruments. The Working Group requested the Secretariat to revise the drafting materials contained in document A/CN.9/WG.I/WP.66/Add.1-4, reflecting its deliberations at the fifteenth session, for further consideration (A/CN.9/668, paras. 11 and 12).

3. The present note is submitted pursuant to the Working Group's request at its fifteenth session to the Secretariat to research the drafting history of some provisions of the 1994 Model Law and the treatment of the issues raised by some of those provisions in the relevant international instruments. Those provisions have been incorporated in the draft revised Model Law that was before the Working Group at its fifteenth session but raised questions and proposals for revision from the delegates and observers. The Working Group deferred the consideration of those proposals until after it had considered the Secretariat's findings. This note sets out the results of the Secretariat's research. (The draft revised Model Law that reflects the deliberations at the Working Group's fifteenth session (the "proposed revised Model Law") is set out in a separate note (A/CN.9/WG.I/WP.69 and addenda)).

4. In accordance with the agreement reached at the Working Group's fifteenth session (A/CN.9/668, para. 280), the documents for the sixteenth session of the Working Group will be posted on the UNCITRAL website upon their availability in various language versions

II. The Secretariat's findings as regards the drafting history of some provisions of the 1994 Model Law and the treatment of the issues raised by some of those provisions in international instruments regulating public procurement

A. Provisions on responsiveness of tenders (article 34 (2) (a) of the 1994 Model Law and draft article 32 (2) (a) of the proposed revised Model Law)

5. At its fifteenth session, the Working Group heard the suggestion that the broad reference to "all requirements set forth in the solicitation documents" in the context of ascertaining responsive tenders should be narrowed by referring only to the "relevant requirements". The Working Group agreed to defer the consideration of this suggestion to a later stage. The Secretariat was requested: to present the suggestion in square brackets; to research the drafting history of the provisions, and the manner in which similar issues were addressed in applicable international instruments; and to report its findings when the provisions were considered (A/CN.9/668, paras. 180 (a) and 181).

6. The Secretariat researched the drafting history of these provisions and also examined the relevant provisions of the applicable international instruments. The findings are set out below.

Drafting history of the provisions

7. In its first draft of the Model Law, the Secretariat proposed to define a responsive tender as the tender conforming "to the required characteristics of the goods or construction to be procured, contractual terms and conditions and other requirements set forth in the procurement documents" (A/CN.9/WG.V/WP.24, draft

article 28 (4) (a)). In the second draft of the Secretariat, the reference was made to the conformity of the tender to "the requirements set forth in the solicitation documents, including requirements concerning the characteristics of the goods, construction [or services] to be procured and the terms and conditions of the procurement contract." In both drafts, the provisions also referred to permissible minor deviations from the requirements set forth in the solicitation documents.

8. At its eleventh and twelfth sessions, in 1990 and 1991, the Working Group on the New International Economic Order, which considered the drafts, agreed with the general principle that the tender must be rejected if it did not conform in all respects to the requirements set forth in the procurement documents, except where deviations from those requirements were minor (A/CN.9/331, para. 156, and A/CN.9/343, para. 49). The Working Group agreed on "a general rule to the effect that a procuring entity might regard a tender as responsive if the tender contained only minor deviations from the requirements set forth in the procurement documents, and that 'responsive tender' be defined in the article containing definitions ([then] article 2). Under that approach, the procuring entity would have the flexibility to determine whether or not a deviation was minor in the context of the particular procurement proceedings." (A/CN.9/331, para. 156).

9. Further to the agreement reached at the twelfth session (A/CN.9/343, paras. 49-52), the provisions were reformulated: the reference was made to "all" requirements set forth in the tender solicitation documents and the words at the end of the provisions (reproduced in paragraph 7 above) beginning with the word "including" were deleted as being superfluous. At that session, the Working Group did not accept the proposal that the provisions should refer to "mandatory" requirements, in order to distinguish specifications or stipulations in the solicitation documents to which tenders must conform from those to which tenders need not to conform (for example, if tenders could be enhanced). It was agreed that the word "requirements" itself implied that conformity was mandatory" (A/CN.9/343, para. 50).

10. The notion that, in order to be considered responsive, a tender had to conform to all of the requirements set forth in the solicitation documents, was reiterated at the Working Group's fourteenth session (A/CN.9/359, para. 155).

11. At subsequent sessions, the Working Group had before it further revised wording of the relevant provisions. They in particular reflected the Working Group's decision not to include a definition "responsive tender" in article 2 of the Model Law, but to include its substance within the article addressing evaluation and comparison of tenders (A/CN.9/WG.V/WP.36, draft article 28 (1 bis) (a)). The revised provisions read in essence as article 34 (2) (a) of the 1994 Model Law, which are procedural in nature since they indicate which tenders can be regarded as responsive, rather than defining responsiveness itself. Suggestions to replace in those provisions the word "may" with "shall" and to delete the word "only" did not gain support (A/CN.9/371, paras. 145 and 252, and annex, article 29 (2) (a)).

12. Upon circulation of the draft Model Law for comments and adoption of the text of the Model Law by the Working Group and the Commission, in 1994, no pertinent changes were proposed to these provisions (A/CN.9/392, para. 106, and A/49/17, para. 44).

13. The drafting history does not indicate that the drafters considered the provisions of article 34 (2) (a) in conjunction with article 34 (3). Article 34 (3) lists grounds for rejection of tenders, setting, among others, the absence of qualifications of suppliers or contractors and non-responsiveness of tenders as separate grounds.

While both — the requirements applicable to qualifications of suppliers or contractors and requirements as regards responsiveness of tenders — would be set forth in the solicitation documents, from the drafting it is not clear whether the drafters intended that both or only the latter (i.e., excluding the requirements applicable to qualifications of suppliers) would be taken into account in determining the responsiveness of tenders. The drafters of the 1994 text were not persuaded of the merits of specifying which requirements are taken into account in ascertainment of the responsiveness of tenders, preferring to keep the general reference in the Model Law to all requirements in the solicitation documents (see paragraphs 7-9 above).

Relevant provisions of applicable international instruments

14. The WTO Agreement on Government Procurement, which entered into force in 1994 (the WTO GPA), requires in this context that for a tender to be considered for award it must, at the time of opening, comply with "the essential requirements of the notices or tender documentation and be from a supplier which complies with the conditions for participation" (article XIII (4) (a)). The respective provisions in the provisionally agreed text of the revised WTO Agreement on Government Procurement (the revised WTO GPA)[1] are essentially the same: "to be considered for award, a tender must be in writing and must, at the time of opening, comply with the essential requirements of the notices and tender documentation and be from a supplier that satisfies the conditions for participation" (emphasis added) (article XV (4)). (The WTO GPA and the revised WTO GPA are hereafter referred to collectively as the "WTO instruments".)

15. The equivalent provisions of the EU procurement directive 2004/18/EC of 31 March 2004 (the EU directive) appear to be located in article 41 (2), second indent, and refer to reasons to be given to any unsuccessful tenderer for the rejection of its tender. The provisions refer in this context to technical specifications, the reasons for the contracting authority's decision of non-equivalence or its decision that the works, supplies or services do not meet the performance or functional requirements.

Options for the Working Group to consider

16. The Working Group may wish to clarify either in the Model Law or in the Guide that the reference to "all requirements set forth in the solicitation documents" in the context of ascertaining responsive tenders should be read as a reference to the requirements relevant to that ascertainment and not as a reference to all requirements set out in the solicitation documents. For example, the solicitation documents may include requirements applicable to the qualifications of suppliers or contractors, or requirements about modalities and the deadline for submission of tenders. The consequences of non-compliance with these latter requirements are addressed in other articles of the Model Law, for example, article 30 (6) of the 1994 Model Law, which addresses late submissions.

---

[1] Document GPA/W/297, December 2006, available as of the date of this report at www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm.

B. Provisions on the successful tender (article 34 (4) (b) and 42 (2) (b) of the 1994 Model Law and draft articles 32 (4) (b), 35 (8) (b) and 47 (1) of the proposed revised Model Law)

17. The Working Group, at its fifteenth session, heard suggestions that the use of the term "lowest evaluated tender" in the revised Model Law should be reconsidered. In particular, the use of the term "the best evaluated submission" was suggested. It was explained that in practice it was the highest or the best, not the lowest, evaluated submission that was accepted. The provisions, it was pointed out, as drafted at present, might cause unnecessary confusion. The Working Group noted that the term "lowest evaluated tender" was used in the 1994 text (A/CN.9/668, paras. 180 (c) and 220). The Working Group also noted in this context that the 1994 Model Law in the context of article 42, Selection procedure without negotiation (in the proposed revised Model Law is presented as draft article 35 entitled "Two-envelope tendering"), did not use the term "lowest evaluated tender" but referred to the successful proposal as the proposal with the best combined evaluation in terms of the criteria other than price referred to in paragraph (1) of that article and the price (A/CN.9/668, para. 200).

18. A separate suggestion linked to these provisions was that the revised Model Law in the relevant parts should make it clear that where the price was the only award criterion, the contract was to be awarded to the lowest priced submission, and where there were price and other award criteria, the contract was to be awarded to the lowest/best evaluated submission (A/CN.9/668, para. 180 (d)).

19. The Working Group agreed to defer the consideration of all these suggestions to a later stage. The Secretariat was requested: to present the suggestion in square brackets; to research the drafting history of the provisions, and the manner in which similar issues were addressed in applicable international instruments; and to report its findings when the provisions were considered (A/CN.9/668, paras. 180-181).

20. The Secretariat researched the drafting history of these provisions and also examined the relevant provisions of the WTO instruments and the EU directive. The findings are set out below.

1. The use of terminology

Drafting history of the provisions

21. In its first draft of the Model Law, the Secretariat used the term "the most advantageous tender" and defined it as the tender with the lowest price or the most economically advantageous tender (A/CN.9/WG.V/WP.24, draft article 28 (7) (c)).

22. When that first draft was considered at the eleventh session of the Working Group on the New International Economic Order, the concern was expressed about the use of the term "most advantageous tender". Notwithstanding of the provided definition of the term, it was considered that the danger was high that the term could be misinterpreted in such a way as to imply that the procuring entity had considerably more discretion in evaluating tenders than was intended. It was therefore agreed that the term be replaced with another term that was less susceptible to misinterpretation (A/CN.9/331, para. 166).

23. In its second draft, the Secretariat used the term "the most economic tender" and defined it as the tender with the lowest tender price or the lowest evaluated tender (A/CN.9/WG.V/WP.28, draft article 28 (7) (c)). When that draft was considered by the Working Group, concerns were expressed as regards both of the

newly suggested terms — "the most economic tender" and "the lowest evaluated tender". The terms did not appear to the drafters as taking sufficient account of the use by the procuring entity of criteria other than price to select the successful tender. Similar misgivings were expressed again also with respect to the terms used in the first draft (see paragraph 21 above).

24. As regards the term "the most economic tender", it was widely felt that a more neutral term, such as "successful tender," should be used (A/CN.9/356, para. 22). This term was agreed to be used provisionally pending the determination of a more suitable expression (A/CN.9/356, para. 27). However, the records did not indicate that any discussion of an alternative term took place, or any concern about the use of the term "successful tender" were expressed, at the subsequent sessions of the Working Group and upon adoption of the 1994 text in the Commission. The term "successful tender" is used throughout the 1994 Model Law in the relevant context.

25. As regards the term "the lowest evaluated tender", although some misgivings were initially expressed about this term when it was first before the Working Group at its thirteenth session (see paragraph 23 above), the term was nevertheless continued being used in the formulations considered by the Working Group at that session (A/CN.9/356, paras. 26 and 31).

26. In its third draft, the Secretariat suggested for consideration by the Working Group the term "most favourable tender" in place of the term "lowest evaluated tender" (A/CN.9/WG.V/WP.33, draft article 28 (7) (c) (ii) and (d), footnote 13)). Support was expressed in the Working Group for the use of that alternative term on the grounds that the term "lowest evaluated tender" might suggest that price was dispositive factor and that the term appeared to be opaque and contradictory. The prevailing view however was that the term "most favourable tender" connoted an undesirable degree of subjectivity, while the term "lowest evaluated tender", despite its drawbacks, was preferable because it suggested a greater degree of objectivity (A/CN.9/359, para. 156).

27. No concerns were expressed about the use of the term "the lowest evaluated tender" at subsequent sessions of the Working Group and upon adoption of the 1994 text in the Commission. It is used in the 1994 Model Law (article 34 (4) (b) (ii) and (c)).

Relevant provisions of applicable international instruments

28. The WTO instruments in the respective context state that the contract is to be awarded to the supplier:

(a) Whose tender is either the lowest tender or the tender which in terms of the specific evaluation criteria set forth in the notices or tender documents is determined to be the most advantageous (article XIII (4) (b) of the WTO GPA);

(b) That submitted the most advantageous tender, or where the price is the sole criterion, the lowest price (article XV (5) (a) of the revised WTO GPA).

29. The EU directive in this context uses the term the most economically advantageous tender (articles 53-54) (although in some instances the term "the best tender" is also used (articles 32 (4) (d) and 33 (6)).

Options for the Working Group to consider

30. In considering the use of the term the "lowest evaluated tender", and other alternatives such as "the best evaluated tender/submission" in its place, as was proposed at the Working Group's fifteenth session (see paragraph 17 above), the

Working Group may wish to consider the extensive consideration of the various terms to be used in the relevant context at the time when the 1994 text was drafted and the advantages and concerns expressed about the use of such terms. The Working Group may also wish to consider the effect of the change on the States who enacted the 1994 Model Law with the terminology used therein.

31. As was acknowledged by the drafters, the term "lowest evaluated tender" has its drawbacks and may be confusing in practice, especially in the context of the new provisions on electronic reverse auctions (in which the highest score wins the contract where non-price factors are involved). The Working Group may also wish to take into account concerns that the drafters expressed about an undesirable degree of subjectivity that alternative terms may introduce in the process of identifying the successful tender

32. The term "the best evaluated tender/submission" was not considered by the drafters at the time the 1994 text was prepared, but the concerns about subjectivity may also apply to this term, especially in the light of its closeness to the term "the best and final offer" commonly used in procurement methods involving negotiations.

33. The Working Group may wish to consider that departures from the use of the term appropriate for tendering may be justifiable in other provisions of the Model Law, in the light of the specifics of the procurement method concerned. For example, in the provisions on two-envelope tendering (see paragraph 17 above), the use of the term "lowest evaluated tender" would be misleading since it presupposes that price and non-price criteria are assessed simultaneously. Thus it may be justifiable to refer in these latter provisions to the best[2] combined evaluation in terms of the criteria other than price and the price, which more accurately reflects the evaluation process in that procurement method. The same is true with respect to the use of the term the "best and final offer" in procurement methods involving negotiations.

2. Specification of the award criterion/criteria in the definition of the successful tender

Drafting history of the provisions

34. In the accompanying commentary to the first draft of the Model Law, it was explained that "the most advantageous tender" would be the tender with the lowest price when it was ascertained on the basis of the tender price alone. Where "the most advantageous tender" would be the most economically advantageous tender, the criteria in addition to the tender price would be considered (A/CN.9/WG.V/WP.25, paras. 16-17 of the commentary to draft article 28). These ideas have subsequently been reflected in the accompanying Guide commentary to the 1994 Model Law.

35. When the draft Model Law approved by the Working Group on the New International Economic Order was considered in the Commission in 1993, a suggestion was made to amend the provisions on the successful tender based on the

---

[2] It should be noted that the original draft referred to the "highest combined evaluation". It was subsequently agreed to replace it with the "best combined evaluation", in view of the confusion that might be caused if it were juxtaposed with the notion of the lowest price. The Working Group also took into account that technical factors would not necessarily be expressed or quantified in monetary terms, the system using "merit" points might be used in rating proposals rather than adjusting the price to reflect the relative technical merit of a proposal (A/CN.9/389, para. 73).

lowest priced tender as follows: "The successful tender shall be (i) the tender from the tenderer which has been determined to be fully capable of undertaking the contract and whose tender bears the lowest tender price." It was explained that the purpose of the amendment was to allow the procuring entity to take into account, in addition to the price, also the capability of the tenderers to perform the contract. The proposed modification did not attract much support. It was agreed that, once a supplier or contractor was found to be qualified and its tender accepted, slight differences among the suppliers or contractors as to their capability to perform the contract should not be used as a factor in evaluating the tenders. Otherwise, an undesirable degree of subjectivity would be injected into the evaluation of tenders that would open the door to improper practices. To guard against this risk in tendering proceedings, the qualification decision should be simply an "in or out" decision, and not a criterion for comparing tenders (A/48/17, para. 172).

Relevant provisions of applicable international instruments

36. The WTO GPA is silent in this respect. The relevant provisions of the revised WTO GPA state that the contract is to be awarded to the supplier that submitted the most advantageous tender, or where the price is the sole criterion, the lowest price (article XV (5) (a) of the revised WTO GPA).

37. The relevant provisions of the EU directive state that the criteria on which the contracting authorities shall base the award of public contracts shall be either: (a) when the award is made to the tender most economically advantageous from the point of view of the contracting authority, various criteria linked to the subject-matter of the public contract in question, for example, quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion, or (b) the lowest price only (article 53 (1)).

Option for the Working Group to consider

38. The additions proposed to be made to the text at the Working Group's fifteenth session (see paragraph 18 above) appear not to contradict the intention of the drafters and may align the revised Model Law with the applicable international instruments in the relevant part. It should be noted that the proposed revisions are also in line with the drafting approach taken in the provisions on electronic reverse auctions (draft article 41 (2) of the proposed revised Model Law). The Working Group may wish therefore consider incorporating the proposed changes in the revised Model Law, and may wish to include references to these terms in draft article 12 of the proposed revised Model Law. The Working Group may also wish to clarify the matter further in the accompanying Guide.

C. Provisions on compensation for losses (article 54 (3) (f) of the 1994 Model Law and draft article 58 (5) (f) of the proposed revised Model Law)

39. The Working Group, at its fifteenth session, considered provisions on compensation for costs or losses in the 1994 Model Law. The Working Group agreed:

(a) To retain in paragraph (5) (f) of the relevant draft article (draft article 58 of the proposed revised Model Law) option I only, the wording of which should be

aligned with the relevant provisions of international instruments, such as article XX (7) (c) of the WTO GPA and article XVIII (7) (b) of the revised WTO GPA;

(b) To move option II from paragraph (5) (f) to the Guide with an explanations of the reasons for removing it, in particular that allowing for compensation of anticipatory losses had proved to be highly disruptive for procurement proceedings, in that it provided additional incentives for complaints. It was also suggested that the Guide should explain the evolution in regulations on this matter and highlight the relevant provisions of the WTO GPA and the revised WTO GPA.

40. The Secretariat researched the drafting history of the relevant provisions and the relevant provisions of the WTO instruments. The findings are set out below.

Drafting history of the provisions

41. The question as to the types of losses that should be compensable was addressed at the tenth session of the Working Group on the New International Economic Order. A view was expressed at that session that compensation should be limited to the costs of the tenderer in preparing and submitting its tender; the tenderer should not be entitled to compensation for its lost profits since that would expose the procuring entity to complaints for potentially large sums. The Working Group did not take any decision on that issue at that session (A/CN.9/315, para. 120).

42. In its first draft of provisions on administrative review, the Secretariat's relevant wording on compensation read as follows: "The [insert name of administrative body] may grant one or more of the following remedies: … (g) require the payment of compensation [for any reasonable costs incurred by the person submitting the complaint in connection with the procurement proceedings] [for loss suffered by the person submitting the complaint] as a result of an unlawful act of decision of, or procedure followed by, the procuring entity (A/CN.9/WG.V/WP.27, draft article 38 (2) (g)). In the accompanying commentary, it was noted that, in the absence of the decision by the Working Group on the matter, two alternative possibilities were set forth within square brackets: under the first possibility, the costs envisaged would not include profit from the procurement contract that was lost because of non-acceptance of the tender or offer of the complainant; the second possibility might include lost profit in appropriate cases (paragraph 7 of the commentary on draft article 38, and paragraph 3 of the commentary on draft article 37, in A/CN.9/WG.V/WP.27).

43. At the Working Group's thirteenth session, no decision was reached regarding the types of losses to be compensated. On a related issue, the Working Group agreed that the notion of interest or injury that the person would be required to have in order to be entitled to seek review should be linked to actual or potential loss or damage suffered when the procuring entity violated duties established in the provisions of the Model Law (A/CN.9/356, para. 156).

44. In the absence of the relevant decision at the Working Group's thirteenth session, the same wording was presented for the Working Group's consideration at its next session. At the fourteenth session, differing views were expressed as to the two alternative possibilities. The relevant extracts from the report of that session (A/CN.9/359) are reproduced below:

> "230. …One view was that limiting recovery merely to tender or proposal preparation costs would result in insufficient compensation. At the

same time, it was acknowledged that exposing the procuring entity also to liability for other losses suffered, in particular lost profit, was excessive given the fact that compensation would come from the public purse. It was therefore suggested that compensation should be set somewhere between the mere costs associated with participating in the procurement proceedings and lost profit. The prevailing view, however, was that the Model Law should not recommend as necessary the adoption of a standard of compensation beyond costs associated with the procurement proceedings. In particular, the concern was voiced that the Model Law should not add to the burdens borne by procuring entities in the developing world. At the same time, it was agreed that the Model Law should exclude the possibility of compensation of costs beyond those associated with the procurement proceedings.

"231. Several suggestions were considered for leaving open the possibility of compensation beyond the costs associated with the procurement proceedings. One suggestion was to indicate that the administrative body may require the compensation of "at least" for costs associated with the procurement proceedings. Another suggestion was that the possibility of additional compensation would remain open without the addition of any such language because a complainant might obtain further compensation from a court. The Working Group finally decided that it would be best to present both approaches to compensation currently embodied in subparagraph (g) as options for the enacting State and to discuss in the commentary the choice to be made in this regard by legislatures."

45. The decision taken at that session was not reopened at the Working Group's subsequent sessions and was not questioned upon adoption of the text of the Model Law in the Commission. Two options for the provisions on compensation were included in the 1994 text, and they were accompanied by the exiting commentary in the Guide (see paragraph 10 of the Guide commentary to article 54).

Relevant provisions of applicable international instruments

46. The relevant extracts from the WTO instruments read as follows:

"7. Challenge procedures shall provide for: … (c) … corrective action or compensation for the loss or damages suffered, which may be limited to costs for tender preparation or protest." (Article XX of the WTO GPA)

"7. Each Party shall adopt or maintain procedures that provide for: … (b) … corrective action or compensation for the loss or damages suffered, which may be limited to either the costs for the preparation of the tender or the costs relating to the challenge, or both." (Article XVIII of the revised WTO GPA)

47. Commentators, when addressing the meaning of these extracts, have observed that they can be interpreted as limiting pecuniary relief to costs for tender preparation or costs of challenge, and alternatively as giving an option to States to provide for damages in addition to such costs. The Working Group may note that the use of the facilitative word "may" as regards limiting pecuniary compensation, rather than a more prescriptive word (such as "shall", or "should"), is the basis of some of these interpretations (notwithstanding the addition of the words "or both" at the end of article XVIII of the revised WTO GPA). Commentators have also observed that the provisions are designed to enable States to enact them in accordance with the traditions and practices in their own legal systems.

48. Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council directive 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (the "Remedies Directive") requires member States to provide for interim measures, for setting aside decisions taken unlawfully and for awarding damages to persons harmed by such decisions (article 2 (1)). It does not set the legal grounds for award of damages nor a basis for calculating the amount of damages to be awarded. The issue of the award of damages is left to national jurisdictions.

49. As the Remedies Directive has not yet been implemented in all European Union member States, the Working Group may wish to consider the relief available in current national systems within the European Union. The issue of awarding damages in most systems is approached from the broader perspective of putting in place an effective remedies system.[3] Some commentators, for example, have observed that providing in legal texts for remedies that are not practically available (such as by making awards of damages contingent on the complainant proving conclusively that it would have won the procurement contract concerned) might render the system ineffective.

50. In accordance with the results of studies of review and remedies systems of the European Union member States by the Support for Improvement in Governance and Management Programme (SIGMA), launched by the Public Governance Committee of the Organization for Economic Cooperation and Development (OECD): "there is common recognition that effective recourse systems for challenging procurement decisions should provide timely access, independent review, efficient and timely resolution of complaints and adequate remedies. However, the practice varies significantly across countries."[4]

51. According to a joint survey of the OECD and the European Union,[5] the relief in the European Union member States focuses on corrective action (sometimes known as interim relief) and pecuniary compensation, including the costs of tender preparation, of the challenge procedure, and other damages. In some systems, the SIGMA Paper No. 30 "Public Procurement Review Procedures," available at http://unpan1.un.org/intradoc/groups/public/documents/NISPAcee/UNPAN006807.pdf. Possibility of award for damages is viewed as an integral part of an effective recourse system, and in most systems, the primary remedy is corrective action. Damages may be available where corrective action is not possible or practicable, or more generally (and they may include not only lost profits, but also loss of a chance to win the contract concerned, and (less commonly) loss of reputation). Practices differ as regards review bodies that may award compensation of damages.

52. More specifically, when the legal grounds for claiming compensation of damages exist, tender costs are awarded in all member States while lost profits in some European Union member States, such as Denmark, Finland, Germany, Hungary, Latvia, Lithuania, the Netherlands, Portugal and the United Kingdom. In France, lost profits are awarded if the claimant had a serious chance of winning the

---

[3] A requirement that remedies systems be effective also underpins the provisions in the WTO instruments (article XX.2 of the WTO GPA and article XVIII of the revised WTO GPA), the United Nations Convention Against Corruption (article 9 (1) (d)), and the APEC Non-Binding Principles on Government Procurement (Annex 3, at 4.1). These texts also suggest that the systems should be non-discriminatory, transparent, timely and effective.

[4] E. Beth, "Integrity in Public Procurement: Good Practice from A to Z", OECD, 2007. Available at SSRN: http://ssrn.com/abstract=987026 and through the OECD website.

[5] SIGMA Paper No. 30 "Public Procurement Review Procedures", available at http://unpan1.un.org/intradoc/groups/public/documents/NISPAcee/UNPAN006807.pdf.

contract. In most cases, courts, ordinary or administrative, have power to award compensation of damages; in Denmark, however, a specialized public procurement review body also has such power. According to commentators on the European Union procurement regulations, there are increasing examples of successful actions in some European Union member States for damages in the field of the enforcement of public procurement rules, including actions for loss of profit.[6]

53. The provisions in the systems surveyed by the OECD are in broad terms consistent with the overall emphasis on the primacy of corrective action in the WTO instruments, though they appear to be more facilitative of damages as relief than the provisions in the WTO instruments. The development of case law in national systems and in the European Court of Justice,[7] and the fact that the Remedies Directive is not yet broadly implemented, indicate that this is a developing area of law.[8]

Option for the Working Group to consider

54. In the light of the drafting history of the provisions, the wording of the applicable international instruments and their less than uniform interpretation, the Working Group may wish to consider how best to implement its decisions set out in paragraph 39 above. One option would be to use a prescriptive term to prevent the award of damages such as for lost profits in the text of the Model Law, and another would be to retain the arguably more flexible approach of the WTO instruments. It may wish to provide additional guidance as it deems appropriate on the subject in the revised Guide, addressing such matters as ensuring an effective system of remedies, the balance between various types of relief, the particular issues arising with setting aside concluded contracts, and the different considerations that might apply to administrative rather than judicial remedies (including the potential risk of abuse if administrative systems concentrate decision-making power, particularly the power to award damages, in a small entity or the hands of a few individuals).

D. Provisions on some other remedies (article 54 (3) (a) of the 1994 Model Law and draft article 58 (5) (a) of the proposed revised Model Law)

55. The Working Group, at its fifteenth session heard the suggestion that paragraph (5) (a) of draft article 60 (draft article 58 of the proposed revised Model Law) should be included in the chapeau of the paragraph. The relevant paragraph lists the declaration by an independent administrative body of the legal rules or principles that govern the subject-matter of the complaint as one of the remedies that the independent administrative body may grant. It was explained that the listed

---

[6] See, e.g., a series of articles on the subject in Public Procurement Law Review, 2006, vol. 15, pp. 159-240; also S. Treumer "Damages for Breach of the EC Public Procurement Rules from a Danish Perspective", European Business Organization Law Review, 2004, and H. Leffler, "Damages Liability for Breach of EC Procurement Law: Governing Principles and Practical Solutions", *Public Procurement Law Review*, 2003, vol. 4, p. 151 at p. 161.

[7] For a summary of some European cases prior to the Remedies Directive, see www.sigmaweb.org/dataoecd/44/45/40443900.ppt, and for information about infringement of European Union law, see http://europa.eu.int/comm/secretariat_general/sgb/droit_com/index_en.htm.

[8] For a summary of federal review in the United States (which is conducted by the United States Government Accountability Office (GAO), in which "anticipatory damages" (broadly speaking, lost profits) are not awarded, see "Bid Protests at GAO: a Descriptive Guide", 8th ed., 2006 (GAO-06-797SP), available at www.gao.gov/decisions/bidpro/bid/d06797sp.pdf , and for the published case reports, see resources at www.gao.gov/legal/bidprotest.html.

measure could not be regarded as a remedy but should rather be regarded as a natural step in the review process. The Working Group requested the Secretariat to research the drafting history of the provisions and decided to defer the consideration of the suggestion until after the findings of the Secretariat were considered (A/CN.9/668, para. 264).

56. The wording in question and its location in paragraph was included in the Secretariat's first draft of provisions on administrative review and remained as such throughout the negotiation of the 1994 text. No concerns were raised about its content or location. The general comment was made at the tenth session of the Working Group on the New International Economic Order that the remedies listed in the relevant paragraph would be available to a tenderer depending on the nature of its claim (A/CN.9/315, para. 121).

57. Thus it may be that the aggrieved supplier or contractor is submitting a claim to an independent administrative body in which it complains about the application by the procuring entity of incorrect legal rules or principles to the subject-matter of its complaint (for example if it appeals to the administrative body the decision taken by the procuring entity under article 53 of the 1994 Model Law). In such a case, the administrative body would grant the remedy listed in article 54 (3) (a) of the 1994 text.

58. In the light of this explanation, the Working Group may wish to consider whether there may be a benefit in retaining the wording and its location as it appears in the 1994 text.

E. Exceptions to disclosure (articles 11 (3) (a) and 55 (3) of the 1994 Model Law and draft articles 19 (2) (b), 22 (4) (a), and 59 (3)-(5) of the proposed revised Model Law)

59. The Working Group, at its fifteenth session, heard the suggestion that the exceptions to disclosure in paragraph (2) (b) of draft article 19 were drafted too broadly, might inhibit transparency, and should be redrafted to refer only to confidential information. The Working Group agreed to consider whether to revise the wording at a future session (A/CN.9/668, para. 131).

60. As was pointed out at that session, the exceptions to disclosure in paragraph (2) (b) of draft article 19 were linked to draft article 22 (4) (a) of the proposed revised Model Law (the article on the record of procurement proceedings; article 11 (3) (a) of the 1994 Model Law), from which the relevant wording was taken (A/CN.9/668, para. 130). It should also be noted that exceptions to disclosure are also found in article 34 (8) of the 1994 Model Law (draft article 31 (8) of the proposed revised Model Law) that reads:

> "(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."

61. The Secretariat researched the drafting history of articles 11 (3) (a) and 34 (8) of the 1994 Model Law and examined the relevant provisions from the applicable international instruments. The findings are set out below.

Drafting history of the provisions

62. The Secretariat's first draft of provisions on the record of procurement proceedings stated that "no information shall be disclosed contrary to any law of [this State] relating to confidentiality" (A/CN.9/WG.V/WP.24, draft article 33 (2)). When this draft was before the Working Group on the New International Economic Order, it was agreed that the scope of confidentiality should be expanded by providing that "information should not be disclosed if 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." Some opposition was expressed with this wording on the ground that the scope of disclosure could severely be restricted by enacting States that would adopt laws making various aspects of procurement proceedings confidential (A/CN.9/331, para. 210). At subsequent sessions, it was agreed however to retain all these restrictions to disclosure but add in the Model Law that disclosure may be made in these cases by the order of a competent court and subject to the conditions of such an order (A/CN.9/356, para. 80).

63. The Secretariat's first draft of what became article 34 (8) of the 1994 Model Law was in essence the same as the current text (A/CN.9/WG.V/WP.24, draft article 28 (9)). When the draft was considered by the Working Group on the New International Economic Order, it was generally agreed that information relating to the examination, clarification, evaluation and comparison of tenders should not be disclosed except as provided in the article on the record of procurement proceedings. The explicit reference in this context was made to possibility of obtaining an order of a competent court on disclosure of the information concerned (A/CN.9/331, para. 211, and A/CN.9/356, para. 80). Thus the Working Group ultimately adopted the original wording proposed in the Secretariat's first draft, with some drafting modifications. No concerns about the wording were raised during the adoption of the text of the Model Law in the Commission.

Relevant provisions of applicable international instruments

64. As was noted at the Working Group's fifteenth session (A/CN.9/668, para. 131), the wording in question used in the 1994 Model Law and repeated in the proposed revised Model Law is similar to the wording on the same subject found in the WTO instruments and the EU directive. The table below sets out the relevant provisions from these instruments for ease of reference:

WTO GPA (1994)	Revised WTO GPA (2006)	EU directive
Article XVIII **Information and Review as Regards Obligations of Entities** … 4. However, entities may decide that certain information on the contract award, contained in paragraphs 1 and 2 (c), be withheld where release of such information would impede law enforcement or otherwise be contrary to the public interest or would prejudice the	**Article XVII** **Disclosure of Information** … *Non-Disclosure of Information* 2. Notwithstanding any other provision of this Agreement, a Party, including its procuring entities, may not provide information to a particular supplier that might prejudice fair competition between suppliers.	**Article 35** **Notices** **…** 4. … Certain information on the contract award or the conclusion of the framework agreement may be withheld from publication where release of such information would impede law enforcement or otherwise be contrary to the public interest, would harm the

WTO GPA (1994)	Revised WTO GPA (2006)	EU directive
legitimate commercial interest of particular enterprises, public or private, or might prejudice fair competition between suppliers. **Article XIX** **Information and Review as Regards Obligations of Parties** ... 2. The government of an unsuccessful tenderer which is a Party to this Agreement may seek, without prejudice to the provisions under Article XXII, such additional information on the contract award as may be necessary to ensure that the procurement was made fairly and impartially. To this end, the procuring government shall provide information on both the characteristics and relative advantages of the winning tender and the contract price. Normally this latter information may be disclosed by the government of the unsuccessful tenderer provided it exercises this right with discretion. In cases where release of this information would prejudice competition in future tenders, this information shall not be disclosed except after consultation with and agreement of the Party which gave the information to the government of the unsuccessful tenderer.	3. Nothing in this Agreement shall be construed to require a Party, including its procuring entities, authorities, and review bodies, to release confidential information under this Agreement where release: (a) would impede law enforcement; (b) might prejudice fair competition between suppliers; (c) would prejudice the legitimate commercial interests of particular persons, including the protection of intellectual property; or (d) would otherwise be contrary to the public interest.	legitimate commercial interests of economic operators, public or private, or might prejudice fair competition between them. **Article 41** **Informing candidates and tenderers** 1. Contracting authorities shall as soon as possible inform candidates and tenderers of decisions reached concerning the conclusion of a framework agreement, the award of the contract or admittance to a dynamic purchasing system, including the grounds for any decision not to conclude a framework agreement or award a contract for which there has been a call for competition or to recommence the procedure or implement a dynamic purchasing system; that information shall be given in writing upon request to the contracting authorities. … 1. However, contracting authorities may decide to withhold certain information referred to in paragraph 1, regarding the contract award, the conclusion of framework agreements or admittance to a dynamic purchasing system where the release of such information would impede law enforcement, would otherwise be contrary to the public interest, would prejudice the legitimate commercial interests of economic operators, whether public or private, or might prejudice fair competition between them.

WTO GPA (1994)	Revised WTO GPA (2006)	EU directive
		Article 69 **Notices** 2. … Where the release of information on the outcome of the contest would impede law enforcement, be contrary to the public interest, prejudice the legitimate commercial interests of a particular enterprise, whether public or private, or might prejudice fair competition between service providers, such information need not be published.

Options for the Working Group to consider

65. The Working Group may consider that the concerns raised regarding the provisions were fully considered by the drafters of the 1994 Model Law, that nevertheless they preferred to use the current wording, and that the current wording is aligned with the relevant provisions of the applicable international instruments.

66. In addition, the Working Group may wish to consider that, whatever wording is adopted as regards restrictions to disclosure, the provisions of the revised Model Law where such restrictions are set out should all be aligned. Apart from the provisions on the record of procurement proceedings, examination, evaluation and comparison of tenders, and acceptance of the successful tender (standstill provisions), other provisions of the proposed revised Model Law follow the wording of article 11 (3) (a) of the 1994 Model Law in setting out exceptions to disclosure (for example, draft article 59, which is based on article 55 of the 1994 Model Law and which was further revised pursuant to the deliberations at the Working Group's fifteenth session (in particular, the agreement to add the provisions on exceptions to disclosure; see A/CN.9/668, para 267)).

67. In addition, the Working Group may wish to ensure internal consistency among all relevant provisions, such as those on restrictions on disclosure of information relating to the examination, clarification, evaluation and comparison of tenders in article 34 (8) of the 1994 Model Law (draft article 31 (8) of the proposed revised Model Law).

A/CN.9/WG.I/WP.68/Add.1 (Original: English)

Note by the Secretariat on possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services - drafting history of some provisions of the 1994 Model Law and the treatment of the issues raised by some of those provisions in international instruments regulating public procurement, submitted to the Working Group on Procurement at its sixteenth session

ADDENDUM

CONTENTS

II. The Secretariat's findings as regards the drafting history of some provisions of the 1994 Model Law and the treatment of the issues raised by some of those provisions in international instruments regulating public procurement (*continued*)

F. Some provisions on the record of procurement proceedings (article 11 (1) (d) of the 1994 Model Law and draft article 22 (1) (e) of the proposed revised Model Law)

1. At its fifteenth session, the Working Group considered the following provisions taken from article 11 (1) (d) of the 1994 Model Law:

> "(1) The procuring entity shall maintain a record of the procurement proceedings containing, at a minimum, the following information:
>
> "…

> "(d) The price, or the basis for determining the price, and a summary of the other principal terms and conditions of each tender, proposal, offer or quotation and of the procurement contract, where these are known to the procuring entity;"

2. At that session, it was queried whether the words in these provisions "where these are known to the procuring entity" when referring to price were appropriate, because it was unlikely that the information would not be known to the procuring entity. The Working Group agreed that the provisions should be revised to ensure the meaning was clear (A/CN.9/668, para. 154).

3. As was further pointed out at the session, the accompanying commentary in the Guide indicated the value of having the phrase "where these are known to the procuring entity" in the text in the light of the specific nature of some procurement. The relevant extract from the Guide states:

> "The rationale behind limiting disclosure of information required to be disclosed under article 11 (1) (d) to that which is known to the procuring entity is that there may be procurement proceedings in which not all proposals would be fully developed or finalized by the proponents, in particular where some of the proposals did not survive to the final stages of the procurement proceedings. The reference in this paragraph to "a basis for determining the price" is meant to reflect the possibility that in some instances, particularly in procurement of services, the tenders, proposals, offers or quotations would contain a formula by which the price could be determined rather than an actual price quotation."

4. The drafting history of the provisions indicates that they were discussed during the negotiation of the 1994 text. In particular, the phrase, which at that time read "if these are known to the procuring entity" and was upon adoption of the 1994 text slightly modified to read "where these are known to the procuring entity", was included in the provisions in response to concern that the earlier wording of these provisions without such a qualifier was oriented to the procurement of goods or construction and did not fit well with procurement of services, in particular since it gave undue prominence to the price, which would not necessarily be appropriate in the case of procurement services (A/CN.9/389, paras. 33 and 92, and A/CN.9/392, paras. 44 and 117 and annex, article 11).

5. When the draft text was considered in the Commission, in 1994, a question was raised about the phrase "if these are known to the procuring entity". In response, it was explained that it was meant to address, for example, the cases in which the procuring entity would not know the price until the evaluation of a supplier or a contractor on the basis of its qualifications, as in the "two-envelope system", a system which would not require the opening of the "price envelope" for those suppliers and contractors whose proposals had been rejected on technical grounds (A/49/17, para. 31). In the subsequent consideration of the accompanying commentary to these provisions in the Guide, it was pointed out that the reference to the information "known" to the procuring entity should focus on those situations where the price of certain proposals would not become revealed before the conclusion of the procurement proceedings.

6. In the light of the extensive consideration of the relevant provisions in the Working Group and in the Commission when the 1994 text was prepared and adopted, the Working Group may wish to consider whether there are merits in retaining the current wording of the provisions in the Model Law. The Guide may

explain further that since the maintaining of the record of procurement proceedings is an ongoing process throughout any given procurement proceedings, the required information would be included in the record upon its availability to the procuring entity. It could further explain that the phrase "where these are known to the procuring entity" is not meant to diminish in any way the obligation of the procuring entity to keep the record of the procurement proceedings complete in all relevant respects.

G. Provisions on the extension of the period of effectiveness of tenders and of the validity of tender securities (article 31 (2) (a) of the 1994 Model Law and draft article 30 (2) (a) of the proposed revised Model Law)

7. The Working Group, at its fifteenth session, heard a proposal to delete the second sentence of paragraph (2) (a) of draft article 31 (draft article 30 of the proposed revised Model Law) on the basis that it was superfluous. It requested that the derivation and reasons for the inclusion of the provision in the Model Law be examined. The Working Group deferred its consideration of the draft article to a later stage (A/CN.9/668, paras. 175-176).

8. The provisions in question read as follows:

> "(2) (a) Prior to the expiry of the period of effectiveness of tenders, the procuring entity may request suppliers or contractors to extend the period for an additional specified period of time. A supplier or contractor may refuse the request without forfeiting its tender security, and the effectiveness of its tender will terminate upon the expiry of the unextended period of effectiveness;"

9. The provisions as reproduced in the paragraph above were included in the first draft of the Model Law prepared by the Secretariat, except for the last words "and the effectiveness of its tender will terminate upon the expiry of the unextended period of effectiveness" (A/CN.9/WG.V/WP.24, draft article 25 (2) (a)). The latter words were added upon agreement in the Working Group on the New International Economic Order to clarify in the provisions that a supplier or contractor that did not agree to extend the period of effectiveness of its tender could participate in the tendering proceedings only until its tender was effective (A/CN.9/331, para. 124).

10. As was explained by an observer at the fifteenth session of the present Working Group, the provision in question was often invoked in the projects financed by the World Bank and referred to situations in which the procuring entity was not able to evaluate all submissions on time and for that reason had to extend the deadline. In such situations, it was noted, suppliers might, but should not be obliged to, extend the validity of their tenders and a refusal to do so should not forfeit their submission security (A/CN.9/668, para. 175).

11. In addition, the following rationale for the inclusion of the provisions was given by the Secretariat to the Working Group on the New International Economic Order:

> "In cases where the tender proceedings cannot be concluded and the contract cannot be entered into within the specified period of validity of tenders, the procuring entity will have to seek an extension of the period. Under many procurement laws, tenderers continue to be bound by their tenders after the

expiration of the stipulated period of validity only if they so agree. Under other laws, however, the procuring entity can extend the period of validity by so notifying tenderers prior to the expiration of the original period. Although that approach may provide greater security for procuring entities, it may result in higher tender prices … It may therefore be more consistent with the objectives of economy and efficiency to fix a period of validity that is realistic and to provide that tenderers will not be bound by their tenders after the period expires unless they so agree." (A/CN.9/WG.V/WP.22, para. 141)

"Higher tender prices may result since tenderers will have to include in their prices an increment to compensate for the costs and risks to which they are exposed during such a period (e.g., the costs of the tender guarantee; the necessity to keep their resources committed to the project; the risks of higher construction or manufacturing costs." (A/CN.9/WG.V/WP.22, para. 140)

"Paragraph 2 (a) permits the procuring entity to request an extension of the period, for example, in cases where the tendering proceedings cannot be concluded and the contract cannot be entered into within the specified period of time. Extensions of the period should be avoided, since they could result in the loss of advantageous tenders and could interfere with the efficient functioning of the tendering proceedings. To avoid the necessity of extending the period, the procuring entity should endeavour to fix in the procurement documents a period of time of as realistic a length as possible." (A/CN.9/WG.V/WP.25, paragraph 3 of the commentary to draft article 25)

12. When the first draft with the accompanying commentary was considered by the Working Group on the New International Economic Order, it was agreed that requests by the procuring entity for extensions of the period of effectiveness of tenders should be discouraged and should be allowed only in exceptional circumstances. In that connection, mention was made of an undesirable practice by which procuring entities sometimes pressured contractors and suppliers to grant an extension by threatening to claim under the tender securities supplied by the contractors and suppliers (A/CN.9/331, para. 124). The agreement reached by the Working Group at that session was in line with the previously expressed views in the Working Group that the model procurement law should inhibit the procuring entity from seeking extensions of the period of the validity of tenders unreasonably (A/CN.9/315, para. 76).

13. These decisions were upheld at subsequent stages of negotiation and at the stage of adoption of the relevant provisions.

14. The Working Group may wish to consider whether this drafting history explains why there may be a benefit in retaining the provisions as they appear in the 1994 Model Law. The Working Group may also wish to consider that retaining them would be in line with the original intention of the drafters to discourage extensions of the period of effectiveness of tenders through the model law. It may also wish to explain in the revised Guide that the purpose of the provisions is in particular to avoid allowing procuring entities to pressure suppliers or contractors to grant an extension by threatening to claim under the tender securities supplied by them (see paragraph 12 above).

H. Notification of suppliers or contractors by a procuring entity about its decisions and reasons therefor

1. Mandatory notification of the procuring entity's decisions

15. Under the 1994 Model Law, suppliers or contractors must be notified about:

(a) A procuring entity's decision to reject all tenders (article 12 (3), corresponding to revised draft article 16 (3)).[1] In addition, article 11 (1) (f) of the 1994 text, corresponding to revised draft article 22 (1) (g), requires the inclusion of the decision in the record of procurement proceedings. Under other provisions of article 11, this part of the record is to be made available to suppliers or contractors that presented submissions or applied for prequalification (hereafter "the interested suppliers or contractors"), upon their request, after the procurement proceedings are concluded;

(b) A procuring entity's decision to reject the tender for inducement (article 15, corresponding to revised draft article 18 (2)). In this case, the 1994 text also requires the procuring entity to provide reasons for its decision. In addition, article 11 (1) (h), corresponding to revised draft article 22 (1) (i), requires the inclusion of the fact of the rejection in the record of procurement proceedings. Under other provisions of article 11, this part of the record is to be made available to all the interested suppliers or contractors, upon their request, at any time;

(c) A procuring entity's decision on prequalification and in the course of reassessment, if any, of qualifications at subsequent stages of the procurement proceedings (article 7 (6) and (8), corresponding to the provisions in revised draft articles 22 (9) and 10 (8) (d)).[2] In addition, article 11 (1) (c) of the 1994 text, which corresponds to revised draft article 22 (1) (d), requires that certain information on qualification be included in the record of procurement proceedings. Under other provisions of article 11, this part of the record is to be made available to the interested suppliers or contractors, upon their request, after the procurement proceedings are concluded. Disclosure of this information at an earlier stage is possible only by court order;

(d) Clarification and modification of solicitation documents (articles 28, 40, 46 (4), 48 (5), 49 (2) and 50 (1), corresponding to revised draft articles 28, 38, 39, 40 and 36). In addition, article 11 (1) (m), corresponding to revised draft article 22 (1) (m), requires the inclusion in the record of procurement proceedings of a summary of any request for clarification and a summary of any modification. Under other provisions of article 11, this part of the record would be made available to the interested suppliers or contractors, upon their request, after the procurement proceedings are terminated. Disclosure of this information at an earlier stage is possible only by court order;

(e) Corrections in submitted tenders (article 34 (1) (b), corresponding to revised draft article 32 (1) (b)). The Working Group may wish to consider whether the procuring entity should in addition be required to include in the record of

---

[1] See paragraphs 12 and 19-30 of this note for discussion of the requirement to communicate to the affected suppliers of contractors reasons for the procuring entity's decision.

[2] The Working Group may wish to consider amending the provisions to require the procuring entity to communicate to the affected suppliers or contractors also reasons for its decisions, either upon request of the affected suppliers or contractor or without such request.

procurement proceedings information about the corrections. No relevant requirement exists in article 11 of the 1994 text;

(f) A procuring entity's decision in the course of a selection procedure with consecutive negotiations (article 44; no corresponding article currently exists in the proposed revised Model Law).

16. Under the 1994 Model Law, a procuring entity must also promptly respond to the request by a supplier or contractor to confirm the acceptability of a proposed issuer of a tender security (article 32 (1) (d), corresponding to revised draft article 14 (1) (d)).

17. In the proposed revised Model Law, suppliers or contractors must in addition be notified about:

(a) A procuring entity's decision to reject an abnormally low submission (revised draft article 17). The proposed article also requires the notification of the grounds for the decision. It is also provided that the decision and the grounds therefor are to be included in the record. Corresponding changes were made in revised draft article 22 (1) (i). Under other provisions of revised draft article 22, this part of the record would be made available to all the interested suppliers or contractors, upon their request, at any time;

(b) A procuring entity's intended decision to accept the successful submission (revised draft article 19 (2)). It is also required under the proposed provisions that the decision should be accompanied by additional information about the name and address of the successful supplier or contractor, the contract price or where necessary a summary of other characteristics and relative advantages of the successful submission. These provisions were included as a result of the introduction of a standstill period;

(c) A procuring entity's decision in the course of electronic reverse auctions (revised draft articles 44 and 45) and framework agreements (revised draft articles 51, 53 and 55). Currently, in most cases, the provisions require notification of the decisions without grounds therefor. The Working Group may wish to consider strengthening these provisions, by requiring, where appropriate, the communication to the interested suppliers or contractors of reasons for the decisions. Corresponding amendments to revised draft article 22 would be presented for the Working Group's consideration in due course.

2. Communication of reasons for a procuring entity's decision upon the request of suppliers or contractors concerned

18. Under the 1994 Model Law, a procuring entity is required:

(a) To provide reasons for its decision on disqualification in the course of prequalification, upon the request of suppliers or contractors affected by such decision (article 7 (7), corresponding to revised draft article 15 (10)); and

(b) To provide upon request[3] reasons for its decision to reject all submissions (article 12 (1), corresponding to revised draft article 16 (1)).

---

[3] The Model Law does not specify in this case upon whose request the reasons are to be provided. It may be implied that reference is made in this context to the request of any interested supplier or contractor, as defined in paragraph 15 (a) of this note.

Disqualification

19. The Working Group, at its fifteenth session, considered provisions from article 7 (7) of the 1994 text reading: "The procuring entity shall upon request communicate to suppliers or contractors that have not been pre-qualified 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." The meaning of the phrase in the end of these provisions stating that "the procuring entity is not required to specify the evidence or give the reasons for its finding that those grounds were present" was questioned (A/CN.9/668, para. 107).

20. The drafting history of these provisions indicates that they were included in the text of the 1994 Model Law further to the agreement reached in the Working Group on the New International Economic Order to clarify and amplify the distinction between "grounds" for the denial of prequalification and "reasons to substantiate those grounds" (A/CN.9/343, para. 156).

21. At its fifteenth session, the present Working Group agreed to reword the current formulation in the light of the strengthened review provisions in the revised Model Law, to allow for meaningful debriefing and where necessary review. It was also agreed that the Guide should explain these reasons for the revisions made to the 1994 text (A/CN.9/668, para. 107).

22. Reflecting that agreement in the Working Group, the phrase "but the procuring entity is not required to specify the evidence or give the reasons for its finding that those grounds were present" was deleted from the corresponding provisions in draft article 15 (10) of the proposed revised Model Law. The provisions as redrafted in the proposed Model Law read therefore as follows: "The procuring entity shall upon request communicate to suppliers or contractors that have not been pre-qualified the grounds therefor."

23. The Working Group may wish to consider whether the provisions as redrafted are sufficient to ensure effective debriefing.

24. It should be noted that the provisions in question are supplemented by article 11 (1) (c) of the 1994 text, which corresponds to draft article 22 (1) (d) of the proposed revised Model Law. It requires that "information relative to the qualifications, or lack thereof, of suppliers or contractors that submitted tenders, proposals, offers or quotations" be included in the record of procurement proceedings.[4] Under other provisions of article 11, that part of the record of the procurement proceedings would be made available to the interested suppliers or contractors, upon their request, after the procurement proceedings were terminated. The disclosure of that information at an earlier stage would be possible only by court order.

Rejection of all submissions

25. The Working Group, at its fifteenth session, considered the provisions from article 12 (1) of the 1994 Model Law reading: "The procuring entity shall upon

---

[4] This wording would exclude information relative to the qualifications, or lack thereof, of suppliers or contractors that submitted applications to pre-qualify but were excluded from further participation in the procurement proceedings as a result of disqualification in the prequalification proceedings. The Working Group may wish to consider revising the provisions so that they would also refer to information relative to the qualifications, or lack thereof, of that latter group of suppliers or contractors.

request communicate to any supplier or contractor that submitted a tender, proposal, offer or quotation, the grounds for its rejection of all tenders, proposals, offers or quotations, but is not required to justify those grounds."

26. The suggestion was made at that session that the words "upon request" should be deleted in these provisions, with the effect that the procuring entity would have to substantiate its decision to reject all submission in all cases even in the absence of request by a supplier or contractor to do so (A/CN.9/668, para. 115).

27. Another suggestion was that the following words could be deleted from the provisions concerned as being superfluous: "but is not required to justify those grounds." The general view was that the procuring entity should not be required to provide any justification for its decision to reject all submissions, but should inform the suppliers or contractors concerned of the decision and grounds for it (A/CN.9/668, paras. 114-115).

28. No agreement was reached on whether the provisions should be revised pursuant to these suggestions. The Working Group deferred the approval of the draft article as proposed to be revised at that session to a later stage (A/CN.9/668, paras. 115-116).

29. The Secretariat researched the drafting history of these provisions. The findings are set out below.

30. The first draft of the Secretariat included only the requirement to notify of the rejection of all tenders all suppliers or contractors that submitted tenders (A/CN.9/WG.V/WP.24, draft article 29 (3)). This requirement did not raise any concern and was retained throughout the negotiation of the 1994 text and upon its adoption in the Commission. It appears in article 12 (3) of the 1994 text.

31. The Working Group on the New International Economic Order decided to supplement this requirement with the provisions that would require the procuring entity to give the reasons for rejection of all tenders upon request. It was agreed that the procuring entity should not be obligated to justify those reasons (A/CN.9/331, para. 181).

32. The second draft presented by the Secretariat was amended accordingly. While no concern was raised about the words "upon request" in these provisions at the subsequent stages of negotiation of the 1994 text and upon its adoption in the Commission, the words added to the provisions reading "but shall not be required to justify those grounds" did raise concerns.

33. When the Secretariat's second draft was considered in the Working Group, the view was expressed that these words might present difficulties in jurisdictions where courts had inherent power to review administrative decisions and to go behind the reasons advanced for administrative actions. Moreover, it was said, there might be cases where it would be appropriate to require a procuring entity to justify the grounds for the rejection of tenders. It was further suggested that the approach taken could affect the ability of aggrieved parties to exercise remedies. The prevailing view, however, was that the words should be retained. In support of that view, it was stated that the procuring entity should be free not to proceed with a procurement, for example, on economic, social or political grounds, which it need not justify. It was sufficient that it gave reasons, and there should be no remedies against the procuring entity for the rejection of all tenders. On that basis, the Working Group decided to retain those words and adopted the provisions (A/CN.9/356, paras. 47-48). No concerns about this wording were raised at the

subsequent stages of the negotiation of the 1994 text and upon its adoption in the Commission.

34. Thus, although there appears to be no difference in understanding between the drafters of the 1994 text and the present Working Group, i.e. that the procuring entity should not be obligated to justify the grounds on which it based the decision to reject all submissions. However, the drafters of the 1994 text did not consider the words "but is not required to justify those grounds" in the provisions superfluous. They decided to retain them as an indication that the relevant decisions of the procuring entities could not be challenged by suppliers or contractors. The provisions were in addition supplemented by article 52 (2) that exempted decisions of procuring entities on rejection of all submissions from review.

35. As was also pointed out in paragraph 32 above, nor did the Working Group on the New International Economic Order question the need for the words "upon request" in the provisions. The Working Group may wish to consider whether it should take a different approach, with the effect that the procuring entity will be obligated always to accompany the notice of rejection of all submissions, which it must provide under article 12 (3) of the 1994 text (corresponding to draft article 16 (3) of the proposed revised Model Law), with information about the reasons for its decision.

36. It should be noted that provisions on rejection of all submissions are supplemented by article 11 (1) (f) of the 1994 text, corresponding to revised draft article 22 (1) (g). The latter requires the inclusion of both information about the decision and grounds therefor in the record of procurement proceedings. Under other provisions of article 11, that part of the record of the procurement proceedings is made available to the interested suppliers or contractors, upon their request, after the procurement proceedings are terminated.

3. Additional provisions of the Model Law to consider in the light of the strengthened provisions on review and remedies

37. The Working Group may wish to consider the implementation of its decision to delete article 52 (2) of the 1994 text in the context of other provisions of the Model Law. The Working Group may recall that article 52 (2) of the 1994 text exempted from review a number of decisions of the procuring entity, including the selection of the method of procurement or of a selection procedure, limitations imposed on the basis of nationality, rejection of all submissions, and a refusal by the procuring entity to respond to an expression of an interest in request for proposals proceedings.

38. Article 52 (2) was included in the 1994 Model Law in the light of the decision of the Working Group on the New International Economic Order to limit the right to review only to cases where the procuring entity violated duties established by the Model Law (in particular, as regards qualification and selection of suppliers or contractors) and not to extend it to cases where actual or potential loss was suffered as a result of a breach of provisions that gave discretion to the procuring entity (A/CN.9/356, para. 156). As a consequence, the 1994 text in general provides for minimum requirements as regards communication by the procuring entity of information about its decisions to suppliers or contractors (see section 1 above). Even fewer requirements exist as regards communication of reasons for decisions (see sections 1 and 2 above).

39. In the case of rejection of tenders on the basis that they are non-responsive (article 34 (2) and (3) of the 1994 text), the drafting history of the relevant provisions indicates the explicit intention of the drafters to exempt the procuring entity from the obligation to provide the relevant information about its decision (and reasons therefor) to the suppliers or contractors affected. This approach was explained by the fact that incorporating such a requirement would impose "an unjustified added burden on the procuring entity at a time when it was busy evaluating tenders", and might suggest that the procuring entity would have to make a specific decision on each tender with respect to each of the criteria listed in what became article 34 (3) of the 1994 text. Accordingly, it was decided not to require a formal action of rejection (A/CN.9/359, para. 152).

40. In other instances, such as in the case of disqualification under article 6 of the 1994 text or return of the tender submitted after the deadline (article 30 (6) (e) of the 1994 text), the drafting history does not explain why the procuring entity did not need to notify suppliers or contractors affected by its decision of its decisions (and grounds therefor). This may be regarded as an omission. It should be noted that article 11 of the 1994 text does not require the relevant information to be recorded.

41. The Working Group may wish to consider whether, in each of the cases listed below, the relevant provisions should require notification of (i) the procuring entity's decision and (ii) reasons therefor. In addition, the Working Group may also wish to consider whether information should be provided upon request of suppliers or contractors concerned or without such request (in the cases listed in subparagraphs (a) to (c) below, it would be possible to provide the relevant information only upon request of suppliers or contractors concerned, but in others, the request would not be necessary in practical terms). A further alternative for some cases might be to issue a notice (in the same manner as a contract award). In formulating its position, the Working Group may wish to ensure that similar situations are addressed consistently throughout the Model Law:

(a) **Limiting participation on the basis of nationality** (article 8 (2) of the 1994 text, corresponding to revised draft article 9 (2)). The Working Group may wish to consider whether the provisions of article 11 (1) (l) of the 1994 text (corresponding to revised draft article 22 (1) (n)) would alone be sufficient. They require including a statement in the record of procurement proceedings of the grounds and circumstances on which the procuring entity relied in making the relevant decision. Under other provisions of article 11 (draft article 22), that part of the record of the procurement proceedings would be made available to the interested suppliers or contractors at any time;

(b) **The choice of procurement method other than tendering**. The Working Group may wish to consider whether the provisions of article 11 (1) (i) and (j) of the 1994 text (corresponding to revised draft article 22 (1) (j) and (l)) would alone be sufficient. They require including a statement in the record of procurement proceedings of the grounds and circumstances on which the procuring entity relied in making the relevant decision. Under other provisions of article 11, this part of the record of the procurement proceedings is to be made available to the interested suppliers or contractors at any time;

(c) **The choice of direct as opposed to open solicitation**. The Working Group may wish to consider whether the provisions of article 11 (1) (k) of the 1994 text to the same effect (corresponding to revised draft article 22 (1) (j)) would alone be sufficient;

(d) **Disqualification other than as a result of prequalification** (article 6 of the 1994 text, corresponding to revised draft article 10). The Working Group may wish to consider whether the provisions of article 11 (1) (c) of the 1994 text (corresponding to revised draft article 22 (1) (d)) would alone be sufficient. They require that information relative to the qualifications, or lack thereof, of suppliers or contractors that submitted tenders be included in the record. Under other provisions of article 11, this part of the record is to be made available to the interested suppliers or contractors, upon their request, after the procurement proceedings are terminated. Disclosure of the information at an earlier stage would be possible only by court order;

(e) **Return of the tender submitted after the deadline** (article 30 (6), corresponding to revised draft article 29 (6)). The Working Group may also wish to consider that the procuring entity should be required to include the relevant information in the record of procurement proceedings. No requirement exists in article 11 of the 1994 text;

(f) **Rejection of tenders on the basis that they are non-responsive** (article 34 (2) and (3) of the 1994 text, corresponding to revised draft article 32 (2) and (3)). The Working Group may wish to consider in addition whether article 11 (1) (e) of the 1994 text, corresponding to revised draft article 22 (1) (f), indeed requires the procuring entity to include in the record information related to ascertainment of responsiveness of submissions. Article 11 (1) (e) of the 1994 text refers to a summary of the "evaluation and comparison" of submissions. The terms "evaluation and comparison" are used in article 34 (4) of the 1994 text (corresponding to revised draft article 32 (4)) only in the context of the tenders that have not been rejected. The title of article 34 of the 1994 text implies that the term "examination" refers to the ascertainment of responsiveness of tenders. The Working Group may wish therefore to consider explicitly requiring the record to include information on the ascertainment of responsiveness of submissions;

(g) In the **selection procedure without negotiation** (article 42 of the 1994 text, corresponding to revised draft article 35 on two-envelope tendering). The 1994 provisions do not require notifying suppliers or contractors that have been excluded from further participation in the procurement because they failed to attain a rating at or above the relevant threshold. This is in contrast to article 44 (d) of the 1994 text (Selection procedure with consecutive negotiation; no corresponding provisions in the proposed revised Model Law), where the provision of a notification is required in similar situations. The Working Group may also wish to consider that the procuring entity should be required to include the relevant information in the record. No such requirement exists in article 11 of the 1994 Model Law;

(h) **In request-for-proposals, competitive negotiations and request-for-quotations proceedings** (articles 48-50 of the 1994 text; corresponding provisions on request for quotations are in revised draft article 36; no corresponding provisions for request for proposals and competitive negotiations are in the current proposed revised Model Law). The Working Group may wish to consider that the regulation of these methods would be strengthened in the revised Model Law by the application of the provisions on acceptance of the successful submission, including a standstill period, to them;

(i) **Review by the procuring entity** (articles 53 and 56 of the 1994 text, corresponding to revised draft articles 57 and 60). Under article 56 (5) of the 1994 text, for example, a decision on whether the complaint will be entertained, whether

the procurement proceedings will be suspended or whether a suspension is to be extended, together with the grounds and circumstances therefor, must be included in the record but there are no notification requirements. The provisions were included in revised draft article 60 (3) for the Working Group's consideration. The Working Group may wish to consider whether they will be sufficient;[5] and

(j) **Proceedings (other than tendering) not resulting in a procurement contract**. The Working Group may wish to consider whether the provisions of article 11 (1) (g) (corresponding to revised draft article 22 (1) (h)) would alone be sufficient. They require including in the record a statement that the proceedings did not result in a procurement contract and the grounds therefor. Under other provisions of article 11, this part of the record is to be made available to the interested suppliers or contractors, upon their request, after the procurement proceedings are concluded.

42. The Working Group may also wish to consider including text in the revised Guide that would highlight the value of two-way debriefing in appropriate cases, for both procuring entities and suppliers or contractors (as is provided for in some jurisdictions). The Guide might also highlight concerns expressed by the drafters of the 1994 Model Law that, depending on a stage of the procurement proceedings, extensive debriefing requirements might be cumbersome for the procuring entity, particularly in traditional rather than electronic procurement. The requirements of effective debriefing should however always be considered in conjunction with the right of suppliers or contractors concerned to seek review of the procuring entity's decisions under the strengthened provisions of the revised Model Law.

43. In this context, the Working Group may also wish to consider including in the revised Model Law provisions on the timing of notifications. For example, some provisions of the proposed revised Model Law already require that (intended) decisions of the procuring entity should be promptly communicated to suppliers or contractors concerned. The Working Group may wish to consider on a case-by-case basis whether it would be appropriate to require in all cases that notices be given to affected supplier(s) or contractor(s) promptly after the decision has been made. The Working Group might also wish to consider including in the Guide a discussion of interaction of the time within which some of the notices are to be provided with the standstill period.

---

[5] It should be noted that, unlike other similar situations, the requirement to include this information in the record is found only in articles 53 and 56 and not repeated in the article on the record of procurement proceedings itself. This is an inconsistency that the Working Group may wish to eliminate in the revised Model Law.

J. Note by the Secretariat on possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services — a revised text of the Model Law, submitted to the Working Group on Procurement at its sixteenth session

(A/CN.9/WG.I/WP.69 and Add.1-5) [Original: English]

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 8 to 89 of document A/CN.9/WG.I/WP.67, which is before the Working Group at its sixteenth 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 fifteenth session, the Working Group completed the first reading of the proposed revised Model Law contained in a note by the Secretariat (A/CN.9/WG.I/WP.66/Add.1-4). It noted that, although a number of issues were outstanding, including the entire chapter IV, the conceptual framework was agreed upon. It also noted that further research was required for some provisions in particular in order to ensure that they were compliant with the relevant international instruments. The Working Group requested the Secretariat to revise the drafting materials contained in document A/CN.9/WG.I/WP.66/Add.1-4, reflecting its deliberations at the fifteenth session, for further consideration (A/CN.9/668, paras. 11 and 12).

3. The present note is submitted pursuant to the Working Group's requests at its fifteenth session. It sets out the draft revised Model Law that reflects the deliberations at the Working Group's fifteenth session (the "proposed revised Model Law"), except for its chapter IV and provisions on framework agreements allowing for negotiated procedures. The Working Group may wish to recall in this respect that at its fifteenth session it noted difficulties with the completion of the outstanding research and the drafting by the sixteenth session of the Working Group. As regards procurement methods involving negotiations (chapter IV), one delegation agreed to present a conference room paper proposing a revised chapter IV (A/CN.9/668, para. 278). It was also agreed that the drafting of provisions allowing for negotiations in the context of framework agreements should be undertaken together with chapter IV (A/CN.9/668, para. 224).

4. Therefore, the draft of chapter IV contained in addendum 3 to this note merely consolidates the relevant provisions from the 1994 Model Law with consequential changes in the light of the revisions agreed to be made so far to the 1994 Model Law. That addendum also sets out the proposal for a consolidated article on request for proposals and competitive negotiations, which the Working Group had before it but did not consider at its fifteenth session (A/CN.9/668, paras. 210-212). Any additional proposals on provisions for procurement methods involving negotiations will be made available at the session.

5. In accordance with the agreement reached at the Working Group's fifteenth session (A/CN.9/668, para. 280), the documents for the sixteenth session of the Working Group will be posted on the UNCITRAL website upon their availability in various language versions.

A/CN.9/WG.I/WP.69/Add.1 (Original: English)

Note by the Secretariat on possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services - a revised text of the Model Law, submitted to the Working Group on Procurement at its sixteenth session

ADDENDUM

This note sets out the preamble and articles 1-14 of chapter I (General provisions) of a revised text for the Model Law.

The Working Group's attention is drawn to draft articles 7 and 12, consideration of which was deferred to a later stage.

Draft articles 2, 4 (2), 10 (8) and 13 were revised pursuant to the Working Group's request at its fifteenth session. The revised text of these articles is therefore before the Working Group for the first time.

At its fifteenth session, the Working Group approved the remaining provisions of the proposed revised Model Law included in this addendum, either without change or as revised at that session.

The Secretariat's comments are included in the accompanying footnotes.

UNCITRAL MODEL LAW ON PUBLIC PROCUREMENT[1]

Preamble[2]

WHEREAS the [Government] [Parliament] of ... considers it desirable to regulate procurement so as to promote the objectives of:

(a) Maximizing economy and efficiency in procurement;

(b) Fostering and encouraging participation in procurement proceedings by suppliers and contractors, especially where appropriate, participation by suppliers and contractors regardless of nationality, and thereby promoting international trade;

(c) Promoting competition among suppliers and contractors for the supply of the subject matter of the procurement;

(d) Providing for the fair and equitable treatment of all suppliers and contractors;

(e) Promoting the integrity of, and fairness and public confidence in, the procurement process; and

(f) Achieving transparency in the procedures relating to procurement,

Be it therefore enacted as follows.

---

[1] The title change reflects the Working Group's decision (A/CN.9/668, para. 270).

[2] The Working Group has approved the preamble (A/CN.9/668, para. 271).

CHAPTER I. GENERAL PROVISIONS

Article 1. Scope of application

This Law applies to all procurement by procuring entities.[3]

Article 2. Definitions[4]

For the purposes of this Law:

(a) "Procurement" means the acquisition by any means of goods, construction or services ("subject matter of the procurement");[5]

(b) "Procuring entity" means:

(i) *Option I*

Any governmental department, agency, organ or other unit, or any subdivision thereof, in this State that engages in procurement, except ...; (and)

Option II

Any department, agency, organ or other unit, or any subdivision thereof, of the ("Government" or other term used to refer to the national Government of the enacting State) that engages in procurement, except ...; (and)

(ii) (The enacting State may insert in this subparagraph and, if necessary, in subsequent subparagraphs, other entities or enterprises, or categories thereof, to be included in the definition of "procuring entity");[6]

(c) "Supplier or contractor" means, according to the context, any potential party or party to the procurement proceedings with the procuring entity;[7]

---

[3] The draft article has been revised pursuant to the Working Group's instruction (A/CN.9/668, para. 17). It was agreed that the Guide would point out that States in situations of economic and financial crisis might exempt the application of the Model Law through legislative measures (which would themselves receive the scrutiny of the legislature) (A/CN.9/668, para. 63).

[4] The draft article has been revised pursuant to the Working Group's instructions (A/CN.9/668, paras. 272-274). The Working Group may wish to consider the introduction of a glossary of main terms in the Guide to Enactment, to complement article 2 of the text, and whether to present the definitions in alphabetical order.

[5] The Working Group has approved this definition revised from the 1994 text (article 2 (a)) (A/CN.9/668, para. 273 (b)). It was agreed (A/CN.9/668, para. 273 (e)) that the Guide accompanying this definition would set out the substance of the definitions of the goods, construction and services, which were taken from the 1994 text (article 2 (c) to (e)). It was also agreed at that session that the Guide would explain that the words "by any means" in the subparagraph intended to indicate that procurement was carried out not only through acquisition by purchase but also by other means such as lease, and should not be read as referring to unlawful acts (A/CN.9/668, para. 273 (c)). The Working Group may wish to draw on equivalent terms in Article I.2 of the WTO Agreement on Government Procurement (1994, GPA) and the provisionally agreed text of the revised GPA Article II.2 (b): "purchase, lease and rental or hire purchase, with or without an option to buy".

[6] The Working Group has approved this definition taken from the 1994 text (article 2 (b)) (A/CN.9/668, paras. 272-274).

[7] The Working Group has approved this definition, taken from the 1994 text (article 2 (f)) as amended by the Working Group at its fourteenth session (A/CN.9/668, paras. 272-274),

(d) "Procurement contract" means a contract between the procuring entity and a supplier or contractor resulting from procurement proceedings;[8]

(e) "[Submission] security" means a security required from suppliers or contractors by the procuring entity and provided to the procuring entity to secure the fulfilment of any obligation referred to in article [14 (1) (f)] and includes such arrangements as bank guarantees, surety bonds, standby letters of credit, cheques on which a bank is primarily liable, cash deposits, promissory notes and bills of exchange. For the avoidance of doubt, the term excludes any security for the performance of the contract;[9]

(f) "Currency" includes monetary unit of account;[10]

(g) "Submission(s)" means tender(s), proposal(s), offer(s), quotation(s) and bid(s) referred to collectively or generically;[11]

(h) "Solicitation" means request to suppliers or contractors to present submissions;[12]

(i) "Successful submission" means the submission ascertained by the procuring entity to be successful in accordance with the evaluation criteria set out in the solicitation documents pursuant to article [12] of this Law;[13]

(j) "Solicitation documents" means all documents for solicitation of submissions;[14]

(k) "Description(s)" means the description provided in accordance with article [11] of this Law;[15]

[(l) "Open solicitation" means solicitation in ... (the enacting State specifies the official gazette or other official publication in which the solicitation is to be published);][16]

[(m) "Direct solicitation" means solicitation from [chosen/identified] supplier(s) or contractor(s);][17]

(n) A "framework agreement procedure" is a procurement conducted in two stages: a first stage to select supplier(s) or contractor(s) to be the party or parties to a framework agreement with a procuring entity, and a second stage to award a

---

replacing the phrase "the procurement proceedings" with "a procurement contract" (A/CN.9/664, para. 24).

8 The Working Group has approved this definition taken from the 1994 text (article 2 (g)) (A/CN.9/668, paras. 272-274).

9 The Working Group has approved this definition, which is based on article 2 (h) of the 1994 text and amended in the light of the proposed article 14 (A/CN.9/668, paras. 272-274).

10 The Working Group has approved this definition taken from the 1994 text (article 2 (i)) (A/CN.9/668, paras. 272-274).

11 New definition as approved by the Working Group (A/CN.9/668, paras. 272-274).

12 Ibid.

13 Ibid.

14 Ibid.

15 New definition as approved by the Working Group (A/CN.9/668, para. 273 (d)). This paragraph is based on articles 16 and 27 (d) of the 1994 text.

16 The Working Group has agreed to place this new definition in square brackets in article 2 for further consideration (A/CN.9/668, para. 273 (a)).

17 Ibid.

procurement contract under the framework agreement to a supplier or contractor party to the framework agreement;[18]

(o) A "framework agreement" is an agreement between the procuring entity and the selected supplier(s) or contractor(s) concluded upon completion of the first stage of the framework agreement procedure;[19]

(p) A "closed framework agreement" is a framework agreement to which no supplier or contractor who is not initially a party to the framework agreement may subsequently become a party;[20]

(q) An "open framework agreement" is a framework agreement to which supplier(s) or contractor(s) in addition to the initial parties may subsequently become a party or parties;[21]

(r) A "framework agreement procedure with second stage competition" is a framework agreement procedure in which certain terms and conditions of the procurement, which cannot be established with sufficient precision when the framework agreement is concluded, are to be established or refined through second stage competition;[22]

(s) A "framework agreement procedure without second stage competition" is a framework agreement procedure without a second-stage competition to establish or refine the terms and conditions of the procurement;[23]

[(t) A "material change in the description of the subject matter of the procurement or all other terms and conditions of the procurement" means any amendment that would make the submissions from any suppliers or contractors parties to the framework agreement non-responsive, that would render previously non-responsive submissions responsive, and that [could] [would][24] change the status of suppliers or contractors with regard to their qualification.][25]

---

18 The Working Group has agreed to move this new definition from the proposed article 49 in A/CN.9/WG.I/WP.66/Add.4 to article 2 for further consideration (A/CN.9/668, para. 273 (f)).

19 Ibid.

20 Ibid. The Working Group may also wish to consider whether, so as to avoid confusion in Chapter VI, this detailed definition might assist in interpreting the provisions of the Chapter. See, further, footnote 39 in A/CN.9/WG.I/WP.66/Add.4. If detailed definitions are to be retained in this article, the Working Group may wish to include, to provide balance, further definitions (such as of electronic reverse auctions).

21 Ibid.

22 Ibid.

23 Ibid.

24 The Working Group may wish to consider whether "could" might be a more appropriate term than the previously appearing "would", as elements of the qualification criteria are subjective (see proposed article 10).

25 The Working Group has agreed to move this new definition from the proposed article 51 in A/CN.9/WG.I/WP.66/Add.4 to article 2, for further consideration (A/CN.9/668, para. 273 (f)) together with any proposals that might be submitted by delegates on the subject (A/CN.9/668, para. 237). It has also agreed that the substance of the deleted final words from the original draft in A/CN.9/WG.I/WP.66/Add.4 should be reflected in the Guide, as an explanation of the policy considerations underlying the definition (A/CN.9/668, paras. 236-237).

Article 3. International obligations of this State relating to procurement [and intergovernmental agreements within (this State)][26]

To the extent that this Law conflicts with an obligation of this State under or arising out of any

(a) Treaty or other form of agreement to which it is a party with one or more other States,

(b) Agreement entered into by this State with an intergovernmental international financing institution, or

(c) Agreement between the federal Government of [name of federal State] and any subdivision or subdivisions of [name of federal State], or between any two or more such subdivisions,

the requirements of the treaty or agreement shall prevail; but in all other respects, the procurement shall be governed by this Law.

Article 4. Procurement regulations[27]

(1) The ... (the enacting State specifies the organ or authority authorized to promulgate the procurement regulations) is authorized to promulgate procurement regulations to fulfil the objectives and to carry out the provisions of this Law.

(2) The procurement regulations shall include a code of conduct for officers or employees of procuring entities, addressing, inter alia, the prevention of conflicts of interest in public procurement and where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declarations of interest in particular public procurements, screening procedures and training requirements.[28]

Article 5. Publication of legal texts[29]

(1) Except as provided for in paragraph 2 of this article, the text of this Law, procurement regulations and other legal texts of general application in connection with procurement covered by this Law, and all amendments thereto, shall be promptly made accessible to the public and systematically maintained.

(2) Judicial decisions and administrative rulings with precedent value in connection with procurement covered by this Law shall be made available to the public and updated if need be.

---

[26] The Working Group has approved this article reproducing article 3 of the 1994 text (A/CN.9/668, para. 20).

[27] The Working Group has approved this article, which is based on article 4 of the 1994 text, with the revisions to new paragraph (2) (A/CN.9/668, paras. 26-27).

[28] It was agreed by the Working Group that the paragraph should be supplemented by provisions in the Guide reproducing article 8 (5) of the United Nations Convention against Corruption (UNCAC), and discussing implementation issues (A/CN.9/668, paras. 28-29).

[29] The Working Group has approved this article, which is based on article 5 of the 1994 text (A/CN.9/668, para. 32).

Article 6. Information on planned procurement activities[30]

Procuring entities may publish information regarding planned procurement activities for forthcoming months or years. Such publication does not constitute a solicitation and does not obligate the procuring entity to issue solicitations for the procurement opportunities identified.

Article 7. Rules concerning methods, techniques and procedures for procurement and type of solicitation[31, 32]

(1) Except as otherwise provided by this Law, a procuring entity shall conduct procurement by means of tendering proceedings.[33]

(2) A procuring entity may use a method of procurement other than tendering only in accordance with paragraphs (3) to (5) and (7) of this article, and shall choose the most competitive[34] method, technique and procedure appropriate in the circumstances of the given procurement.[35]

(3) Where it is feasible to provide detailed description of the subject matter of the procurement and establish the evaluation criteria in quantifiable or monetary terms, but where the use of tendering proceedings would not be appropriate for reasons of economic efficiency [economy and efficiency] [economy or efficiency],[36] a procuring entity may use a method of procurement referred to in chapter III of this law, provided that the conditions for the use of the method concerned, as specified in the relevant provisions of Chapter III, are satisfied.[37]

(4) Where it is not feasible for the procuring entity to formulate detailed description of the subject matter of the procurement and/or establish the evaluation criteria in quantifiable or monetary terms, [or in other instances listed in article 37

---

30 The Working Group has approved the draft article as revised (A/CN.9/668, paras. 37-38), and has agreed that the Guide should explain the benefits of such publication for strategic and operational planning, and should emphasize that effective pre-advertisement of forthcoming procurement should not facilitate collusion (A/CN.9/668, para. 37).

31 The Working Group has deferred the consideration of this revised article (A/CN.9/668, para. 70).

32 The title was changed to reflect the revisions to paragraph (2) of the draft article as approved by the Working Group (A/CN.9/668, paras. 44-45).

33 The Working Group has approved the paragraph, which is based on provisions of article 18 (1) of the 1994 text (A/CN.9/668, para. 40).

34 The Working Group may wish to consider how the Guide should explain the notion of "competitive", and the extent to which it can be facilitated even without fully "open" procedures.

35 The Working Group has approved the revised paragraph, which is based on provisions of article 18 of the 1994 text (A/CN.9/668, paras. 44-45). The intended meaning of the phrase "appropriate in the circumstances of the given procurement" is to be explained in the Guide (A/CN.9/668, paras. 42-43).

36 The Working Group may wish to consider the extent to which the reference to "economic efficiency" in this article should be aligned with similar references elsewhere in the text (which were previously not consistent in the use of terminology, such as proposed articles 20, 34 and 48 (2)). See also the commentary to those proposed articles.

37 The Working Group has approved the revised paragraph, which is based on article 18 of the 1994 text (A/CN.9/668, paras. 46-48).

of this Law,][38] a procuring entity may use a method of procurement referred to in chapter IV of this Law, provided that the conditions for the use of that method, as specified in the relevant provisions of that chapter are satisfied.[39]

(5) A procuring entity may use electronic reverse auction as a [stand-alone] method of procurement or in conjunction with other methods of procurement [as appropriate] in accordance with the provisions of chapter V of this Law, provided that the conditions for the use of electronic reverse auctions in that Chapter are satisfied.[40]

(6)[41] (a) Without prejudice to article 24 of this Law, a procuring entity using a method of procurement other than tendering in accordance with paragraphs (3) to (5) of this article shall use open solicitation unless:[42]

(i) The conditions for the use of direct solicitation specified in articles [34, 36, 39 and 40] are present; or

(ii) Direct solicitation is the only means of ensuring confidentiality or is required by reason of the national interest;

provided that in using direct solicitation, the procuring entity solicits submissions from a sufficient number of suppliers or contractors to ensure effective competition;

(b) Where direct solicitation is used to ensure confidentiality, and where the procuring entity determines therefore that the procedures set out in articles 6, 15 (9) as regards public disclosure, 20, 22 (2), 24, or [… the provisions on public disclosure in chapter VII. Review are to be added] of this Law should not apply, it shall include in the record of the procurement required under article 22 of this Law, a statement of the grounds and circumstances on which it relied to justify its determination;[43]

(c) Open solicitation shall include the publication of the invitation to present submissions in accordance with article 24 (2), except:[44]

---

38 The wording in square brackets was included for consideration by the Working Group together with chapter IV, in the light of the additional conditions for use listed in the proposed article 37 (itself based on article 19 of the 1994 text). These additional conditions are not covered by cases listed in the opening phrase to this subparagraph: "Where it is not feasible for the procuring entity to formulate detailed description of the subject matter of the procurement and/or establish the evaluation criteria in quantifiable or monetary terms." The additional conditions listed in article 37 refer to such situations as urgency, the failure of tendering proceedings, and national security and national defence considerations.

39 The Working Group has approved the paragraph, which is based on articles 18 and 19 (1) (a) of the 1994 text (A/CN.9/668, para. 49).

40 The Working Group has approved the paragraph (A/CN.9/668, para. 50).

41 The Working Group has deferred the consideration of the revised paragraph, which was presented as paragraph (7) in the previous version (A/CN.9/668, paras. 66-67). It was noted that the provisions of the paragraph were based on a number of repetitive provisions of the 1994 text, contained in articles 17, 23, 24 and 37. The Working Group may wish to consider whether the revised order of presentation of the article assists the reader in following its provisions.

42 The subparagraph is as revised by the Working Group (A/CN.9/668, para. 66 (a) and (b)).

43 The subparagraph is as provisionally approved by the Working Group, with all cross-references retained and updated (A/CN.9/668, para. 66 (e)).

44 The subparagraph is as revised by the Working Group (A/CN.9/668, para. 66 (f)). However, the Working Group may wish to consider whether the current drafting indicates that article 24 (1)

(i) Where the procurement proceedings are limited solely to domestic suppliers or contractors pursuant to article [9 (1)]; or

(ii) The procuring entity determines, in view of the low value of the subject matter of the procurement, that only domestic suppliers or contractors are likely to be interested in presenting submissions, in which case it shall include in the record of the procurement required under article [22] of this Law, a statement of the grounds and circumstances on which it relied to justify its determination. The enacting State shall establish in the procurement regulations a value threshold for the purposes of invoking the exception referred to in this paragraph.[45]

(7)[46] (a) A procuring entity may engage in single-source procurement in the following exceptional circumstances:

(i) The goods, construction or services are available only from a particular supplier or contractor, or a particular supplier or contractor has exclusive rights in respect of the goods, construction or services, such that no reasonable alternative or substitute exists, and the use of a competitive[47] procurement method would therefore not be possible;[48]

(ii) There is an urgent need for the subject matter of the procurement, and engaging in tendering proceedings or any other method of procurement because of the time involved in using those methods would therefore be impractical, provided that the circumstances giving rise to the urgency were neither foreseeable by the procuring entity nor the result of dilatory conduct on its part;[49]

(iii) The procuring entity, having procured goods, equipment, technology or services from a supplier or contractor, determines that additional supplies must be procured from that supplier or contractor for reasons of standardization or

---

might not apply, and if so to delete the cross-reference.

45 The subparagraph is as revised by the Working Group (A/CN.9/668, para. 66 (g)).

46 The Working Group has approved the revised paragraph (presented as paragraph (6) of draft article 7) (A/CN.9/668, paras. 51-64). It was based on article 22 of the 1994 text, the provisions of which were to be retained in full except for its paragraph (1) (e), which was to be deleted (A/CN.9/668, para. 58). The decisions made in connection with related provisions (A/CN.9/668, para. 66 (b)), and the addition of new provisions in the paragraph, necessitated splitting the provisions in subparagraphs (a), (b) and (c). It was agreed that the Guide accompanying the paragraph would highlight that some jurisdictions might require procuring entities to obtain a prior approval from a higher-level authority before engaging in single-source procurement (A/CN.9/668, para. 53).

47 As to the notion of "competitive", see footnote 34 above.

48 The Working Group has approved the subparagraph, which is based on article 22 (1) (a) of the 1994 text (A/CN.9/668, para. 55). It was agreed that the Guide accompanying the subparagraph would provide sufficient explanations about the intended scope of the provisions and specific examples.

49 The Working Group has approved the revised subparagraph, which is based on article 22 (1) (b) of the 1994 text (A/CN.9/668, para. 56). It was agreed that the Guide would (a) explain that single-source procurement was possible only if competitive negotiations were precluded for reasons of urgency (if there were only one supplier or contractor, single-source procurement would be available under subparagraph (a) irrespective of that urgency) and (b) stress that the justification extends only to the urgent need, and not to the subject matter of the procurement, so as to avoid open-ended procurement justified on the basis of an initial urgent need (see footnote 26 in A/CN.9/WG.I/WP.66/Add.1).

because of the need for compatibility with existing goods, equipment, technology or services, taking into account the effectiveness of the original procurement in meeting the needs of the procuring entity, the limited size of the proposed procurement in relation to the original procurement, the reasonableness of the price and the unsuitability of alternatives to the goods or services in question;[50]

(iv) In the case of procurement for reasons of national defence or national security, where the procuring entity determines that the use of any other method of procurement is not appropriate;[51]

(v) Subject to approval by ... (the enacting State designates an organ to issue the approval), and following public notice and adequate opportunity to comment,[52] a procuring entity may engage in single-source procurement when procurement from a particular supplier or contractor is necessary in order to promote a policy specified in article 12 (4) (a), provided that procurement from no other supplier or contractor is capable of promoting that policy;[53]

(b) The procuring entity shall cause a notice of the single-source procurement to be published in ... (each enacting State specifies the official gazette or other official publication in which the notice is to be published). The notice shall not confer any rights on suppliers or contractors, including any right to have a submission evaluated;[54]

(c) The procedure set out in paragraph (6) (b) of this article and articles [6,][55] 20, 22 (2) or [[…] *the provisions on public disclosure in chapter VII. Review are to be added*] of this Law shall not apply to single-source procurement where considerations of confidentiality are involved or by reason of the national interest or in the case of urgency referred to in subparagraph (a) (ii) of this paragraph. The procuring entity shall include in the record of the procurement required under article [22] of this Law, a statement of the grounds and circumstances on which it relied to justify its determination.[56]

(8) The procuring entity shall include in the record required under article [22] a statement of the grounds and circumstances on which it relied to justify the use of

---

[50] The Working Group has approved the revised subparagraph, which is based on article 22 (1) (d) of the 1994 text (A/CN.9/668, para. 57). It was agreed that the Guide would explain that the use of single-source procurement for subsequent purchases should be exceptional, and that the preferable option for a series of purchases would be a framework agreement. If there were none, single-source procurement for a subsequent purchase should be limited both in size and in time (ibid.).

[51] This new subparagraph implements a request of the Working Group (A/CN.9/668, para. 59), and that the Guide would explain that "national defence or national security" could equally apply to regional defence or security issues (ibid).

[52] The Working Group may wish to consider whether an "opportunity to comment" would include review of the decision and whether this reference is necessary.

[53] The Working Group has decided to include the wording of article 22 (2) of the 1994 text (A/CN.9/668, para. 61).

[54] This new paragraph implements a request of the Working Group (A/CN.9/668, para. 66 (b)). The Working Group may wish to consider whether the final sentence is consistent with the ambit of the review provisions (Chapter VII).

[55] The Working Group may wish to consider cross-refer to article 6.

[56] See first part of footnote 53, above.

any procurement method other than tendering or the use of direct solicitation, in accordance with paragraphs (2) to (7) of this article.[57]

Article 8. Communications in procurement[58]

(1) Any document, notification, decision and other information generated in the course of a procurement and communicated as required by this Law, including in connection with review proceedings under chapter [VII] or in the course of a meeting, or forming part of the record of procurement proceedings under article [22], shall be in a form that provides a record of the content of the information and that is accessible so as to be usable for subsequent reference.

(2) Communication of information between suppliers or contractors and the procuring entity referred to in articles [14 (1) (d),[59] 15 (6) and (9),[60] 19 (4),[61] 30 (2) (a),[62] 32 (1),[63] …,[64] and in the case of direct solicitation in accordance with article 7 (6) (a),[65]] may be made by means that do not provide a record of the content of the information on the condition that, immediately thereafter, [the sender gives the recipient a] [confirmation of the communication] [is given to the recipient of the communication] in a form that provides a record of the content of the information and that is accessible so as to be usable for subsequent reference.

(3) The procuring entity, when first soliciting the participation of suppliers or contractors in the procurement proceedings, shall specify:

(a) Any requirement of form;

(b) The means [to be used to communicate information] [of communication] [by] [from] or on behalf of the procuring entity to a supplier or contractor or to the public or [by] [from] a supplier or contractor to the procuring entity or other entity acting on its behalf;

(c) The means to be used to satisfy all requirements under this Law for information to be in writing or for a signature; and

(d) The means to be used to hold any meeting of suppliers or contractors.

(4) [The means referred to in the preceding paragraph shall be] [The procuring entity shall use means of communication that are] readily capable of being utilized

---

[57] The Working Group has approved the paragraph (A/CN.9/668, para. 69).

[58] The Working Group has approved the draft article, which is based on article 5 bis as preliminarily approved by the Working Group at its twelfth session (A/CN.9/640, paras. 17-25), subject to updating the cross-references (A/CN.9/668, para. 71).

[59] Corresponds to the previous reference to article 32 (1) (d).

[60] Corresponds to the previous reference to article 7 (4) and (6).

[61] Corresponds to the previous reference to article 36 (1), and the Working Group may wish to amend or remove it, depending on the finalization of the Working Group's revisions to the proposed article 19. The issue is whether or not a procurement contract can enter into force on the basis of, for example, a telephone call, followed by written confirmation. See, also, article 19 (9) below (drawing on article 36 (4) of the 1994 text) regarding the meaning of dispatch.

[62] Corresponds to the previous reference to the same article.

[63] Corresponds to the previous reference to article 34 (1).

[64] The missing reference is to the previous article 44 (b) to (f) (selection procedure with consecutive negotiation). It will be updated in the light of the revisions to chapter IV.

[65] Corresponds to the previous reference to articles 37 (3) and 47 (1) of the 1994 text.

with those in common use by suppliers or contractors in the relevant context. [The means to be used to hold] [In addition, the procuring entity shall hold] any meeting of suppliers or contractors [using means that] [shall in addition] ensure that suppliers or contractors can fully and contemporaneously participate in the meeting.

(5) [The procuring entity shall put in place appropriate] [Appropriate] measures [shall be put in place] to secure the authenticity, integrity and confidentiality of information concerned.[66]

Article 9. Participation by suppliers or contractors[67]

(1) Suppliers or contractors are permitted to participate in procurement proceedings without regard to nationality, except in cases in which the procuring entity decides, on grounds specified in the procurement regulations or according to other provisions of law, to limit participation in procurement proceedings on the basis of nationality.

(2) A procuring entity that limits participation on the basis of nationality pursuant to paragraph (1) of this article shall include in the record of the procurement proceedings a statement of the grounds and circumstances on which it relied.

(3) The procuring entity, when first soliciting the participation of suppliers or contractors in the procurement proceedings, shall declare to them that they may participate in the procurement proceedings regardless of nationality, a declaration which may not later be altered. However, if it decides to limit participation pursuant to paragraph (1) of this article, it shall so declare to them.

Article 10. Qualifications of suppliers and contractors[68]

(1) This article applies to the ascertainment by the procuring entity of the qualifications of suppliers or contractors at any stage of the procurement proceedings.

(2) Suppliers or contractors must meet such of the following criteria as the procuring entity considers appropriate in the particular procurement proceedings:

(i) That they possess the necessary professional and technical qualifications, professional and technical competence, financial resources, equipment and other physical facilities, managerial capability, reliability, experience, ethical standards, and reputation, and the personnel, to perform the procurement contract;

(ii) That they have legal capacity to enter into the procurement contract;

(iii) That they are not insolvent, in receivership, bankrupt or being wound up,

---

[66] Various provisions in this article were drafted in the passive voice, and the Working Group may wish to consider the alternatives in square brackets, which are drafted in the active voice, to make it clear that the obligations concerned are those of the procuring entity.

[67] The Working Group has approved the draft article, which reproduces article 8 of the 1994 text (A/CN.9/668, para. 72).

[68] The Working Group has approved the revised draft article, which is based on article 6 of the 1994 text, subject to updating the cross-references as appropriate (A/CN.9/668, paras. 75-76 and 109).

their affairs are not being administered by a court or a judicial officer, their business activities have not been suspended, and they are not the subject of legal proceedings for any of the foregoing;

(iv) That they have fulfilled their obligations to pay taxes and social security contributions in this State;

(v) That they have not, and their directors or officers have not, been convicted of any criminal offence related to their professional conduct or the making of false statements or misrepresentations as to their qualifications to enter into a procurement contract within a period of ... years (the enacting State specifies the period of time) preceding the commencement of the procurement proceedings, or have not been otherwise disqualified pursuant to administrative suspension or debarment proceedings.

(3) Subject to the right of suppliers or contractors to protect their intellectual property or trade secrets, the procuring entity may require suppliers or contractors participating in procurement proceedings to provide such appropriate documentary evidence or other information as it may deem useful to satisfy itself that the suppliers or contractors are qualified in accordance with the criteria referred to in paragraph (2).

(4) Any requirement established pursuant to this article shall be set forth in the prequalification documents, if any, and in the solicitation documents, and shall apply equally to all suppliers or contractors. A procuring entity shall impose no criterion, requirement or procedure with respect to the qualifications of suppliers or contractors other than those provided for in this Law.

(5) The procuring entity shall evaluate the qualifications of suppliers or contractors in accordance with the qualification criteria and procedures set forth in the prequalification documents, if any, and in the solicitation documents.

(6) Subject to article 9 (1), the procuring entity shall establish no criterion, requirement or procedure with respect to the qualifications of suppliers or contractors that discriminates against or among suppliers or contractors or against categories thereof on the basis of nationality, or that is not objectively justifiable.

(7) Notwithstanding paragraph (6) of this article, the procuring entity may require the legalization of documentary evidence provided by the supplier or contractor presenting the successful submission to demonstrate its qualifications in procurement proceedings. In doing so, the procuring entity shall not impose any requirements as to the legalization of the documentary evidence other than those provided for in the laws of this State relating to the legalization of documents of the type in question.

(8) (a) The procuring entity shall disqualify a supplier or contractor if it finds at any time that the information submitted concerning the qualifications of the supplier or contractor was false;

(b) A procuring entity may disqualify a supplier or contractor if it finds at any time that the information submitted concerning the qualifications of the supplier or contractor was materially inaccurate or materially incomplete;

(c) Other than in a case to which subparagraph (a) of this paragraph applies, a procuring entity may not disqualify a supplier or contractor on the ground that information submitted concerning the qualifications of the supplier or contractor was inaccurate or incomplete in a non-material respect. The supplier or contractor

may, however, be disqualified if it fails to remedy such deficiencies promptly upon request by the procuring entity;

(d) The procuring entity may require a supplier or contractor that has been prequalified in accordance with article 15 of this Law 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.[69]

Article 11. Rules concerning description of the subject matter of the procurement, and the terms and conditions of the procurement contract or framework agreement[70]

(1) The procuring entity shall set out in the solicitation documents the description of the subject matter of the procurement that it will use in [the examination of submissions] [assessing whether a submission is responsive].[71] Where thresholds are set by the procuring entity for identifying non-responsive submissions, the procuring entity shall also set out the thresholds and the manner in which they are to be applied in the [examination] [assessment] in the solicitation documents.[72]

(2) No description of the subject matter of a procurement that creates an obstacle to the participation of suppliers or contractors in the procurement proceedings, including any obstacle based on nationality, shall be included or used in the prequalification documents, if any, or in the solicitation documents.

(3) The description of the subject matter of the procurement may include specifications, plans, drawings, designs, requirements concerning testing and test methods, packaging, marking or labelling or conformity certification, and symbols and terminology.

(4) To the extent practicable, any description of the subject matter of the procurement shall be objective, functional and generic, and shall set out the relevant technical and quality characteristics or the performance characteristics of that

---

[69] This subparagraph was added to reflect the preference expressed at the Working Group's fifteenth session for removing the content of the subparagraph from the last paragraph of article 15 and merging it with paragraph (8) of article 10 (A/CN.9/668, para. 109).

[70] The Working Group has approved the revised draft article, which is based on article 16 of the 1994 text (A/CN.9/668, paras. 78-80). It was agreed that the Guide to Enactment accompanying the article would draw the attention of enacting States to practices in some jurisdictions, proved to be useful, to require including in the solicitation documents the reference source for technical terms used (such as the European Common Procurement Vocabulary).

[71] The Working Group may recall that the term "examination" is considered to refer to the ascertainment of responsiveness of tenders (see para. 41 (f) of A/CN.9/WG.I/WP.68/Add.1, referring to article 34 of the 1994 text), and may wish therefore to consider whether to use this generic term, or to use a descriptive phrase, and whether to include a definition or cross reference to article 32 (2) (a), which contains a definition of responsiveness. Further explanation in the Guide would be provided, as appropriate.

[72] The provisions are new, and are based on model legislative provision 11 (d) of the UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects (the PFIP provisions).

subject matter.[73] There shall be no requirement for or reference to a particular trademark or trade name, patent, design or type, specific origin or producer unless there is no sufficiently precise or intelligible way of describing the characteristics of the subject matter of the procurement and provided that words such as "or equivalent" are included.[74]

(5) (a) Standardized features, requirements, symbols and terminology relating to the technical and quality characteristics of the subject matter of the procurement shall be used, where available, in formulating any description of the subject matter of the procurement to be included in the prequalification documents, if any, or in the solicitation documents;

(b) Due regard shall be had for the use of standardized trade terms, where available, in formulating the terms and conditions of the procurement and the contract to be entered into as a result of the procurement proceedings, and in formulating other relevant aspects of the prequalification documents, if any, or solicitation documents.

Article 12. Rules concerning evaluation criteria [the evaluation of submissions][75]

(1) [In [examining,][76] evaluating and comparing submissions and determining the successful submission] [In order to determine the successful submission] (the evaluation procedure), the procuring entity shall:

(a) Use only [evaluation] criteria [(the "evaluation criteria")][77] that relate to the subject matter of the procurement [and have been set out in the solicitation documents];

(b) [Use only those [evaluation] criteria that have been set out in the solicitation documents; and

(c)] Apply [them] [the [evaluation] criteria] in the manner that has been disclosed in the solicitation documents.

(2) Any non-price [evaluation] criteria shall, to the extent practicable, be objective and [quantifiable] [quantified]. All [evaluation] criteria shall be given a relative

---

[73] The Guide would explain that the caveat introducing this paragraph is included to allow technical or input-based specifications where appropriate.

[74] The wording of the second sentence has been aligned with article VI (3) of the GPA, pursuant to the decision of the Working Group (A/CN.9/668, para. 79).

[75] The Working Group has requested the Secretariat to restructure and revise the draft article and deferred the consideration of the revised article to a later date (A/CN.9/668, paras. 85 and 87). The draft article is based on articles 27 (e), 34 (4), 38 (m), 39 and 48 (3) of the 1994 text and model legislative provision 11 (d) of the PFIP Provisions. The Working Group may consider that extensive discussion in the Guide to support the article will be critical.

[76] See footnote 70, above. The Working Group may recall that the term "examination" is considered to refer to the ascertainment of responsiveness of tenders (see para. 41 (f) of A/CN.9/WG.I/WP.68/Add.1), and may wish therefore to remove it to the preceding article.

[77] The Working Group may wish to consider whether a definition is necessary or useful, and where it should be located, if so.

weight in the evaluation procedure, [and/or], wherever practicable, shall be expressed in monetary terms.[78]

(3) The [evaluation] criteria may concern consider only:[79]

(a) The price, subject to any margin of preference applied pursuant to paragraph (4) (b) of this article;

(b) The cost of operating, maintaining and repairing goods or construction, the time for delivery of goods, completion of construction or provision of services, the functional characteristics of goods or construction, the terms of payment and of guarantees in respect of the subject matter of the procurement, subject to any margin of preference applied pursuant to paragraph (4) (b) of this article;

(c) Where the procurement is conducted in accordance with article … [two-envelope tendering] or with chapter IV, and where relevant, the qualifications, experience, reputation, reliability and professional and managerial competence of the supplier or contractor and of the personnel to be involved in providing the services, subject to any margin of preference applied pursuant to paragraph (4) (b) of this article.

(4) If authorized by the procurement regulations (and subject to approval by ... (the enacting State designates an organ to issue the approval),) a procuring entity in the evaluation procedure may in addition:[80]

(a) [In determining the lowest evaluated tender][81] Consider the effect that acceptance of a submission would have on the balance of payments position and foreign exchange reserves of [this State], the countertrade arrangements offered by suppliers or contractors, the extent of local content, including manufacture, labour and materials, in goods, construction or services being offered by suppliers or contractors, the economic development potential offered by submissions, including domestic investment or other business activity, the encouragement of employment, the reservation of certain production for domestic suppliers, the transfer of technology and the development of managerial, scientific and operational skills [... (the enacting State may expand this subparagraph by including additional criteria)];

(b) Grant a margin of preference for the benefit of submissions for construction by domestic contractors, for the benefit of submissions for domestically produced goods or for the benefit of domestic suppliers of services.

---

78 The paragraph is based on article 34 (4) (b) (ii) of the 1994 text. The Working Group may wish to consider whether the qualification “wherever practicable” is correctly located, whether there is a substantive difference between expression in monetary terms and “quantified”, whether “quantifiable” and “given a relative weight” express the same or different requirements, and whether the provisions are sufficient to prevent any change to the weighting.

79 The paragraph is based on article 34 (4) (c) (i) and (ii), article 39 (1) (a)-(c), and article 48 (3), of the 1994 text. The Working Group may wish to consider whether there could be additions to the list (such as aesthetic or environmental criteria), which would be subject to the requirements of paragraph (2), ensuring they are objective, quantifiable and weighted wherever practicable.

80 The paragraph is based on the provisions of article 34 (4) (c) (iii) and (iv) and (d) repeated in article 39 (1) (d) and (e) and (2), of the 1994 text.

81 The Working Group may recall that article 34 (4) (c) of the 1994 text permitted these factors to be taken into account only where the evaluation would be on the basis of lowest evaluated tender (and not lowest price tender), and may wish to include the same restriction here.

The margin of preference shall be calculated in accordance with the procurement regulations and reflected in the record of the procurement proceedings;[82]

(c) [In determining the lowest evaluated tender][83] Take into account national defence and security considerations.

(5) The procuring entity shall set out in the solicitation documents:[84]

(a) All [evaluation] criteria established pursuant to this article, including any margin of preference; and

(b) Where any criteria other than price are to be used in the evaluation procedure, the relative weight to be accorded to each [evaluation] criterion (including the price) and the manner in which the criteria are to be applied in the evaluation procedure.

[(6) The evaluation procedure shall be conducted by applying the [evaluation] criteria in the manner set out in the solicitation documents, to determine the successful submission, as follows:[85]

(a) The lowest price tender, or the [best] [lowest][86] evaluated tender, for proceedings conducted under Chapter II, and articles [35 and 39] of this Law;

(b) The proposal with the lowest price, or the proposal with the best combined evaluation in terms of the criteria other than price and the price[87] for proceedings conducted under article [36] of this Law;

(c) The lowest-priced quotation meeting the needs of the procuring entity,[88] for proceedings conducted under article [37] of this Law;

(d) The proposal best meeting the needs of the procuring entity,[89] for proceedings conducted under article [40] of this Law; or

(e) The best and final offer, for proceedings conducted under article [41] of this Law.]

---

82 The Working Group may wish to consider whether a margin of preference can only be an alternative to the inclusion of socioeconomic factors, and not an additional criterion.

83 See footnote 80, above.

84 The paragraph is based on the provisions of article 27 (e) repeated in article 38 (m), of the 1994 text. The Working Group may consider that article 27 (Contents of solicitation documents) could alternatively contain this provision.

85 The Working Group may wish to consider the need for and location of these provisions.

86 See section II.B of A/CN.9/WG.I/WP.68 for a discussion of these terms.

87 The Working Group may wish to consider the extent to which these notions are substantively different from the assessments conducted in tendering proceedings, and whether there may be any benefit in retaining wording that is familiar to users of the Model Law even if so, or whether consistency and simplification would justify aligning the terms used in both procurement methods.

88 The Working Group may wish to consider whether this basis for identifying the successful tender is sufficiently objective, and the extent to which it differs in reality from the lowest price tender.

89 The Working Group may wish to consider whether this basis for identifying the successful tender is sufficiently objective, and the extent to which it differs in reality from the lowest evaluated tender.

Article 13. Rules concerning the language of documents[90]

(1) The prequalification documents, if any, and solicitation documents shall be formulated in ... (the enacting State specifies its official language or languages) (and in a language customarily used in international trade except where the procurement proceedings are limited to domestic suppliers or contractors under article [7 (6) (c) (i) and (ii)] of this Law).

(2) Applications to prequalify, if any, and submissions may be formulated and presented in any language in which the prequalification documents, if any, and solicitation documents have been issued or in any other language that the procuring entity specifies in the prequalification documents, if any, and solicitation documents, respectively.

Article 14. Submission securities[91]

(1) When the procuring entity requires suppliers or contractors presenting submissions to provide a submission security:

(a) The requirement shall apply to all such suppliers or contractors;

(b) The solicitation documents may stipulate that the issuer of the submission security and the confirmer, if any, of the submission security, as well as the form and terms of the submission security, must be acceptable to the procuring entity;

(c) Notwithstanding the provisions of subparagraph (b) of this paragraph, a submission security shall not be rejected by the procuring entity on the grounds that the submission security was not issued by an issuer in this State if the submission security and the issuer otherwise conform to requirements set forth in the solicitation documents (, unless the acceptance by the procuring entity of such a submission security would be in violation of a law of this State);

(d) Prior to presenting a submission, a supplier or contractor may request the procuring entity to confirm the acceptability of a proposed issuer of a submission security, or of a proposed confirmer, if required; the procuring entity shall respond promptly to such a request;

(e) Confirmation of the acceptability of a proposed issuer or of any proposed confirmer does not preclude the procuring entity from rejecting the submission security on the ground that the issuer or the confirmer, as the case may be, has become insolvent or otherwise lacks creditworthiness;

(f) The procuring entity shall specify in the solicitation documents any requirements with respect to the issuer and the nature, form, amount and other principal terms and conditions of the required submission security; any requirement that refers directly or indirectly to conduct by the supplier or contractor presenting the submission shall not relate to conduct other than:

---

[90] The Working Group has agreed to merge proposed articles 13 and 29 into one article, to deal with the language of all relevant documents together (A/CN.9/668, para. 169). Accordingly the revised article 13 in this draft consolidates provisions of articles 17 and 29 of the 1994 text.

[91] The Working Group has approved the draft article, which is based on article 32 of the 1994 text (A/CN.9/668, para. 91).

(i) Withdrawal or modification of the submission after the deadline for presenting of submissions, or before the deadline if so stipulated in the solicitation documents;

(ii) Failure to sign the procurement contract if required by the procuring entity to do so;

(iii) Failure to provide a required security for the performance of the contract after the submission has been accepted or to comply with any other condition precedent to signing the procurement contract specified in the solicitation documents.

(2) The procuring entity shall make no claim to the amount of the submission security, and shall promptly return, or procure the return of, the security document, after whichever of the following that occurs earliest:

(a) The expiry of the submission security;

(b) The entry into force of a procurement contract and the provision of a security for the performance of the contract, if such a security is required by the solicitation documents;

(c) The termination of the procurement proceedings without the entry into force of a procurement contract;

(d) The withdrawal of the submission prior to the deadline for presenting submissions, unless the solicitation documents stipulate that no such withdrawal is permitted.

A/CN.9/WG.I/WP.69/Add.2 (Original: English)

Note by the Secretariat on possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services — a revised text of the Model Law, submitted to the Working Group on Procurement at its sixteenth session

ADDENDUM

CHAPTER I. GENERAL PROVISIONS
(*continued*)

Article 15. Prequalification proceedings[1]

(1) The procuring entity may engage in prequalification proceedings with a view towards identifying, prior to the solicitation, suppliers and contractors that are qualified. The provisions of article [10] shall apply to prequalification proceedings.[2]

(2) If the procuring entity engages in prequalification proceedings, it shall cause an invitation to prequalify to be published in … (the enacting State specifies the official gazette or other official publication in which the invitation to prequalify is to be published). The invitation to prequalify shall also be published, in a language customarily used in international trade, in a newspaper of wide international circulation or in a relevant trade publication or technical or professional journal of wide international circulation, except where the procurement proceedings are limited to domestic suppliers or contractors under article [7 (6) (c) (i) and (ii)] of this Law.[3]

(3)[4] The invitation to prequalify shall contain, at a minimum, the following information:

(a) The name and address of the procuring entity;

(b) A summary of the principal required terms and conditions of the procurement contract to be entered into as a result of the procurement proceedings, including the nature and quantity, and place of delivery of the goods to be supplied, the nature and location of the construction to be effected, or the nature of the services and the location where they are to be provided, as well as the desired or required time for the supply of the goods or for the completion of the construction, or the timetable for the provision of the services;

(c) The criteria and procedures to be used for ascertaining the qualifications of suppliers or contractors, in conformity with article [10 (2)];

---

[1] The Working Group, at its fifteenth session, approved the draft article as revised at that session (A/CN.9/668, paras. 94-110).

[2] The paragraph has been revised pursuant to the Working Group's decisions at its fifteenth session (A/CN.9/668, paras. 95 and 96).

[3] The Working Group, at its fifteenth session, approved the paragraph without change (A/CN.9/668, para. 97).

[4] Ibid.

(d) A declaration, which may not later be altered, that suppliers or contractors may participate in the procurement proceedings regardless of nationality, or a declaration that participation is limited on the basis of nationality pursuant to article [9 (1)], as the case may be;

(e) The means, manner and modalities of obtaining the prequalification documents;[5]

(f) The price, if any, charged by the procuring entity for the prequalification documents and, subsequent to prequalification, for the solicitation documents;

(g) Except procurement proceedings are limited to domestic suppliers or contractors under article [7 (6) (c) (i) and (ii)] of this Law, the currency and terms of payment for the prequalification documents and, subsequent to prequalification, for the solicitation documents;

(h) Except procurement proceedings are limited to domestic suppliers or contractors under article [7 (6) (c) (i) and (ii)] of this Law, the language or languages in which the prequalification documents are available and in which, subsequent to prequalification, the solicitation documents will be available;

(i) The manner, modalities and deadline for the submission of applications to prequalify. The deadline for the submission of applications to prequalify shall be expressed as a specific date and time and allow sufficient time for suppliers or contractors to prepare and submit their applications, taking into account the reasonable needs of the procuring entity.[6]

(4) The procuring entity 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 providing them to suppliers or contractors.[7]

(5)[8] The prequalification documents shall include, at a minimum the following information:

(a) Instructions for preparing and submitting prequalification applications;

(b) Any documentary evidence or other information that must be submitted by suppliers or contractors to demonstrate their qualifications;

(c) The name, functional title and address of one or more officers or employees of the procuring entity who are authorized to communicate directly with and to receive communications directly from suppliers or contractors in connection with the prequalification proceedings, without the intervention of an intermediary;

(d) References to this Law, the procurement regulations and other laws and regulations directly pertinent to the prequalification proceedings;

---

5 This subparagraph has been revised to make it technologically neutral and consistent with similar provisions of the Model Law.

6 This subparagraph has been revised to make it technologically neutral and consistent with similar provisions of the Model Law.

7 The Working Group, at its fifteenth session, approved the paragraph without change (A/CN.9/668, para. 97).

8 Ibid.

(e) If already known, the manner, modalities and deadline for presenting submissions;[9]

(f) 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.

(6) 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.[10]

(7) The procuring entity shall take 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.[11]

(8) Only suppliers or contractors that have been prequalified are entitled to participate further in the procurement proceedings.[12]

(9) The procuring entity shall promptly notify each supplier or contractor submitting an application to prequalify whether or not it has been prequalified and shall make available to any member of the general public, upon request, the names of all suppliers or contractors that have been prequalified.[13]

(10) The procuring entity shall upon request promptly[14] communicate to suppliers or contractors that have not been prequalified the grounds therefor.[15, 16]

---

[9] This subparagraph has been revised to make it technologically neutral and consistent with similar provisions of the Model Law.

[10] Ibid.

[11] Ibid.

[12] Ibid.

[13] The Working Group, at its fifteenth session, approved the paragraph with a minor consequential change (A/CN.9/668, para. 105).

[14] The Working Group agreed that the Guide should explain that the notice ought to be given prior to the solicitation (A/CN.9/668, para. 106).

[15] The paragraph has been revised pursuant to the Working Group's decisions at its fifteenth session (A/CN.9/668, paras. 106-108). See further A/CN.9/WG.I/WP.68/Add.1, under section II.H.

[16] The last paragraph of this draft article that was before the Working Group at its fifteenth session was removed to the proposed article 10, pursuant to the preference expressed during the Working Group's deliberations at its fifteenth session (A/CN.9/668, para. 109).

Article 16. Rejection of all submissions[17]

(1) The procuring entity may reject all submissions [cancel the procurement][18] at any time prior to the acceptance of a submission.[19] The procuring entity shall [upon request] communicate to any supplier or contractor that presented a submission, the grounds for its rejection of all submissions[, but is not required to justify those grounds].[20]

(2) The procuring entity shall incur no liability, solely by virtue of its invoking paragraph (1) of this article, towards suppliers or contractors that have presented submissions.[21]

(3) Notice of the rejection of all submissions shall be given promptly to all suppliers or contractors that presented submissions.

Article 17. Rejection of abnormally low submissions[22]

(1) The procuring entity may reject a submission if the procuring entity has determined that the submitted price with [and/or] the constituent elements of a submission is, in relation to the subject matter of the procurement, abnormally low and raises concerns with the procuring entity as to the ability of the supplier or contractor to perform the procurement contract, provided that:

(a) The procuring entity has requested in writing from the supplier or contractor concerned details of the constituent elements of a submission that give rise to concerns as to the ability of the supplier or contractor to perform the procurement contract;

(b) The procuring entity has taken account of the information supplied, if any, but continues, on a reasonable basis,[23] to hold those concerns; and

---

17 The Working Group, at its fifteenth session, deferred the approval of the draft article, which is based on article 12 of the 1994 Model Law, as revised at that session to a later date (A/CN.9/668, para. 116).

18 The Working Group may wish to consider whether the procuring entity would require an express authorization to cancel the procurement before submissions are received, and whether, if so, the reference to rejecting all submissions would become superfluous.

19 The two opening phrases in this sentence were deleted pursuant to the Working Group's decisions at its fifteenth session (A/CN.9/668, paras. 112 and 113).

20 The words in two sets of square brackets in the paragraph were proposed to be deleted at the Working Group's fifteenth session. The Working Group deferred the consideration of the proposed revisions to a later date (A/CN.9/668, paras. 114-116). See further A/CN.9/WG.I/WP.68/Add.1, under section II.H.

21 The Working Group may wish to consider the effect of this provision in conjunction with the revised provisions on remedies and enforcement in chapter VII of the revised Model Law, which render a decision to reject all submissions subject to review.

22 The Working Group, at its fifteenth session, approved the article without change (A/CN.9/668, para. 120), but noted that other reasons for rejection (such as money-laundering) would be discussed in the Guide.

23 The Working Group may wish to consider whether the term "reasonable" might be capable of different interpretations, and whether an alternative formulation, such as "on the basis of all the information provided by the supplier or contractor and in the submission" might be less subject to subjective interpretation.

(c) The procuring entity has recorded those concerns and its reasons for holding them, and all communications with the supplier or contractor under this article, in the record of the procurement proceedings.

(2) The decision of the procuring entity to reject a submission in accordance with this article and grounds for the decision shall be recorded in the record of the procurement proceedings and promptly communicated to the supplier or contractor concerned.

Article 18. Rejection of a submission on the ground of inducements from suppliers or contractors or on the ground of conflicts of interest[24]

(1) A procuring entity shall reject a submission if:

(a) The supplier or contractor that presented it offers, gives or agrees to give, directly or indirectly, to any current or former officer or employee of the procuring entity or other governmental authority a gratuity in any form, an offer of employment or any other thing of service or value, as an inducement with respect to an act or decision of, or procedure followed by, the procuring entity in connection with the procurement proceedings;[25] or

(b) The supplier or contractor has gained an unfair competitive advantage as the result of a conflict of interest in violation of the applicable standards.[26]

(2) The rejection of the submission under this article and the grounds therefor shall be recorded in the record of the procurement proceedings and promptly communicated to the supplier or contractor.[27]

Article 19. Acceptance of submissions and entry into force of the procurement contract[28]

(1) Unless rejected in accordance with the provisions of this Law, the procuring entity shall accept the successful submission.[29]

(2) [Except in the case of single-source procurement,] the procuring entity shall promptly notify all suppliers or contractors whose submissions were evaluated of its

---

[24] The Working Group, at its fifteenth session, approved the draft article as revised at that session (A/CN.9/668, paras. 121-125).

[25] The Working Group, at its fifteenth session, approved the paragraph, which reproduced in the relevant part article 15 of the 1994 Model Law, with the deletion of the opening phrase referring to the higher-level approval (A/CN.9/668, para. 122).

[26] The provisions are new and were included further to the Working Group's decisions at the fifteenth session (A/CN.9/668, paras. 123-124).

[27] The Working Group, at its fifteenth session, approved the paragraph, which reproduced in the relevant part article 15 of the 1994 Model Law, without change (A/CN.9/668, paras. 121-125).

[28] The Working Group deferred the approval of the draft article as proposed to be revised at the fifteenth session to a later stage pending in particular the consideration of the revised paragraphs (2) and (11) (A/CN.9/668, paras. 126-145).

[29] The Working Group, at its fifteenth session, approved the paragraph, which is based on article 36 (1), the first sentence, of the 1994 Model Law, without change (A/CN.9/668, para. 127).

intended decision to accept the successful submission. The notice shall contain, at a minimum, the following information:[30]

(a) The name and address of the supplier or contractor presenting the successful submission;

(b) The contract price or, where necessary, a summary of other characteristics and relative advantages of the successful submission, provided that the procuring entity shall not disclose [any confidential information] [any information if its disclosure would be contrary to law, would impede law enforcement, would not be in the public interest, would prejudice legitimate commercial interests of the suppliers or contractors or would impede[31] fair competition];[32] and

(c) The period before the entry into force of the procurement contract during which the suppliers or contractors concerned may seek review of the decisions of the procuring entity related to the ascertainment of the successful submission (the standstill period). The standstill period shall be sufficiently long, to allow the suppliers or contractors concerned to seek where necessary the effective review in accordance with chapter VII of this Law, and shall run from the date of the dispatch of the notice to all the suppliers or contractors concerned in accordance with this paragraph.[33]

(3) Paragraph (2) of this article shall not apply to awards where the contract price is less than […] or where the procuring entity certifies that urgent public interest considerations require the procurement to proceed without a standstill period. The certification, which shall state the grounds for the finding that such urgent considerations exist, shall be made a part of the record of the procurement proceedings and shall be conclusive with respect to all levels of review under chapter VII of this Law except judicial review.[34]

(4) Upon expiry of the standstill period, or in the absence of an applicable standstill period, promptly after the successful submission was ascertained, the procuring entity shall dispatch the notice of acceptance of the successful submission

---

30 The paragraph is as proposed to be revised at the Working Group's fifteenth session (A/CN.9/668, para. 129).

31 The Working Group may wish to consider alternative terms used by the WTO GPA and in Directive 2004/18/EC, such as "prejudice" (used consistently in the GPA when referring to legitimate commercial interests) and "harm" (used in the Directive). If so, the Working Group may wish to instruct the Secretariat to make consequential changes throughout the text (such as in the provisions addressing the record of the procurement and review).

32 At the Working Group's fifteenth session, the point was made that the exceptions to the disclosure provisions in that paragraph were drafted too broadly, might inhibit transparency, and should be redrafted to refer only to confidential information. In response, it was noted that the language proposed was similar to the language found in the WTO GPA (article XVIII (4)) and Directive 2004/17/EC, article 49 (2); and Directive 2004/18/EC, articles 35 (4), 41 (3) and 69 (2). The Working Group agreed to consider whether to revise the wording at a future session. See further A/CN.9/WG.I/WP.68, under section E. It was also agreed that the Guide would explain that the phrase "to impede fair competition" should be interpreted as encompassing the risks of hampering competition not only in the procurement proceedings in question but also in subsequent procurements (A/CN.9/668, para. 131).

33 The paragraph is as proposed to be revised at the Working Group's fifteenth session (A/CN.9/668, para. 133).

34 The Working Group, at its fifteenth session, approved the paragraph as revised at that session (A/CN.9/668, paras. 135-138).

to the supplier or contractor that presented that submission unless otherwise determined by the review body or ordered by a competent court.[35]

(5) Unless a written procurement contract and/or approval by a higher authority is/are required, a procurement contract in accordance with the terms and conditions of the successful submission enters into force when the notice of acceptance is dispatched to the supplier or contractor concerned, provided that the notice is dispatched while the submission is still in force.[36]

(6) Where the solicitation documents require the supplier or contractor whose submission has been accepted to sign a written procurement contract conforming to the terms and conditions of the accepted submission:[37]

(a) The procuring entity (the requesting ministry) and the supplier or contractor concerned shall sign the procurement contract within a reasonable period of time after the notice of acceptance is dispatched to the supplier or contractor concerned;

(b) Unless the solicitation documents stipulate that the procurement contract is subject to approval by a higher authority, the procurement contract enters into force when the contract is signed by the supplier or contractor concerned and by the procuring entity (the requesting ministry). Between the time when the notice of acceptance is dispatched to the supplier or contractor concerned and the entry into force of the procurement contract, neither the procuring entity (the requesting ministry) nor that supplier or contractor shall take any action that interferes with the entry into force of the procurement contract or with its performance.

(7) Where the solicitation documents stipulate that the procurement contract is subject to approval by a higher authority, the procurement contract shall not enter into force before the approval is given. The solicitation documents shall specify the estimated period of time following dispatch of the notice of acceptance that will be required to obtain the approval. A failure to obtain the approval within the time specified in the solicitation documents shall not extend the period of effectiveness of submissions specified in the solicitation documents or the period of effectiveness of the submission security required under article [14] of this Law.[38]

(8) If the supplier or contractor whose submission has been accepted fails to sign a written procurement contract, if required to do so, or fails to provide any required security for the performance of the contract, the procuring entity shall select a successful submission in accordance with the applicable provisions from among the remaining submissions that [are in force] [remain valid], subject to the right of the procuring entity, in accordance with article [16 (1)], to reject all remaining submissions. The provisions of this article shall then apply to the supplier or contractor that presented that submission.[39]

(9) The notices under this article are dispatched when they are promptly and properly addressed or otherwise directed and transmitted to the supplier or contractor, or conveyed to an appropriate authority for transmission to the supplier

---

35 The Working Group, at its fifteenth session, approved the paragraph without change (A/CN.9/668, para. 140).

36 Ibid.

37 Ibid.

38 Ibid.

39 Ibid.

or contractor, by any reliable means specified in accordance with article [8] of this Law.[40]

(10) Upon the entry into force of the procurement contract and, if required, the provision by the supplier or contractor of a security for the performance of the contract, notice of the procurement contract shall be given to other suppliers or contractors, specifying the name and address of the supplier or contractor that has entered into the contract and the contract price.[41]

(11) The provisions of this article shall apply to the selection of the party or parties to the closed framework agreements in accordance with articles […] of this Law [as well as to the award of procurement contracts under [open and] closed framework agreements in accordance with articles […] of this Law].[42]

Article 20. Public notice of awards of procurement contract and framework agreement[43]

(1) Upon the entry into force of the procurement contract or conclusion of a framework agreement, the procuring entity shall promptly publish notice of the award of the procurement contract or the framework agreement, specifying the name of the supplier or contractor to whom the procurement contract was awarded or, in the case of the framework agreement, name(s) of the supplier(s) or contractor(s) with whom the framework agreement was concluded.

(2) Paragraph (1) is not applicable to awards where the contract price is less than […] and to awards of procurement contracts under framework agreements unless the contract price under a framework agreement exceeds [the enacting State includes a minimum amount [or] the amount set out in the procurement regulations]. The procuring entity shall also publish quarterly notices of all procurement contracts issued under an open framework agreement.

(3) The procurement regulations may provide for the manner of publication of the notices required by paragraphs (1) and (2) of this article.

---

40 The paragraph has been revised pursuant to the request of the Working Group, at is fifteenth session, to reflect that the dispatch of the notices referred to in the article should be made promptly and by reliable means (A/CN.9/668, paras. 132 and 140).

41 The Working Group, at its fifteenth session, approved the paragraph without change (A/CN.9/668, para. 140).

42 The Working Group, at its fifteenth session, deferred the consideration of the paragraph. At that session, views varied as regards the advisability of providing for a standstill period at the stage of the award of procurement contracts under framework agreements (A/CN.9/668, paras. 141-144). An option might be to provide for a short standstill period, which might alleviate the concerns expressed regarding the speed of award appropriate for framework agreements, and which given the more limited concerns that the award of a procurement contract thereunder may pose, may also provide sufficient time for suppliers. In electronic framework agreements, the period could be extremely short.

43 The Working Group, at its fifteenth session, approved the draft article, which is based on article 14 of the 1994 Model Law, as revised at that session (A/CN.9/668, paras. 147-148).

Article 21. Confidentiality[44]

(1) Without prejudice to articles 19 (2), 20, 22 and 31 of this Law, the procuring entity shall treat applications to prequalify and submissions in such a manner as to avoid the [inappropriate][45] disclosure of their contents to competing suppliers or contractors.

(2) Any discussions, communications and negotiations between the procuring entity and a supplier or contractors pursuant to articles in chapter IV of this Law shall be confidential. Unless required by law or by a court order or permitted in solicitation documents, no party to the negotiations shall disclose to any other person any technical, price or other information relating to the negotiations without the consent of the other party.

[Article 22. Record of procurement proceedings[46]

(1) The procuring entity shall maintain a record of the procurement proceedings containing, at a minimum, the following information:

(a) A brief description of the subject matter of the procurement;[47]

(b) The names and addresses of suppliers or contractors that presented submissions, and the name and address of the supplier or contractor with whom the procurement contract is entered into and the contract price;[48]

(c) The procuring entity's decision as to the means of communication to be used in the procurement proceedings;[49]

(d) Information relative to the qualifications, or lack thereof, of suppliers or contractors that presented submissions;[50]

---

[44] The article is as proposed to be revised at the Working Group's fifteenth session (A/CN.9/668, paras. 150-151). The Working Group deferred the consideration of the revised article to a later stage (A/CN.9/668, para. 152).

[45] At the fifteenth session, the Working Group noted that, where clarifications and modifications of tenders are concerned, and at the public opening of tenders, some disclosure might be necessary, but agreed to reconsider the matter at a future date, together with the guidance that the Guide should provide on the matter (A/CN.9/668, paras. 150 and 151).

[46] The Working Group, at its fifteenth session, deferred the consideration and the approval of the draft article until after all outstanding issues had been resolved (A/CN.9/668, para. 157). The draft article is based on article 11 of the 1994 Model Law, with the consequential changes in the light of the proposed revisions to the Model Law. The Working Group may wish to consider deferring further the consideration of this article until after all outstanding issues in the revised Model Law have been resolved. The Working Group may also wish to consider the provisions on the record of procurement proceedings together with the issues raised in A/CN.9/WG.I/WP.68 and Add.1, sections II. E, F and H.

[47] Based on article 11 (1) (a) of the 1994 Model Law, with the consequential changes in the light of the proposed new definitions in article 2.

[48] Based on article 11 (1) (b) of the 1994 Model Law, with the consequential changes in the light of the proposed new definitions in article 2. The Working Group may wish to consider the amendments to this subparagraph in the light of the provisions on framework agreements.

[49] The new subparagraph is as preliminarily approved by the Working Group at its ninth session (subparagraph (b) bis, A/CN.9/595, paras. 49-51).

[50] Based on article 11 (1) (c) of the 1994 Model Law, with consequential changes in the light of the proposed new definitions in article 2.

(e) The price, or the basis for determining the price, and a summary of the other principal terms and conditions of each submission and of the procurement contract, where these are known to the procuring entity;[51]

(f) A summary of the evaluation and comparison of submissions, including the application of any margin of preference pursuant to article [12 (3) (b)];[52]

(g) If all submissions were rejected pursuant to article [16] of this Law, a statement to that effect and the grounds therefor, in accordance with article [16 (1)];[53]

(h) If, in procurement proceedings involving methods of procurement other than tendering, those proceedings did not result in a procurement contract, a statement to that effect and of the grounds therefor;[54]

(i) The information required by articles [17 and 18], if a submission was rejected pursuant to those provisions;[55]

(j) The statement of the grounds and circumstances required under article [7 (8)];[56]

(k) In procurement proceedings involving the use of electronic reverse auctions, information about the grounds and circumstances on which the procuring entity relied to justify recourse to the auction, the date and time of the opening and closing of the auction, information about the grounds and circumstances on which the procuring entity relied to justify the rejection of the bids submitted during the auction and [any other information that the Working Group decides to add];[57]

[(l) In the procurement of services by means of chapter IV, the statement required under article 41 (2) of the grounds and circumstances on which the procuring entity relied to justify the selection procedure used;][58]

(m) A summary of any requests for clarification of the prequalification documents, or solicitation documents, the responses thereto, as well as a summary of any modification of those documents;[59]

---

[51] Based on article 11 (1) (d) of the 1994 Model Law, with the consequential changes in the light of the proposed new definitions in article 2. The Working Group may wish to consider the amendments to this subparagraph in the light of the provisions on framework agreements.

[52] Based on article 11 (1) (e) of the 1994 Model Law, with the consequential changes in the light of the proposed new definitions in article 2.

[53] Based on article 11 (1) (f) of the 1994 Model Law, with the consequential changes in the light of the proposed new definitions in article 2.

[54] Reproduces article 11 (1) (g) of the 1994 Model Law.

[55] Based on article 11 (1) (h) of the 1994 Model Law, with the consequential changes in the light of the proposed new definitions in article 2. In addition, the subparagraph was amended to reflect the introduction of the article on the abnormally low submissions (see article 17 of the revised Model Law).

[56] Based on articles 11 (1) (i), (k) and (l) of the 1994 Model Law, which were merged in the light of provisions of the proposed new article 7.

[57] The subparagraph is as preliminarily approved by the Working Group at its eleventh and twelfth sessions (subparagraph (i) bis, A/CN.9/623, para. 100, and A/CN.9/640, para. 91) and incorporating the suggestions made at the Working Group's fifteenth session (A/CN.9/668, para. 155). The Working Group is to consider whether any other information should be added in lieu of the words in the square brackets.

[58] Reproduces article 11 (1) (j) of the 1994 Model Law. To be considered together with chapter IV.

[59] Based on article 11 (1) (m) of the 1994 Model Law, with the consequential changes in the light

(n) In procurement proceedings in which the procuring entity, in accordance with article 9 (1), limits participation on the basis of nationality, a statement of the grounds and circumstances relied upon by the procuring entity for imposing the limitation;[60]

(o) [other information required to be included in the record in accordance with the provisions of this Law is to be added].[61]

(2) Subject to article [31 (3)], the portion of the record referred to in subparagraphs [(a) and (b)] of paragraph (1) of this article shall, on request, be made available to any person after a submission has been accepted or after procurement proceedings have been terminated without resulting in a procurement contract.[62]

(3) Subject to article [31 (3)], the portion of the record referred to in subparagraphs [(d) to (h), and (m)], of paragraph (1) of this article shall, on request, be made available to suppliers or contractors that presented a submission, or applied for prequalification, after a submission has been accepted or procurement proceedings have been terminated without resulting in a procurement contract. Disclosure of the portion of the record referred to in subparagraphs [(d) to (f), and (m)], may be ordered at an earlier stage by a competent court.[63]

(4) Except when ordered to do so by a competent court, and subject to the conditions of such an order, the procuring entity shall not disclose:

(a) Information if its disclosure would be contrary to law, would impede law enforcement, would not be in the public interest, would prejudice legitimate commercial interests of the suppliers or contractors or would impede fair competition;

(b) Information relating to the examination, evaluation and comparison of submissions, and submission prices, other than the summary referred to in paragraph [(1) (f)] of this article.[64]

---

of the proposed new definitions in article 2.

60 Reproduces article 11 (1) (l) of the 1994 Model Law.

61 The Working Group may wish to include further specific provision, such as regarding framework agreements if it decides that technological constraints may limit the number of suppliers that may be admitted to an open framework agreement. In addition, some other information not listed in the 1994 Model Law may be added. See, in this regard, the issues raised in A/CN.9/WG.I/WP.68/Add.1, section H.

62 Based on article 11 (2) of the 1994 Model Law, with the consequential changes in the cross references and changes in the light of the proposed new definitions in article 2.

63 Based on article 11 (3), the first two sentences, of the 1994 Model Law, with the consequential changes in the cross references and changes in the light of the proposed new definitions in article 2. Reflecting suggestions made at the Working Group's twelfth session (A/CN.9/640, para. 90), the remaining provisions from paragraph (3) were placed in the new paragraph (4), with the consequential renumbering of the old paragraph (4) to paragraph (5). The restructured provisions were presented to the Working Group for consideration in document A/CN.9/WG.I/WP.59. The Working Group did not consider them in detail.

64 Based on article 11 (3), the last sentence, of the 1994 Model Law, with the consequential changes in the cross reference and changes in the light of the proposed new definitions in article 2. See the immediately preceding footnote for further information.

(5) The procuring entity shall not be liable to suppliers or contractors for damages owing solely to a failure to maintain a record of the procurement proceedings in accordance with the present article.[65]]

CHAPTER II. TENDERING PROCEEDINGS[66]

SECTION I. SOLICITATION OF TENDERS

Article 23. Domestic tendering[67]

Where the procurement proceedings are limited to domestic suppliers or contractors under article [7 (6) (c) (i) and (ii)] of this Law, the procuring entity shall not be required to employ the procedures set out in articles 14 (1) (c),[68] 24 (2),[69] 25 (h) and (i),[70] and 27 (j), (k) and (s),[71] of this Law.[72]

Article 24. Procedures for soliciting tenders[73]

(1) A procuring entity shall solicit tenders by causing an invitation to tender to be published in … (the enacting State specifies the official gazette or other official publication in which the invitation to tender is to be published).

(2) The invitation to tender shall also be published, in a language customarily used in international trade, in a newspaper of wide international circulation or in a relevant trade publication or technical or professional journal of wide international circulation.[74]

---

65 Reproduces article 11 (4) of the 1994 Model Law. The Working Group may wish to consider this provision, which was taken from article 11 (4) of the 1994 Model Law, in the light of its decisions as regards remedies and enforcement.

66 The provisions of chapter II of the 1994 Model Law were included in article 7 and the relevant articles of chapters III and IV of the revised Model Law. Chapter II reproduces the provisions of chapter III of the 1994 Model Law, except as marked to reflect the revisions made to the Model Law.

67 The Working Group, at its fifteenth session, approved the draft article, which is based on article 23 of the 1994 Model Law, without change (A/CN.9/668, para. 158).

68 Corresponds to the reference to article 32 (1) (c) in article 23 of the 1994 Model Law.

69 Corresponds to the reference to the same article in article 23 of the 1994 Model Law.

70 Corresponds to the references to articles 25 (1) (h) and 25 (1) (i) in article 23 of the 1994 Model Law.

71 Corresponds to the references to articles 27 (j), 27 (k) and 27 (s) in article 23 of the 1994 Model Law.

72 The references to articles 25 (2) (c) and 25 (2) (d) in article 23 of the 1994 Model Law were reflected in the relevant provisions of article 15 of the revised Model Law since they were related to prequalification.

73 The Working Group, at its fifteenth session, approved the draft article, which is based on article 24 of the 1994 Model Law, without change (A/CN.9/668, para. 159).

74 As noted in A/CN.9/WG.I/WP.66/Add.1, the Working Group may wish to include a definition of “international” publication so as to simplify the drafting of this article and draft article 15 (2).

Article 25. Contents of invitation to tender[75]

The invitation to tender shall contain, at a minimum, the following information:

(a) The name and address of the procuring entity;

(b) The nature and quantity, and place of delivery of goods to be supplied, the nature and location of construction to be effected, or the nature and location of services to be provided, or the appropriate combination thereof;

(c) The desired or required time for the supply of goods or for the completion of construction, or the timetable for the provision of services, or appropriate combination thereof;

(d) The criteria and procedures to be used for evaluating the qualifications of suppliers or contractors, in conformity with article [10 (2)];

(e) A declaration, which may not later be altered, that suppliers or contractors may participate in the procurement proceedings regardless of nationality, or a declaration that participation is limited on the basis of nationality pursuant to article [9 (1)], as the case may be;

(f) The means, manner and modalities of obtaining the solicitation documents;[76]

(g) The price, if any, charged by the procuring entity for the solicitation documents;

(h) The currency and means of payment for the solicitation documents;

(i) The language or languages in which the solicitation documents are available;

(j) The manner, modalities and deadline for the submission of tenders.

Article 26. Provision of solicitation documents[77]

The procuring entity shall provide the solicitation documents to suppliers or contractors in accordance with the procedures and requirements specified in the invitation to tender. If prequalification proceedings have been engaged in, the procuring entity shall provide a set of solicitation documents to each supplier or contractor that has been prequalified and that pays the price, if any, charged for those documents. The price that the procuring entity may charge for the solicitation documents shall reflect only the cost of providing them to suppliers or contractors.

---

[75] The Working Group, at its fifteenth session, approved the draft article, which is based on article 25 (1) of the 1994 Model Law, with amendments to subparagraph (j) (A/CN.9/668, paras. 161-162).

[76] This subparagraph was revised to ensure that it is technologically neutral.

[77] The Working Group, at its fifteenth session, approved the draft article, which is based on article 26 of the 1994 Model Law, with a consequential change (A/CN.9/668, paras. 163-164).

Article 27. Contents of solicitation documents[78]

The solicitation documents shall include, at a minimum, the following information:

(a) Instructions for preparing tenders;

(b) The criteria and procedures, in conformity with the provisions of article [10], relative to the evaluation of the qualifications of suppliers or contractors and relative to the further demonstration of qualifications pursuant to article [33 (6)];

(c) The requirements as to documentary evidence or other information that must be submitted by suppliers or contractors to demonstrate their qualifications;

(d) The description of the subject matter of the procurement, in conformity with article [11]; the quantity of goods and/or services to be performed; the location where construction is to be effected or services are to be provided; and the desired or required time, if any, when goods are to be delivered, construction is to be effected or services are to be provided;

(e) Information about the evaluation criteria, the evaluation procedure and the assessment of responsiveness of tenders, as specified in article [12 (4) (a)];[79]

(f) The terms and conditions of the procurement contract, to the extent they are already known to the procuring entity, and the contract form, if any, to be signed by the parties;

(g) If alternatives to the characteristics of the subject matter of the procurement, contractual terms and conditions or other requirements set forth in the solicitation documents are permitted, a statement to that effect, and a description of the manner in which alternative tenders are to be evaluated and compared;

(h) If suppliers or contractors are permitted to submit tenders for only a portion of the subject matter of the procurement, a description of the portion or portions for which tenders may be submitted;

(i) The manner in which the tender price is to be formulated and expressed, including a statement as to whether the price is to cover elements other than the cost of the subject matter of the procurement itself, such as any applicable transportation and insurance charges, customs duties and taxes;

(j) The currency or currencies in which the tender price is to be formulated and expressed;

(k) The language or languages, in conformity with article [13], in which tenders are to be prepared;

---

[78] The Working Group, at its fifteenth session, approved the draft article, which is based on article 27 of the 1994 Model Law (A/CN.9/668, para. 166).

[79] Although it was agreed at the Working Group's fifteenth session that the reference to relative weights should be added in this subparagraph (A/CN.9/668, para. 165), the Working Group may wish to consider whether the proposed wording with the cross reference to article 12 (4) (a) should be sufficient and would ensure consistency throughout the Model Law. The proposed article 12 (4) (a) contains the requirement to disclose in the solicitation documents the relative weights where applicable (in the price-only procurements, this point is moot) along with other information. Unnecessary confusion may arise if the reference in paragraph (e) is made only to the relative weights and not to the other information specified in article 12 (4) (a).

(l) Any requirements of the procuring entity with respect to the issuer and the nature, form, amount and other principal terms and conditions of any tender security to be provided by suppliers or contractors submitting tenders in accordance with article 14, and any such requirements for any security for the performance of the procurement contract to be provided by the supplier or contractor that enters into the procurement contract, including securities such as labour and material bonds;

(m) If a supplier or contractor may not modify or withdraw its tender prior to the deadline for the submission of tenders without forfeiting its tender security, a statement to that effect;

(n) The manner, modalities and deadline for the submission of tenders, in conformity with article [29];[80]

(o) The means by which, pursuant to article [28], suppliers or contractors may seek clarifications of the solicitation documents, and a statement as to whether the procuring entity intends, at this stage, to convene a meeting of suppliers or contractors;

(p) The period of time during which tenders shall be in effect, in conformity with article [30];

(q) The manner, modalities, date and time for the opening of tenders, in conformity with article [31];[81]

(r) The procedures to be followed for opening and examining tenders;

(s) The currency that will be used for the purpose of evaluating and comparing tenders pursuant to article [32 (5)] and either the exchange rate that will be used for the conversion of tenders into that currency or a statement that the rate published by a specified financial institution prevailing on a specified date will be used;

(t) References to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings;

(u) The name, functional title and address of one or more officers or employees of the procuring entity who are authorized to communicate directly with and to receive communications directly from suppliers or contractors in connection with the procurement proceedings, without the intervention of an intermediary;

(v) Any commitments to be made by the supplier or contractor outside of the procurement contract, such as commitments relating to countertrade or to the transfer of technology;

(w) Notice of the right provided under article [56] of this Law to seek review of an unlawful act or decision of, or procedure followed by, the procuring entity in relation to the procurement proceedings;

(x) Any formalities that will be required once a tender has been accepted for a procurement contract to enter into force, including, where applicable, the

---

[80] The Working Group may wish to add a requirement for a reasonable period to allow suppliers to prepare their tenders, as it has provided in the context of framework agreements. Suggested text is provided in proposed revised article 29 (1), but the Working Group may also wish to make appropriate reference in this article.

[81] This subparagraph has been revised to make it technologically neutral and consistent with similar provisions of the Model Law.

execution of a written procurement contract pursuant to article [19], and approval by a higher authority or the Government and the estimated period of time following the dispatch of the notice of acceptance that will be required to obtain the approval;

(y) Any other requirements established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and submission of tenders and to other aspects of the procurement proceedings.

Article 28. Clarifications and modifications of solicitation documents[82]

(1) A supplier or contractor may request a clarification of the solicitation documents from the procuring entity. The procuring entity shall respond to any request by a supplier or contractor for clarification of the solicitation documents that is received by the procuring entity within a reasonable time prior to the deadline for the submission of tenders. The procuring entity shall respond within a reasonable time so as to enable the supplier or contractor to make a timely submission of its tender and shall, without identifying the source of the request, communicate the clarification to all suppliers or contractors to which the procuring entity has provided the solicitation documents.

(2) At any time prior to the deadline for submission of tenders, the procuring entity may, for any reason, whether on its own initiative or as a result of a request for clarification by a supplier or contractor, modify the solicitation documents by issuing an addendum. The addendum shall be communicated promptly to all suppliers or contractors to which the procuring entity has provided the solicitation documents and shall be binding on those suppliers or contractors.

(3) If the procuring entity convenes a meeting of suppliers or contractors, it shall prepare minutes of the meeting containing the requests submitted at the meeting for clarification of the solicitation documents, and its responses to those requests, without identifying the sources of the requests. The minutes shall be provided promptly to all suppliers or contractors to which the procuring entity provided the solicitation documents, so as to enable those suppliers or contractors to take the minutes into account in preparing their tenders.

SECTION II. SUBMISSION OF TENDERS

Article 29. Submission of tenders[83]

(1) Without prejudice to paragraphs (2) to (5) of this article, the procuring entity

---

[82] The Working Group, at its fifteenth session, approved the draft article, which reproduces article 28 of the 1994 Model Law, without change (A/CN.9/668, para. 167). It was agreed that the Guide commentary accompanying the article should refer to the provisions that dealt with the extension of the deadline for presenting submissions (article 29 (2) of the current draft). It was also pointed out that in the context of electronic procurement it should be made clear that any obligation of the procuring entity to debrief individual suppliers or contractors would arise to the extent that the identities of the suppliers or contractors were known to the procuring entity (A/CN.9/668, para. 168).

[83] The Working Group, at its fifteenth session, approved the draft article, which is based on article 30 of the 1994 Model Law, with the revisions to paragraph (1) (A/CN.9/668, para. 171).

shall fix in the invitation to tender in accordance with article 25 (j) and in the solicitation documents in accordance with article 27 (n) the manner, modalities and deadline for the submission of tenders. The deadline for the submission of tenders shall be expressed as a specific date and time and allow sufficient time for suppliers or contractors to prepare and submit their tenders, taking into account the reasonable needs of the procuring entity.[84]

(2) If, pursuant to article [28], the procuring entity issues a clarification or modification of the solicitation documents, or if a meeting of suppliers or contractors is held, it shall, prior to the deadline for the submission of tenders, extend the deadline if necessary to afford suppliers or contractors reasonable time to take the clarification or modification, or the minutes of the meeting, into account in their tenders.

(3) The procuring entity may, in its absolute discretion, prior to the deadline for the submission of tenders, extend the deadline if it is not possible for one or more suppliers or contractors to submit their tenders by the deadline owing to any circumstance beyond their control.

(4) Notice of any extension of the deadline shall be given promptly to each supplier or contractor to which the procuring entity provided the solicitation documents.

(5)[85] (a) A tender shall be submitted in writing, and signed, and:

(i) If in paper form, in a sealed envelope; or

(ii) If in any other form, according to requirements specified by the procuring entity, which ensure at least a similar degree of authenticity, security, integrity and confidentiality;

(b) The procuring entity shall provide to the supplier or contractor a receipt showing the date and time when its tender was received;[86]

(c) The procuring entity shall preserve the security, integrity and confidentiality of a tender, and shall ensure that the content of the tender is examined only after its opening in accordance with this Law.

(6) A tender received by the procuring entity after the deadline for the submission of tenders shall not be opened and shall be returned to the supplier or contractor that submitted it.

---

[84] The provisions of the paragraph were revised to make them technologically neutral and consistent throughout the Model Law.

[85] The text of paragraph (5) of this article is as preliminarily approved by the Working Group at its twelfth session (see A/CN.9/640, para. 28).

[86] The Working Group, at its fifteenth session, accepted the suggestion that the Guide in the context of this subparagraph should discuss the nature of the receipt to be provided, and should state that the certification of receipt provided by the procuring entity would be conclusive (A/CN.9/668, para. 173).

Article 30. Period of effectiveness of tenders; modification and withdrawal of tenders[87]

(1) Tenders shall be in effect during the period of time specified in the solicitation documents.

(2) (a) Prior to the expiry of the period of effectiveness of tenders, the procuring entity may request suppliers or contractors to extend the period for an additional specified period of time. [A supplier or contractor may refuse the request without forfeiting its tender security, and the effectiveness of its tender will terminate upon the expiry of the unextended period of effectiveness];

(b) Suppliers or contractors that agree to an extension of the period of effectiveness of their tenders shall extend or procure an extension of the period of effectiveness of tender securities provided by them or provide new tender securities to cover the extended period of effectiveness of their tenders. A supplier or contractor whose tender security is not extended, or that has not provided a new tender security, is considered to have refused the request to extend the period of effectiveness of its tender.

(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 without forfeiting its tender security. The modification or notice of withdrawal is effective if it is received by the procuring entity prior to the deadline for the submission of tenders.

---

[87] The Working Group, at its fifteenth session, deferred the consideration of the draft article, which is based on article 31 of the 1994 Model Law, in the light of divergent views expressed regarding the suggestion to delete the second sentence of paragraph (2) (a) (A/CN.9/668, paras. 175-176). For the discussion of the drafting history of the provisions, see A/CN.9/WG.I/WP.68/Add.1, section G.

A/CN.9/WG.I/WP.69/Add.3 (Original: English)

Note by the Secretariat on possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services — a revised text of the Model Law, submitted to the Working Group on Procurement at its sixteenth session

ADDENDUM

This note sets out draft articles 31-33 of chapter II (Tendering proceedings) and chapter III (Conditions for use and procedures of restricted tendering, two-envelope tendering, and request for quotations) of the proposed revised Model Law.

The Working Group's attention is drawn to draft articles 32, 34 and 35, consideration of which was deferred by the Working Group to a later stage.

The Secretariat's comments are set out in the accompanying footnotes.

This note in addition consolidates the provisions from the 1994 Model Law relevant to proposed chapter IV (Conditions for use and procedures of two-stage tendering, request for proposals and competitive negotiation), with consequential changes in the light of the revisions agreed to be made so far to the 1994 Model Law. A proposal for a consolidated article on request for proposals and competitive negotiations, which the Working Group had before it but did not consider at its fifteenth session (A/CN.9/668, paras. 210-212) is set out in A/CN.9/WG.I/WP.69/Add.4. Any additional proposals for a revised chapter IV submitted by delegations as indicated at the Working Group's fifteenth session (A/CN.9/668, para. 279) will be made available for consideration by the Working Group at the session.

CHAPTER II. TENDERING PROCEEDINGS (*continued*)

SECTION III. EVALUATION AND COMPARISON OF TENDERS

Article 31. Opening of tenders[1]

(1) Tenders shall be opened at the time specified in the solicitation documents as the deadline for the submission of tenders, or at the deadline specified in any

---

[1] The Working Group, at its fifteenth session, approved the draft article, which is based on article 33 of the 1994 Model Law and the text of paragraph (2) preliminarily approved by the Working Group at its twelfth session (see A/CN.9/640, para. 38), without change (A/CN.9/668, para. 177). It was agreed that the Guide should highlight that the modalities for the opening of tenders established by the procuring entity (time, place where applicable, and other factors) should allow for the presence of suppliers or contractors (A/CN.9/668, para. 178).

extension of the deadline, in accordance with the manner, modalities and procedures specified in the solicitation documents.[2]

(2) 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. Suppliers or contractors shall be deemed to have been permitted to be present at the opening of the tenders if they have been given opportunity to be fully and contemporaneously apprised of the opening of the tenders.

(3) The name and address of each supplier or contractor whose tender is opened and the tender price shall be announced to those persons present at the opening of tenders, communicated on request to suppliers or contractors that have submitted tenders but that are not present or represented at the opening of tenders, and recorded immediately in the record of the tendering proceedings required by article [22].[3]

Article 32. Examination, evaluation and comparison of tenders[4]

(1) (a) The procuring entity may ask a supplier or contractor individually for clarifications of its tender 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;

(b) Notwithstanding subparagraph (a) of this paragraph, the procuring entity shall correct purely arithmetical errors that are discovered during the examination of tenders. The procuring entity shall give prompt notice of any such correction to the supplier or contractor that submitted the tender.

(2) (a) Subject to subparagraph (b) of this paragraph, the procuring entity [may] [shall][5] regard a tender as responsive [only][6] if it conforms to [all requirements set forth in the solicitation documents] [the relevant requirements set

---

[2] This paragraph has been revised to make it technologically neutral and consistent with similar provisions of the Model Law.

[3] The Working Group may recall that the provisions of article 22 (1) (b) require the equivalent details of all those that submitted tenders to be recorded, and may wish to include a note in the Guide to explain that any late tenders would be returned unopened, but their (late) submission would be noted in the record.

[4] The Working Group, at its fifteenth session, deferred the consideration of this article, which is based on article 34 of the 1994 Model Law, in the light of the divergent views expressed regarding the drafting suggestions thereto (A/CN.9/668, paras. 180-181). As was requested by the Working Group, the drafting suggestions were placed in square brackets in the present draft for further consideration by the Working Group. The Secretariat was also requested to research the drafting history of the provisions concerned, and the manner in which similar issues were addressed in applicable international instruments, and to report its findings when the provisions were considered (ibid). The results of the research are reflected in document A/CN.9/WG.I/WP.68, sections II.A and B.

[5] The Working Group may wish to consider replacing the word “may” appearing in the 1994 text with the word “shall”, to ensure that responsiveness is ascertained objectively. The Working Group may consider that the use of the word “may” in this context might allow unintended and undesirable subjectivity, and provides a description of what a responsive tender might be, rather than a definition of a responsive tender.

[6] The Working Group may consider that the word “only” is unnecessary if the word “shall” is used in this provision, as to which, see footnote 5 above.

forth in the solicitation documents] [the description of the subject matter of the procurement and the terms and conditions of the procurement contract or framework agreement [set out in the solicitation documents in accordance with article 11 of this Law]];[7]

(b) The procuring entity may regard a tender as responsive even if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the solicitation documents or if it contains errors or oversights that are capable of being corrected without touching on the substance of the tender. Any such deviations shall be quantified, to the extent possible, and appropriately taken account of in the evaluation and comparison of tenders.[8]

(3) The procuring entity shall reject a tender:

(a) If the supplier or contractor that submitted the tender is not qualified;

(b) If the supplier or contractor that submitted the tender does not accept a correction of an arithmetical error made pursuant to paragraph (1) (b) of this article;

(c) If the tender is not responsive;

(d) In the circumstances referred to in articles [17 and 18].

(4) (a) The procuring entity shall evaluate and compare the tenders that have not been rejected in order to ascertain the successful tender, as defined in subparagraph (b) of this paragraph, in accordance with the procedures and criteria set forth in the solicitation documents. No criterion shall be used that has not been set forth in the solicitation documents;

(b) The successful tender shall be:

(i) [Where price is the only award criterion,][9] The tender with the lowest tender price, subject to any margin of preference applied pursuant to article [12]; or

---

[7] The Working Group, at its fifteenth session, deferred the consideration of these alternative texts in square brackets and requested the Secretariat to research the drafting history of the provisions concerned, and the manner in which similar issues were addressed in applicable international instruments, and to report its findings when the provisions were considered (A/CN.9/668, paras. 180 (a) and 181). The results of the research are reflected in document A/CN.9/WG.I/WP.68, section II.A.

[8] The Working Group may wish to consider whether the assessment of responsiveness is a step that should be regulated in some or all other procurement methods, and how it compares with the establishment of a threshold under draft revised article 35 (Two-envelope tendering). At the fifteenth session, a suggestion was made to include a cross reference to revised draft article 11 in paragraph 3 (c) of this article (A/CN.9/668, para. 179 (b)). The current scope of revised draft article 11 does not allow for an appropriate cross reference, as it refers to the description of the subject matter of the procurement and the terms and conditions of the procurement contract rather than the assessment of responsiveness. The Working Group may therefore wish to consider whether draft revised article 11 should include a provision on the assessment of responsiveness, in addition to its provisions on the description of the subject matter of the procurement (so doing would also align article 11 with the proposed provisions on evaluation in draft revised article 12).

[9] The Working Group, at its fifteenth session, deferred the consideration of the suggestion to add this phrase in the beginning of this subparagraph and requested the Secretariat to research the drafting history of the provisions concerned, and the manner in which similar issues were

(ii) [Where there are price and other award criteria,][10] If the procuring entity has so stipulated in the solicitation documents, the [lowest][11] evaluated tender ascertained on the basis of the evaluation criteria specified in the solicitation documents in accordance with article [12].

(5) When tender prices are expressed in two or more currencies, the tender prices of all tenders shall be converted to the same currency, and according to the rate specified in the solicitation documents pursuant to article [27 (s)], for the purpose of evaluating and comparing tenders.

(6) Whether or not it has engaged in prequalification proceedings pursuant to article [15], the procuring entity may require the supplier or contractor submitting the tender that has been found to be the successful tender pursuant to paragraph (4) (b) of this article to demonstrate again its qualifications in accordance with criteria and procedures conforming to the provisions of article [10]. The criteria and procedures to be used for such further demonstration shall be set forth in the solicitation documents. Where prequalification proceedings have been engaged in, the criteria shall be the same as those used in the prequalification proceedings.

(7) If the supplier or contractor submitting the successful tender is requested to demonstrate again its qualifications in accordance with paragraph (6) of this article but fails to do so, the procuring entity shall reject that tender and shall select a successful tender, in accordance with paragraph (4) of this article, from among the remaining tenders, subject to the right of the procuring entity, in accordance with article [16 (1)], to reject all remaining tenders.

(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 articles [19 and 22].

Article 33. Prohibition of negotiations with suppliers or contractors[12]

No negotiations shall take place between the procuring entity and a supplier or contractor with respect to a tender submitted by the supplier or contractor.

---

addressed in applicable international instruments, and to report its findings when the provisions were considered (A/CN.9/668, paras. 180 (d) and 181). The results of the research are reflected in document A/CN.9/WG.I/WP.68, section II.B.2.

[10] Ibid.

[11] The Working Group, at its fifteenth session, deferred the consideration of an alternative term to the lowest evaluated tender, such as the best evaluated tender, and requested the Secretariat to research the drafting history of the provisions concerned, and the manner in which similar issues were addressed in applicable international instruments, and to report its findings when the provisions were considered (A/CN.9/668, paras. 180 (c), 181 and 220). The results of the research are reflected in document A/CN.9/WG.I/WP.68, section II.B.1. See, also, the provisions of revised draft article 12, in A/CN.9/WG.I/WP.69/Add.1.

[12] The Working Group, at its fifteenth session, approved the draft article, which is based on article 35 of the 1994 Model Law, without change (A/CN.9/668, para. 182).

CHAPTER III. CONDITIONS FOR USE AND PROCEDURES FOR RESTRICTED TENDERING, TWO-ENVELOPE TENDERING, AND REQUEST FOR QUOTATIONS

Article 34. Restricted tendering[13]

OPTION 1[14]

(1) The procuring entity may, where necessary for reasons of [economy and efficiency] [economy or efficiency] [economic efficiency],[15] engage in procurement by means of restricted tendering in accordance with this article, when:

(a) The subject matter of the procurement, by reason of its highly [complex or][16] specialized nature, is 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 subject matter of the procurement.

(2) (a) When the procuring entity engages in restricted tendering on the grounds referred to in paragraph 1 (a) of this article, it shall solicit tenders from all suppliers and contractors from whom the subject matter of the procurement is available;

(b) When the procuring entity engages in restricted tendering on the grounds referred to in paragraph 1 (b) of this article, it shall select suppliers or contractors from whom to solicit tenders in a non-discriminatory manner,[17] and it shall select a sufficient number of suppliers or contractors to ensure effective competition.

---

[13] The Working Group, at its fifteenth session, deferred the consideration of all options for this article (A/CN.9/668, para. 192). It was agreed however that the opening phrase referring to higher-level approval would be deleted in all options (A/CN.9/668, para. 189). The Working Group, at that session, requested the Secretariat to draft option 3, based on the proposal made at the session that would align the provisions of the Model Law on restricted tendering with the provisions on selective tendering procedures in article X of the WTO Agreement on Government Procurement (A/CN.9/668, para. 188).

[14] Based on the merged articles 20 and 47 of the 1994 Model Law. Paragraph (1) is based on article 20 of the 1994 Model Law. Paragraphs (2)-(4) are based on article 47 of the 1994 Model Law.

[15] The Working Group may wish to consider which of the three terms in square brackets should be retained in the provisions, in the light of the proposed article 7 (3) (that uses the term "economic efficiency") and the existing provisions of the Model Law (that are not consistent in the use of the other two terms) (see articles 20 and 48 (2)).

[16] At the Working Group's fifteenth session, some preference was expressed for retaining option 1 on the ground that restricted tendering would be useful, in addition to the situations covered by option 2 (the value of the procurement would be disproportionate to the time and cost required to examine and evaluate a large number of tenders), for procurement of specialized products. There was no discussion at the session on whether complex projects would always involve specialized items, and thus whether recourse to restricted tendering could be justified on the basis of complexity alone. If the Working Group considers that the text should provide flexibly for highly complex and specialized procurement, it might wish to retain option 1 accordingly (A/CN.9/668, para. 185).

[17] The Working Group may wish further to consider how to provide appropriate guidance on what

(3) The procuring entity shall cause a notice of the restricted-tendering proceeding to be published in … (each enacting State specifies the official gazette or other official publication in which the notice is to be published).[18] The notice shall contain at a minimum the information listed in article 25 of this Law.[19] The notice shall not confer any rights on suppliers or contractors, including any right to have a tender evaluated.[20]

(4) The provisions of chapter II of this Law, except article [24], shall apply to restricted-tendering proceedings, except to the extent that those provisions are derogated from in this article.

OPTION 2[21]

(1) The procuring entity may, where necessary for reasons of [economy and efficiency] [economy or efficiency] [economic efficiency],[22] engage in procurement by means of restricted tendering in accordance with this article when [the subject matter of the procurement, by reason of its highly specialized nature, is available only from a limited number of suppliers or contractors, or when][23] the time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the subject matter of the procurement.

(2) The procuring entity shall select suppliers or contractors from whom to solicit tenders in a non-discriminatory manner,[24] and it shall select a sufficient number of suppliers or contractors to ensure effective competition.

(3) The procuring entity shall cause a notice of the restricted-tendering proceeding to be published in … (each enacting State specifies the official gazette or other official publication in which the notice is to be published). The notice shall contain at a minimum the information listed in article 25 of this Law. The notice shall not

---

"non-discriminatory" means in this context, and the criteria that might be used to select participants. The Working Group may recall its decision that there should be no mandatory prequalification under the draft proposed Model Law, but that prequalification could be used to limit access to a specific procurement (A/CN.9/668, para. 95), a notion reflected in option 3 for this article, below. In addition, the Working Group has noted that the nature of the procurement may present objective criteria for selection (A/CN.9/668, para. 190). It has also been observed that in the types of procurement in which the second ground for the use of restricted tendering applies, qualification criteria alone might be insufficient to limit access to reasonable numbers of participants.

18 In this regard, the Working Group may note that this provision requires domestic publication (as under article 24 (1)), but not international publication (as under article 24 (2)). An alternative formulation might be to delete paragraph (3) of this article and replace the reference to article 24 in paragraph (4) with a reference to article 24 (2).

19 The second sentence in paragraph (3) was included further to the Working Group's decision at its fifteenth session (A/CN.9/668, para. 191).

20 The Working Group may wish to consider the effect of this provision in conjunction with revised articles on remedies and enforcement in chapter VII of the revised Model Law.

21 The reasons for proposing option 2 are set out in document A/CN.9/WG.I/WP.66, paras. 38-40.

22 The Working Group may wish to consider which of the three terms in square brackets should be retained in the provisions, in the light of the proposed article 7 (3) (that uses the term "economic efficiency") and the existing provisions of the Model Law (that are not consistent in the use of the other two terms) (see articles 20 and 48 (2)).

23 The text in square brackets was included further to the suggestion made at the Working Group's fifteenth session (A/CN.9/668, para. 186).

24 See footnote 17, above.

confer any rights on suppliers or contractors, including any right to have a tender evaluated.[25]

(4) The provisions of chapter II of this Law, except article [24], shall apply to restricted-tendering proceedings, except to the extent that those provisions are derogated from in this article.

OPTION 3[26]

Article 34. Tendering with pre-selection

(1) The procuring entity may, where necessary for reasons of [economy and efficiency] [economy or efficiency] [economic efficiency],[27] engage in procurement by means of tendering with pre-selection in accordance with this article when the time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the subject matter of the procurement.

(2) Where a procuring entity intends to use tendering with pre-selection, the procuring entity shall engage in prequalification proceedings in accordance with article 15 of this Law except:

(a) The invitation to pre-qualify and the prequalification documents shall state, in addition to the information listed in article 15 (3) and (5), that the procuring entity intends upon completion of the prequalification proceedings to solicit tenders only from a limited number of pre-qualified suppliers or contractors that best meet the prequalification criteria;

(b) The invitation to pre-qualify and the prequalification documents shall in addition state the maximum number of pre-qualified suppliers or contractors from whom the tenders will be solicited, which shall be at least [5], and the manner in which the selection of that number will be carried out;[28]

(c) The procuring entity shall rate the suppliers or contractors that meet the prequalification criteria on the basis of the criteria applied to assess their qualifications and draw up the list of suppliers or contractors that will be invited to present tenders upon completion of the prequalification proceedings. In drawing up the list, the procuring entity shall apply only the manner of rating that is set forth in the invitation to pre-qualify and the prequalification documents. The procuring entity shall select suppliers or contractors from whom to solicit tenders in a

---

[25] The Working Group may wish to consider the effect of this provision in conjunction with revised articles on remedies and enforcement in chapter VII of the revised Model Law. See, also, footnote 18, above.

[26] Based on the proposal made at the Working Group's fifteenth session, which in turn draws on the provisions of article X of the WTO Agreement on Government Procurement and article IX of the WTO revised Agreement on Government Procurement. The option is presented for the consideration by the Working Group for the first time, further to the request made at the Working Group's fifteenth session (A/CN.9/668, para. 188).

[27] The Working Group may wish to consider which of the three terms in square brackets should be retained in the provisions, in the light of the proposed article 7 (3) (that uses the term "economic efficiency") and the existing provisions of the Model Law (that are not consistent in the use of the other two terms) (see articles 20 and 48 (2)).

[28] As regards certain criteria that might be applied to identify the relevant suppliers, see footnote 17, above.

non-discriminatory manner and it shall select a sufficient number of suppliers or contractors to ensure effective competition;

(d) The procuring entity shall promptly notify each supplier or contractor whether or not it has been selected and shall make available to any member of the general public, upon request, the names of all suppliers or contractors that have been selected. The procuring entity shall upon request communicate to suppliers or contractors that have not been selected the grounds therefore.

(3) The procuring entity shall invite all selected suppliers or contractors to submit their tenders. Where the solicitation documents are not made publicly available from the date of publication of the invitation to pre-qualify, the procuring entity shall ensure that those documents are made available at the same time to all the selected suppliers or contractors.

(4) The provisions of chapter II of this Law shall apply to the subsequent stages of the tendering with pre-selection proceedings, except to the extent that those provisions are derogated from in this article.

Article 35. Two-envelope tendering[29]

(1) [(Subject to approval by … (the enacting State designates an organ to issue the approval),)][30] the procuring entity may engage in procurement by means of two-envelope tendering in accordance with this article [where quality and technical aspects of tenders are to be evaluated separately from price].[31]

(2) The procuring entity may solicit tenders through open solicitation or in cases specified in article [34 (1)] through direct solicitation.[32]

(3) In the case of open solicitation, the provisions of chapter II of this Law[, other than [articles 31 (2) and (3),]] shall apply to the proceedings under this article, except to the extent that those provisions are derogated from in this article.[33]

(4) In the case of direct solicitation, the provisions of article [34 (2) and (3)] and the provisions of chapter II of this Law[, other than articles [24 and 31],] shall apply to proceedings under this article, except to the extent that those provisions are derogated from in this article.[34]

---

[29] The Working Group, at its fifteenth session, after a debate on whether the provisions should be retained in the revised Model Law, decided to retain the draft article, which was based on article 42 (2) of the 1994 Model Law, but deferred its consideration to a later stage (A/CN.9/668, para. 201). The article proposed in this document has been redrafted to make the intended scope and purpose of the article clearer, in the light of the deliberations at the Working Group's fifteenth session (A/CN.9/668, paras. 193-201).

[30] The Working Group may wish to consider whether this phrase should be retained, in the light of its decisions at the fifteenth session to remove the requirement of higher-level approval in other similar instances. The Working Group decided at that session that it would consider whether the requirement should be imposed on a case-by-case basis (A/CN.9/668, para. 122).

[31] Based on article 19 (1) (a) (i) of the 1994 Model Law. The Working Group may wish to consider which conditions should be imposed for the use of this method.

[32] Based on provisions of article 37 of the 1994 Model Law.

[33] Based on the thrust of chapter IV of the 1994 Model Law. The Working Group may wish to consider whether the transparency provisions of article 31 should apply to proceedings under this article.

[34] Ibid. The Working Group may also wish to consider whether the provisions of articles 24 and 31

(5) The solicitation documents shall call upon suppliers or contractors to submit simultaneously to the procuring entity tenders in two envelopes: one envelope containing quality and technical aspects of the tender and the other envelope containing the tender price.

(6) The procuring entity shall establish a threshold with respect to quality and technical aspects of the tenders in accordance with the evaluation criteria other than price as set out in the solicitation documents in accordance with article 12 of this Law.[35]

(7) The procuring entity shall open the envelopes containing quality and technical aspects of tenders. The procuring entity shall rate the quality and technical aspects of each tender in accordance with the criteria and the relative weight and manner of application of those criteria as set forth in the solicitation documents pursuant to [article 12] of this Law.[36] [The envelopes containing the quality and technical aspects of those] [Those] tenders that attain a rating below the threshold [shall be returned to the suppliers or contractors that submitted them, and their tenders] shall be considered to be non-responsive.

(8) Upon completion of the examination, evaluation, comparison and rating of the quality and technical aspects of the tenders, the procuring entity shall open the envelopes containing the price information of only those tenders the quality and technical aspects of which have attained a rating at or above the threshold. The envelopes containing the price information of tenders that attained a rating below the threshold as regards quality and technical aspects shall not be opened [and shall be returned to the suppliers or contractors that submitted them].

(9) The procuring entity shall compare the prices and on that basis identify the successful tender in accordance with the criteria and the procedure set out in the solicitation documents pursuant to article 12. The successful tender shall be:

(a) The tender with the lowest tender price; or

(b) The tender with the best combined evaluation in terms of the criteria other than price referred to in paragraph (7) of this article and the price.[37]

---

should be applied.

[35] The Working Group may wish to consider whether the reference to establishing a threshold and assessing tenders in the light of it in this article is equivalent to an assessment of responsiveness, as paragraph (7) indicates. If so, it may wish to simplify the provisions by cross-referring to draft revised articles 11 and 32 as appropriate.

[36] The Working Group may wish to consider whether there is some overlap between assessing responsiveness and evaluating tenders in the provisions of this and the subsequent paragraph (which are based on article 42 of the 1994 text). If so, it may wish to apply the steps undertaken in normal tendering proceedings, through repetition or cross reference, with additional provisions to reflect the two envelope procedure. In addition, the Working Group may recall that the drafters of the 1994 text stated that the Model Law sought to avoid setting out mechanisms (and focused on principles), and whether some detail could accordingly be discussed in the Guide. For example, the article could include paragraph (1), and a paragraph to state that the provisions of chapter II and articles 34 (2) and (3) apply, with additional provisions to allow for two envelopes and sequential opening. See also the following footnote as regards the evaluation of the tenders.

[37] At the Working Group's fifteenth session, concern was raised that the provisions of this subparagraph are not aligned with other similar provisions in the Model Law (e.g., article 32 (4) (b) (ii) of this proposed draft). The Working Group may wish to consider the extent of the difference between accepting the "lowest evaluated tender" and the "tender

Article 36. Request for quotations[38]

(1) A procuring entity may engage in procurement by means of a request for quotations in accordance with this article for the procurement of readily available goods or services that are not specially produced or provided to the particular descriptions[39] of the procuring entity and for which there is an established market, so long as the estimated value of the procurement contract is less than the amount set forth in the procurement regulations.

(2) A procuring entity shall not divide its procurement into separate contracts for the purpose of invoking paragraph (1) of this article.

(3) The procuring entity shall request quotations from as many suppliers or contractors as practicable, but from at least three. Each supplier or contractor from whom a quotation is requested shall be informed whether any elements other than the charges for the subject matters of the procurement themselves, such as any applicable transportation and insurance charges, customs duties and taxes, are to be included in the price.

(4) Each supplier or contractor is permitted to give only one price quotation and is not permitted to change its quotation. No negotiations shall take place between the procuring entity and a supplier or contractor with respect to a quotation submitted by the supplier or contractor.

(5) The successful quotation shall be the lowest-priced quotation meeting the needs of the procuring entity.[40]

---

with the best combined evaluation" in terms of the price and other criteria, and whether it is a difference in substance or in terminology. The Working Group may also wish to consider whether, in the light of the drafting history and explanations provided in A/CN.9/WG.I/WP.68, section II.B, there is benefit in retaining the different terminology and possibly different evaluation, whether the benefits of consistency might outweigh the benefits of retaining familiar terms and concepts, or vice versa, and accordingly whether the provisions of (for example) draft revised article 32 (4) (b) (ii) could be applied here. In this regard, the Working Group may wish to consider whether the procedure in this article is likely to be of real benefit where the lowest tender price will be accepted, and whether a simple alternative would be to allow two envelopes to be requested as an option in ordinary tendering proceedings, perhaps also where the evaluation will be based best combined (or lowest evaluated) tender.

[38] The Working Group, at its fifteenth session, approved the draft article, which is based on articles 21 and 50 of the 1994 Model Law, as revised at that session (A/CN.9/668, paras. 202-208).

[39] The terms "goods and services" in this paragraph are descriptive. The previous terms "specifications or requirements" have been replaced to ensure consistency with draft revised articles 2 and 11 (and the Working Group may wish to consider the extent of cross-referencing for terms introduced into the proposed revised text).

[40] See, also, draft revised article 12 as regards the terminology for ascertaining the successful quotation.

[CHAPTER IV. CONDITIONS FOR USE AND PROCEDURES OF TWO-STAGE TENDERING, REQUEST FOR PROPOSALS AND COMPETITIVE NEGOTIATION[41, 42]

Article 37. Conditions for use of two-stage tendering, request for proposals or competitive negotiation[43]

(1) [(Subject to approval by … (the enacting State designates an organ to issue the approval),)][44] a procuring entity may engage in procurement by means of two-stage tendering, request for proposals, or competitive negotiation, in the following circumstances:

(a) It is not feasible for the procuring entity to formulate detailed specifications for the subject matter of the procurement, or to identify its characteristics in accordance with article [11] and, in order to obtain the most satisfactory solution to its procurement needs:

(i) It seeks tenders, proposals or offers as to various possible means of meeting its needs; and[45]

(ii) Because of the technical character or nature of the subject matter of the procurement, it is necessary for the procuring entity to negotiate with suppliers or contractors;

(b) When the procuring entity seeks to enter into a contract for the purpose of research, experiment, study or development, except where the contract includes the production of items in quantities sufficient to establish their commercial viability or to recover research and development costs;

---

41 The Working Group, at its fifteenth session, deferred the consideration of the entire chapter (A/CN.9/668, para. 212). One delegation agreed to present a conference room paper proposing a revised chapter IV. The Working Group may wish therefore to consider the proposed chapter IV as it would be set out in that conference room paper.

42 Without prejudice to the proposal for chapter IV expected to be submitted by a delegation in a conference room paper, the present document consolidates the relevant provisions of the 1994 Model Law with the consequential amendments in the light of the revisions agreed to be made so far to the 1994 text. In addition, at its fifteenth session, the Working Group had before it the proposal for the consolidated articles on competitive negotiation and request for proposals (A/CN.9/668, paras. 210-211). The consideration of that proposal was deferred at that session (ibid., para. 212). That proposal is also set out in this chapter with the Secretariat's suggested amendments in the footnotes.

43 Based on article 19 of the 1994 Model Law, with consequential changes in the light of the proposed revisions to the Model Law and the removal of the definitions of "goods, construction or services".

44 The Working Group may wish to consider whether this phrase should be retained, in the light of its decisions at the fifteenth session to remove the requirement of higher-level approval in other similar instances. The Working Group decided, at that session, that it would consider whether the requirement should be imposed on a case-by-case basis (A/CN.9/668, para. 122).

45 "And" replaced "or."

(c) In the case of procurement for the reasons of national defence or national security, where the procuring entity determines that the selected method is the most appropriate method of procurement;[46] or

(d) When tendering proceedings have been engaged in but no tenders were submitted or all tenders were rejected by the procuring entity pursuant to article [16 and 32 (3)], and when, in the judgement of the procuring entity, engaging in new tendering proceedings would be unlikely to result in a procurement contract.[47]

(2) [(Subject to approval by … (the enacting State designates an organ to issue the approval),)][48] the procuring entity may engage in procurement by means of competitive negotiation also when there is an urgent need for the subject matter of the procurement, and engaging in tendering proceedings or other methods of procurement because of the time involved in using those methods would therefore be impractical, provided that the circumstances giving rise to the urgency were neither foreseeable by the procuring entity nor the result of dilatory conduct on its part.[49]

Article 38. Two-stage tendering[50]

(1) The provisions of chapter II of this Law shall apply to two-stage tendering proceedings except to the extent those provisions are derogated from in this article.

(2) The solicitation documents shall call upon suppliers or contractors to submit, in the first stage of the two-stage tendering proceedings, initial tenders containing their proposals without a tender price. The solicitation documents may solicit proposals relating to the technical, quality or other characteristics of the subject matter of the procurement as well as to contractual terms and conditions of supply, and, where relevant, the professional and technical competence and qualifications of the suppliers or contractors.

(3) The procuring entity may, in the first stage, engage in negotiations with any supplier or contractor whose tender has not been rejected pursuant to article [16 and 32 (3)] concerning any aspect of its tender.

(4) In the second stage of the two-stage tendering proceedings, the procuring entity shall invite suppliers or contractors whose tenders have not been rejected to submit final tenders with prices with respect to a single set of the descriptions of the subject matter of the procurement.[51] In formulating those descriptions,[52] the

---

46 Amended in the light of the expanded scope of the Model Law and in the light of the revisions agreed to be made in the similar provisions appearing in the context of the single-source procurement in the proposed article 7 (7) (a) (iv) (A/CN.9/668, para. 59).

47 Amended in the light of the proposed expansion of article 1.

48 The Working Group may wish to consider whether this phrase should be retained, in the light of its decisions at the fifteenth session to remove the requirement of higher-level approval in other similar instances. The Working Group decided, at that session, that it would consider whether the requirement should be imposed on a case-by-case basis (A/CN.9/668, para. 122).

49 Based on article 19 (2) of the 1994 Model Law, which has been amended in the light of the revisions agreed to be made at the Working Group's fifteenth session to the similar provisions appearing in the context of single-source procurement in the proposed article 7 (7) (a) (ii) (A/CN.9/668, para. 56).

50 Based on article 46 of the 1994 Model Law.

51 The phrase "descriptions of the subject matter of the procurement" replaced the word "specifications" in the light of the proposed new definition in article 2.

procuring entity may delete or modify any aspect, originally set forth in the solicitation documents, of the technical or quality characteristics of the subject matter of the procurement, and any criterion originally set forth in those documents for evaluating and comparing tenders and for ascertaining the successful tender, and may add new characteristics or criteria that conform with this Law. Any such deletion, modification or addition shall be communicated to suppliers or contractors in the invitation to submit final tenders. A supplier or contractor not wishing to submit a final tender may withdraw from the tendering proceedings without forfeiting any tender security that the supplier or contractor may have been required to provide. The final tenders shall be evaluated and compared in order to ascertain the successful tender as defined in article [32 (4) (b)].[53]

Article 39. Request for proposals[54]

(1) Requests for proposals shall be addressed to as many suppliers or contractors as practicable, but to at least three, if possible.[55]

(2) The procuring entity shall publish in a newspaper of wide international circulation or in a relevant trade publication or technical or professional journal of wide international circulation a notice seeking expressions of interest in submitting a proposal, unless for reasons of [economy and efficiency] [economy or efficiency] [economic efficiency][56] the procuring entity considers it undesirable to publish such a notice; the notice shall not confer any rights on suppliers or contractors, including any right to have a proposal evaluated.[57]

(3) A request for proposals issued by a procuring entity shall include at least the following information:

(a) The name and address of the procuring entity;

---

[52] Ibid.

[53] The Working Group may wish to consider whether the Model Law should provide for another type of the two-stage procedures for requesting proposals envisaged in the PFIPs instruments that resemble two-stage tendering except that (i) no exclusion of price in initial proposals is required, and (ii) negotiations subsequent to the submission of the proposals against the final single set of specifications are allowed (see A/CN.9/WG.I/WP.66, para. 22 (c) and the PFIPs model legislative provisions 10-17).

[54] The Working Group may wish to consider whether to revise this article incorporating the provisions of articles 43, 44 and 48 of the 1994 Model Law and conforming to the relevant provisions in the PFIPs instruments.

[55] The Working Group may wish to consider the juxtaposition of this and the following article and whether the order of the articles should be revised.

[56] The Working Group may wish to consider which of the three terms in square brackets should be retained in the provisions, in the light of the proposed article 7 (3) (that uses the term “economic efficiency”) and the existing provisions of the Model Law (that is not consistent in the use of the other two terms) (see articles 20 and 48 (2)).

[57] The Working Group is invited to consider the effect of this last statement in the light of the deletion of the exceptions from review. One of the exceptions in article 52 (2) of the 1994 Model Law (in subparagraph (e)) referred to a refusal by the procuring entity to respond to an expression of interest in participating in request for proposals proceedings pursuant to article 48 (2). Thus the intention of the drafters of the 1994 Model Law was to explicitly exclude these cases from review and liability on the part of the procuring entity. Similar considerations apply to options 1 and 2 of the proposed new article 34 (3) (see above).

(b) The description of the subject matter of the procurement, in conformity with article [11], including the technical and other parameters to which the proposal must conform, as well as, in the case of procurement of construction, the location of any construction to be effected and, in the case of services, the location where they are to be provided;[58]

(c) The information about the evaluation criteria, the evaluation procedure and the assessment of responsiveness of proposals, as specified in article [12 (4) (a)];[59] and

(d) The desired format and any instructions, including any relevant timetables applicable in respect of the proposal.

(4) Any modification or clarification of the request for proposals, including modification of the criteria for evaluating proposals as specified in the request for proposals in accordance with paragraph (3) of this article, shall be communicated to all suppliers or contractors participating in the request-for-proposals proceedings.

(5) The procuring entity [may] [shall][60] engage in negotiations with suppliers or contractors with respect to their proposals and may seek or permit revisions of such proposals, provided that the conditions of article 21 of this Law are satisfied and the opportunity to participate in negotiations is extended to all suppliers or contractors that have submitted proposals and whose proposals have not been rejected.[61]

(6) Following completion of negotiations, the procuring entity shall request all suppliers or contractors remaining in the proceedings to submit, by a specified date, a best and final offer with respect to all aspects of their proposals.

(7) The procuring entity shall employ the following procedures in the evaluation of proposals:

(a) Only the criteria set forth in the request for proposals shall be considered;[62]

(b) The effectiveness of a proposal in meeting the needs of the procuring entity shall be evaluated separately from the price;

(c) The price of a proposal shall be considered by the procuring entity only after completion of the technical evaluation.

(8) The successful proposal shall be the proposal that best meets the needs of the procuring entity as determined in accordance with the criteria for evaluating the proposals set forth in the request for proposals, as well as with the relative weight and manner of application of those criteria indicated in the request for proposals.[63, 64]

---

[58] Amended in the light of the proposed new article 11.

[59] Amended in the light of the proposed new article 12.

[60] The Working Group may wish to consider whether the word "may" is appropriate in this context (the wording of the 1994 Model Law).

[61] Based on article 48 (7) as amended in the light of the proposed new article 21.

[62] The Working Group may wish to consider how provisions of the proposed article 12 should apply in the context of negotiated procurement.

[63] Revised in the light of the proposed new article 19.

[64] The procedures described in paragraphs (5) to (8) of this article, which are based on article 48 (7) to (10) of the 1994 Model Law, resemble the procedures of the selection procedure with simultaneous negotiations of article 43 of the 1994 Model Law. Since chapter IV of the

Article 40. Competitive negotiation[65]

(1) In competitive negotiation proceedings, the procuring entity shall engage in negotiations with a sufficient number of suppliers or contractors to ensure effective competition.

(2) Any requirements, guidelines, documents, clarifications or other information relative to the negotiations that are communicated by the procuring entity to a supplier or contractor shall be communicated on an equal basis to all other suppliers or contractors engaging in negotiations with the procuring entity relative to the procurement.

(3) Following completion of negotiations, the procuring entity shall request all suppliers or contractors remaining in the proceedings to submit, by a specified date, a best and final offer with respect to all aspects of their proposals.

(4) The successful offer shall be the offer that best meets the needs of the procuring entity.[66]

1994 Model Law provides in addition for selection procedure with consecutive negotiation (article 44), the Working Group may wish to consider expanding the provisions on negotiation in this revised article by providing for two types of negotiations in the context of request for proposals. The Working Group may wish to read the draft revised article in conjunction with articles 43 and 44 of the 1994 text.

[65] Based on article 49 of the 1994 Model Law.

[66] A definition of the successful proposal was added for the purposes of the proposed amended article 19 and the relevant proposed new definition in article 2. See, however, proposed amended article 12 and the comments thereto.

A/CN.9/WG.I/WP.69/Add.4 (Original: English)

Note by the Secretariat on possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services - a revised text of the Model Law, submitted to the Working Group on Procurement at its sixteenth session

ADDENDUM

This note sets out a proposal for a consolidated article on request for proposals and competitive negotiations, which the Working Group had before it but did not consider at its fifteenth session (A/CN.9/668, paras. 210-212), as an alternative to the provisions from the 1994 Model Law on the procedures for request for proposals and competitive negotiation. It also contains proposed provisions for chapters V (Conditions for use of and procedures for electronic reverse auctions) and VI (Framework agreements procedures).[1]

The Working Group's attention is drawn to draft articles 48 and 50, the consideration of which was deferred by the Working Group to a later stage.

The Secretariat's comments are set out in the accompanying footnotes.

CHAPTER IV. CONDITIONS FOR USE OF AND PROCEDURES FOR TWO-STAGE TENDERING, REQUEST FOR PROPOSALS AND COMPETITIVE NEGOTIATION
(*continued*)

[Article [39]. Competitive negotiation[2]

(1) In competitive negotiation proceedings, the procuring entity shall engage in negotiations with a sufficient number of suppliers or contractors to ensure effective competition.

---

[1] At its fifteenth session, the Working Group agreed to consider drafting suggestions for the chapter on framework agreements procedures that would allow for negotiations in the context of framework agreements. It was agreed that the drafting of the relevant provisions should be undertaken together with the drafting of a revised chapter IV (A/CN.9/668, para. 224).

[2] The proposed article was before the Working Group at its fifteenth session. It consolidated the articles on request for proposals and competitive negotiation (articles 48 and 49 of the 1994 Model Law) on the ground that requests for proposals were typically the solicitations used to launch competitive negotiations (A/CN.9/668, para. 211). The Working Group decided to defer the consideration of the proposed article together with other provisions of chapter IV to a later stage (A/CN.9/668, para. 212). The Working Group may wish to consider that the merger of these two articles would eliminate the significant degree of flexibility currently provided for in the article on competitive negotiation (article 49 of the 1994 Model Law). The Working Group may also wish to consider that whether, and if so how, the provisions of article 44 of the 1994 Model Law on selection procedure with consecutive negotiations should be incorporated in the revised Model Law. The proposed merged article incorporates only the selection procedure with simultaneous negotiation.

(2) Requests for proposals shall be addressed to as many suppliers or contractors as practicable, but to at least three, if possible.

(3) The procuring entity shall publish in a newspaper of wide international circulation or in a relevant trade publication or technical or professional journal of wide international circulation a notice seeking expressions of interest in submitting a proposal, unless for reasons of [economy and efficiency] [economy or efficiency] [economic efficiency][3] the procuring entity considers it undesirable to publish such a notice; the notice shall not confer any rights on suppliers or contractors, including any right to have a proposal evaluated.

(4) The procuring entity shall establish the criteria for evaluating the proposals and determine the relative weight to be accorded to each such criterion and the manner in which they are to be applied in the evaluation of the proposals. The criteria shall concern:

(a) The relative managerial and technical competence of the supplier or contractor;

(b) The effectiveness of the proposal submitted by the supplier or contractor in meeting the needs of the procuring entity; and

(c) The price submitted by the supplier or contractor for carrying out its proposal and the cost of operating, maintaining and repairing the proposed goods or construction.[4]

(5) A request for proposals issued by a procuring entity shall include at least the following information:

(a) The name and address of the procuring entity;

(b) A description of the procurement need including the technical and other parameters to which the proposal must conform, as well as, in the case of procurement of construction, the location of any construction to be effected and, in the case of services, the location where they are to be provided;[5]

(c) The criteria for evaluating the proposal, expressed in monetary terms to the extent practicable, the relative weight to be given to each such criterion and the manner in which they will be applied in the evaluation of the proposal;[6] and

(d) The desired format and any instructions, including any relevant timetables applicable in respect of the proposal.

---

[3] The Working Group may wish to consider which of the three terms in square brackets should be retained in the provisions, in the light of the proposed article 7 (3) (that uses the term "economic efficiency") and the existing provisions of the Model Law (that is not consistent in the use of the other two terms) (see articles 20 and 48 (2)).

[4] The Working Group may wish to consider that the provisions of this paragraph repeat article 12 and therefore should be deleted.

[5] The Working Group may wish to consider that the subparagraph should be amended in the light of the new definition of "description" in article 2, the proposed article 11 and the revisions made to the similar provisions appearing in the context of the tendering proceedings (article 27 (d)).

[6] The Working Group may wish to consider whether the subparagraph should be amended to conform to the proposed article 12 and the revisions made to similar provisions appearing in the context of tendering proceedings (article 27 (e)).

(6) Any modification or clarification of the request for proposals, including modification of the criteria for evaluating proposals referred to in paragraph (3) of this article, shall be communicated to all suppliers or contractors participating in the request-for-proposals proceedings.

(7) The procuring entity shall treat proposals in such a manner so as to avoid the disclosure of their contents to competing suppliers or contractors.[7]

(8) The procuring entity [may] [shall][8] engage in negotiations with suppliers or contractors with respect to their proposals and may seek or permit revisions of such proposals, provided that the following conditions are satisfied:

(a) Any negotiations between the procuring entity and a supplier or contractor shall be confidential;[9]

(b) Subject to article [22], one party to the negotiations shall not reveal to any other person any technical, price or other market information relating to the negotiations without the consent of the other party;[10]

(c) The opportunity to participate in negotiations is extended to all suppliers or contractors that have submitted proposals and whose proposals have not been rejected.

(9) Any requirements, guidelines, documents, clarifications or other information relative to the negotiations that are communicated by the procuring entity to a supplier or contractor shall be communicated on an equal basis to all other suppliers or contractors engaging in negotiations with the procuring entity relative to the procurement.

(10) Negotiations between the procuring entity and a supplier or contractor shall be confidential, and, except as provided in article [22], one party to those negotiations shall not reveal to any other person any technical, price or other market information relating to the negotiations without the consent of the other party.[11]

(11) Following completion of negotiations, the procuring entity shall request all suppliers or contractors remaining in the proceedings to submit, by a specified date, a best and final offer with respect to all aspects of their proposals. The procuring entity shall select the successful offer on the basis of such best and final offers.[12]

(12) The procuring entity shall employ the following procedures in the evaluation of proposals:

(a) Only the criteria referred to in paragraph (3) of this article as set forth in the request for proposals shall be considered;

---

7 The Working Group may wish to consider that the provisions of this paragraph repeat the proposed article 21 and therefore should be deleted.

8 The Working Group may wish to consider that in the light of paragraph (1) of the proposed article, the word “shall”, not “may” as proposed, should be used.

9 The Working Group may wish to consider that the provisions of this paragraph repeat the proposed article 21 and are therefore unnecessary.

10 Ibid.

11 Ibid. In addition, the Working Group may wish to consider that the provisions are already addressed in paragraph (8).

12 The Working Group may wish to consider whether the second sentence of this paragraph overlaps with the proposed paragraph 13 of this article and therefore may be deleted.

(b) The effectiveness of a proposal in meeting the needs of the procuring entity shall be evaluated separately from the price;

(c) The price of a proposal shall be considered by the procuring entity only after completion of the technical evaluation.

(13) Any award by the procuring entity shall be made to the supplier or contractor whose proposal best meets the needs of the procuring entity as determined in accordance with the criteria for evaluating the proposals set forth in the request for proposals, as well as with the relative weight and manner of application of those criteria indicated in the request for proposals."[13]]

CHAPTER V. [CONDITIONS FOR USE OF AND PROCEDURES FOR] ELECTRONIC REVERSE AUCTIONS

Article 41. Conditions for use of electronic reverse auctions[14]

(1) A procuring entity may engage in procurement by means of an electronic reverse auction, or may use an electronic reverse auction to determine the successful submission in other methods of procurement, as appropriate, in accordance with the provisions of this chapter and under the following conditions:

(a) Where it is feasible for the procuring entity to formulate detailed and precise descriptions for the subject matter of the procurement;

(b) Where there is a competitive market of suppliers or contractors anticipated to be qualified to participate in the electronic reverse auction such that effective competition is ensured; and

(c) Where the criteria to be used by the procuring entity in determining the successful submission are quantifiable and can be expressed in monetary terms.

(2) The electronic reverse auction shall be based on:

(a) Price, where the procurement contract is to be awarded to the lowest price; or

(b) Prices and other criteria to be used by the procuring entity in determining the successful submission, specified in accordance with article [12] and as set out in the notice of the electronic reverse auction, where the procurement contract is to be awarded to the lowest evaluated submission.

(3) Where the procurement contract is awarded on the basis of the lowest evaluated submission, the electronic reverse auction shall be preceded by a full assessment of responsiveness and evaluation of initial submissions in accordance with the criteria to be used by the procuring entity in determining the successful submission and the relative weight of such criteria, as specified in accordance with article [12] and as set out in the notice of the electronic reverse auction. The

---

[13] The Working Group may wish to consider whether the paragraph should be conformed to the proposed articles 12 and 19, and whether it accurately applies the definition of the successful submission in article 2.

[14] The Working Group, at its fifteenth session, approved the article as revised at that session (A/CN.9/668, para. 216).

invitation to the electronic reverse auction shall be accompanied by the outcome of the full assessment of responsiveness and evaluation of initial submissions in accordance with the provisions of article [44 (4)].

Article 42. Procedures for soliciting participation in procurement involving the use of electronic reverse auctions[15]

(1) Where an electronic reverse auction is to be used as a [stand-alone] procurement method, the procuring entity shall cause a notice of the electronic reverse auction to be published in accordance with procedures of article [24] of this Law.

(2) Notwithstanding paragraph (1) of this article, where the procurement proceedings are limited to domestic suppliers or contractors under article [7 (6) (c) (i) and (ii)] of this Law, the procuring entity shall not be required to employ the procedures set out in articles 14 (1) (c), 24 (2), [25 (h) and (i), and 27 (j), (k) and (s)] of this Law.[16]

(3) Where an electronic reverse auction is to be used in other methods of procurement, the procuring entity shall notify suppliers and contractors when first soliciting their participation in the procurement proceedings, as appropriate, that an electronic reverse auction will be held.[17]

Article 43. Contents of the notice of the electronic reverse auction[18]

(1) The notice of the electronic reverse auction shall include, at a minimum [and in addition to other information required for the procurement method concerned], the following:

(a) Where the auction is to be used as a [stand-alone] procurement method, information referred to in article [25 (a), (d) and (e), and article 27 (d), (f), (h) to (j) and (t) to (y);]

(b) The criteria to be used by the procuring entity in determining the successful submission, including any criteria other than price to be used, the relative

---

[15] The Working Group, at its fifteenth session, approved the draft article without change (A/CN.9/668, para. 222).

[16] The Working Group may wish to consider whether there should be an explicit statement of the provisions of the Model Law that would apply to auctions as a stand-alone procurement method, in addition to those of general application (in Chapters I and VII). Some other provisions, such as those referred to in article 43 (1) (a), are expressly applied in this article, but the Working Group may consider that there may be some uncertainty as to the extent to which, for example, the relevant provisions of Chapters II and III apply. See, for example, footnote 20 below.

[17] The Working Group may wish to consider whether an express statement that this notification constitutes the notice of an electronic reverse auction for the purposes of the next article is required.

[18] The Working Group, at its fifteenth session, approved the draft article without change (A/CN.9/668, para. 222).

weights of all criteria, the mathematical formula to be used in the evaluation procedure and indication of any criteria that cannot be varied during the auction;[19]

(c) How the electronic reverse auction can be accessed; and information about the electronic equipment being used and technical specifications for connection;

(d) The manner and, if already determined, deadline by which the suppliers and contractors shall register to participate in the auction;

(e) Criteria governing the closing of the auction and, if already determined, the date and time of the opening of the auction;

(f) 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); and

(g) The rules for the conduct of the electronic reverse auction, including the information that will be made available to the bidders in the course of the auction and the conditions under which the bidders will be able to bid.

(2) Where the auction is to be used as a [stand-alone] procurement method, the procuring entity may decide to impose a minimum and/or maximum on the number of suppliers or contractors to be invited to the auction on the condition that the procuring entity has satisfied itself that in doing so it would ensure that effective competition and fairness are maintained. In such case, the notice of the electronic reverse auction shall state such a number and, where the maximum is imposed, the criteria and procedure that will be followed in selecting the maximum number of suppliers or contractors.[20]

(3) The procuring entity may decide that the electronic reverse auction shall be preceded by prequalification [in accordance with article [15]]. In such case, the notice of the electronic reverse auction shall contain the invitation to pre-qualify [and include the information referred to in article [15 (3).]][21]

(4) The procuring entity may decide that the electronic reverse auction shall be preceded by an assessment as to whether the submissions are responsive. In such case, the notice of the electronic reverse auction shall contain an invitation to present initial submissions and include information referred to in articles [25 (f) to (j) and 27 (a), (k) to (s) and (z)] and information on procedures to be used in such assessment.

(5) Where both a full evaluation of initial submissions and an assessment of responsiveness are required in accordance with the provisions of article [41 (3),] the notice of the electronic reverse auctions shall contain an invitation to present initial submissions and shall include the information referred to in articles [25 (f) to (j) and 27 (a), (k) to (s) and (z)] and information on procedures to be used in such evaluation.

---

[19] The Working Group may wish to consider whether an express cross-reference to proposed article 12 and making provision for a mathematical formula might be preferable to the current formulation, in order to avoid any perceived difference or inconsistency between this provision and proposed article 12.

[20] The Working Group may wish to ensure consistency between this provision and the provisions on limiting numbers in proposed article 34.

[21] The Working Group may wish to consider whether the provisions of the entire proposed article 15 (Prequalification) should be applied by cross-reference, or whether the more limited cross reference to the article 15 (3) would be sufficient.

Article 44. Invitation to participate in the electronic reverse auction[22]

(1) Except as provided for in paragraphs (2) to (4) of this article, the notice of the electronic reverse auction shall serve as an invitation to participate in the auction and shall be complete in all respects, including as regards information specified in paragraph (5) of this article.

(2) Where a limitation on the number of suppliers or contractors to be invited to the auction has been imposed in accordance with article [43 (2),] the procuring entity shall send an invitation to participate in the auction individually and simultaneously to each supplier or contractor selected corresponding to the number, and in accordance with the criteria and procedure, specified in the notice of the electronic reverse auction.[23]

(3) Where the auction has been preceded by prequalification of suppliers or contractors in accordance with articles [15 and 43 (3),] the procuring entity shall:

(a) Promptly notify each supplier or contractor concerned whether or not it has been pre-qualified, and where a supplier or contractor that has not been pre-qualified so requests, promptly communicate to that supplier or contractor the grounds for the decision not to pre-qualify;[24]

(b) Send the invitation to participate in the auction individually and simultaneously to each supplier or contractor pre-qualified in accordance with article [15] of this Law.

(4) Where the auction has been preceded by an assessment of responsiveness or full evaluation of initial submissions [in accordance with articles [[11], [12], 26, 28 to 30, 31 (1), 32 (1) and (2) and 43 (4) and (5),]] the procuring entity shall:

(a) Promptly notify each supplier or contractor concerned whether or not its submission is responsive. Where a supplier or contractor's submission is not responsive, and is accordingly rejected in accordance with article [32 (3)], the procuring entity shall, upon request, promptly communicate to the supplier or contractor concerned the grounds upon which its initial submission was considered to be non-responsive;[25]

(b) Send an invitation to participate in the auction individually and simultaneously to each supplier or contractor whose initial submission was responsive. The procuring entity shall also notify each supplier or contractor

---

22 The Working Group, at its fifteenth session, approved the article without change (A/CN.9/668, para. 222).

23 The Working Group may wish to consider whether the text or the Guide should explain that, if there are fewer participants than the maximum permitted number, that all must be invited to participate.

24 Additional provision to ensure consistency with proposed article 15. As noted in footnote 21 above, the Working Group may wish to apply the provisions of the entire article 15 to this procedure, in which case this additional provision would no longer be necessary. The Working Group may wish to explain in the Guide that the notice that the supplier was pre-qualified can be included in the invitation to participate (and similarly as regards any responsiveness assessment and the outcome of any full evaluation).

25 Additional provision to ensure consistency with proposed article 15. As noted in footnote 21 above, the Working Group may wish to apply the provisions of the entire article to this procedure, in which case this additional provision would no longer be necessary.

concerned of the outcome of any full evaluation of its respective initial submission.[26]

(5) Unless already provided in the notice of the electronic reverse auction, the invitation to participate in the auction shall set out:

(a) The deadline by which the invited suppliers and contractors shall register to participate in the auction;

(b) The date and time of the opening of the auction;

(c) The requirements for registration and identification of bidders at the opening of the auction;

(d) Information concerning individual connection to the electronic equipment being used; and

(e) All other information concerning the electronic reverse auction necessary to enable the supplier or contractor to participate in the auction.

(6) The procuring entity shall ensure that the number of suppliers or contractors invited to participate in the auction in accordance with this article is sufficient to guarantee effective competition.

Article 45. Registration to participate in the electronic reverse auction and timing of holding of the auction[27]

(1) The fact of the registration to participate in the auction shall be promptly confirmed individually to each registered supplier or contractor.

(2) If the number of suppliers or contractors registered to participate in the auction is in the opinion of the procuring entity insufficient to ensure effective competition, the procuring entity may cancel the electronic reverse auction. The fact of the cancellation of the auction shall be promptly communicated individually to each registered supplier or contractor.

(3) The auction shall not take place before expiry of adequate time after the notice of the electronic reverse auction has been issued or, where invitations to participate in the auction are sent, from the date of sending the invitations to all suppliers or contractors concerned. This time shall be sufficiently long to allow suppliers or contractors to prepare for the auction, taking into account the reasonable needs of the procuring entity.[28]

---

[26] The Working Group may wish to consider what guidance should be given in the Guide addressing the extent of the information on the outcome of the full evaluation should be provided. See, also, footnote 30, below.

[27] The Working Group, at its fifteenth session, approved the article without change (A/CN.9/668, para. 222).

[28] The words “taking into account the reasonable needs of the procuring entity” were added to ensure consistency with other similar provisions of the Model Law (see, e.g., articles 15 (3) (i) and 29 (1) of this draft).

Article 46. Requirements during the auction[29]

(1) During an electronic reverse auction:

(a) All bidders shall have an equal and continuous opportunity to present their submissions;

(b) There shall be automatic evaluation of all submissions in accordance with the criteria and other relevant information included in the notice of the electronic reverse auction;

(c) Each bidder must instantaneously and on a continuous basis during the auction receive sufficient information allowing it to determine the standing of its submission vis-à-vis other submissions;[30]

(d) There shall be no communication between the procuring entity and the bidders or among the bidders, other than as provided for in subparagraphs (a) and (c) of this paragraph.

(2) The procuring entity shall not disclose the identity of any bidder during the auction.

(3) The auction shall be closed in accordance with the criteria specified in the notice of the electronic reverse auction.

(4) The procuring entity shall suspend or terminate the electronic reverse auction in the case of failures in its communication system that risk the proper conduct of the auction or for other reasons stipulated in the rules for the conduct of the electronic reverse auction. The procuring entity shall not disclose the identity of any bidder in the case of suspension or termination of the auction.

Article 47. Requirements after the auction[31]

(1) The submission ascertained at the closure of the auction to be the lowest price or the [lowest] [best][32] evaluated submission, as applicable, shall be the successful submission.

---

[29] The Working Group, at its fifteenth session, approved the article without change (A/CN.9/668, para. 222).

[30] The Working Group, at its fifteenth session, approved the subparagraph without change but agreed that the Guide would highlight the risks of collusion that might arise where information about other bids is provided, and would provide examples of existing good practice to mitigate these risks.

[31] The Working Group, at its fifteenth session, approved the article subject to the consideration at a later stage of the use of the term “the best evaluated submission” in place of the term “the lowest evaluated submission” (A/CN.9/668, para. 222). See the footnote immediately below.

[32] At the Working Group’s fifteenth session, it was suggested that the term “the lowest evaluated submission” should be replaced with the term “the best evaluated submission”, since in practice it was the highest or the best, not the lowest, evaluated submission that was accepted. The provisions, it was pointed out, as drafted at present, might cause unnecessary confusion. The Working Group noted that the suggested change should be considered in conjunction with other provisions of the Model Law. It was also pointed out that the term was used in the 1994 text. The Working Group deferred the consideration of the issue to a later stage (A/CN.9/668, paras. 220 and 222). The same issue is discussed in the context of proposed articles 12 and 32 (4) (b) (ii) of this draft. The Working Group may wish therefore to conform its use of

(2) Whether or not it has engaged in prequalification proceedings pursuant to article [15], the procuring entity may require the bidder presenting the submission that has been found at the closure of the auction to be the successful submission to demonstrate again its qualifications in accordance with criteria and procedures conforming to the provisions of article [10]. If the bidder fails to do so, the procuring entity shall reject that submission. Unless the procuring entity decided, in accordance with article [16 (1)], to reject all remaining submissions, it shall select the submission that at the closure of the auction was the next lowest price or next [lowest] evaluated submission, provided that the bidder that presented that submission can demonstrate its qualifications if required to do so.

(3) Where it has not assessed responsiveness of initial submissions prior to the auction, the procuring entity shall assess after the auction the responsiveness of the submission that at the closure of the auction has been found to be the successful submission. The procuring entity shall reject the submission if that submission is found to be unresponsive. Unless the procuring entity decided, in accordance with article [16 (1)], to reject all remaining submissions, it shall select the submission that at the closure of the auction was the next lowest price or next [lowest] evaluated submission, provided that this submission is found to be responsive.

(4) The procuring entity may engage in procedures described in article [17] if the submission that at the closure of the auction has been found to be the successful submission gives rise to concerns as to the ability of the bidder that presented that submission to perform the procurement contract. If the procuring entity rejects the submission on the grounds specified in article [17], it shall select the submission that at the closure of the auction was the next lowest price or next [lowest] evaluated submission, subject to the right of the procuring entity, in accordance with article [16 (1)], to reject all remaining submissions.

CHAPTER VI. FRAMEWORK AGREEMENTS PROCEDURES[33]

Article 48. Conditions for use of a framework agreement procedure[34]

(1) A procuring entity may engage in a framework agreement procedure in accordance with this chapter where it determines that:

(a) The need for the subject matter of the procurement [is expected to/will]

---

this and similar notions throughout the Model Law. See also the related discussion in A/CN.9/WG.I/WP.68, under section II.B.1.

[33] At the Working Group's fifteenth session, the view was expressed that it might be necessary to allow for negotiated procedures subsequent to the conclusion of the framework agreements. It was suggested that drafting of the provisions allowing for negotiations in the context of framework agreements should be undertaken together with chapter IV. The Working Group agreed with these suggestions (A/CN.9/668, para. 224).

[34] The Working Group, at its fifteenth session, agreed to remove to article 2 the definitions proposed to be included in this article in the note by the Secretariat (A/CN.9/WG.I/WP.66/Add.4) (A/CN.9/668, paras. 229 and 273 (f)). The Working Group deferred the consideration of other revisions proposed to be made to the draft article to a later stage (A/CN.9/668, para. 229).

arise on a [repeated or indefinite][35] basis during a given period of time; or

(b) By virtue of the nature of the subject matter of the procurement, the need for it may arise on an urgent basis during a given period of time; or

[(c) Other grounds and circumstances that justify recourse to a framework agreement procedure.][36]

(2) The procuring entity shall include in the record required under article [22] of this Law a statement of the grounds and circumstances upon which it relied to justify the recourse to a framework agreement procedure and the type of framework agreement selected.[37]

Article 49. Information to be specified when first soliciting participation in a framework agreement procedure[38]

When first soliciting the participation of suppliers or contractors in a framework agreement procedure, the procuring entity shall specify:

(a) The name and address of the procuring entity;

(b) That the procurement will be conducted as a framework agreement procedure;

(c) The type of the framework agreement to be concluded — a closed or open framework agreement; if closed, whether it is with or without second-stage competition; and, if closed without second-stage competition, whether it is to be concluded with one or more than one supplier or contractor;[39]

---

[35] One of the issues deferred by the Working Group was a proposal presented at the fifteenth session to reconsider the inclusion and extent of conditions for use (A/CN.9/668, paras. 227-229). The alternatives in square brackets were provided by participants at the session to the Secretariat, for further consideration by the Working Group, with the comment that the term "indefinite" indicates unknown timing and/or unknown quantities.

[36] At the Working Group's fifteenth session, it was alternatively suggested that an additional open-ended subparagraph (c) could be included, which would allow the procuring entity to have recourse to framework agreement procedures subject to the justification of its decision in the record of the procurement proceedings (A/CN.9/668, para. 228).

[37] At the Working Group's fifteenth session, it was suggested that all provisions in this chapter referring to the record of procurement proceedings should be consolidated for further consideration at a later date (A/CN.9/668, para. 229). The Secretariat consolidated as many of the provisions in this paragraph that the context would allow. The understanding is that their content will eventually be also reflected in an article on the record of procurement proceedings (article 22 of the proposed revised Model Law). According to the understanding reached by the Working Group, the consideration of the provisions on the record of procurement proceedings is to be deferred until after all other outstanding substantive issues with respect to a revised Model Law have been resolved which will also include provisions related to the record found elsewhere in this Chapter.

[38] The Working Group, at its fifteenth session, approved the draft article as revised at that session (A/CN.9/668, para. 233).

[39] This subparagraph was revised as a result of the amendments made to draft article 48, such as the removal of the description of various types of framework agreements to the article on definitions (article 2 of this draft). In order to avoid extensive cross-referencing, the Working Group may wish to consider including some of the more detailed definitions (marked in the comments to article 2) in this Chapter, with the more general definitions remaining in article 2.

(d) All minimum information required to be included in the framework agreement in accordance with article [52] or [54], as applicable;

(e) In framework agreements with more than one supplier or contractor, any minimum or maximum number of suppliers or contractors that will be parties to the framework agreement;

(f) The procedures and criteria to be used by the procuring entity in the selection of the parties to the framework agreement; in the case of closed framework agreements, in addition any evaluation criteria, their relative weight and the manner in which they will be applied in the selection and whether the selection will be based on the lowest price or [lowest][40] evaluated submission;

(g) In closed framework agreements procedures, the information referred to in article 25 (e)-(j) and article 27 (a)-(c) and (g)-(z), unless such information will be established in a second-stage competition.

Article 50. No material variation during the operation of the framework agreement[41]

During the operation of the framework agreement, no amendment to the terms and conditions of the procurement, including variation of the relative weight of the evaluation criteria, shall be permitted if it leads to a material change in the description of the subject matter of the procurement or all other terms and conditions of the procurement established when first soliciting the participation of suppliers or contractors in a framework agreement procedure in accordance with article [49].

Article 51. [Selection of the party or parties to a closed framework agreement] [First stage of a closed framework agreement procedure][42]

(1) The procuring entity shall select the party or parties to a closed framework agreement[43] with a procuring entity:

(a) By means of tendering proceedings in accordance with provisions of chapter II of this Law except to the extent that those provisions are derogated from in this article and article [52]; or

---

[40] See footnote 27 above.

[41] The Working Group, at its fifteenth session, agreed to remove to article 2 the definition of "material change" proposed to be included in this article in the note by the Secretariat (A/CN.9/WG.I/WP.66/Add.4) (A/CN.9/668, paras. 235-237 and 273 (f)). The Working Group deferred the consideration of the revised draft article (A/CN.9/668, paras. 235-237).

[42] The Working Group, at its fifteenth session, approved the draft article without change (A/CN.9/668, para. 238). The proposed change in title (the first option in square brackets) is to avoid any confusion with the initial solicitation under proposed article 49 (which would be the first step in the proceedings).

[43] Paragraph (1) of the previous draft was deleted to ensure consistency with the revisions made to proposed article 48 (removal of the descriptions of the type of framework agreement procedures to article 2), and also because the decision on the selection of the type of framework agreement should already be taken by this stage and reflected in the solicitation docs (see proposed article 49 (c)) above.

(b) By means of a method of procurement of chapter III under the conditions of article [7 (3)] of this Law and in accordance with the relevant provisions of chapter III except to the extent that those provisions are derogated from in this article and article [52];

(c) In the case of a framework agreement concluded with one supplier or contractor, in addition to the methods of procurement specified in subparagraphs (a) and (b) of this paragraph, by means of single-source procurement under the conditions set out in article [7 (7) (a) (i) and (iii) to (v)].

(2) The procuring entity shall include in the record required under article 22 of this Law a statement of the grounds and circumstances upon which it relied to justify the use of any method of procurement other than tendering for the selection of the party or parties to a closed framework agreement with the procuring entity.

(3) The procuring entity shall select the supplier(s) or contractor(s) with which to enter into the framework agreement on the basis of the specified selection criteria, including the relative weights of such criteria and the manner of their application. The procuring entity shall promptly notify the selected supplier(s) or contractor(s) of their selection.[44]

Article 52. Minimum requirements of closed framework agreements[45]

(1) A closed framework agreement may be concluded between the procuring entity and one supplier or contractor or more than one supplier or contractor.[46]

(2) A closed framework agreement shall be concluded in writing and shall set out:

(a) The duration of the framework agreement, which shall not exceed [the enacting State specifies a maximum] years;[47]

(b) The description of the subject matter of the procurement and all other terms and conditions of the procurement established when the framework agreement is concluded;

(c) To the extent that they are known, estimates of the terms and conditions of the procurement that cannot be established with sufficient precision when the framework agreement is concluded;

---

[44] The Working Group may wish to consider whether, in the light of the strengthened review provisions, the paragraph should also provide for debriefing of suppliers or contractors that were not selected. See in this context the relevant discussion in a note by the Secretariat A/CN.9/WG.I/WP.68/Add.1, under section H.

[45] The Working Group, at its fifteenth session, approved the draft article as revised at that session (A/CN.9/668, para. 245).

[46] The paragraph was revised further to a suggestion at the Working Group's fifteenth session that the reference to a defined number should be deleted, and a decision on any required number left to an enacting State (A/CN.9/668, para. 243).

[47] At the Working Group's fifteenth session, it was agreed that paragraph (5) should be accompanied with the provisions in the Guide highlighting the danger of closed framework agreements of long duration, in the light of their potentially anticompetitive nature (A/CN.9/668, para. 244).

(d) Whether in a closed framework agreement concluded with more than one supplier or contractor there will be a second-stage competition to award a procurement contract under the framework agreement[48] and, if so:

(i) A statement of the terms and conditions that are to be established or refined through second-stage competition;

(ii) The procedures for and the possible frequency[49] of any second-stage competition and envisaged deadlines for submission of second-stage tenders;[50]

(iii) Whether the award of a procurement contract under the framework agreement will be based on the lowest price or [lowest] evaluated tender […];

(iv) Evaluation procedures and criteria, including the relative weight of such criteria and the manner in which they will be applied, in accordance with article [12] of this Law, during any second-stage competition. The framework agreement may specify a range within which the relative weights of the evaluation criteria may be varied during second-stage competition, provided that any such variation does not lead to a material variation in the procurement as described in article [50].

(3) A closed framework agreement with more than one supplier or contractor shall be concluded as one agreement between all parties unless:

(a) The procuring entity determines that it is in the interests of either party that separate agreements with each supplier or contractor party to the framework agreement be concluded; and

(b) The procuring entity includes in the record required under article [22] a statement of the grounds and circumstances on which it relied to justify the conclusion of separate agreements; and

(c) Any variation in the terms and conditions of the separate agreements for a given procurement is minor, of a non-material nature and concerns only those provisions that justify the conclusion of separate agreements.

(4) If the procuring entity is to maintain a closed framework agreement electronically, the framework agreement shall in addition to information specified

---

[48] The chapeau has been redrafted to avoid giving the impression that all multi-supplier agreements must involve second-stage competition.

[49] At the Working Group's fifteenth session, it was agreed that the reference to the "envisaged frequency" should be replaced with a reference to the "possible frequency" (A/CN.9/668, para. 240).

[50] At the Working Group's fifteenth session, the view was expressed that information about tentative deadlines within which second-stage submissions would have to be presented was to be disclosed to suppliers or contractors in advance. That information was considered to be important for suppliers or contractors to decide whether to become parties to the framework agreement. The suggestion was made that the issue should be addressed in the context of proposed article 49 (g) to the extent it was not already covered, with explanation in the Guide that information provided was intended to be indicative rather than binding on the procuring entity (A/CN.9/668, para. 248). The Working Group may wish to consider that this type of information would most likely in practice be included in the framework agreement itself rather than in the solicitation notice. Since in accordance with the proposed article 49 (d), the minimum content of the framework agreement is to be disclosed at the outset of the procurement proceedings, the Working Group may wish to include the relevant information in the present subparagraph rather than in proposed article 49 (g).

elsewhere in this article contain all information necessary to allow the effective operation of the electronic framework agreement, including information on how the electronic framework agreement and notifications of forthcoming procurement contracts under the framework agreement can be accessed, the electronic equipment being used, and technical specifications for connection.

Article 53. Selection of parties to an open framework agreement procedure[51]

(1) The procuring entity shall establish and maintain an open framework agreement in electronic form.

(2) To establish an open framework agreement, the procuring entity shall publish a notice of the open framework agreement procedure, in accordance with article 24. The notice shall contain the information specified in article [49].

(3) The procuring entity shall, during the period of operation of the open framework agreement, either:

(a) Republish as frequently as practicable, but at least once annually, the initial notice of the open framework agreement procedure, a notice of the award of a framework agreement and an invitation to present further submissions to become a party to the framework agreement, in the publication or publications in which the initial publication was made; or

(b) Maintain a copy of the published information at the website or other electronic address set out in the initial notice.

(4) Suppliers and contractors may apply to become a party or parties to the open framework agreement at any time during its operation by presenting their submissions to the procuring entity in compliance with the requirements of the notice of the open framework agreement procedure.

(5) The procuring entity shall examine all such submissions to become a party to the framework agreement received during the period of its operation within a maximum of […] days in accordance with the procedures set out in the notice of the open framework agreement procedure.

(6) The framework agreement shall be concluded with all suppliers or contractors unless their submissions were rejected in accordance with article [32 (3)] of this Law.

(7) The procuring entity may set out a maximum number of parties to the open framework agreement because of technical or other capacity limitations. The procuring entity shall provide information about the imposition of such a maximum and the maximum number when first soliciting participation in a framework agreement procedure in accordance with article 49 of this Law. The procuring entity shall include a statement of the grounds and circumstances upon which it relied to justify the imposition of such a maximum in the record required under article [22] of this Law.

---

[51] The Working Group, at its fifteenth session, approved the draft article as revised at that session (A/CN.9/668, paras. 250-253). The title reflects the proposed changes to the title of proposed article 51.

(8) The procuring entity shall promptly notify the suppliers or contractors whether they have been selected to be parties to the framework agreement.[52]

Article 54. Minimum requirements as regards open framework agreements[53]

(1) An open framework agreement shall provide for second-stage competition for the award of a procurement contract under the agreement and shall in addition contain at a minimum:

(a) The description of the subject matter of the procurement and all other terms and conditions of the procurement known when the open framework agreement is established;

(b) Any terms and conditions that may be refined through second-stage competition;

(c) The language or languages of the open framework agreement and all information about the electronic operation of the agreement, including how the agreement and notifications of forthcoming procurement contracts under the agreement can be assessed, electronic equipment used and the technical arrangements and specifications;

(d) If any limitation on a number of suppliers or contractors that are parties to the agreement is imposed, a maximum number of suppliers or contractors that may enter into the framework agreement;

(e) The terms and conditions for suppliers or contractors to be admitted to the open framework agreement, including:

(i) An explicit statement that suppliers or contractors may apply to become parties to the framework agreement at any time during the period of its operation, subject to any maximum number of suppliers, if any;

(ii) The information specified in article 25 (e), and article 27 (b), (c), (t), (u), (w) and (z); and

(iii) Instructions for preparing and submitting indicative tenders, including the information referred to in article 27 (i) to (k);

(f) The procedures and the possible frequency of second-stage competition;

(g) Whether the award of a procurement contract under the framework agreement will be based on the lowest price or [lowest] evaluated tender;

(h) The evaluation procedures and criteria to be applied during the second-stage competition, including the relative weight of the evaluation criteria and the manner in which they will be applied, in accordance with article [12] of this Law. The framework agreement may specify a range within which the relative weights of

---

[52] The Working Group may wish to consider whether, in the light of the strengthened review provisions, the paragraph should also provide for debriefing of suppliers or contractors that were not selected. See in this context the relevant discussion in a note by the Secretariat A/CN.9/WG.I/WP.68/Add.1, under section H.

[53] The Working Group, at its fifteenth session, approved the draft article as revised at that session (A/CN.9/668, para. 254).

the evaluation criteria may be varied during second-stage competition, provided that any such variation does not lead to a material variation in the procurement as described in article [50];

(i) The duration of the framework agreement.[54]

(2) The procuring entity shall, during the entire period of operation of the open framework agreement, ensure unrestricted, direct and full access to the specifications and terms and conditions of the open framework agreement and to any other necessary information relevant to its operation.

Article 55. Second stage of a framework agreement procedure[55]

(1) The award of any procurement contract under a framework agreement shall be effected in accordance with its terms and conditions and the provisions of this article.

(2) No procurement contract under the closed framework agreement shall be awarded to suppliers or contractors that were not originally parties to the closed framework agreement.

(3) (a) Each anticipated procurement contract under a closed framework agreement with the second-stage competition and an open framework agreement shall be the subject of a written invitation to tender;

(b) The procuring entity shall invite all suppliers or contractors that are parties to the framework agreement, or where relevant all such suppliers and contractors then capable of meeting the needs of the procuring entity, to present their tenders for the supply of the items to be procured;

(c) The invitation to tender shall:

(i) Restate the existing terms and conditions of the framework agreement to be included in the anticipated procurement contract, set out the terms and conditions that are to be subject to the second-stage competition and provide further detail of the terms and conditions where necessary;

(ii) Restate the procedures and selection criteria for the award of the anticipated procurement contract (including their relative weight and the manner of their application), and include the information referred to in article 27 (q) to (s) and (x) to (z) of this Law;

(iii) Set out instructions for preparing second-stage tenders, including information specified in article 27 (g) to (p) of this Law;

(iv) Fix the manner, modalities and deadline for the submission of tenders. The deadline for the submission of tenders shall be expressed as a specific date and time and allow sufficient time for suppliers or contractors to prepare and

---

[54] The Working Group, at its fifteenth session, agreed to add the reference to the duration of the framework agreement in this article (A/CN.9/668, para. 254).

[55] The Working Group, at its fifteenth session, agreed to merge draft articles addressing second-stage procedures in closed and open framework agreements. With this change, it approved the substance of the draft article (A/CN.9/668, paras. 247 and 255).

submit their tenders, taking into account the reasonable needs of the procuring entity;[56]

(d) The procuring entity shall evaluate all tenders received and determine the successful tender in accordance with the evaluation criteria and the procedures set out in the invitation to tender;

(e) [The procuring entity shall accept the successful tender in accordance with article 19].[57]

(4) The procuring entity shall promptly notify in writing all suppliers or contractors that are parties to the framework agreement of the award of the contract, the name and address of the supplier or contractor to whom the notice has been issued and the contract price.[58]

---

[56] The provisions of the paragraph were revised to make them technologically neutral and consistent with similar provisions in other articles of this proposed revised Model Law.

[57] To be reviewed in the light of the pending decision of the Working Group with respect to draft article 19 (11), in particular as regards the advisability of providing for a standstill period at the stage of the award of procurement contracts under framework agreements (A/CN.9/668, paras. 141-144).

[58] Ibid.

A/CN.9/WG.I/WP.69/Add.5 (Original: English)

Note by the Secretariat on possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services — a revised text of the Model Law, submitted to the Working Group on Procurement at its sixteenth session

ADDENDUM

This note sets out provisions for Chapter VII (Review) for a revised text of the Model Law. This note also contains a table indicating correlation of the articles in the proposed revised Model Law to the articles of the 1994 Model Law and new provisions considered by the Working Group to date.

CHAPTER VII. REVIEW

Article 56. Right to review[1]

Any supplier or contractor that claims to have suffered, or that may suffer, loss or injury due to non-compliance with the provisions of this Law may seek review in accordance with articles 57 to 61 and challenge in appropriate bodies in accordance with applicable law any decisions taken as a result of such a review.

Article 57. Review by the procuring entity or the approving authority[2]

(1) Without prejudice to the right of suppliers or contractors to seek directly review before an independent administrative body in accordance with article 58 of this Law, a supplier or contractor entitled under article 56 to seek review may submit a complaint to the procuring entity or where applicable to the approving authority.[3] The complaints shall be submitted in writing provided that:

(a) Complaints as regards the terms of solicitation shall be submitted no later than the deadline for presenting the submissions;

(b) All other complaints arising from the procurement proceedings shall be submitted before the entry into force of the procurement contract within […] days of when the supplier or contractor submitting the complaint became aware of the circumstances giving rise to the complaint or of when that supplier or contractor should have become aware of those circumstances, whichever is earlier.

---

[1] The Working Group, at its fifteenth session, approved the draft article without change (A/CN.9/668, para. 257).

[2] The Working Group, at its fifteenth session, approved the article as revised at that session (A/CN.9/668, paras. 259-260). In particular, it was agreed that the provisions should not fix any deadlines in terms of a specific number of days but leave this information in square brackets to be filled in by an enacting State. It was also agreed that the Guide should in this respect bring to the attention of enacting States the time period specified in the WTO Agreement on Government Procurement.

[3] The paragraph was redrafted further to the suggestion at the Working Group's fifteenth session to make the provisions of the proposed article less ambiguous as regards the optional nature of the review under article 59 (A/CN.9/668, para. 259).

(2) Unless the complaint is resolved by mutual agreement of the parties, the procuring entity or the approving authority as appropriate shall, within […] days after the submission of the complaint, issue a written decision. The decision shall:

(a) State the reasons for the decision; and

(b) If the complaint is upheld in whole or in part, state the corrective measures that shall be undertaken.

(3) If the procuring entity or the approving authority does not issue a decision by the time specified in paragraph (2) of this article, the supplier or contractor submitting the complaint or the procuring entity as the case may be is entitled immediately thereafter to institute proceedings under article 58 or 61. Upon the institution of such proceedings, the competence of the procuring entity or the approving authority to entertain the complaint ceases.

Article 58. Review before an independent administrative body*[4]

(1) A supplier or contractor entitled under article 56 to seek review may submit a complaint to [insert name of administrative body].

(2) The complaints shall be submitted in writing within […] days of when the supplier or contractor submitting the complaint became aware of the circumstances giving rise to the complaint or of when that supplier or contractor should have become aware of those circumstances, whichever is earlier, provided that the complaints as regards the terms of solicitation shall be submitted no later than the deadline for presenting the submissions.

(3) The [timely] submission of a complaint under article 57 shall suspend the time period for submission of a complaint under this article for the whole duration of the actual proceedings under article 57 up to the maximum period required for the procuring entity or the approving authority as the case may be to take a decision in accordance with article 57 (2) and communicate such decision to the supplier or contractor in accordance with article 60 (3).

(4) Upon receipt of a complaint, the [insert name of administrative body] shall give notice of the complaint promptly to the procuring entity and to the approving authority where applicable.

---

* States where hierarchical administrative review of administrative actions, decisions and procedures is not a feature of the legal system may omit this article and provide only for judicial review (article 61), on the condition that in the enacting State exists an effective system of judicial review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the procurement rules and procedures of this Law are not followed, in compliance with the requirements of the United Nations Convention against Corruption.

[4] The Working Group, at its fifteenth session, approved the draft article as revised at that session subject to further consideration of an outstanding issue (see the footnote immediately below) (A/CN.9/668, para. 265). It was agreed to clarify in the Guide in the context of this article the meaning of the term “independent administrative body,” in particular whether the body should be composed of outside experts. It was noted that the Guide might highlight the disruptions to the procurement proceedings if decision-taking at the review stage lacked independence since decisions would be subject to appeal and would cause further delays (A/CN.9/668, para. 262 (g)).

(5) The [insert name of administrative body] may grant one or more of the following remedies, unless it dismisses the complaint:

(a) Declare the legal rules or principles that govern the subject matter of the complaint;[5]

(b) Prohibit the procuring entity from acting or deciding unlawfully or from following an unlawful procedure;

(c) Require the procuring entity that has acted or proceeded in an unlawful manner, or that has reached an unlawful decision, to act or to proceed in a lawful manner or to reach a lawful decision;

(d) Annul in whole or in part an unlawful act or decision of the procuring entity;

(e) Revise an unlawful decision by the procuring entity or substitute its own decision for such a decision;

(f) Require the payment of compensation for any reasonable costs incurred by the supplier or contractor submitting the complaint in connection with the procurement proceedings as a result of an unlawful act or decision of, or procedure followed by, the procuring entity, and for any loss or damages suffered, which [may] [shall] be limited to [either] costs for the preparation of the submission or [protest] [the costs relating to the challenge, or both]; [6]

(g) Order that the procurement proceedings be terminated;

(h) Annul the procurement contract that entered into force unlawfully and, if notice of the procurement contract award has been published, order the publication of notice of the annulment of the award.

(6) The [insert name of administrative body] shall within […] days issue a written

---

[5] At the Working Group's fifteenth session, in response to the suggestion that paragraph (5) (a) should be included in the chapeau of the paragraph, the Secretariat was requested to research the drafting history of the provisions. The Working Group decided to defer the consideration of the suggestion until after the findings of the Secretariat were considered (A/CN.9/668, para. 264). The results of the requested research are set out in a note by the Secretariat A/CN.9/WG.I/WP.68, under section D.

[6] The Working Group, at its fifteenth session, agreed to retain in paragraph (5) (f) option I only, the wording of which should be aligned with the relevant provisions of international instruments, such as article XX (7) (c) of the WTO Agreement on Government Procurement (1994) (the GPA) and article XVIII (7) (b) of the provisionally agreed text of the revised WTO Agreement on Government Procurement (the draft revised GPA). The Working Group further agreed to move option II from paragraph (5) (f) to the Guide with the explanations of the reasons for removing it, in particular that allowing for compensation of anticipatory losses proved to be highly disruptive for procurement proceedings since it provided additional incentives for complaints. It was also suggested that the Guide should explain evolution in regulations on this matter and highlight the relevant provisions of the WTO instruments. For the reasons set out in a note by the Secretariat A/CN.9/WG.I/WP.68, section C, the Secretariat faced difficulties with the implementation of the Working Group's instructions. The Working Group may wish to consider the proposed wording together with the considerations raised in the referred note by the Secretariat. The words put in square brackets also reflect the different wording in article XX (7) (c) of the GPA and article XVIII (7) (b) of the provisionally agreed text of the revised GPA. Finally, the Working Group may wish to revise the wording of the preceding subparagraph to include a reference to corrective action, which is the term used in both the GPA and the revised GPA.

decision concerning the complaint, stating the reasons for the decision and the remedies granted, if any.

(7) The decision shall be final unless an action is commenced under article 63.

Article 59. Certain rules applicable to review proceedings under articles 57 and 58[7]

(1) Promptly after the submission of a complaint under article 57 or article 58, the review body shall notify all suppliers or contractors participating in the procurement proceedings[8] to which the complaint relates as well as any governmental authority whose interests are or could be affected of the submission of the complaint and of its substance.

(2) Any such supplier or contractor or governmental authority has the right to participate in the review proceedings. A supplier or contractor or the governmental authority that fails to participate in the review proceedings is barred from subsequently making the same type of claim.

(3) The participants to the review proceedings shall have access to all proceedings and shall have the right to be heard prior to a decision of the review body being made on the complaint, the right to be represented and accompanied, and the right to request that the proceedings take place in public and that witnesses be presented. No information shall be disclosed if its disclosure would be contrary to law, or would impede law enforcement, or would not be in the public interest, or would prejudice legitimate commercial interests of the suppliers or contractors or would impede fair competition.[9]

(4) In the cases of the review by the approving authority or the [insert name of administrative body], the procuring entity shall provide timely to the review body all the documents pertinent to the complaint, including the record of the procurement proceedings, provided, however, that no information shall be disclosed if its 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 impede fair competition.[10]

---

[7] The Working Group, at its fifteenth session, approved the draft article as revised at that session (A/CN.9/668, paras. 267-268).

[8] At the Working Group's fifteenth session, it was agreed to clarify in the Guide that the term "participating in the procurement proceedings" could include a different pool of participants depending on the timing of the review proceedings and subject of the complaint, and further to specify that those whose submissions were rejected might not have the right to participate in the review proceedings if the latter concerns the stages in the procurement proceedings subsequent and not related to the rejection (A/CN.9/668, para. 267 (c)).

[9] The Working Group, at its fifteenth session, agreed to consider including in paragraphs (3) and (4) exceptions to disclosure on the basis of confidentiality, with the Guide explaining that considerations of confidentiality should not impair a fair trial and a fair hearing (A/CN.9/668, para. 267 (b)). The paragraph was redrafted accordingly by the addition of the second sentence. The provisions added should be considered together with similar provisions in other articles of the proposed revised Model Law, such as draft article 19 (2) (b) (see document A/CN.9/WG.I/WP.69/Add.2). At its fifteenth session, the Working Group deferred the consideration of the possible exceptions to the disclosure (A/CN.9/668, para. 131).

[10] This paragraph has been revised pursuant to the agreement at the Working Group's fifteenth session to remove the ambiguity in reference to "relevant documents" and to include in the

(5) A copy of the decision of the review body shall be furnished within […] days after the issuance of the decision to the participants to the review proceedings. In addition, after the decision has been issued, the complaint and the decision shall be promptly made available for inspection by the general public, provided, however, that no information shall be disclosed if its 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 impede fair competition.[11]

(6) Any decision by the review body and the grounds and circumstances therefore shall be made part of the record of the procurement proceedings.

Article 60. Suspension of procurement proceedings[12]

(1) The [timely] submission of a complaint suspends the procurement proceedings for a period to be determined by the review body:

(a) Provided that the complaint is not frivolous and contains a declaration the contents of which, if proven, demonstrate that the supplier or contractor will suffer irreparable injury in the absence of a suspension, that it is probable that the complaint will succeed, and that the granting of the suspension would not cause disproportionate harm to the procuring entity or to other suppliers or contractors;

(b) Unless the procuring entity certifies that urgent public interest considerations require the procurement to proceed. The certification, which shall state the grounds for the finding that such urgent considerations exist and which shall be made a part of the record of the procurement proceedings, is conclusive with respect to all levels of review except judicial review.

(2) The review body may extend the originally determined period of suspension in order to preserve the rights of the supplier or contractor submitting the complaint or commencing the action pending the disposition of the review proceedings, provided that the total period of suspension shall not exceed the period required for the review body to take decision in accordance with article 57 or 58 as applicable.

(3) The decision on the suspension or the extension of the suspension shall be promptly communicated to all participants to the review proceedings, indicating the duration of suspension or extension. Where the decision was taken not to suspend the procurement proceedings on the grounds indicated in paragraph (1) of this article, the review body shall notify the supplier or contractor concerned about that decision and the grounds therefor. Any decision under this article and the grounds and circumstances therefor shall also be made part of the record of the procurement proceedings.

---

paragraph exceptions to disclosure on the basis of confidentiality, with the Guide explaining that considerations of confidentiality should not impair a fair trial and a fair hearing (A/CN.9/668, para. 267 (a) and (b)). See the immediately preceding footnote for the issues related to the confidentiality provisions.

[11] Ibid., as regards confidentiality provisions.

[12] The Working Group, at its fifteenth session, approved the draft article, which is based on article 56 of the 1994 Model Law, without change (A/CN.9/668, para. 269).

Article 61. Judicial review[13]

The [insert name of court or courts] has jurisdiction over actions pursuant to article 56 and petitions for judicial review of decisions made by review bodies, or of the failure of those bodies to make a decision within the prescribed time limit, under article 57 or 58.

Article in the revised Model Law	Corresponding provisions in the 1994 Model Law	New provisions considered by the Working Group
Chapter I. GENERAL PROVISIONS	**Chapter I. GENERAL PROVISIONS**	
Article 1. Scope	Article 1. Scope	Revisions to article 1 of the 1994 Model Law agreed upon at the Working Group's fifteenth session (A/CN.9/668, paras. 16-17)
Article 2. Definitions	Article 2. Definitions	Revisions to article 2 of the 1994 Model Law agreed upon at the Working Group's fifteenth session (A/CN.9/668, paras. 272-274)
Article 3. International obligations of this State relating to procurement [and intergovernmental agreements within (this State)]	Article 3. International obligations of this State relating to procurement [and intergovernmental agreements within (this State)]	
Article 4. Procurement regulations	Article 4. Procurement regulations	Revisions to article 4 of the 1994 Model Law agreed upon at the Working Group's fifteenth session (A/CN.9/668, paras. 26-27)
Article 5. Publication of legal texts	Article 5. Public accessibility of legal texts	Draft article 5 as preliminarily approved by the Working Group at its twelfth session (A/CN.9/640, paras. 30-34), except for its paragraph (3), which was included in a separate article 6 (see below)
Article 6. Information on forthcoming procurement opportunities		Draft article 5, paragraph (3), as preliminarily approved by the Working Group at its twelfth session (A/CN.9/640, paras. 30-34) Revisions agreed upon at the Working Group's fifteenth session (A/CN.9/668, paras. 37-38)

[13] The Working Group, at its fifteenth session, approved the draft article, which is based on article 57 of the 1994 Model Law, without change (A/CN.9/668, para. 269).

Article in the revised Model Law	Corresponding provisions in the 1994 Model Law	New provisions considered by the Working Group
Article 7. Rules concerning methods of procurement and type of solicitation (new provisions, based on the 1994 text)	Articles 18, 17 (a) and (b), 19 (1) (a), 22, 23 (a) and (b), and 37 (2) and (3) (c), and the Guide commentary to article 22 (basis of new provisions)	Revisions considered at the Working Group's fifteenth session (A/CN.9/668, paras. 39-70)
Article 8. Communications in procurement	Replaced article 9. Form of communications	Article 5 bis as preliminarily approved by the Working Group at its twelfth session (A/CN.9/640, paras. 17-25)
Article 9. Participation by suppliers or contractors	Article 8. Participation by suppliers or contractors	
Article 10. Qualifications of suppliers and contractors	Article 6. Qualifications of suppliers and contractors Article 10. Rules concerning documentary evidence provided by suppliers or contractors	Revisions agreed upon at the Working Group's fifteenth session (A/CN.9/668, paras. 73-76)
Article 11. Rules concerning description of the subject matter of the procurement and the terms and conditions of the procurement contract or framework agreement	Article 16. Rules concerning description of goods, construction or services	Revisions agreed upon at the Working Group's fifteenth session (A/CN.9/668, paras. 77-81)
Article 12. Rules concerning evaluation criteria (new provisions based on the 1994 text)	Articles 27 (e), 34 (4), 38 (m), 39 and 48 (3) (basis of new provisions)	Revisions considered at the Working Group's fifteenth session (A/CN.9/668, paras. 82-87)
Article 13. Rules concerning the language of documents	Article 17. Language Article 29. Language of tenders	Revisions agreed upon at the Working Group's fifteenth session (A/CN.9/668, paras. 88 and 169)
Article 14. Submission securities	Article 32. Tender securities	
Article 15. Prequalification proceedings	Article 7. Prequalification proceedings. Also articles 23, 24 and 25, provisions related to prequalification	Revisions agreed upon at the Working Group's fifteenth session (A/CN.9/668, paras. 93-110)
Article 16. Rejection of all submissions	Article 12. Rejection of all tenders, proposals, offers or quotations	Revisions considered at the Working Group's fifteenth session (A/CN.9/668, paras. 111-117)
Article 17. Rejection of abnormally low submissions		Based on article 12 bis as preliminarily agreed upon by the Working Group at its twelfth session (A/CN.9/640, paras. 44-55)

Article in the revised Model Law	**Corresponding provisions in the 1994 Model Law**	**New provisions considered by the Working Group**
Article 18. Rejection of a submission on the ground of inducements from suppliers or contractors or on the ground of conflicts of interest	Article 15. Inducements from suppliers or contractors	Conflicts of interest (A/CN.9/664, para. 116) A proposal by a delegation for a new paragraph 1 of the article and revisions agreed upon, at the Working Group's fifteenth session (A/CN.9/668, paras. 121-125)
Article 19. Acceptance of submissions and entry into force of the procurement contract	Article 13. Entry into force of the procurement contract Article 36. Acceptance of tender and entry into force of procurement contract	Standstill period (A/CN.9/664, paras. 45-55 and 72) Revisions considered at the Working Group's fifteenth session (A/CN.9/668, paras. 126-145)
Article 20. Public notice of awards of procurement contract and framework agreement	Article 14. Public notice of procurement contract awards	Revisions agreed upon at the Working Group's fifteenth session (A/CN.9/668, paras. 146-148)
Article 21. Confidentiality	Article 45. Confidentiality	Revisions considered at the Working Group's fifteenth session (A/CN.9/668, paras. 149-152)
Article 22. Record of procurement proceedings	Article 11. Record of procurement proceedings	Paragraph (1) (b) bis as preliminarily approved by the Working Group at its ninth session (A/CN.9/595, para. 49) Paragraph (1) (i) bis, as preliminarily approved by the Working Group at its eleventh and twelfth sessions (A/CN.9/623, para. 100, and A/CN.9/640, para. 91) Restructured paragraph (3) as suggested at the Working Group's twelfth session (A/CN.9/640, para. 90). The Working Group did not consider in detail the restructured provisions. Revisions considered at the Working Group's fifteenth session (A/CN.9/668, paras. 153-157)
	Chapter II. METHODS OF PROCUREMENT AND THEIR CONDITIONS FOR USE was deleted (articles 18 and 22 were reflected in new article 7, the remaining articles are in the relevant provisions of new chapters III and IV)	

Article in the revised Model Law	Corresponding provisions in the 1994 Model Law	New provisions considered by the Working Group
Chapter II. TENDERING PROCEEDINGS	**Chapter III. TENDERING PROCEEDINGS**	Revisions agreed upon at the Working Group's fifteenth session (A/CN.9/668, paras. 161-166, and 169-172) Revisions considered at the Working Group's fifteenth session (A/CN.9/668, paras. 175-176, and 179-181)
Articles 23-28	Articles 23-28, with consequential changes	Revisions agreed upon at the Working Group's fifteenth session (A/CN.9/668, paras. 161-166)
	Article 29. Language of tenders was deleted and its provisions merged with the proposed article 13. Rules concerning the language of documents, in chapter I. General provisions, in order to make them applicable to all procurement methods	Revisions agreed upon at the Working Group's fifteenth session (A/CN.9/668, para. 169)
Articles 29-30	Articles 30-31, with consequential changes	Revisions agreed upon at the Working Group's fifteenth session (A/CN.9/668, paras. 170-172) Revisions considered at the Working Group's fifteenth session (A/CN.9/668, paras. 175-176)
	Article 32. Tender securities became article 14. Submission securities and placed in chapter I. General provisions, in order to make it applicable to all procurement methods	
Articles 31-33	Articles 33-35, with consequential changes	Revisions considered at the Working Group's fifteenth session (A/CN.9/668, paras. 175-176, and 179-181)
	Article 36. Acceptance of tender and entry into force of procurement contract became article 19 and placed in chapter I. General provisions, in order to make it applicable to all procurement methods	

Article in the revised Model Law	Corresponding provisions in the 1994 Model Law	New provisions considered by the Working Group
CHAPTER III. CONDITIONS FOR USE AND PROCEDURES OF RESTRICTED TENDERING, TWO-ENVELOPE TENDERING, AND REQUEST FOR QUOTATIONS	Chapter II, articles 20 and 21; chapter IV, article 42 and other relevant provisions; and chapter V, articles 47 and 50	Revisions considered at the Working Group's fifteenth session (A/CN.9/668, paras. 183-201) Revisions agreed upon at the Working Group's fifteenth session (A/CN.9/668, paras. 202-208)
Article 34. Restricted tendering Options 1 and 2 Option 3 Article 34. Tendering with reselection	Articles 20 (Conditions for use of restricted tendering) and 47 (Restricted tendering)	Article X of the WTO Agreement on Government Procurement and article IX of the WTO revised Agreement on Government Procurement Revisions considered at the Working Group's fifteenth session (A/CN.9/668, paras. 183-192)
Article 35. Two-envelope tendering	Article 42. Selection procedure without negotiation, and other relevant provisions of chapter IV. Principal method for procurement of services	Revisions considered at the Working Group's fifteenth session (A/CN.9/668, paras. 193-201)
Article 36. Request for quotations	Articles 21 (Conditions for use of request for quotations) and 50 (Request for quotations)	Revisions agreed upon at the Working Group's fifteenth session (A/CN.9/668, paras. 202-208)
[CHAPTER IV. CONDITIONS FOR USE AND PROCEDURES OF TWO-STAGE TENDERING, REQUEST FOR PROPOSALS, AND COMPETITIVE NEGOTIATION]	Chapter II, article 19; chapter IV, articles 43 and 44 and other relevant provisions; chapter V, articles 46, 48 and 49; and relevant provisions from the PFIPs instruments	A proposal by a delegation for a merged articles 48 and 49 (A/CN.9/668, paras. 210-211) Consideration of the chapter is pending
CHAPTER V. CONDITIONS FOR USE AND PROCEDURES OF ELECTRONIC REVERSE AUCTIONS		Articles 22 bis and 51 bis to septies (see A/CN.9/WG.I/WP.59, A/CN.9/WG.I/WP.61, para. 17, and A/CN.9/640, paras. 56-89), with consequential changes Revisions agreed upon at the Working Group's fifteenth session (A/CN.9/668, paras. 213-222)

Article in the revised Model Law	Corresponding provisions in the 1994 Model Law	New provisions considered by the Working Group
CHAPTER VI. FRAMEWORK AGREEMENTS PROCEDURES		Articles 22 ter and 51 octies to quindecies (see A/CN.9/WG.I/WP.62, and A/CN.9/664, paras. 75-110), with consequential changes Revisions agreed upon at the Working Group's fifteenth session (A/CN.9/668, paras. 230-233 and 239-255) Revisions considered at the Working Group's fifteenth session (A/CN.9/668, paras. 226-229 and 235-237)
CHAPTER VII. REVIEW	Chapter VI. Review	Revisions considered at the Working Group's fourteenth session (A/CN.9/664, paras. 19-74) Revisions agreed upon at the Working Group's fifteenth session (A/CN.9/668, paras. 259-262 and 267-268) Revisions considered at the Working Group's fifteenth session (A/CN.9/668, paras. 264 and 267 (b))
Article 56. Right to review	Article 52. Right to review	Revisions considered at the Working Group's fourteenth session (A/CN.9/664, paras. 19-27)
Article 57. Review by the procuring entity or the approving authority	Article 53. Review by procuring entity (or by approving authority)	Revisions considered at the Working Group's fourteenth session (A/CN.9/664, paras. 28-33) Revisions agreed upon at the Working Group's fifteenth session (A/CN.9/668, paras. 259-260)
Article 58. Review before an independent administrative body	Article 54. Administrative review	Revisions considered at the Working Group's fourteenth session (A/CN.9/664, paras. 34-58) Revisions agreed upon at the Working Group's fifteenth session (A/CN.9/668, para. 262) Revisions considered at the Working Group's fifteenth session (A/CN.9/668, para. 264)

Article in the revised Model Law	**Corresponding provisions in the 1994 Model Law**	**New provisions considered by the Working Group**
Article 59. Certain rules applicable to review proceedings under articles 57 and 58	Article 55. Certain rules applicable to review proceedings under article 53 [and article 54]	Revisions considered at the Working Group's fourteenth session (A/CN.9/664, paras. 59-60) Revisions agreed upon at the Working Group's fifteenth session (A/CN.9/668, paras. 267-268) Revisions considered at the Working Group's fifteenth session (A/CN.9/668, para. 267 (b))
Article 60. Suspension of procurement proceedings	Article 56. Suspension of procurement proceedings	Revisions considered at the Working Group's fourteenth session (A/CN.9/664, paras. 61-73)
Article 61. Judicial review	Article 57. Judicial review	

II. INTERNATIONAL COMMERCIAL ARBITRATION AND CONCILIATION

A. Report of the Working Group on Arbitration on the work of its forty-ninth session (Vienna, 15-19 September 2008)

(A/CN.9/665) [Original: English]

CONTENTS

I. 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 UNCITRAL Arbitration Model Law"), as well as the use of the UNCITRAL Arbitration Rules ("the UNCITRAL Arbitration Rules" or "the Rules") and the

[1] *Official Records of the General Assembly, Fifty-third Session, Supplement No. 17* (A/53/17), para. 235.

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] When the Commission discussed that topic, it left open the question of what form its future work might take. It was agreed that decisions on the matter should be taken later as the substance of proposed 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).[3]

3. At its thirty-ninth session (New York, 19 June-7 July 2006), the Commission agreed that the topic of revising the UNCITRAL Arbitration Rules should be given priority. The Commission noted that, as one of the early instruments elaborated 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, 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 carefully define the list of topics which might need to be addressed in a revised version of the UNCITRAL Arbitration Rules.[4]

4. 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 define 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 studying the question of arbitrability in the context of immovable property, unfair competition and insolvency could provide useful guidance for States. 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 predefined list of arbitrable matters could unnecessarily restrict a State's ability to meet certain public policy concerns that were likely to evolve over time.[5]

5. 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 was the issue of arbitration in the field of insolvency. Yet another suggestion was made to address the impact of anti-suit injunctions on international arbitration. A further suggestion was made 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

---

2 Ibid., *Fifty-fourth Session, Supplement No. 17* (A/54/17), para. 337.
3 Ibid., para. 338.
4 Ibid., *Sixty-first Session, Supplement No. 17* (A/61/17), para. 184.
5 Ibid., para. 185.

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.[6]

6. 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 resume its work on the question of a revision of the UNCITRAL Arbitration Rules. It was also agreed that the issue of arbitrability was a topic which 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, deal with the implications of electronic communications in the context of the revision of the UNCITRAL Arbitration Rules.[7]

7. At its fortieth session, the Commission noted that the UNCITRAL Arbitration Rules had not been amended since their adoption in 1976 and that the review should seek to modernize the Rules and to promote greater efficiency in arbitral proceedings. The Commission generally agreed that the mandate of the Working Group to maintain the original structure and spirit of the UNCITRAL Arbitration Rules had provided useful guidance to the Working Group in its deliberations to date and should continue to be a guiding principle for its work.[8] The Commission noted that broad support had been expressed in the Working Group for a generic approach that sought to identify common denominators that applied to all types of arbitration irrespective of the subject matter of the dispute, in preference to dealing with specific situations. However, the Commission noted that the extent to which the revised UNCITRAL Arbitration Rules should take account of investor-State dispute settlement or administered arbitration remained to be considered by the Working Group at future sessions.[9]

8. At its forty-first session (New York, 16 June-3 July 2008), the Commission noted that the Working Group had decided to proceed with its work on the revision of the UNCITRAL Arbitration Rules in their generic form and to seek guidance from the Commission on whether, after completion of its current work on the Rules, the Working Group should consider in further depth the specificity of treaty-based arbitration and, if so, which form that work should take. After discussion, the Commission agreed that it would not be desirable to include specific provisions on treaty-based arbitration in the UNCITRAL Arbitration Rules themselves and that any work on investor-State disputes which the Working Group might have to undertake in the future should not delay the completion of the revision of the UNCITRAL Arbitration Rules in their generic form. As to timing, the Commission agreed that the topic of transparency in treaty-based investor-State arbitration was worthy of future consideration and should be dealt with as a matter of

---

6 Ibid., para. 186.
7 Ibid., para. 187.
8 Ibid., *Sixty-second Session, Supplement No. 17* (A/62/17), part I, para. 174.
9 Ibid., para. 175.

priority immediately after completion of the current revision of the UNCITRAL Arbitration Rules.[10]

II. Organization of the session

9. The Working Group, which was composed of all States members of the Commission, held its forty-ninth session in Vienna, from 15 to 19 September 2008. The session was attended by the following States members of the Working Group: Algeria, Armenia, Australia, Austria, Bahrain, Belarus, Bolivia, Bulgaria, Cameroon, Canada, Chile, China, Colombia, Czech Republic, El Salvador, Fiji, France, Germany, Greece, Guatemala, Iran (Islamic Republic of), Italy, Japan, Kenya, Lebanon, Malaysia, Mexico, Namibia, Norway, Pakistan, Paraguay, Poland, Republic of Korea, Russian Federation, Singapore, Spain, Switzerland, Thailand, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

10. The session was attended by observers from the following States: Argentina, Belgium, Croatia, Dominican Republic, Finland, Hungary, Indonesia, Ireland, Jordan, Mauritius, Netherlands, Philippines, Portugal, Romania, Slovakia, Slovenia, Sudan, Sweden, Turkey, Ukraine, United Republic of Tanzania and Yemen.

11. The session was attended by observers from the following international intergovernmental organizations invited by the Commission: Permanent Court of Arbitration (PCA).

12. The session was also attended by observers from the following international non-governmental organizations invited by the Commission: Alumni Association of the Willem C. Vis International Commercial Arbitration Moot (MAA), American Arbitration Association (AAA), American Bar Association (ABA), Asia Pacific Regional Arbitration Group (APRAG), Association for the Promotion of Arbitration in Africa (APAA), *Association Suisse de l'Arbitrage* (ASA), Center for International Environmental Law (CIEL), Center for International Legal Studies (CILS), Chartered Institute of Arbitrators (CIArb), Construction Industry Arbitration Council — Singapore International Arbitration Centre (CIAC-SIAC), Corporate Counsel International Arbitration Group (CCIAG), Inter-American Bar Association (IABA), International Arbitral Centre of the Austrian Federal Economic Chamber, International Bar Association (IBA), International Council for Commercial Arbitration (ICCA), International Law Institute (ILI), Kuala Lumpur Regional Centre for Arbitration (KLRCA), London Court of International Arbitration (LCIA), Milan Club of Arbitrators and *Union Internationale des Avocats* (UIA).

13. The Working Group elected the following officers:

Chairman: Mr. Michael E. Schneider (Switzerland);

Rapporteur: Mr. Sainivalati Navoti (Fiji).

14. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.II/WP.150); (b) notes by the Secretariat on a revision of the UNCITRAL Arbitration Rules pursuant to the deliberations of the

---

[10] Report of the United Nations Commission on International Trade Law, Forty-first Session (A/63/17), para. 314.

Working Group at its forty-sixth to forty-eighth sessions (A/CN.9/WG.II/WP.151, A/CN.9/WG.II/WP.151/Add.1 and A/CN.9/WG.II/WP.152).

15. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Revision of the UNCITRAL Arbitration Rules.
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

16. The Working Group resumed its work on agenda item 4 on the basis of the notes prepared by the Secretariat (A/CN.9/WG.II/WP.151, A/CN.9/WG.II/WP.151/Add.1 and A/CN.9/WG.II/WP.152). The deliberations and decisions of the Working Group with respect to this item are reflected in chapter IV. The Secretariat was requested to prepare a draft of revised UNCITRAL Arbitration Rules, based on the deliberations and decisions of the Working Group.

IV. Revision of the UNCITRAL Arbitration Rules

17. The Working Group recalled that it had concluded a first reading of the revised version of the Rules at its forty-eighth session and that it had commenced its second reading of articles 1 and 2. The Working Group agreed to resume discussions on the revision of the Rules on the basis of document A/CN.9/WG.II/WP.151 and the proposed revisions contained therein.

Section I. Introductory rules

Scope of application

Article 1

Paragraph (1)

18. The Working Group considered paragraph (1). A concern was expressed that the deletion of the requirement that the arbitration agreement be in writing might create difficulties in practice, and therefore there should be convincing evidence indicating the existence of such agreement. In response, it was recalled that the Working Group had agreed to delete the writing requirement (A/CN.9/646, para. 71), in view of the fact that some legal systems and a number of arbitration rules did not require an arbitration agreement to be in writing (see A/CN.9/614, para. 29 and A/CN.9/619, paras. 28-29). It was observed that the Rules did not take a stand on the form of the arbitration agreement, as it was preferable that that matter be regulated by applicable law. After discussion, the Working Group adopted

paragraph (1) as contained in document A/CN.9/WG.II/WP.151, without any modification.

Paragraph (1 bis) — Applicable version of the UNCITRAL Arbitration Rules

19. The Working Group considered paragraph (1 bis), which established a deeming provision on the applicable version of the Rules. As a matter of drafting, it was suggested to replace the word "another" in the first line of the paragraph with the words "a particular", in order to clarify that the will of the parties would in all circumstances prevail. That proposal was adopted.

Paragraph (2)

20. The Working Group adopted the substance of paragraph (2), without any modification.

Model arbitration clause for contracts

"may wish to" — "should"

21. The Working Group considered a proposal to replace the words "may wish to consider" appearing in the chapeau of the note to the model arbitration clause with the words "should consider", in order to emphasize the importance for the parties of considering inclusion of the elements listed. A concern was expressed that such replacement might have an impact on the validity of the clause if the parties did not include one of the matters listed in their arbitration agreement. After discussion, the Working Group agreed that the concern was unfounded and decided to replace the words "may wish to" with the word "should". The substance of the model arbitration clause was adopted without any further modification.

Placement

22. It was observed that the model arbitration clause appeared in the 1976 version of the Rules as a footnote to the writing requirement contained in article 1, paragraph (1). Following the deletion of that requirement, the Working Group agreed that it would consider later whether to place the model arbitration clause at the end of the Rules, together with other model provisions such as model statements of independence.

Notice, calculation of periods of time

Article 2

Paragraphs (1) and (1 bis)

23. The Working Group recalled that it had agreed to expressly include in the Rules language which authorized both electronic as well as other traditional forms of communication (A/CN.9/619, para. 50). It was said that, although the 1976 version of the Rules did not preclude electronic communications, it might be helpful for the revised Rules to provide clear guidance to their users on that question. Especially since paragraph (1) relied on notions such as the notification being "physically delivered to the addressee" or "delivered at its habitual residence", a clear reference to electronic communications was necessary to avoid

arguments as to whether all means of communication, including dematerialized communications, were intended to be covered by the Rules.

24. The discussion focused on the interplay between paragraphs (1) and (1 bis) and the manner in which the provisions should be restructured to provide additional clarity regarding their purposes and avoid possible overlap. It was pointed out that paragraph (1) was intended to create a presumption (in the form of a deeming provision) regarding the receipt and delivery of a notice of arbitration. Paragraph (1 bis) established a list of the actual modes of communication acceptable for delivering such notice. Various proposals were made to clarify the functions served by the two provisions.

25. One proposal was to delete paragraph (1 bis) and to include in paragraph (1) wordings catering for electronic communication, along the following lines: "For the purposes of these Rules, any notice, including a notification, communication or proposal, is deemed to have been received if it is physically delivered to the addressee or if it is delivered (including by electronic communication that provides a record of its transmission) at its habitual residence, place of business, or designated address." An alternative proposal was to use instead of the words "electronic communication" the words "any form of communication", which were said to encompass all possible modes of communication, including both future means of telecommunication and currently existing techniques, such as telefax, that were rapidly becoming obsolete.

26. Another proposal was to clarify that communication could be sent to a postal or an electronic address by amending paragraph (1) along the following lines: "or if it is delivered at its habitual residence, place of business, mailing or designated electronic address". While that proposal drew on terminology used in the 2005 United Nations Convention on the Use of Electronic Communications in International Contracts, it was objected to on the grounds that it might require extensive explanations and the use of additional concepts, such as "data message" which was found unnecessary in the context of the Rules.

27. In favour of maintaining two separate paragraphs, it was observed that it might not be advisable to combine a rule establishing which means of communication might be used by the parties with a rule indicating the conditions under which a presumption as to receipt might flow from the use of such means of communication. A proposal was made to retain paragraph (1 bis) without modification. Another proposal was to amend paragraph (1 bis) to avoid listing specific means of communication and enlarge its scope along the following lines: "Any notice, including a notification, communication or proposal may be delivered by any means of communication, including electronic communication, that provide a record of its transmission." A concern was expressed that the reference to a record of transmission raised a number of technical and legal difficulties that could not be addressed in the context of the Rules. In response, it was observed that comparable wording had been used by some arbitral institutions in their international arbitration rules, as well as in other UNCITRAL instruments, such as the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, apparently without giving rise to practical difficulties.

28. As a matter of structure, it was suggested that it was preferable first to describe the acceptable means of communication, as currently laid out in draft

paragraph (1 bis), and only thereafter to provide for a presumption regarding receipt of a notice of arbitration delivered through such means of communication. For that reason, it was proposed to reverse the order of the paragraphs. That proposal received support.

29. After discussion, the Working Group agreed to include a paragraph dealing with the means of communication that the parties might use under the Rules, and to ensure that all means of communication would be acceptable under the Rules. For that purpose, the Working Group agreed to reverse the order of paragraphs (1) and (1 bis). The first paragraph would be drafted so as to reflect the principle that a notice might be delivered by any means that provided a record of its transmission. The second paragraph would reflect the principle that, if a notice was not delivered to the addressee in person, it might be delivered at its habitual residence, place of business or at any other address identified by the addressee for the purpose of receiving such a notice "or, if none of these can be found after making reasonable inquiry, at the addressee's last-known residence or place of business. Notice shall be deemed to have been received on the day it is so delivered".

30. The Working Group requested the Secretariat to draft a revised version of paragraphs (1) and (1 bis), taking account of the principles agreed to by the Working Group.

Paragraph (2)

31. The Working Group adopted paragraph (2) in substance, without any modification.

Notice of arbitration and response to the notice of arbitration

Article 3

32. It was observed that article 3 dealt with both the notice of arbitration and the response to the notice of arbitration, and it might be preferable to insert the provisions on the response to the notice of arbitration in a separate article.

Paragraph (1)

33. With respect to paragraph (1), a proposal was made to replace the word "give" by the word "deliver", in order to align the wording of article 3 with article 2. That proposal did not find support. Another proposal was to include the appointing authority as a recipient of notice. No support was expressed for that inclusion. It was noted, however, that there was no objection to a party including the appointing authority in the notice of arbitration.

34. The Working Group adopted paragraph (1) in substance, without any modification.

Paragraphs (2) and (3)

35. The Working Group adopted paragraphs (2) and (3) in substance, without any modification.

Paragraph (4)

Subparagraph (c)

36. The Working Group considered whether the option for the claimant to communicate its statement of claim together with the notice of arbitration should be retained. A proposal was made to delete subparagraph (c) and to insert the following sentence at the end of article 3, paragraph (1): "The claimant may elect to treat its notice of arbitration in article 3, paragraph (3) as a statement of claim." The proposal to insert such provision in paragraph (1) was opposed on the ground that the decision to treat the notice of arbitration as a statement of claim should only be required after the respondent had submitted its response. Otherwise, the claimant would not know whether it should further develop its position. The Working Group agreed to delete subparagraph (c), and to include the proposed sentence in article 18.

37. Subject to the deletion of subparagraph (c), the Working Group adopted the substance of paragraph (4) without modification.

Paragraph (5)

38. The Working Group agreed to delete the words "to the extent possible" in square brackets in the chapeau of paragraph 5.

Subparagraph (a)

39. It was observed that there might be a contradiction between subparagraph (a), which required the respondent to include in its response to the notice of arbitration a plea on lack of jurisdiction, and article 21, paragraph (2) of the Rules which required that such a plea be raised no later than in the statement of defence. Thus, it was suggested to delete subparagraph (a). In response, it was proposed to remove subparagraph (a) from paragraph (5) and place it under paragraph (6), which listed optional items that might be included in the response to the notice of arbitration. That proposal was adopted by the Working Group.

40. The Working Group adopted the substance of paragraph (5) with the modifications agreed to in paragraph 39 above and paragraph 67 below.

Paragraph (6)

41. The Working Group adopted the substance of paragraph (6) with the inclusion of the provision removed from paragraph (5) (a) (see above, paras. 39 and 40).

Paragraph (7)

42. A suggestion was made to replace the word "impeded" by the word "hindered". That suggestion found broad support and the Working Group adopted paragraph (7) with that modification.

Representation and assistance

Article 4

43. Broad support was expressed for the retention of the text between square brackets, which was viewed as capturing the different approaches in different legal

systems for administering proof of authority and to promote good practice for international arbitration.

44. It was suggested to replace the words "the parties" at the beginning of paragraph 4 with the words "each party" and the words "by them" with the words "by it". In the second sentence, it was further suggested to include the tribunal as an additional recipient of the communication after the word "parties". Both suggestions found broad support.

45. The Working Group adopted article 4 with the above-stated modifications.

Designating and appointing authorities

Article 4 bis

46. The provision tentatively numbered article 4 bis expressed the principle that the appointing authority could be appointed by the parties at any time during the arbitration proceedings, and not only in circumstances provided for in the 1976 version of the Rules. It also sought to clarify for the users of the Rules the importance of the role of the appointing authority. The Working Group confirmed the principle of including in the Rules a provision addressing the respective roles of the designating and appointing authorities.

47. The Working Group recalled the discussions at its forty-sixth session, where a proposal had been made to provide as default rule that, if the parties were unable to agree on an appointing authority, the Secretary-General of the Permanent Court of Arbitration ("PCA") should act directly as the appointing authority, instead of designating an appointing authority (A/CN.9/619, para. 71). It was further stated that to address concerns expressed on that proposal (A/CN.9/619, para. 72), an additional proposal had been made that such a default rule should not apply when the parties expressly agreed that the Secretary-General of the PCA should not act as an appointing authority or where, given the circumstances, the Secretary-General of the PCA considered that another appointing authority should be appointed.

48. The above proposals were reiterated. In support of including the proposed default rule, it was stated that it provided the parties with a simple, streamlined and efficient procedure. The representative of the PCA reiterated the agreement of its Secretary-General to perform the functions provided for in the draft revised Rules, and would be ready to perform the functions of appointing authority in case the parties would not have agreed on an appointing authority. The representative of the PCA also reminded the Working Group of the report of the Secretary-General of the PCA on its activities under the UNCITRAL Arbitration Rules since 1976 made at the fortieth session of the Commission (A/CN.9/634).

49. The Working Group recalled that, at its forty-sixth session, the prevailing view had been, however, that the proposal constituted a major and unnecessary departure from the existing UNCITRAL Arbitration Rules (A/CN.9/619, paras. 72 and 74). Diverging views were expressed whether that question should be debated again in the Working Group.

50. After discussion, the Working Group agreed that that question might need to be re-examined after completion of the second reading of the Rules, on the basis of a written proposal to be submitted to the Secretariat in time for translation before the next session of the Working Group. The view was also expressed that, whether

or not consensus could be reached in the Working Group regarding a possible default rule, the matter was of political nature and could only be settled by the Commission.

Paragraph (1)

51. The Working Group agreed to clarify in paragraph (1) that the Secretary-General of the PCA was expressly entitled to act as an appointing authority under the Rules by including a reference to the Secretary-General of the PCA as one example of an institution that could serve as appointing authority. As a matter of drafting, it was proposed to add the words "at The Hague" to the title of the "Secretary-General of the Permanent Court of Arbitration". With those modifications, paragraph (1) was adopted in substance by the Working Group.

Paragraph (2)

52. The Working Group adopted the substance of paragraph (2), without any modification.

Paragraph (3)

53. The Working Group adopted the substance of paragraph (3), without any modification.

Paragraph (4)

54. The Working Group agreed to delete the words "to the extent it considers possible" in the first sentence of paragraph (4), and to add, at the end of that first sentence, the words "in any manner it considers appropriate", in order to better reflect the discretion of the appointing authority in obtaining views from the parties.

Paragraph (5)

55. The Working Group adopted the substance of paragraph (5), without any modification.

Paragraph (6)

56. The Working Group adopted the substance of paragraph (6), without any modification.

Section II. Composition of the arbitral tribunal

Number of arbitrators

Article 5

57. The Working Group considered the two options on the number of arbitrators contained in article 5, which reflected the discussions of the Working Group at its forty-sixth session (A.CN.9/619, paras. 79-82). Both options received support.

58. Option 1 provided that if the parties did not agree on the number of arbitrators within 30 days after the receipt by the respondent of the notice of arbitration, three

arbitrators should be appointed. Support was expressed for that option on the ground that a default rule providing for a three-member arbitral tribunal might enhance the legitimacy of the arbitral tribunal and better guarantee impartiality and fairness of the proceedings, in the situation where parties could not agree on the number of arbitrators. It was observed that in complex arbitration cases, a default rule requiring one arbitrator might not be workable. It was pointed out that a three arbitrator default rule solution most closely reflected the 1976 version of the Rules, as well as the solution contained in article 10, paragraph 2, of the UNCITRAL Arbitration Model Law.

59. Option 2 provided that if the parties did not reach agreement on the number of arbitrators, one arbitrator should be appointed, unless either the claimant, in its notice of arbitration, or the respondent, within 30 days after receipt of the notice of arbitration, requested that three arbitrators should be appointed. Support was expressed for option 2 on the ground that it reduced the risk of imposing three-member arbitral tribunals in cases involving small claims. In support of that argument, it was observed that the UNCITRAL arbitration cases that were brought to the attention of the PCA often related to disputes involving small claims, where a default rule of three arbitrators might be overly burdensome for the parties. It was observed as well that option 2 was particularly useful in cases where a party failed to participate in the process, since it provided the other party the opportunity to decide on the number of arbitrators. However, it was observed that option 2 might create an unbalanced situation between the parties, as the claimant had to decide, at the stage of the notice of arbitration, whether to opt for a three-member arbitral tribunal, whereas the respondent might do so at the later stage of its response to the notice of arbitration, when the degree of complexity of the dispute would be more clearly identified.

60. An alternative proposal was made that, if the parties were unable to agree on the number of arbitrators, that number should be determined by the appointing authority. The Working Group recalled that it had rejected a similar proposal at its forty-fifth (A/CN.9/614, para. 60) and forty-sixth (A/CN.9/619, para. 80) sessions for the reason that involving an appointing authority at such an early stage of the arbitral proceeding could create unnecessary delays.

61. After discussion, the Working Group did not reach consensus in favour of either option, and for that reason decided that the default rule, as contained in article 5 of the 1976 version of the Rules should be maintained, with necessary adjustments to ensure consistency of article 5 with other revised articles of the Rules.

Role of the appointing authority for the determination of the number of arbitrators

62. Concern was raised that in practice, the default provision of article 5 of the 1976 version of the Rules created situations where, despite the claimant's proposal in its notice of arbitration to appoint a sole arbitrator, a three-member arbitral tribunal had to be constituted due to the respondent's failure to react to that proposal. A suggestion was made to add a new provision either under article 5 or article 7 to cope with that specific situation where the parties had not previously agreed on the number of arbitrators and the respondent failed to respond to the claimant's proposal to appoint a sole arbitrator. In those circumstances, and in case the respondent failed to appoint a second arbitrator, it was suggested that the

appointing authority might, at the request of the claimant, appoint a sole arbitrator, if it determined that, in view of the circumstances of the case, this would be more appropriate.

63. That suggestion received support and was said to provide a useful corrective mechanism in case the respondent did not participate in the process and the arbitration case did not warrant the appointment of a three-member arbitral tribunal. In addition, it was noted that the suggested provision would not create delays, as in any case the appointing authority was requested to intervene in the appointment process. It was observed that according to article 4 bis, paragraph (5), the appointing authority would have all relevant information to make its decision on the number of arbitrators. Concerning the placement of that new provision, preference was expressed for its inclusion as a new paragraph to article 5, instead of article 7, because that would more logically follow the order of the provisions.

64. After discussion, the Working Group requested the Secretariat to draft a provision reflecting the above proposal for consideration at its next session.

Consistency between article 3 (5) (d) and article 5 on time limits for the determination of the number of arbitrators

65. It was observed that article 3 (5) (d) contained a provision on the number of arbitrators to be proposed by the respondent, a provision under which the respondent enjoyed a 30-day time limit to make its proposal on the number of arbitrators. In contrast, article 5 provided for a period of 15 days from the notice of arbitration within which the parties should agree on the number of arbitrators, failing which, the default rule would apply. It was said that the inconsistency of time limits contained in those two articles needed to be addressed.

66. In that respect, various proposals were made. One proposal was to provide that the 15-day time limit under article 5 should commence from the expiration of the time limit for the response to the notice of arbitration. That additional time period was said to be necessary to allow further exchange between the parties on that question. In response, it was observed that that additional time period of 15 days might not be necessary, as the 30-day limitation provided for the response to the notice of arbitration under article 3, paragraph (5) was sufficient to allow parties to try to find an agreement on that question. It was therefore proposed to avoid mentioning any time limit in article 5 as that article would apply once the parties had already an opportunity to exchange the notice of arbitration and the response to it.

67. After discussion, the Working Group agreed that article 3, paragraph (5) (c) should be amended to include a reference to article 3, paragraph (3) (g), which would put it beyond doubt that the respondent should provide a response to the claimant on the number of arbitrators. As a consequence, article 3, paragraph (5) (d) would be deleted. In addition, it was agreed to provide under article 5 that the three-arbitrator default rule would apply if the parties failed to reach an agreement on the number of arbitrators within the 30-day time limit provided for responding to the notice of arbitration under article 3, paragraph (5).

Appointment of arbitrators

Article 6

68. It was observed that the words "at the request of a party" were included in paragraph (2), but were omitted in paragraph (1). For the sake of consistency, it was agreed to include those words at the end of paragraph (1) and to delete them from both the first sentence of the chapeau to paragraph (2), and paragraph (2) (a). With those modifications, the Working Group adopted the substance of article 6.

Article 7

69. The Working Group adopted article 7 in substance, without any modification.

Article 7 bis

70. It was observed that article 7 bis did not contain any limitation of time. In response, it was said that it was not necessary to include a time limit under article 7 bis, as there was no need to provide for specific deadlines applicable to the appointment of arbitrators in multiparty arbitration. It was further observed that the provision contained in article 7 bis was commonly found in international arbitration rules of other arbitral institutions, and did not create any difficulty in practice.

71. The Working Group adopted article 7 bis in substance, without any modification.

Article 8

72. The Working Group recalled that it had agreed to the deletion of article 8, the substance of which had been placed in article 4 bis on the designating and appointing authorities (A/CN.9/619, para. 94).

Challenge of arbitrators (Articles 9 to 12)

Article 9

Title

73. The Working Group agreed to include in the title of the section the words "Disclosures by and", in order to better reflect the content of article 9.

Members of the arbitral tribunal

74. The Working Group agreed to add the words "and the other members of the arbitral tribunal" after the word "parties" in the second sentence of article 9 to clarify that an arbitrator should disclose not only to the parties, but also to the other members of the arbitral tribunal, circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. With that modification, the Working Group adopted article 9 in substance.

Model statements of independence

75. The Working Group recalled that it had agreed at its forty-sixth session that guidance should be provided in the Rules on the required content of disclosure, in

the form, for instance, of a model statement of independence attached as a footnote to article 9 or in any accompanying material (A/CN.9/619, paras. 96-99).

Title

76. The Working Group agreed that the model statements of independence should be entitled "Model statements pursuant to article 9 of the Rules".

"Impartial and independent"

77. Concern was expressed that the model statements of independence were not fully consistent with article 9, as the first sentence of both statements contained a declaration on the independence of the arbitrator, but omitted a reference to his or her impartiality. After discussion, the Working Group agreed that the first sentence of both statements should read: "I am impartial and independent of each of the parties and intend to remain so."

Content of the statements

78. It was said that it might not be appropriate that the first statement combined a situation where "no circumstances to disclose" were identified and a subjective approach based on a declaration by the arbitrator that, in his or her opinion, circumstances should not give rise to justifiable doubt as to his or her independence and impartiality, and that in the second statement, the relations and circumstances which would be mentioned should, *a contrario*, necessarily be considered as likely to give rise to justifiable doubts. It was suggested that to better distinguish between the two statements, the first one should more clearly focus on the absence of any relation between the arbitrator and the parties. It was proposed that the second sentence of the first statement of independence should be replaced by wording along the following lines: "To the best of my knowledge, there are no past or present professional, business or other relationships with the parties, or any other circumstances that might cause a party to question my impartiality or independence". In response, it was said that the inclusion of such language in the first statement was unnecessary and would be too far-reaching. The Working Group did not adopt that proposal.

79. With a view to alleviating the above concern, the Working Group agreed to add in the second statement of independence entitled "circumstances to disclose", an additional sentence after the words "[include statement]" along the following lines: "Nevertheless, I do not regard such circumstances as likely to give rise to justifiable doubts as to my impartiality or independence."

80. The Working Group adopted the two model statements of independence in substance, with the agreed amendments mentioned in the preceding paragraphs.

Article 10

81. The Working Group adopted article 10 in substance, without any modification.

Article 11

Paragraph (1)

82. A suggestion was made to add the words "should have been known" at the end of paragraph (1) to ensure that a notice of challenge sent 15 days after the date a party should have known the circumstances triggering the challenge would not be admissible. In response, it was said that it would be for the party that challenged the arbitrator to determine when the circumstances were actually known. It was observed that that matter would be better dealt with under article 12, paragraph (2), which related to the appointing authority making that determination. The Working Group agreed not to include the proposed words in paragraph (1) and to consider whether the Rules should include a provision based on imputed knowledge of circumstances giving rise to the challenge when discussing article 12, paragraph (2) (see below, paras. 99-102).

83. The Working Group adopted paragraph (1), without any modification.

Paragraph (2)

84. The Working Group agreed to delete the words in brackets "shall be in writing and" and, with that modification, adopted paragraph (2) in substance.

Paragraph (3)

"[all other parties] [the party or parties that appointed the challenged arbitrator]"

85. The Working Group considered whether, where a party challenged an arbitrator, the agreement of all parties should be required for the challenge to be successful, or whether the agreement of the party that appointed the challenged arbitrator was sufficient. Strong support was expressed for requiring the agreement of all parties. It was said that that solution would be consistent with the one adopted in the 1976 version of the Rules, where "the other party" was required to agree. It was recalled that the words "all parties" had been proposed to cater for multi-party arbitration.

86. In favour of requiring the agreement of the party or parties that appointed the challenged arbitrator, it was said that in a case with two respondents, if one of them challenged the arbitrator appointed by a single claimant, the effect of requiring all parties to agree would be to give the second respondent a provisional veto over the challenge. This would force the challenging party to bring its challenge before an appointing authority, despite the willingness of the claimant that had appointed the challenged arbitrator to accept the challenge. That situation might arise where, for instance, a respondent would have tactical reasons to delay the arbitral proceedings by forcing a lengthier challenge process. It was said that there might be a need to provide for additional language to deal with the case where the challenged arbitrator was either the sole or presiding arbitrator.

87. In response, it was observed that once a party appointed an arbitrator, that party should not retain a greater stake in the future service of that arbitrator in the proceedings. It was said that differentiating among the arbitrators based on who appointed them would run contrary to the fundamental principle whereby all arbitrators were equally appointed for the overall purpose of the arbitration. It was also said that requiring the agreement of the party or parties that appointed the

challenged arbitrator would add an unnecessary layer of complexity to cope with situations that occurred infrequently in practice, since arbitrators would normally consider voluntarily withdrawing. Moreover, it was contended that if agreement of only the appointing authority was required for a successful challenge, then a party would have an absolute right to challenge or remove an arbitrator appointed by it. It was further contended that, as a practical matter, the proposal to require all parties to agree to a challenge was better adapted for challenges to sole or presiding arbitrators not appointed by a party.

88. After discussion, the Working Group agreed to insert the words "all parties" as proposed in the first bracketed option of the first sentence of paragraph (3).

Termination of the mandate of the arbitrator

89. The Working Group considered whether it should be expressly clarified in paragraph (3) that once the parties agreed on the challenge, the mandate of the arbitrator would terminate whether or not the challenged arbitrator agreed to withdraw. It was said that if that addition was made, the words "and the challenged arbitrator does not withdraw" could be omitted from article 12 (see below, paragraphs 94-98). That proposal was seen as providing an opportunity to better clarify the date when the arbitrator's removal would take effect. It was observed that that question was important in practice, namely when the challenge occurred during the arbitral proceedings, when, for instance, provisional measures were to be taken by the arbitral tribunal.

90. Objections were expressed to that proposal on the ground that in certain jurisdictions, the applicable law included statutory provisions on the mandate of the arbitrators, which could not be merely terminated by agreement of the parties. The Working Group noted that the absence of an express reference to the termination of the mandate of the arbitrator did not seem to have created much difficulty in practice and that an additional statement on the termination of the arbitrator's mandate was therefore unnecessary.

91. The Working Group agreed that the last sentence of paragraph (3) should be deleted as it was redundant with the provision of article 13, paragraph (1), which contained a generic provision on procedures in case of replacement of an arbitrator. With a view to providing clarity regarding the removal of the arbitrator and the applicable procedure, the Working Group agreed to include a sentence at the end of paragraph (3), along the following lines: "In both cases, the arbitrator shall be replaced by the procedure in article 13". The Working Group agreed that similar language should be included in article 12. It was noted that such language might not be necessary in articles 11 and 12 if adequately dealt with in article 13.

92. After discussion, the Working Group adopted paragraph (3) with the modification mentioned in paragraphs 88 and 91 above.

Article 12

Paragraph (1)

"any party"

93. Consistent with the decision made under article 11, paragraph (3), the Working Group agreed to insert the words "any party" in the first sentence of paragraph (1), after the words "the notice of challenge," (see above, paras 85-88).

"and the challenged arbitrator did not withdraw"

94. A concern was expressed that, as currently drafted, paragraph (1) might create a risk that, in the exceptional situation where an arbitrator would refuse to withdraw despite the parties having agreed on the challenge, such refusal would prevent the parties from pursuing the challenge. To avoid that risk, it was suggested that the word "and" should be replaced by the word "or".

95. Objections were raised against replacing "and" by "or" for the reason that the 1976 version of the Rules used the word "and" and that language had never created difficulties.

96. In support of the suggested replacement, it was observed that the word "or" would better mirror the structure of article 11, paragraph (3), which referred in its first sentence to the situation where all parties agreed to the challenge, and in the second sentence, provided that the arbitrator might withdraw from his or her office. It was said that in the situation where all parties agreed on the challenge, but the challenged arbitrator refused to withdraw, he or she would nevertheless be removed from office without the need to continue with the challenge procedure. Therefore, the use of the word "or" would clarify the applicable procedure.

97. After discussion, the Working Group agreed to replace the word "and" appearing after the words "to the challenge" in the first sentence of paragraph (1) by the word "or".

98. With the modifications mentioned above, the Working Group adopted paragraph (1). The Secretariat was requested to examine whether drafting simplifications could be made in that paragraph.

Paragraph (2)

99. It was observed that paragraph (2) was not contained in the 1976 version of the Rules, and that its purpose was to deal with potential abuse by a party of the challenge procedure, with the aim to delay the arbitral proceedings. Support was expressed for the idea that the appointing authority should be able to consider the factor described in paragraph (2) in making its decision concerning whether to accept or reject a challenge.

100. Strong concerns were raised that paragraph (2) would be difficult to apply in practice. It would put the appointing authority in the situation where it had to determine whether the challenging party ought to have known the grounds for challenge at an earlier stage of the procedure, a determination that would suppose inquiries that might be impractical for the appointing authority to perform. It was pointed out that there was no need for that provision, since the appointing authority had, in any case, the discretion to reject a challenge on any ground it deemed

appropriate, including in the case covered in paragraph (2). It was said that paragraph (2) might have the unintended effect of limiting the grounds on which the appointing authority might reject a challenge. It was said that an additional unintended effect of that provision was that a party might feel compelled to bring claims prematurely, in order to avoid the foreclosure effect of the provision. That effect would create particular difficulties in arbitration cases involving States, which were usually reluctant to enter into challenge procedures, unless and until the accuracy of serious allegations would be ascertained.

101. In addition, it was observed that the inclusion of a mechanism based on imputed knowledge would constitute a novelty in the Rules, and might lead to potential inconsistencies with other provisions of the Rules, such as for instance, article 30 on waiver to object, which was based on a concept of actual knowledge.

102. After discussion, the Working Group agreed to delete paragraph (2).

Replacement of an arbitrator

Article 13

Paragraph (1)

103. The Working Group considered paragraph (1), which established a general rule on the replacement procedure to be applied, when it was necessary to appoint a substitute arbitrator during the course of the arbitral proceedings. The Working Group agreed that the reference to articles 6 to 9 should be replaced by a reference to articles 6, 7 and 7 bis. The Working Group adopted the substance of paragraph (1), without any further modification.

Paragraphs (2) and (3)

104. Paragraphs (2) and (3) addressed the procedure applicable to the replacement of an arbitrator in case the arbitrator to be replaced resigned for invalid reasons, refused or failed to act or was successfully challenged. Paragraph (2) provided that in the event that an arbitrator had resigned for invalid reasons or refused or failed to act, the appointing authority might, if so requested by a party, either replace that arbitrator or authorize the other arbitrators to proceed with the arbitration and make any decision or award. Paragraph (3) provided that in those circumstances as well as in the event of successful challenge under article 12, the appointing authority should decide whether itself to proceed with the appointment of the substitute arbitrator.

105. It was observed that those two paragraphs required careful consideration as they both had the consequence of depriving the parties of the fundamental right to appoint an arbitrator. Therefore, it was said that safeguards should be provided in those paragraphs to ensure that they would apply only in exceptional circumstances.

106. It was observed that paragraph (2) dealt with situations that differed in nature, some of which implied misconduct from either the parties or members of the arbitral tribunal, while others involved the arbitrator being prevented from performing his or her functions for legitimate reasons. It was observed that there was a need to better delineate the cases that triggered the application of the exceptional procedure referred to in paragraph (2) and to distinguish the consequences attached to those

cases depending on their nature. The Working Group reviewed the various situations dealt with under paragraphs (2) and (3), and then proceeded to discuss the impact of those situations on the replacement procedure to be applied.

Situations triggering the application of exceptional procedures for the replacement of an arbitrator

107. The Working Group first considered the situation where an arbitrator would refuse or fail to act, and therefore would not exercise its functions, for any reason, not necessarily tainted by misconduct. The attention of the Working Group was drawn to objective situations where the appointing authority would need to make the appointment, for example, where a court decision or another public authority enjoined an arbitrator from participating in the proceedings. In response to a question whether, in such circumstances, the Rules should distinguish between temporary and long-lasting absence of the arbitrator, it was observed that such a distinction might complicate the mechanism and was not commonly used in international arbitration rules. It was observed that article 13, paragraph (2) of the 1976 version of the Rules simply provided that the procedure in respect of the challenge and replacement of an arbitrator should apply. It was pointed out that a similar provision was found in article 14 of the UNCITRAL Arbitration Model Law.

108. For the sake of consistency in the structure of articles 12 and 13 of the Rules, it was suggested that a paragraph should be added under article 12 to the effect that, in the event an arbitrator failed to act or in the event of de jure or de facto impossibility of his or her performing his or her functions, the procedure in respect of the challenge should apply. That proposal was adopted by the Working Group.

109. As to the situation where an arbitrator had to be replaced due to resignation or failure or refusal to act for invalid reasons, concerns were expressed regarding the reference to “invalid reasons”. The word “invalid” was said to be vague and open to divergent interpretations. Various alternative wordings were proposed, such as “insufficient”, “untenable”, “unwarranted”, “unjustified”, or “objectively frivolous”. It was observed that, in a slightly different formulation, the notion of validity of grounds was used in other UNCITRAL instruments, such as in article 14, paragraph (2), of the UNCITRAL Arbitration Model Law, which had not resulted in difficulties of interpretation. A suggestion was made to use positive wording along the lines of “without valid reasons” to emphasize that the withdrawing arbitrator should provide reasons for his or her withdrawal. It was suggested to establish an even higher standard by including words, such as, “manifestly” before “without valid reasons” and “in exceptional circumstances”.

110. A proposal was made to refer to the notion of “improper conduct” which was said to better encompass the situations of abuse and manipulation, which might not be covered by the notion of “invalid reasons”. That proposal was objected to on the grounds that, together with some of the above-suggested alternative language, a reference to “improper conduct” implied a subjective assessment of the conduct of the arbitrator by the appointing authority, which might run counter to the goal of predictability and consistency in the application of the Rules, particularly where less experienced appointing authorities were involved. It was said that the language used should clarify which situation would trigger the intervention of the appointing authority, instead of referring to faulty behaviour of a party.

Discretion of the appointing authority to appoint a substitute arbitrator and truncated tribunal

111. It was observed that it was possible either to opt for a generic description of the cases where a party should be deprived of a right to appoint the substitute arbitrator or to enumerate such cases. Some support was expressed for adopting a generic approach granting the appointing authority broad discretion in its decision whether itself to proceed with the replacement of the arbitrator, subject to clarification that such discretion would only exist in exceptional circumstances. It was stated that the need for direct appointment of an arbitrator might arise in a variety of situations, not limited to the misconduct of a party or an arbitrator. A view was expressed that, whether or not a specific provision was adopted under article 13, the discretion of the appointing authority, as generally recognized by the Rules, was sufficiently broad to allow it to replace an arbitrator.

112. Diverging opinions were expressed on whether the appointing authority should be allowed more broadly to itself proceed with the appointment of a substitute arbitrator. It was observed that depriving a party of its right to appoint an arbitrator should only occur as a matter of sanction in case a party or an arbitrator misbehaved. In response, it was said that that provision dealt with replacing an arbitrator in the most efficient manner, and was therefore not connected to the notion of sanction. In support of enumerating the cases where a party would be deprived of a right to appoint a substitute arbitrator, it was said that such listing would provide more safeguards to the parties. The prevailing view, however, was that a provision allowing an appointing authority to proceed with the direct appointment of an arbitrator should not extend beyond the cases of improper conduct and should remain generic so as to cover all possible instances.

113. It was stated that the provision in paragraph (2) on a truncated tribunal should focus on the rare circumstances in which the truncated tribunal mechanism would apply. It was agreed that a provision should indicate what kind of conduct would trigger the mechanism, and at what point the mechanism could begin to operate (i.e., only after the conclusion of the hearings or possibly earlier). It was agreed that a provision allowing the appointing authority to opt for a truncated tribunal should include all necessary limitations so as to ensure that it might only happen in exceptional circumstances, and taking account of the stage of the proceedings. It was observed that other international arbitrational rules regulated the matter of a truncated tribunal, including the arbitration rules of the International Chamber of Commerce ("ICC rules") and of the American Arbitration Association ("AAA rules"). It was recalled that article 10 of the AAA rules provided, inter alia, that the administrator should determine whether there were sufficient reasons to accept the resignation of an arbitrator.

114. It was suggested that the mechanism should apply within strict time limits, for example, only once the hearings were closed. It was observed that under the ICC rules, the decision to establish a truncated tribunal was only possible at the closure of proceedings. In response, it was recalled that one of the purposes of the revision of the UNCITRAL Arbitration Rules was to include more time flexibility to establish a truncated tribunal, in order to address the difficulties arising in practice with arbitrators' withdrawals throughout the arbitral proceedings.

Proposal

115. In order to address the various concerns expressed regarding paragraphs (2) and (3), a proposal was made to replace those two paragraphs by a provision, which would read along the following lines: "If, on the application of a party, the appointing authority determines that the need for replacement of an arbitrator was caused by improper conduct in circumstances that justify a party's not having the right to appoint the substitute arbitrator, then the appointing authority may, after giving an opportunity to the parties, the arbitrators, and the arbitrator being replaced to express their views: (a) proceed itself to make the appointment of the substitute arbitrator; or (b) if the same occurs at the late stage of the proceedings, authorize the other arbitrators to proceed with the arbitration and make any decision or award."

116. That proposal received broad support. However, a number of observations were made regarding its formulation. It was observed that that proposal referred to the notion of "improper conduct in circumstances", which might be too vague a concept. It was proposed to refer instead to a "conduct justifying a party being deprived of the right to appoint a replacement arbitrator". It was noted that referring to a party being deprived of "the right" to appoint a substitute arbitrator might be inappropriate and that the notion might be better captured using the word "opportunity" instead of "right". A variant of that proposal was to replace the words "improper conduct in circumstances" by the words "an attempt to obstruct the proceedings". It was pointed out that a general reference to "improper conduct" did not clarify whose conduct was at stake, which might imply the arbitrators only or the parties as well. In response, it was observed that it might be appropriate for the appointing authority itself to appoint the arbitrator or authorize a truncated tribunal if there was improper conduct of an arbitrator in the circumstances that justified a party not having the right to appoint a substitute arbitrator. It was suggested that a reference to "exceptional circumstances" should be added to better qualify the conditions under which the provisions of subparagraphs (a) and (b) would apply. The need to provide the replaced arbitrator with an opportunity to be heard was questioned. It was stated that the notion of "late stage in the proceedings" was ambiguous and should be replaced with a more specific concept, such as the "closure of the proceedings" or "a substantially advanced stage of the proceedings".

117. After discussion, the Working Group requested the Secretariat to provide a revised draft of the proposal referred to above in paragraph 115, for consideration by the Working Group at a later stage.

Repetition of hearings in the event of the replacement of an arbitrator

Article 14

118. The Working Group adopted the text of article 14 in substance, without any modification.

Section III. Arbitral proceedings

General provisions — Article 15

Paragraph (1)

119. The Working Group adopted paragraph (1) in substance, without any modification.

Paragraph (1 bis)

120. It was clarified that paragraph (1 bis) only applied to the time periods concerning the arbitration procedure and not to any substantial time periods concerning the dispute underlying the arbitration case.

121. A concern was raised that paragraph (1 bis) might create difficulties in practice, where national laws would not permit arbitrators to extend the periods of time in the arbitration procedure. In response, it was said that the practice of the ICC Court of Arbitration, which frequently extended the periods of time of the arbitration procedure, did not seem to have caused any problems and also that the question of non-derogable provisions of national law were already accommodated in article 1 of the Rules.

122. Another concern was expressed that paragraph (1 bis) as currently drafted included an invitation for the parties to express their views only in case of extension or abridgement of any period of time agreed by the parties, as provided for under subparagraph (b), but not for any period of time prescribed under the Rules, as provided for under subparagraph (a). It was pointed out that it was a fundamental right of the parties to express their views and it should apply generally to the instances referred to in both subparagraphs. More generally, it was said that that right applied in many different instances under the Rules, and it might be awkward to expressly refer to that right in paragraph (1 bis) only. It was therefore proposed to delete that reference. However, it was generally felt in the Working Group that it might be important to signal to arbitral tribunals the significance of not amending periods of time without the parties being involved in that decision-making process.

123. After discussion, the Working Group agreed to extend the invitation to parties to express their views to cover both instances and, as a matter of drafting, to place the phrase “after inviting the parties to express their views” after the words “The arbitral tribunal may,”.

124. The Working Group heard concerns that the decision of the arbitral tribunal to extend or abridge any period of time should be taken prudently, as it disregarded the party’s agreement. It was further observed that the wording could be broadly interpreted, which might be especially dangerous in case of inexperienced arbitrators. In order to address these concerns, it was suggested to establish a threshold for the arbitral tribunal by including words such as “if necessary”, “in exceptional circumstances” or, in reference to article 23, “on justified grounds”.

125. After discussion, the Working Group adopted the substance of paragraph (1 bis), with the modification referred to above in paragraph 123.

Paragraph (2)

126. The Working Group adopted paragraph (2) in substance, without any modification.

Paragraph (3)

127. It was observed that communication by one party to the arbitral tribunal could not always be communicated by that party to all other parties at the same time, as required under paragraph (3), in particular in case a party would apply to the tribunal for a preliminary order. It was thus proposed to either delete paragraph (3) entirely or the words "at the same time". In response, it was pointed out that the proposed deletion would run counter to the current practice in international arbitration to send communications at the same time to the parties and the arbitral tribunal. It was further observed that that method contributed to the facilitation of arbitral proceedings and should not be changed. To reconcile those views, it was suggested to include in paragraph (3) words along the lines of "unless otherwise authorized by the arbitral tribunal or required by the Rules". That proposal received support, and after discussion, the Working Group agreed that a revised version of that paragraph should be prepared by the Secretariat, bearing in mind the above suggestions.

Paragraph (4)

128. The purpose of paragraph (4) as considered by the Working Group was to allow one or more persons to be joined in the arbitration as a party, provided that such a person was also a party to the arbitration agreement and had consented to be joined. The Working Group recalled that, at its forty-sixth session, it had agreed that the provision on joinder would constitute a major modification to the Rules, and had noted the diverging views, which were expressed on that matter (A/CN.9/619, para. 126).

"and has consented to be joined"

129. It was recalled that the words "third person" had been used instead of "third party" in the paragraph, in recognition of the fact that the party to be joined to the arbitration proceedings was a party to the arbitration agreement. The Working Group agreed that the party to be joined should be a party to the arbitration agreement and that reference to the term "third party" should continue to be avoided.

130. A proposal was made to delete the phrase "and has consented to be joined" in the first sentence of paragraph (4). It was observed that that phrase would not be necessary as the provision already required that the party to be joined should be a party to the arbitration agreement. The agreement of parties to apply the UNCITRAL Arbitration Rules would imply their consent to the application of the joinder provision and to the possibility of the arbitral tribunal being constituted without their consent. Requiring additional agreement by the party to be joined would provide that party with a veto right, which might not be justified.

131. Concerns were expressed that the absence of explicit consent of a party to be joined might entail the consequence that, at the stage of recognition and enforcement of the arbitral award, the party so joined might raise the argument that

it did not participate in the constitution of the arbitral tribunal, and therefore the arbitral tribunal was not composed in accordance with the agreement of the parties.

132. Various suggestions were made to address that concern. A suggestion was made to insert in article 3 a provision to the effect that the parties who considered requesting joinder of another party should do so at an early stage of the proceedings, before the composition of the arbitral tribunal. It was observed that that solution might not be workable in all circumstances.

133. It was observed that article 20 of the Rules might already contain a solution to that question, as it provided that a party might amend or supplement its claim or defence, unless the arbitral tribunal considered it inappropriate having regard to the prejudice to other parties or any other circumstances.

134. Another proposal was made to expressly address that concern in the provision on joinder, by replacing the words "and has consented to be joined" by language along the following lines: ", unless the arbitral tribunal finds, after giving all parties, including the person to be joined, the opportunity to be heard, that joinder should not be permitted because of prejudice to any of those parties". After discussion, the Working Group decided that it should be clarified that the arbitral tribunal might decide that a party be joined without the consent of that party, but before making its decision, the tribunal should provide that party with an opportunity to be heard and decide on the prejudice. The Secretariat was requested to prepare wording reflecting that decision. A further suggestion that the proposed language should be broadened by referring to "all circumstances that the arbitral tribunal deems relevant and applicable", along the lines of article 4.2 of the Swiss Rules of International Arbitration was not adopted.

135. The Working Group agreed to include the words "or awards" after the word "award" in the second sentence of paragraph (4).

Place of arbitration

Article 16

Paragraph (1)

136. The Working Group agreed to delete the words "the convenience of the parties", because mentioning one circumstance only was not justified and there were other circumstances which might be more important. The Working Group adopted paragraph (1) in substance, with the deletion of the words "including the convenience of the parties".

Paragraph (2)

137. Concern was expressed that the current drafting of paragraph (2) suggested that the arbitrators were not free to meet at any location, unless otherwise agreed by the parties. To address that concern, it was suggested to split the paragraph into two sentences, to clarify that the arbitrators might deliberate at any location they considered appropriate. That proposal was adopted by the Working Group.

138. It was suggested that the reference to "consultations" should be deleted, as it was redundant with "meetings and deliberations". That suggestion was adopted by the Working Group.

139. For the sake of clarity, the Working Group also agreed that the words "Notwithstanding the provisions of paragraph (1)" should be deleted. The Working Group adopted paragraph (2) in substance, with the above modifications.

Language

Article 17

140. The Working Group recalled its decision to delete the reference to "languages" in plural from the Rules (A/CN.9/619, para. 145). The Working Group was informed that such change in article 17 could have the negative consequence of depriving the arbitral tribunal of the possibility to have more than one language.

141. The Working Group adopted article 17 in substance, with references to "languages" in the plural.

B. Note by the Secretariat on settlement of commercial disputes: Revision of the UNCITRAL Arbitration Rules, submitted to the Working Group on Arbitration at its forty-ninth session

(A/CN.9/WG.II/WP.151 and Add.1) [Original: English]

CONTENTS

I. Introduction

1. At its thirty-ninth session (New York, 19 June-7 July 2006), the Commission agreed that, in respect of future work of the Working Group, priority be given to a revision of the UNCITRAL Arbitration Rules (1976) ("the UNCITRAL Arbitration Rules" or "the Rules").[1] At its fortieth session (Vienna, 25 June-12 July 2007), the Commission noted that the UNCITRAL Arbitration Rules had not been amended since their adoption in 1976 and that the review should seek to modernize the Rules and to promote greater efficiency in arbitral proceedings. The Commission generally agreed that the mandate of the Working Group to maintain the original structure and spirit of the UNCITRAL Arbitration Rules had provided useful guidance to the Working Group in its deliberations to date and should continue to be a guiding principle for its work.[2] At its forty-first session (New York, 16 June-3 July 2008), the Commission expressed the hope that the Working Group would complete its work on the revision of the UNCITRAL Arbitration Rules in their generic form, so that the final review and adoption of the revised Rules would take place at the forty-second session of the Commission, in 2009.[3]

2. At its forty-fifth session (Vienna, 11-15 September 2006), the Working Group undertook to identify areas where a revision of the UNCITRAL Arbitration Rules might be useful. At that session, the Working Group gave preliminary indications as to various options to be considered in relation to proposed revisions, on the basis of documents A/CN.9/WG.II/WP.143 and Add.1, in order to allow the Secretariat to

---

[1] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17* (A/61/17), paras. 182-187.

[2] Ibid., *Sixty-second Session, Supplement No. 17* (A/62/17), part one, para. 175.

[3] Ibid., *Sixty-third session, Supplement No. 17* (A/63/17), paras. 308-316.

prepare a revised draft of the Rules taking account of such indications. The report of that session is contained in document A/CN.9/614. At its forty-sixth (New York, 5-9 February 2007), forty-seventh (Vienna, 10-14 September 2007) and forty-eighth (New York, 4-8 February 2008) sessions, the Working Group discussed a draft of revised Rules, as contained in documents A/CN.9/WG.II/WP.145 and Add.1. The reports of these sessions are contained in documents A/CN.9/619, A/CN.9/641 and A/CN.9/646, respectively.

3. This note contains an annotated draft of revised UNCITRAL Arbitration Rules, based on the deliberations of the Working Group at its forty-sixth to forty-eighth sessions and on comments received by the Secretariat at the occasion of conferences and meetings organized to discuss the revision of the Rules. It has been prepared for the consideration of the Working Group for the second reading of the revised version of the Rules, in replacement of documents A/CN.9/WG.II/WP.147 and Add.1, and A/CN.9/WG.II/WP.149, as it seemed clearer to propose a complete draft of revised Rules, instead of adding annotations and comments to such previous documents. This note covers draft articles 1 to 17 of the revised version of the Rules. Draft articles 18 to 41, and draft additional provisions are dealt with under A/CN.9/WG.II/WP.151/Add.1.

II. Draft revised UNCITRAL Arbitration Rules

Section I. Introductory rules

Scope of application

Article 1

1. Where parties have agreed that disputes between them in respect of a defined legal relationship, whether contractual or not, shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree. **[1]**

1 bis. Unless the parties have agreed to apply another version of the Rules, the parties to an arbitration agreement concluded after [date of adoption by UNCITRAL of the revised version of the Rules] shall be presumed to have referred to the Rules in effect on the date of commencement of the arbitration. That presumption does not apply where the arbitration agreement has been concluded by accepting after [date of adoption by UNCITRAL of the revised version of the Rules] an offer made before that date. **[2]**

2. These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail. **[3]**

Remarks on draft article 1

1. The Working Group did not modify the substance of paragraph (1) at its forty-eighth session (A/CN.9/646, para. 71).

2. The provisions of paragraph (1 bis) were not contained in the 1976 version of the Rules. That paragraph seeks to determine which version of the Rules applies to arbitrations. The proposed draft is based on discussions of the Working Group at its forty-eighth session (A/CN.9/646, paras. 72-77). It contains a presumption aimed at providing guidance to the arbitrators in case the parties have not expressly indicated which version of the Rules would apply. The presumption that parties have referred to the Rules in effect at the date of commencement of the arbitration applies only to arbitration agreements concluded after the adoption of the revised version of the Rules. That presumption does not apply where arbitration agreements are formed by one or more parties accepting an open offer to arbitrate made by other party or parties before the date of adoption of the revised version of the Rules (A/CN.9/646, paras. 75 and 76).

3. Paragraph (2) is reproduced without modification from the 1976 version of the Rules and was adopted in substance by the Working Group at its forty-eighth session (A/CN.9/646, para. 78).

*** MODEL ARBITRATION CLAUSE FOR CONTRACTS [4]**

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules.

Note — Parties may wish to consider adding: **[5]**

(a) The appointing authority shall be ... (name of institution or person);

(b) The number of arbitrators shall be ... (one or three);

(c) The place of arbitration shall be ... (town and country);

(d) The language to be used in the arbitral proceedings shall be ...

Remarks on the draft model arbitration clause

4. The draft model arbitration clause was adopted in substance by the Working Group at its forty-eighth session (A/CN.9/646, para. 79).

5. The Working Group might wish to consider whether the words “might wish to” appearing in the chapeau of the note to the model arbitration clause should be replaced with the word “should”, in order to indicate to the parties the importance of agreeing on the matters listed.

Notice, calculation of periods of time

Article 2

1. For the purposes of these Rules, any notice, including a notification, communication or proposal, is deemed to have been received if it is physically delivered to the addressee or if it is delivered at its habitual residence, place of business or designated address, or, if none of these can be found after making reasonable inquiry, then at the addressee’s last-known residence or place of business. Notice shall be deemed to have been received on the day it is so delivered. **[6]**

[1 bis. Any notice, including a notification, communication or proposal shall be delivered by registered post, delivery against receipt, courier service or transmitted by telex, telefax or other means of telecommunication, including electronic communication, that provide a record of its transmission.] **[7]**

2. For the purposes of calculating a period of time under these Rules, such period shall begin to run on the day following the day when a notice, notification, communication or proposal is received. If the last day of such period is an official holiday or a non-business day at the residence or place of business of the addressee, the period is extended until the first business day which follows. Official holidays or non-business days occurring during the running of the period of time are included in calculating the period.[8]

Remarks on draft article 2

6. Paragraph (1) reflects the decisions of the Working Group at its forty-eighth session to retain the word "physically" and to replace the reference to a mailing address by mention of a "designated address" (A/CN.9/646, paras. 80-82). The Working Group might wish to consider whether paragraph (1) should expressly address cases where attempts to deliver a notice have been made but were unsuccessful, by amending paragraph (1) as shown in bold: "For the purposes of these Rules, any notice, including a notification, communication or proposal, is deemed to have been received if it is physically delivered to the addressee or if it is delivered at its habitual residence, place of business or designated address. **If** none of these can be found after making reasonable inquiry, **such delivery shall be made or attempted** at the addressee's last-known residence or place of business. Notice shall be deemed to have been received on the day **of such delivery or attempted delivery**."

7. The provisions of paragraph (1 bis) were not contained in the 1976 version of the Rules. That paragraph seeks to reflect the decision of the Working Group to expressly include language which authorizes both electronic as well as other traditional forms of communication (A/CN.9/614, para. 39). The proposed draft, which corresponds to commonly adopted provision in other set of arbitration rules, does not however provide a fully satisfactory solution to the question of evidencing receipt or dispatch of communication. The Working Group might wish to consider whether such a provision should be added in the Rules, considering that paragraph (1) encompasses all sorts of communication, whether traditional or electronic, and that the absence of such a provision does not seem to have created difficulties in the past.

8. Paragraph (2) is reproduced without modification from the 1976 version of the Rules and was adopted in substance by the Working Group at its forty-eighth session (A/CN.9/646, para. 84).

Notice of arbitration and response

Article 3

1. The party or parties initiating recourse to arbitration (hereinafter called the "claimant") shall give to the other party or parties (hereinafter called the "respondent") a notice of arbitration. **[9]**

2. Arbitral proceedings shall be deemed to commence on the date on which the notice of arbitration is received by the respondent. **[10]**

3. The notice of arbitration shall include the following: **[11]**

(a) A demand that the dispute be referred to arbitration;

(b) The names and contact details of the parties;

(c) Identification of the arbitration agreement that is invoked;

(d) Identification of any contract or other legal instrument out of or in relation to which the dispute arises or, in the absence of such contract or instrument, a brief description of the relevant relationship;

(e) A brief description of the claim and an indication of the amount involved, if any;

(f) The relief or remedy sought;

(g) A proposal as to the number of arbitrators, language and place of arbitration, if the parties have not previously agreed thereon.

4. The notice of arbitration may also include:

(a) A proposal for the appointment of an appointing authority referred to in article 4 bis, paragraph 1;

(a bis) A proposal for the appointment of a sole arbitrator referred to in article 6, paragraph 1;

(b) Notification of the appointment of an arbitrator referred to in article 7 or article 7 bis [;

(c) The statement of claim referred to in article 18.] **[12]**

5. Within 30 days of the receipt of the notice of arbitration, the respondent shall communicate to the claimant a response to the notice of arbitration, which shall [, to the extent possible,] include: **[13]**

(a) Any plea that an arbitral tribunal constituted under these Rules lacks jurisdiction;

(b) The name and contact details of each respondent;

(c) A response to the information set forth in the notice of arbitration, pursuant to article 3, paragraph 3 (c), (d), (e) and (f);

(d) A proposal as to the number of arbitrators, language and place of arbitration, if the parties have not previously agreed thereon.

6. The response to the notice of arbitration may also include:

(a) A proposal for the appointment of an appointing authority referred to in article 4 bis, paragraph (1);

(b) A proposal for the appointment of a sole arbitrator referred to in article 6, paragraph 1;

(c) Notification of the appointment of an arbitrator referred to in article 7 or article 7 bis;

(d) A brief description of counterclaims or claims for the purpose

of a set-off, if any, including where relevant, an indication of the amounts involved, and the relief or remedy sought.

7. The constitution of the arbitral tribunal shall not be impeded by: (a) any controversy with respect to the sufficiency of the notice of arbitration, which shall be finally resolved by the arbitral tribunal; or (b) failure by the respondent to communicate a response to the notice of arbitration. In either circumstance, the arbitral tribunal shall proceed as it considers appropriate. **[14]**

Remarks on draft article 3

9. The words "or parties" have been added in paragraph (1) to encompass multi-party arbitration, as decided by the Working Group at its forty-sixth session (A/CN.9/619, para. 51).

10. Paragraph (2) is reproduced without modification from the 1976 version of the Rules and was adopted in substance by the Working Group.

11. Paragraph (3) includes modifications agreed by the Working Group at its forty-sixth session (A/CN.9/619, paras. 52 and 54).

12. The Working Group agreed at its forty-sixth session to further discuss whether the decision by the claimant that its notice of arbitration would constitute its statement of claim should be postponed until the stage of proceedings reflected in article 18 (A/CN.9/619, para. 57). If that option is retained, paragraph 4 (c) could be deleted, and the following provision could be added to article 18: "The claimant may elect to treat its notice of arbitration in article 3, paragraph 3 as a statement of claim" (see document A/CN.9/WG.II/WP.151/Add.1, para. 1). A similar solution would then be proposed in relation to the response to the notice of arbitration, where the respondent would be given the opportunity to decide whether its response to the notice of arbitration should be treated as a statement of defence, under article 19. The following paragraph would be added to article 19: "The respondent may elect to treat its response to the notice of arbitration in article 3, paragraph 5 as a statement of defence" (see document A/CN.9/WG.II/WP.151/Add.1, para. 2).

13. Paragraphs (5) and (6), which cover response to the notice of arbitration were not contained in the 1976 version of the Rules and the draft takes account of comments made in the Working Group that more precise language should be used (A/CN.9/619, paras. 58 and 60).

14. The provisions of paragraph (7) were not contained in the 1976 version of the Rule. That paragraph corresponds to the decision of the Working Group to add a provision indicating that an incomplete notice of arbitration or the failure by the respondent to communicate a response to the notice of arbitration should not prevent the constitution of the arbitral tribunal and that the consequences of such failures should be a matter to be determined by the arbitral tribunal (A/CN.9/619, paras. 55 and 56).

Representation and assistance

Article 4 [15]

The parties may be represented or assisted by persons chosen by them. The names and addresses of such persons must be communicated to all parties. Such communication must specify whether the appointment is

being made for purposes of representation or assistance. [Where a person is to act as a representative of a party, the arbitral tribunal, itself or upon the request of any party, may at any time require proof of authority granted to the representative in such a form as the arbitral tribunal may determine].

Remarks on draft article 4

15. Article 4 includes the modifications agreed by the Working Group at its forty-sixth session to replace the words "of their choice" in the first sentence with the words "chosen by them" (A/CN.9/619, para. 63), and to delete the words "in writing" in the second sentence as the manner in which communication should be exchanged among the parties and the arbitral tribunal is already dealt with under article 2 (A/CN.9/619, para. 68). The Working Group might wish to consider whether the last sentence on the communication of proof of authority, which constitutes an addition compared to the 1976 version of the Rules, is needed (A/CN.9/619, paras. 64-67).

Designating and appointing authorities

Article 4 bis [16]

1. Unless the appointing authority has already been agreed, a party may at any time propose the name or names of one or more institutions or persons [including the Secretary-General of the Permanent Court of Arbitration (hereinafter called the "the PCA"),] one of whom would serve as appointing authority.

2. If all parties have not agreed on the choice of an appointing authority within 30 days after a proposal made in accordance with paragraph 1 has been received by all other parties, any party may request the Secretary-General of the PCA to designate the appointing authority.

3. If the appointing authority refuses to act, or if it fails to appoint an arbitrator within 30 days after it receives a party's request to do so, any party may request the Secretary-General of the PCA to designate an appointing authority. If the appointing authority refuses or fails to make any decision on the fees of the members of the arbitral tribunal within 30 days after it receives a party's request to do so under article 39, paragraph 4, any party may request the Secretary-General of the PCA to make that decision.

4. In exercising its functions under these Rules, the appointing authority may require from any party the information it deems necessary and, to the extent it considers possible, it shall give the parties an opportunity to present their views. All communications between a party and the appointing authority or the Secretary-General of the PCA shall also be provided by the sender to all other parties.

5. When the appointing authority is requested to appoint an arbitrator pursuant to articles 6, 7, 7 bis, or 13, the party making the request shall send to the appointing authority copies of the notice of arbitration and, if it exists, any response to the notice of arbitration.

6. The appointing authority shall have regard to such considerations as

are likely to secure the appointment of an independent and impartial arbitrator and shall take into account the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.

Remarks on draft article 4 bis

16. Article 4 bis was not contained in the 1976 version of the Rules. Its purpose is to clarify for the users of the Rules the importance of the role of the appointing authority, particularly in the context of non-administered arbitration. The draft seeks to better clarify the role of the designating and appointing authorities, as discussed by the Working Group at its forty-sixth session (A/CN.9/619, paras. 69-78). The Working Group might wish to consider whether paragraph (1) should include a reference to the Secretary-General of the PCA as one institution which could serve as appointing authority.

Section II. Composition of the arbitral tribunal

Number of arbitrators

Article 5 [17]

1. *Option 1*: [If the parties have not previously agreed on the number of arbitrators, and if within 30 days after the receipt by the respondent of the notice of arbitration the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed.]

Option 2: [If the parties have not previously agreed on the number of arbitrators, one arbitrator shall be appointed, unless either the claimant, in its notice of arbitration, or the respondent, within 30 days after receipt of the notice of arbitration, requests that there be three, in which case three arbitrators shall be appointed.]

Remarks on draft article 5

17. Article 5 contains alternative proposals on the number of arbitrators, reflecting discussions at the forty-sixth session of the Working Group (A/CN.9/619, paras. 79-82).

Appointment of arbitrators (Articles 6 to 8)

Article 6 [18]

1. If the parties have agreed that a sole arbitrator is to be appointed, and if within 30 days after receipt by all other parties of a proposal for the appointment of a sole arbitrator, the parties have not reached agreement on the choice of a sole arbitrator, the sole arbitrator shall be appointed by the appointing authority.

2. The appointing authority shall, at the request of a party, appoint the sole arbitrator as promptly as possible. In making the appointment the appointing authority shall use the following list-procedure, unless the parties agree that the list-procedure should not be used or unless the appointing authority determines in its discretion that the use of the list-procedure is not appropriate for the case:

(a) At the request of a party the appointing authority shall communicate to each of the parties an identical list containing at least three names;

(b) Within 15 days after the receipt of this list, each party may return the list to the appointing authority after having deleted the name or names to which it objects and numbered the remaining names on the list in the order of its preference;

(c) After the expiration of the above period of time the appointing authority shall appoint the sole arbitrator from among the names approved on the lists returned to it and in accordance with the order of preference indicated by the parties;

(d) If for any reason the appointment cannot be made according to this procedure, the appointing authority may exercise its discretion in appointing the sole arbitrator.

Remarks on draft article 6

18. Article 6 was adopted in substance by the Working Group at its forty-sixth session (A/CN.9/646, para. 84). Consistent with the recommendation of the Working Group to assess further possible simplification that could be made following the adoption of draft article 4 bis, article 6, paragraphs (1) and (2) of the 1976 version of the Rules have been merged and paragraph (4) deleted as its content is covered by draft article 4 bis, paragraph (6) (A/CN.9/619, para. 69).

Article 7 [19]

1. If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the arbitral tribunal.

2. If within 30 days after the receipt of a party's notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator it has appointed, the first party may request the appointing authority to appoint the second arbitrator.

3. If within 30 days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the presiding arbitrator, the presiding arbitrator shall be appointed by the appointing authority in the same way as a sole arbitrator would be appointed under article 6.

Remarks on draft article 7

19. Article 7 was adopted in substance by the Working Group at its forty-sixth session (A/CN.9/646, para. 85). Article 7, paragraph (2) (b) as contained in the 1976 version of the Rules has been deleted, for the same reason as mentioned under paragraph 18 above.

Article 7 bis [20]

1. For the purposes of article 7, paragraph 1, where three arbitrators are to be appointed and there are multiple parties as claimant or as respondent, unless the parties have agreed to another method of appointment of

arbitrators, the multiple parties jointly, whether as claimant or as respondent, shall appoint an arbitrator.

2. If the parties have agreed that the arbitral tribunal is to be composed of a number of arbitrators other than one or three, the arbitrators shall be appointed according to the method agreed upon by the parties.

3. In the event of any failure to constitute the arbitral tribunal under paragraphs 1 and 2, the appointing authority shall, at the request of any party, constitute the arbitral tribunal, and in doing so, may revoke any appointment already made, and appoint or reappoint each of the arbitrators and designate one of them as the presiding arbitrator.

Remarks on draft article 7 bis

20. Article 7 bis was not contained in the 1976 version of the Rules. The purpose of paragraph (1) is to address multi-party arbitration, and the draft seeks to clarify how arbitrators are to be appointed where there are multiple parties, as claimant or defendant, and the parties agreed to the appointment of three arbitrators. Paragraph (2) deals with situations where parties have agreed to appoint a number of arbitrators other than one or three, i.e. situations not covered by articles 6 and 7 (A/CN.9/619, para. 83). Paragraph (3) provides a solution in case of failure to constitute the arbitral tribunal in those situations, and includes the suggestions made in the Working Group (A/CN.9/619, paras. 88-91).

Remarks on article 8 of the 1976 version of the Rules

21. The Working Group agreed to the deletion of article 8, the substance of which has been placed in article 4 bis on the designating and appointing authorities (A/CN.9/619, para. 94).

Challenge of arbitrators (Articles 9 to 12)

Article 9 [22]

When a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator, from the time of his or her appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed by him or her of these circumstances.

Model statements of independence [23]

No circumstances to disclose: I am independent of each of the parties and intend to remain so. To the best of my knowledge, there are no circumstances, past or present, likely to give rise to justifiable doubts as to my impartiality or independence. I hereby undertake promptly to notify the parties and the other members of the arbitral tribunal of any such circumstance that may subsequently come to my attention during this arbitration.

Circumstances to disclose: I am independent of each of the parties and intend to remain so. Attached is a statement of (a) my past and present professional, business and other relationships with the parties and (b) any other circumstance that might cause a party to question my impartiality or independence. [*Include statement*] I hereby undertake promptly to notify the parties and the other members of the arbitral tribunal of any such further relationship or circumstance that may subsequently come to my attention during this arbitration.

Remarks on draft article 9 and the model statements of independence

22. The Working Group adopted article 9 in substance at its forty-sixth session (A/CN.9/619, para. 95).

23. The model statements of independence were not contained in the 1976 version of the Rules. The purpose of including those statements in the Rules is to provide guidance on the required content of disclosure (A/CN.9/619, para. 96).

Article 10 [24]

1. Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.

2. A party may challenge the arbitrator appointed by it only for reasons of which it becomes aware after the appointment has been made.

Remarks on draft article 10

24. Article 10 was adopted in substance by the Working Group at its forty-sixth session (A/CN.9/619, para. 100).

Article 11 [25]

1. A party who intends to challenge an arbitrator shall send notice of its challenge within 15 days after the appointment of the challenged arbitrator has been notified to the challenging party or within 15 days after the circumstances mentioned in articles 9 and 10 became known to that party.

2. The challenge shall be notified to all other parties, to the arbitrator who is challenged and to the other members of the arbitral tribunal. The notification [shall be in writing and] shall state the reasons for the challenge. **[26]**

3. When an arbitrator has been challenged by a party, [all other parties] [the party or parties that appointed the challenged arbitrator] may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his or her office. In neither case does this imply acceptance of the validity of the grounds for the challenge. In both cases the procedure provided in article 6, 7 or 7 bis shall be used in full for the appointment of the substitute arbitrator, even if during the process of appointing the challenged arbitrator a party had failed to exercise its right to appoint or to participate in the appointment. **[27]**

Remarks on draft article 11

25. Article 11 was adopted in substance by the Working Group at its forty-sixth session (A/CN.9/619, para. 101).

26. The Working Group might wish to consider whether the words "shall be in writing and" within brackets in paragraph (2) should be deleted, as the manner in which the information should be exchanged is already dealt with under article 2.

27. The Working Group might wish to consider under paragraph (3) whether, when an arbitrator has been challenged by a party, all parties should be given a right to oppose to the challenge, or whether that right should be limited to the party that appointed the challenged arbitrator. The same question arises in relation to article 12, paragraph (1) (see below, paragraph 28).

Article 12

1. If, within 15 days from the date of the notice of challenge, [any other party] [the party or parties that appointed the challenged arbitrator] does not agree to the challenge and the challenged arbitrator does not withdraw, the party making the challenge may pursue the challenge. In that case, it shall seek a decision on the challenge by the appointing authority within 30 days from date of the notice of challenge. If no appointing authority has been appointed or designated, a decision may be sought within 15 days from the appointment or designation of the appointing authority. **[28]**

2. The appointing authority may reject the challenge if the challenging party ought reasonably to have known the grounds for challenge at an earlier stage of the procedure. **[29]**

Remarks on draft article 12

28. The bracketed texts in paragraph (1) reflect the question whether all parties should be given a right to oppose to the challenge, or whether that right should be limited to the party that appointed the challenged arbitrator (see above, paragraph 27). Paragraph (1) reflects the decision of the Working Group to shorten time limits for challenge (A/CN.9/619, para. 102). Article 12, paragraphs (1) (a) to (c) of the 1976 version of the Rules which referred to the appointing authority are deleted, as that matter is generally dealt with under article 4 bis (A/CN.9/619, para. 69).

29. Paragraph (2) was not contained in the 1976 version of the Rules. Its purpose is to provide guidance to the appointing authority, with a view to limiting dilatory tactics where a party has abused the challenge procedure repeatedly. Article 12, paragraph (2) of the 1976 version of the Rules on the appointment of a substitute arbitrator if the challenge is sustained has been placed under article 13, which deals with the replacement of an arbitrator (see below, paragraph 32).

Replacement of an arbitrator

Article 13

1. Subject to paragraphs 2 and 3, in the event that it is necessary to replace an arbitrator during the course of the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the

procedure provided for in articles 6 to 9 that was applicable to the appointment or choice of the arbitrator being replaced. This procedure shall apply even if during the process of appointing the arbitrator to be replaced, a party had failed to exercise its right to appoint or to participate in the appointment. **[30]**

2. In the event that an arbitrator has resigned for invalid reasons or refuses or fails to act, the appointing authority may, if so requested by a party, either replace that arbitrator or authorize the other arbitrators to proceed with the arbitration and make any decision or award. **[31]**

3. In the event of successful challenge under article 12 or replacement of an arbitrator according to paragraph 2, the appointing authority shall decide whether to apply the procedure for the appointment of an arbitrator provided for in articles 6 to 9 that was applicable to the appointment or choice of the arbitrator being replaced or to proceed itself to the appointment of the substitute arbitrator. **[32]**

Remarks on draft article 13

30. Paragraph (1) establishes a general rule on the appointment of a substitute arbitrator, "when it is necessary to replace an arbitrator", regardless of the cause for such replacement. The specific situations of resignation for invalid reasons or successful challenge are dealt with under paragraphs (2) and (3). The last sentence of that paragraph is proposed to be added for the sake of consistency with article 11, paragraph (3).

31. The Working Group might wish to consider whether paragraph (2) reflects the observations made in the Working Group at its forty-sixth session (A/CN.9/619, paras. 107-112).

32. Paragraph (3) was formerly placed under article 12, paragraph (2) of the 1976 version of the Rules (see above, paragraph 29). It is proposed to locate that provision under article 13 as its content relates to the appointment of a replacement arbitrator. It is recalled that the Working Group agreed at its forty-sixth session that that provision should permit the appointing authority directly to appoint an arbitrator if it considered that the circumstances of the arbitration were such that a party should be deprived of its right to appoint a replacement arbitrator (A/CN.9/619, paras. 103 and 105).

Repetition of hearings in the event of the replacement of an arbitrator

Article 14 [33]

If an arbitrator is replaced, the proceedings shall resume at the stage where the arbitrator who was replaced ceased to perform his or her functions, unless the arbitral tribunal decides otherwise.

Remarks on draft article 14

33. Article 14 has been adopted in substance by the Working Group at its forty-sixth session (A/CN.9/619, para. 113). The reference to articles 11 to 13 which was contained in the 1976 version of that article has been deleted, as it might not be necessary to limit the application of that provision.

Section III. Arbitral proceedings

General provisions

Article 15

1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given an opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute. **[34]**

1 bis. The arbitral tribunal may, at any time, extend or abridge: (a) any period of time prescribed under the Rules; or (b) after inviting the parties to express their views, any period of time agreed by the parties. **[35]**

2. If at an appropriate stage of the proceedings any party so requests, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials.

3. All communications to the arbitral tribunal by one party shall at the same time be communicated by that party to all other parties. **[36]**

[4. The arbitral tribunal may, on the application of any party, allow one or more third persons to be joined in the arbitration as a party provided such person is a party to the arbitration agreement and has consented to be joined. The arbitral tribunal may make an award in respect of all parties so involved in the arbitration.] **[37]**

Remarks on draft article 15

34. Paragraph (1) was adopted in substance by the Working Group at its forty-sixth session (A/CN.9/619, para. 114).

35. Paragraph (1 bis) was not included in the 1976 version of the Rules. It reflects the decision of the Working Group that the Rules should establish the authority of the arbitral tribunal to modify the periods of time prescribed in the Rules but not to alter the general time frames that might be set by the parties in their agreements without prior consultation with the parties (A/CN.9/619, para. 136).

36. Paragraphs (2) and (3) were adopted in substance by the Working Group at its forty-sixth session. The word "communication" in paragraph (3) is proposed in replacement of the words "documents and information supplied", for the sake of consistency with the terminology used in the Rules.

37. The Working Group agreed that a provision on joinder would constitute a major modification to the Rules, and noted the diverging views, which were expressed on that matter (A/CN.9/619, paras. 121-126). The Working Group agreed to consider that matter at a future session, on the basis of information to be provided by arbitral institutions to the Secretariat on the frequency and practical relevance of joinder in arbitration (A/CN.9/619, para. 126). Following consultations, the

Secretariat received comments from the International Court of Arbitration of the International Chamber of Commerce ("ICC"), the London Court of International Arbitration ("LCIA") and the Swiss Arbitration Association ("ASA"). In an article entitled "Multiparty and Multicontract Arbitration: Recent ICC Experience",[4] the ICC briefly outlines certain aspects of the ICC's experience in relation to joinder. The ICC has generally taken a conservative view that, under the rules, only the claimant is entitled to identify the parties to the arbitration.[5] However a more moderate approach has been reflected in three recent cases in which the ICC joined a new party to the arbitral proceedings at the request of a respondent. It appears that the ICC may only allow a new party to be joined in the arbitration at the respondent's request if two conditions are met. First, the third party must have signed the arbitration agreement on the basis of which the request for arbitration has been filed. Second, the respondent must have introduced claims against the new party. The LCIA informed the Secretariat that applications for joinder under article 22.1 (h) of the LCIA Rules of Arbitration[6] have been made in approximately ten cases since that provision was introduced in the Rules in 1998, and those applications have rarely been successful. ASA reported that it favours a liberal solution such as the one contained in article 4 (2) of the Swiss rules,[7] which gives the arbitral tribunal the discretion to decide on the joinder of a third party after consulting with all the parties and taking into account all the relevant and applicable circumstances. The Swiss rules do not require that one of the parties to the arbitration gives its consent to the participation of the third party to the arbitration. No decision on joinder under article 4 (2) of the Swiss rules has yet been reported.

Place of arbitration

Article 16 [38]

1. If the parties have not previously agreed on the place of arbitration, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties. The award shall be deemed to be made at the place of arbitration.

---

[4] Multiparty and Multicontract Arbitration: Recent ICC Experience, by Anne Marie Whitesell and Eduardo Silva-Romero, published in the ICC International Court of Arbitration bulletin, 2003 Special Supplement — Publication 688 Complex Arbitration.

[5] ICC mentioned that their Rules do not contain a provision on the joinder of parties and that article 4 (6) of the ICC Rules, which is sometimes referred to as a "joinder" provision, does not concern the joinder of parties, but rather the consolidation of claims where multiple arbitrations have been filed and all of the parties in all of the arbitrations are identical. ICC Court has developed a practice whereby, under certain circumstances, the ICC Court will allow the joinder of new parties at the request of a respondent.

[6] Article 22.1 (h) of the LCIA Rules reads: "Unless the parties at any time agree otherwise in writing, the Arbitral Tribunal shall have the power, on the application of any party or of its own motion, but in either case only after giving the parties a reasonable opportunity to state their views: (h) to allow, only upon the application of a party, one or more third persons to be joined in the arbitration as a party provided any such third person and the applicant party have consented thereto in writing, and thereafter to make a single final award, or separate awards, in respect of all parties so implicated in the arbitration;"

[7] Article 4 (2) of the Swiss Rules reads: "Where a third party requests to participate in arbitral proceedings already pending under these Rules or where a party to arbitral proceedings under these Rules intends to cause a third party to participate in the arbitration, the arbitral tribunal shall decide on such request, after consulting with all parties, taking into account all circumstances it deems relevant and applicable."

2. Notwithstanding the provisions of paragraph 1, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any location it considers appropriate for consultations, hearings, meetings and deliberations.

Remarks on draft article 16

38. It was suggested in the Working Group that it might be necessary to distinguish between the legal and physical places of arbitration, and that modification of the terminology used would promote clarity (A/CN.9/619, para. 138). The proposed draft seeks to distinguish between the place of arbitration (meaning the legal seat) and the location where meetings could be held, in terms similar to those adopted under article 20 of the UNCITRAL Model Law on International Commercial Arbitration.

Language

Article 17 [39]

1. Subject to an agreement by the parties, the arbitral tribunal shall, promptly after its appointment, determine the language [or languages] to be used in the proceedings. This determination shall apply to the statement of claim, the statement of defence, and any further written statements and, if oral hearings take place, to the language [or languages] to be used in such hearings.

2. The arbitral tribunal may order that any documents annexed to the statement of claim or statement of defence, and any supplementary documents or exhibits submitted in the course of the proceedings, delivered in their original language, shall be accompanied by a translation into the language [or languages] agreed upon by the parties or determined by the arbitral tribunal.

Remarks on draft article 17

39. The deletion of the reference to "languages" in plural from the Rules, which was discussed by the Working Group during its forty-sixth session (A/CN.9/619, para. 145) might be understood as indicating that arbitrators should choose one language to be used in the arbitration proceedings. The Working Group might wish to consider whether it is advisable to delete that reference as parties from different countries are usually involved in international commercial arbitration and they may not necessarily all be familiar with one language. The use of several languages therefore may be, under certain circumstances, a solution by which the arbitral tribunal may overcome the difficulties arising from the failure of the parties to choose a single language for the arbitration.

A/CN.9/WG.II/WP.151/Add.1 (Original: English)

Note by the Secretariat on settlement of commercial disputes: Revision of the UNCITRAL Arbitration Rules, submitted to the Working Group on Arbitration at its forty-ninth session

ADDENDUM

CONTENTS

I. Introduction

1. At its thirty-ninth session (New York, 19 June-7 July 2006), the Commission agreed that, in respect of future work of the Working Group, priority be given to a revision of the UNCITRAL Arbitration Rules (1976) ("the UNCITRAL Arbitration Rules" or "the Rules").[1] At its fortieth session (Vienna, 25 June-12 July 2007), the Commission noted that the UNCITRAL Arbitration Rules had not been amended since their adoption in 1976 and that the review should seek to modernize the Rules and to promote greater efficiency in arbitral proceedings. The Commission generally agreed that the mandate of the Working Group to maintain the original structure and spirit of the UNCITRAL Arbitration Rules had provided useful guidance to the Working Group in its deliberations to date and should continue to be a guiding principle for its work.[2] At its forty-first session (New York, 16 June-3 July 2008), the Commission expressed the hope that the Working Group would complete its work on the revision of the UNCITRAL Arbitration Rules in their generic form, so that the final review and adoption of the revised Rules would take place at the forty-second session of the Commission, in 2009.[3]

2. At its forty-fifth session (Vienna, 11-15 September 2006), the Working Group undertook to identify areas where a revision of the UNCITRAL Arbitration Rules might be useful. At that session, the Working Group gave preliminary indications as to various options to be considered in relation to proposed revisions, on the basis

[1] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17* (A/61/17), paras. 182-187.

[2] Ibid., *Sixty-second Session, Supplement No. 17* (A/62/17), part one, para. 175.

[3] Ibid., *Sixty-third Session, Supplement No. 17* (A/63/17), paras. 308-316

of documents A/CN.9/WG.II/WP.143 and Add.1, in order to allow the Secretariat to prepare a revised draft of the Rules taking account of such indications. The report of that session is contained in document A/CN.9/614. At its forty-sixth (New York, 5-9 February 2007), forty-seventh (Vienna, 10-14 September 2007) and forty-eighth (New York, 4-8 February 2008) sessions, the Working Group discussed a draft revised Rules, as contained in documents A/CN.9/WG.II/WP.145 and Add.1. The reports of these sessions are contained in documents A/CN.9/619, A/CN.9/641 and A/CN.9/646, respectively.

3. This note contains an annotated draft of revised UNCITRAL Arbitration Rules, based on the deliberations of the Working Group at its forty-sixth to forty-eighth sessions and on comments received by the Secretariat at the occasion of conferences and meetings organized to discuss the revision of the Rules. It has been prepared for the consideration of the Working Group for the second reading of the revised version of the Rules, in replacement of documents A/CN.9/WG.II/WP.147 and Add.1, and A/CN.9/WG.II/WP.149, as it seemed clearer to propose a complete draft of revised Rules, instead of adding annotations and comments to such previous documents. This note covers draft articles 18 to 41 of the revised version of the Rules and includes draft additional provisions. Draft articles 1 to 17 are dealt with under A/CN.9/WG.II/WP.151.

II. Draft revised UNCITRAL Arbitration Rules

Section III — Arbitral proceedings

Statement of claim

Article 18 [1]

1. The claimant shall communicate its statement of claim in writing to the respondent and to each of the arbitrators within a period of time to be determined by the arbitral tribunal. The claimant may elect to treat its notice of arbitration in article 3, paragraph 3 as a statement of claim.

2. The statement of claim shall include the following particulars:

(a) The names and contact details of the parties;

(b) A statement of the facts supporting the claim;

(c) The points at issue;

(d) The relief or remedy sought;

(e) The legal grounds or arguments supporting the claim.

3. A copy of any contract, or other legal instrument, and of the arbitration agreement shall be annexed to the statement of claim. The statement of claim should, as far as possible, be accompanied by all documents and other evidentiary materials relied upon by the claimant, or contain references to them.

Remarks on draft article 18

1. Paragraphs (1), (2) and (3) reflect the modifications adopted by the Working Group at its forty-sixth session (A/CN.9/619, paras. 147-154). The last sentence of paragraph (1) is proposed to be added to deal with the situation where the claimant decides to treat its notice of arbitration as a statement of claim. Its purpose is to allow a claimant to postpone its decision on whether its notice of arbitration constitutes a statement of claim until the time the arbitral tribunal requires the claimant to submit its statement of claim, instead of having to make that decision at the time of the notice of arbitration. If that sentence is adopted by the Working Group, article 3, paragraph (4) (c) should then be deleted (see document A/CN.9/WG.II/WP.151, para. 12).

Statement of defence

Article 19

1. The respondent shall communicate its statement of defence in writing to the claimant and to each of the arbitrators within a period of time to be determined by the arbitral tribunal. The respondent may elect to treat its response to the notice of arbitration in article 3, paragraph 5 as a statement of defence. **[2]**

2. The statement of defence shall reply to the particulars (b), (c), (d) and (e) of the statement of claim (article 18, paragraph 2). The statement of defence should, as far as possible, be accompanied by all documents and other evidentiary material relied upon by the respondent, or contain references to them.

3. In its statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counterclaim or rely on a claim for the purpose of a set-off [*option 1*: arising out of the same legal relationship, whether contractual or not.] [*option 2*: provided that it falls within the scope of the arbitration agreement.] **[3]**

4. The provisions of article 18, paragraph 2, shall apply to a counterclaim and a claim relied on for the purpose of a set-off.

Remarks on draft article 19

2. The last sentence of paragraph (1) is proposed to be added to deal with the situation where the respondent decides to treat its response to the notice of arbitration as its statement of defence (see document A/CN.9/WG.II/WP.151, para. 12).

3. The Working Group agreed that paragraph (3) should contain a provision on set-off and that the arbitral tribunal's competence to consider counterclaims or set-off should, under certain conditions, extend beyond the contract from which the principal claim arose and apply to a wider range of circumstances (A/CN.9/614, paras. 93 and 94; A/CN.9/619, paras. 157-160). To achieve that extension, in option 1 the words "arising out of the same contract", which were contained in the 1976 version of that paragraph are replaced with the words "arising out of the same legal relationship, whether contractual or not"

(A/CN.9/619, para. 157). Option 2 reflects a proposal that the provision should not require that there be a connection between the claim and the counterclaim or set-off, leaving to the arbitral tribunal the discretion to decide that question (A/CN.9/619, para. 158).

Amendments to the claim or defence

Article 20 [4]

During the course of the arbitral proceedings a party may amend or supplement its claim or defence, including a counterclaim, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to other parties or any other circumstances. However, a claim may not be amended or supplemented in such a manner that the amended claim falls outside the scope of the arbitration agreement.

Remarks on draft article 20

4. The Working Group adopted draft article 20 in substance at its forty-sixth session (A/CN.9/619, para. 161). Consistent with a decision not to distinguish between arbitration "clause" and "agreement" (see article 3 (3) (c)), the words "arbitration clause" which appeared in the second sentence article 20 have been deleted. The words "or supplemented" are proposed to be added in the second sentence for the sake of consistency with the wording adopted in the first sentence of article 20.

Pleas as to the jurisdiction of the arbitral tribunal

Article 21 [5]

1. The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail of itself the invalidity of the arbitration clause.

2. A plea that the arbitral tribunal does not have jurisdiction shall be raised no later than in the statement of defence or, with respect to a counterclaim or a claim for the purpose of a set-off, in the reply to the counterclaim or to a claim for the purpose of a set-off. A party is not precluded from raising such a plea by the fact that it has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

3. The arbitral tribunal may rule on a plea referred to in paragraph 2 either as a preliminary question or in an award on the merits. The arbitral tribunal may continue the arbitral proceedings and make an award, notwithstanding any pending challenge to its jurisdiction before a court.

Remarks on draft article 21

5. Draft paragraph (1) reflects the view expressed in the Working Group that article 21, paragraphs (1) and (2), should be redrafted along the lines of article 16, paragraph (1) of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law") in order to make it clear that the arbitral tribunal had the power to raise and decide upon issues regarding the existence and scope of its own jurisdiction (A/CN.9/614, para. 97). Paragraph (2) was adopted by the Working Group in substance (A/CN.9/619, para. 163). Paragraph (3), which replaces article 21, paragraph (4) of the 1976 version of the Rules, contains a provision consistent with article 16, paragraph (3) of the Model Law, in accordance with the Working Group discussions (A/CN.9/614, paras. 99-102; A/CN.9/619, para. 164; A/CN.9/641, para. 18).

Further written statements

Article 22 [6]

The arbitral tribunal shall decide which further written statements, in addition to the statement of claim and the statement of defence, shall be required from the parties or may be presented by them and shall fix the periods of time for communicating such statements.

Remarks on draft article 22

6. Article 22 is reproduced without modification from the 1976 version of the Rules and was adopted by the Working Group in substance at its forty-seventh session (A/CN.9/641, para. 19).

Periods of time

Article 23 [7]

The periods of time fixed by the arbitral tribunal for the communication of written statements (including the statement of claim and statement of defence) should not exceed 45 days. However, the arbitral tribunal may extend the time limits if it concludes that an extension is justified.

Remarks on draft article 23

7. Article 23 is reproduced without modification from the 1976 version of the Rules and was adopted by the Working Group in substance at its forty-seventh session (A/CN.9/641, para. 20).

Evidence

Article 24 [8]

1. Each party shall have the burden of proving the facts relied on to support its claim or defence.

2. [Deleted]

3. At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the tribunal shall determine.

Remarks on draft article 24

8. Paragraphs 1 and 3, which are reproduced without modification from the 1976 version of the Rules, were adopted in substance by the Working Group at its forty-seventh session (A/CN.9/641, paras. 21 and 26). Article 24, paragraph (2) of the 1976 version of the Rules has been deleted in accordance with a widely prevailing view in the Working Group that it was not common practice for an arbitral tribunal to require parties to present a summary of documents (A/CN.9/641, paras. 22-25).

Hearings, witnesses and experts [9]

Article 25

1. In the event of an oral hearing, the arbitral tribunal shall give the parties adequate advance notice of the date, time and place thereof. **[10]**

1 bis. Witnesses and experts presented by the parties may be heard under conditions set by the arbitral tribunal. For the purposes of these Rules, witnesses include any individual testifying to the arbitral tribunal on any issue of fact, whether or not that individual is a party to the arbitration. **[11]**

2. If witnesses and experts are to be heard, at least 15 days before the hearing each party shall communicate to the arbitral tribunal and to all other parties the names and addresses of the witnesses and experts it intends to present, the subject upon and the languages in which such witnesses and experts will present their statements.

3. The arbitral tribunal shall make arrangements for the translation of oral statements made at a hearing and for a record of the hearing if either is deemed necessary by the tribunal under the circumstances of the case, or if the parties have agreed thereto and have communicated such agreement to the tribunal at least 15 days before the hearing. **[10]**

4. Hearings shall be held in camera unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses during the testimony of other witnesses, save when the witness is a party to the arbitration. The arbitral tribunal is free to determine the manner in which witnesses and experts are examined. **[12]**

5. Evidence of witnesses and experts may also be presented in the form of written statements signed by them and oral statements by means that do not require their presence at the hearing. **[13]**

6. The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered. **[10]**

Remarks on draft article 25

9. In order to reflect the decision of the Working Group to clarify that article 25 deals with witnesses and experts appointed by the parties, the title of articles 24 and 25 are proposed to be modified (A/CN.9/641, paras. 27 and 61). In the 1976 version of the Rules, articles 24 and 25 are titled “Evidence and hearings”. The Working Group might wish to consider whether, in the interest of clarity, article 24 could be titled “Evidence”, and article 25 “Hearing, witnesses and

experts". The reference to experts is proposed to be inserted where appropriate in article 25 to clarify that it applies to expert witnesses, as suggested by the Working Group at its forty-seventh session (A/CN.9/641, para. 27).

10. Paragraphs (1), (3) and (6) are reproduced without modification from the 1976 version of the Rules and were adopted in substance by the Working Group at its forty-seventh session (A/CN.9/641, paras. 28, 39 and 45).

11. Paragraph (1 bis) reflects the decision of the Working Group to include a provision confirming the discretion of an arbitral tribunal to set out conditions under which it might hear witnesses and experts and establishing that any person, including a party to the arbitration who testified to the arbitral tribunal should be treated as a witness under the Rules (A/CN.9/641, para. 38). This paragraph is placed before paragraph (2) to take account of the observation that it is preferable first to describe the conditions under which witnesses and experts could be heard and the discretion of the arbitral tribunal in relation to the hearing of witnesses and experts as currently laid out in paragraph (1 bis), and only thereafter to expand on procedural details regarding witnesses and experts (A/CN.9/641, para. 34). The words "For the purposes of these Rules" are inserted to provide a more neutral standard, particularly in States where parties are prohibited from being heard as witnesses (A/CN.9/641, paras. 31 and 38). The provision does not include examples of categories of witnesses, in order to avoid the risk of restrictive interpretation (A/CN.9/641, para. 32).

12. The words "save when the witness is a party to arbitration" are proposed to be added to the last sentence of paragraph (4) to take account of the fact that a party, appearing as a witness should not be requested to retire during the testimony of other witnesses as it might affect that party's ability to present its case (A/CN.9/641, para. 41).

13. The Working Group might wish to consider whether the proposed modification to paragraph (5) addresses the suggestion that paragraph (5) should state not only that evidence of witnesses and experts might be presented in the form of a signed written statement but also that oral statements might be presented by means that did not require their physical presence (A/CN.9/641, para. 43).

Interim measures

Article 26 [14]

1. The arbitral tribunal may, at the request of a party, grant interim measures.

2. An interim measure is any temporary measure 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 an interim measure under paragraph 2 (a), (b) and (c) or a temporary order referred to under paragraph 5 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. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

4. With regard to a request for an interim measure under paragraph 2 (d), the requirements in paragraph 3 (a) and (b) shall apply only to the extent the arbitral tribunal considers appropriate.

5. If the arbitral tribunal determines that disclosure of a request for an interim measure to the party against whom it is directed risks frustrating that measure's purpose, nothing in these Rules prevents the tribunal, when it gives notice of such request to that party, from issuing a temporary order that the party not frustrate the purpose of the requested measure. The arbitral tribunal shall give that party the earliest practicable opportunity to present its case and then determine whether to grant the requested measure. **[15]**

6. The arbitral tribunal may modify, suspend or terminate an interim measure or an order referred to in paragraph 5 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.

7. The arbitral tribunal may require the party requesting an interim measure or applying for an order referred to in paragraph 5 to provide appropriate security in connection with the measure or the order.

8. The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the interim measure or the order referred to in paragraph 5 was requested or granted.

9. The party requesting an interim measure or applying for an order referred to in paragraph 5 may 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.

10. A request for interim measures or an application for an order referred to in paragraph 5 addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement. **[16]**

Remarks on draft article 26

14. Paragraphs 1 to 4 and 6 to 9 are modelled on the provisions on interim measures contained in chapter IV A of the Model Law. The Working Group adopted in substance those paragraphs (A/CN.9/641, paras. 46-51), save for the addition of the reference to the "order referred to in paragraph (5)", which has been inserted for the sake of consistency with the proposed new paragraph (5).

15. The Working Group noted that chapter IV A of the Model Law deals with preliminary orders and agreed to consider a draft paragraph expressing the notion that the arbitral tribunal was entitled to take appropriate measures to prevent the frustration of an interim measure that has been requested and that may be ordered by the arbitral tribunal (A/CN.9/641, para. 60). It is recalled that the Working Group was generally of the view that, unless prohibited by the law governing the arbitral procedure, bearing in mind the broad discretion with which the arbitral tribunal was entitled to conduct the proceedings under article 15, paragraph (1), the Rules, in and of themselves, did not prevent the arbitral tribunal from issuing preliminary orders (A/CN.9/641, para. 59).

16. Paragraph (10) corresponds to article 26, paragraph (3) of the 1976 version of the Rules which the Working Group agreed to retain in the Rules (A/CN.9/641, para. 52). A reference to "an application for an order referred to in paragraph 5" is proposed to be added for the sake of consistency with paragraph (5).

Experts appointed by the arbitral tribunal

Article 27 [17]

1. The arbitral tribunal may appoint one or more experts to report to it, in writing, on specific issues to be determined by the tribunal. A copy of the expert's terms of reference, established by the arbitral tribunal, shall be communicated to the parties.

2. The parties shall give the expert any relevant information or produce for his or her inspection any relevant documents or goods that he or she may require of them. Any dispute between a party and such expert as to the relevance of the required information or production shall be referred to the arbitral tribunal for decision.

3. Upon receipt of the expert's report, the arbitral tribunal shall communicate a copy of the report to the parties, which shall be given the opportunity to express, in writing, their opinion on the report. A party shall be entitled to examine any document on which the expert has relied in his or her report.

4. At the request of any party the expert, after delivery of the report, may be heard at a hearing where the parties shall have the opportunity to be present and to interrogate the expert. At this hearing any party may present expert witnesses in order to testify on the points at issue. The provisions of article 25 shall be applicable to such proceedings.

Remarks on draft article 27

17. The addition of the words "appointed by the arbitral tribunal" to the title of article 27 seeks to clarify that the focus of article 27 is on tribunal-appointed experts (A/CN.9/641, para. 61).

Default

Article 28

1. If, within the period of time fixed by these Rules or the arbitral tribunal, without showing sufficient cause: **[18]**

(a) The claimant has failed to communicate its statement of claim, the arbitral tribunal shall issue an order for the termination of the arbitral proceedings, unless the respondent has submitted a counterclaim;

(b) The respondent has failed to communicate its response to the notice of arbitration or its statement of defence, the arbitral tribunal shall order that the proceedings continue, without treating such failure in itself as an admission of the claimant's allegations; the provisions of this subparagraph also apply to a claimant's failure to submit a defence to a counterclaim or to a claim for the purpose of a set-off.

2. If a party, duly notified under these Rules, fails to appear at a hearing, without showing sufficient cause for such failure, the arbitral tribunal may proceed with the arbitration.

3. If a party, duly invited by the arbitral tribunal to produce documents, exhibits or other evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal may make the award on the evidence before it. **[19]**

Remarks on draft article 28

18. The Working Group may wish to consider whether paragraph (1) should be restructured in two parts: subparagraph (a) deals with the failure of the claimant to submit its statement of claim; subparagraph (b) addresses the situation where the respondent has failed to communicate its statement of defence, and applies equally to the situation where the claimant has failed to communicate a statement of defence in response to a counterclaim. That proposal follows the structure of article 25 of the Model Law (A/CN.9/641, para. 62).

19. In paragraph (3), the word "documentary" is proposed to be replaced with the words "documents, exhibits or other" to reflect the decision of the Working Group to align wordings in articles 24 (3) and 28 (3) (A/CN.9/641, para. 64).

Closure of hearings

Article 29 [20]

1. The arbitral tribunal may inquire of the parties if they have any further proof to offer or witnesses to be heard or submissions to make and, if there are none, it may declare the hearings closed.

2. The arbitral tribunal may, if it considers it necessary owing to exceptional circumstances, decide, on its own motion or upon application of a party, to reopen the hearings at any time before the award is made.

Remarks on draft article 29

20. Article 29 is reproduced without modification from the 1976 version of the Rules and was adopted in substance by the Working Group at its forty-seventh session (A/CN.9/641, para. 65).

Waiver of right to object

Article 30 [21]

A party which knows that any provision of these Rules or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating its objection to such non-compliance without undue delay or, if a time limit is provided therefor, within such period of time, shall be deemed to have waived its right to object.

Remarks on draft article 30

21. The modifications to article 30 reflect the decision of the Working Group to align the language contained in article 30 with that in article 4 of the Model Law (A/CN.9/641, para. 67).

Section IV. The award

Decisions

Article 31 [22]

1. *Option 1*: When there is more than one arbitrator, any award or other decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of the arbitrators.

Option 2, Variant 1: When there is more than one arbitrator and the arbitrators are not able to reach a majority on the substance of the dispute, any award or other decision shall be made by the presiding arbitrator alone. *Variant 2*: When there is more than one arbitrator and the arbitrators are not able to reach a majority on the substance of the dispute, any award or other decision shall be made, if previously agreed by the parties, by the presiding arbitrator alone.

2. In the case of questions of procedure, when there is no majority or when the arbitral tribunal so authorizes, the presiding arbitrator may decide alone, subject to revision, if any, by the arbitral tribunal.

Remarks on draft article 31

22. Given the absence of consensus on the issue of decision-making process by the arbitral tribunal, the Working Group requested the Secretariat to prepare alternative drafts. Option 1 follows the language contained in article 29 of the Model Law by referring to the majority approach with an opt-out provision for the parties

(A/CN.9/641, paras. 73 and 76). Option 2, variant 1 provides that when there is no majority, the award will be decided by the presiding arbitrator alone (A/CN.9/641, para. 71). Variant 2 reflects the proposal that the presiding arbitrator solution should only apply if the parties agreed to opt into that solution (A/CN.9/641, para. 75).

Form and effect of the award

Article 32

1. The arbitral tribunal may make separate awards on different issues at different times. Such awards shall have the same status and effect as any other award made by the arbitral tribunal. **[23]**

2. All awards shall be made in writing and shall be final and binding on the parties. The parties undertake to carry out all awards without delay. Insofar as such waiver can be validly made, the parties shall be deemed to have waived their right to any form of appeal, review or recourse to any court or other competent authority. The right to apply for setting aside an award may be waived only if the parties so expressly agree. **[24]**

3. The arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given. **[25]**

4. An award shall be signed by the arbitrators and it shall contain the date on which the award was made and indicate the place of arbitration. Where there is more than one arbitrator and any of them fails to sign, the award shall state the reason for the absence of the signature. **[26]**

5. An award may be made public with the consent of all parties or where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority. **[27]**

6. Copies of the award signed by the arbitrators shall be communicated to the parties by the arbitral tribunal. **[28]**

7. [Deleted] **[29]**

Remarks on draft article 32

23. As agreed by the Working Group, qualifications regarding the nature of the award such as “final”, “interim”, or “interlocutory” are avoided and paragraph (1) clarifies that the arbitral tribunal may render awards on different issues during the course of the proceedings. It is based on article 26.7 of the Rules of the London Court of International Arbitration (A/CN.9/641, paras. 78-80). The Working Group may wish to consider whether a more general statement would be preferable, along the following lines: “All awards shall have the same status and affect.”

24. The Working Group considered whether the first sentence of paragraph (2) should be amended to clarify that the word “binding” is used to refer to the obligation on the parties to comply with the award and that the award is “final” for the arbitral tribunal which is not entitled to revise it (A/CN.9/641, paras. 81-84). The Working Group might wish to further consider the following options (A/CN.9/641, para. 82): to retain the words “final and binding” as they are commonly used in almost all rules of arbitration centres and do not seem to have

created difficulties; to omit the word "final", and provide that: "An award shall be made in writing and shall be binding on the parties", along the lines of the provision contained in article 28 (6) of the rules of arbitration of the International Chamber of Commerce; to explain the meaning of the word "final", by adopting wording along the following lines: "An award shall be made in writing and shall be binding on the parties. Once rendered, an award shall not be susceptible to revision by the arbitral tribunal, except as provided in article 26 (6) for interim measures rendered in the form of an award, article 35 and article 36."

In accordance with a proposal made in the Working Group, the language inserted in paragraph (2) seeks to make it impossible for parties to use recourse to courts that could be freely waived by the parties but not to exclude challenges to the award on grounds for setting aside the award, except if otherwise agreed by the parties (A/CN.9/641, paras. 85-92).

25. Paragraph (3) is reproduced without modification from the 1976 version of the Rules and was adopted in substance by the Working Group at its forty-seventh session (A/CN.9/641, para. 93).

26. The Working Group agreed to modify the first sentence of paragraph (4) for the sake of consistency with article 16, paragraph (4) of the Rules which refers to the place where the award is "deemed" to be made. In the second sentence, the words "three arbitrators" are proposed to be replaced with the words "more than one arbitrator" to take account of the situation permitted under article 7 bis where parties may decide that the arbitral tribunal is to be composed of a number of arbitrators other than one or three (A/CN.9/641, para. 94).

27. Paragraph (5) has been modified to take account of the situation where a party is under a legal obligation to disclose (A/CN.9/641, paras. 95-99).

28. Paragraph (6) is reproduced without modification from the 1976 version of the Rules and was adopted in substance by the Working Group at its forty-seventh session (A/CN.9/641, para. 100).

29. Article 32, paragraph (7) of the 1976 version of the Rules has been deleted as agreed by the Working Group at its forty-seventh session for the reason that it was unnecessary to the extent it provided that the arbitral tribunal should comply with a mandatory registration requirement contained in the relevant national law (A/CN.9/641, para. 105).

Applicable law, *amiable compositeur*

Article 33

1. The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law [*variant 1*: with which the case has the closest connection] [*variant 2*: which it determines to be appropriate]. **[30]**

2. The arbitral tribunal shall decide as *amiable compositeur* or *ex aequo et bono* only if the parties have expressly authorized the arbitral tribunal to do so and if the law applicable to the arbitral procedure permits such arbitration. **[31]**

3. In all cases, the arbitral tribunal shall decide in accordance with the terms of any applicable contract and shall take into account any usage of the trade applicable to the transaction. **[32]**

Remarks on draft article 33

30. The Working Group agreed that the arbitral tribunal should apply the rules of law designated by the parties and that therefore the words "rules of law" should replace the word "law" in the first sentence of article 33 (A/CN.9/641, para. 107). In relation to the second sentence of paragraph (1), diverging views were expressed as to whether the arbitral tribunal should be given the same discretion to designate "rules of law" where the parties had failed to make a decision regarding the applicable law. It was suggested that the Rules should be consistent with article 28, paragraph (2) of the Model Law which refers to the arbitral tribunal applying the "law" and not the "rules of law" determined to be applicable (A/CN.9/641, paras. 108 and 109). The Working Group expressed broad support for wordings along the lines of variants 1 or 2 contained in the second sentence of paragraph (1), which were said to offer the opportunity to modernize the Rules by allowing the arbitral tribunal to decide directly on the applicability of international instruments. Variant 2 reflects a proposal made to provide the arbitral tribunal with a broader discretion in the determination of the applicable instrument (A/CN.9/641, paras. 106-112).

31. Paragraph (2) is reproduced without modification from the 1976 version of the Rules and was adopted in substance by the Working Group.

32. Paragraph (3) has been amended to ensure broader applicability of the Rules in situations where a contract was not necessarily the basis of the dispute by referring to the words "any applicable" in relation to "contract" and "any" in relation to "usage of trade".

Settlement or other grounds for termination

Article 34 [33]

1. If, before the award is made, the parties agree on a settlement of the dispute, the arbitral tribunal shall either issue an order for the termination of the arbitral proceedings or, if requested by the parties and accepted by the tribunal, record the settlement in the form of an arbitral award on agreed terms. The arbitral tribunal is not obliged to give reasons for such an award.

2. If, before the award is made, the continuation of the arbitral proceedings becomes unnecessary or impossible for any reason not mentioned in paragraph 1, the arbitral tribunal shall inform the parties of its intention to issue an order for the termination of the proceedings. The arbitral tribunal shall have the power to issue such an order unless a party raises justifiable grounds for objection.

3. Copies of the order for termination of the arbitral proceedings or of the arbitral award on agreed terms, signed by the arbitrators, shall be communicated by the arbitral tribunal to the parties. Where an arbitral award on agreed terms is made, the provisions of article 32, paragraphs 2 and 4 to 6, shall apply.

Remarks on draft article 34

33. Consistent with its decision to encompass multi-party arbitrations, the Working Group agreed to replace the word "both parties" by "the parties" in paragraph 1 (A/CN.9/641, para. 114).

Interpretation of the award

Article 35

1. Within 30 days after the receipt of the award, a party, with notice to the other parties, may request that the arbitral tribunal give an interpretation of the award. **[34]**

2. The interpretation shall be given in writing within 45 days after the receipt of the request. The interpretation shall form part of the award and the provisions of article 32, paragraphs 2 to 6, shall apply.

Remarks on draft article 35

34. The modifications in paragraph (1) are consistent with the decision of the Working Group to encompass multi-party arbitrations (A/CN.9/641, para. 115).

Correction of the award

Article 36 [35]

1. Within 30 days after the receipt of the award, any party, with notice to the other parties, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors, or any errors or omissions of a similar nature. The arbitral tribunal may within 30 days after the communication of the award make such corrections on its own initiative.

2. Such corrections shall be in writing, and the provisions of article 32, paragraphs 2 to 6, shall apply.

Remarks on draft article 36

35. The Working Group agreed to adopt paragraph (1) in substance (A/CN.9/641, para. 116). The Working Group might wish to consider whether paragraph (2) should include a time limit within which the arbitral tribunal should make corrections, along the lines of the provisions contained in article 35, paragraph (2).

Additional award

Article 37 [36]

1. Within 30 days after the receipt of the award, a party, with notice to the other parties, may request the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award.

2. If the arbitral tribunal considers the request for an additional award to be justified, it shall complete its award within 60 days after the receipt of the request. The arbitral tribunal may extend, if necessary, the period of time within which it shall make an additional award.

3. When an additional award is made, the provisions of article 32, paragraphs 2 to 6, shall apply.

Remarks on draft article 37

36. The modifications in paragraph (2) reflect the discussion of the Working Group for allowing the arbitral tribunal to hold further hearings and seek further evidence where necessary (A/CN.9/641, paras. 117-121).

Costs (articles 38 to 40)

Article 38 [37]

The arbitral tribunal shall fix the costs of arbitration in its award. The term "costs" includes only:

(a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39;

(b) The reasonable travel and other expenses incurred by the arbitrators;

(c) The reasonable costs of expert advice and of other assistance required by the arbitral tribunal;

(d) The reasonable travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;

(e) The costs for representation and assistance of the parties if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;

(f) Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the PCA.

Remarks on draft article 38

37. The Working Group agreed at its forty-eighth session to add the word "reasonable" in subparagraphs (b), (c), and (d) (A/CN.9/646, para. 18), to delete the word "legal", appearing before the word "representation" in subparagraph (e) and to replace the words "successful party" with the word "parties" in subparagraph (e) (A/CN.9/646, para. 19).

Article 39

1. The fees of the arbitral tribunal shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators and any other relevant circumstances of the case.

2. If an appointing authority has been agreed upon by the parties or designated by the Secretary-General of the PCA, and if that authority has issued or endorsed a schedule of fees for arbitrators in international cases which it administers, the arbitral tribunal in fixing its fees shall take that

schedule of fees into account to the extent that it considers appropriate in the circumstances of the case. **[38]**

3. Promptly after its constitution, the arbitral tribunal shall communicate to the parties the methodology which it proposes to follow for the determination of the fees of its members. In its decision on the costs of arbitration pursuant to article 38, the arbitral tribunal shall set forth the computation of the amounts due, consistent with that methodology. **[39]**

4. Within 15 days from the date any proposal or decision is communicated by the arbitral tribunal to the parties, any party may refer the matter to the appointing authority, or if no appointing authority has been agreed upon or designated, to the Secretary-General of the PCA, for final determination in accordance with the criteria in paragraph (1). Any modification to the fees decided by the appointing authority or the Secretary-General of the PCA shall be deemed to be part of the award. **[39]**

Remarks on draft article 39

38. The words "or endorsed" are proposed to be added after the word "issued" to cover situations where an appointing authority applies a schedule of fees defined by other authorities or rules, and that it has endorsed.

39. Paragraphs (3) and (4) were not contained in the 1976 version of the rules, and they constitute new rules on the question of fees and control by the appointing authority or the Secretary-General of the Permanent Court of Arbitration over the fees charged by arbitrators. The Working Group might wish to consider whether these provisions reflect the decision of the Working Group at its forty-eighth session (A/CN.9/646, paras. 20, 21 and 24-27).

Article 40 [40]

1. The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

2. [Deleted]

3. When the arbitral tribunal issues an order for the termination of the arbitral proceedings or makes an award on agreed terms, it shall fix the costs of arbitration referred to in article 38 and article 39, paragraph 1, in the text of that order or award.

4. No additional fees may be charged by an arbitral tribunal for interpretation or correction or completion of its award under articles 35 to 37. [The arbitral tribunal may charge the costs referred to in article 38 (b) to (f) relating to interpretation or correction or completion of its award under articles 35 to 37.] **[41]**

Remarks on draft article 40

40. In paragraph (1), the words "or parties" have been added to take account of multi-party arbitration. As decided by the Working Group at its forty-eighth session, paragraph (2) has been deleted (A/CN.9/646, paras. 28-36).

41. At its forty-eighth session, the Working Group agreed to further consider whether paragraph (4) should be kept. The second sentence of that paragraph in brackets reflects a proposal made in the Working Group that the scope of paragraph (4) should be limited to fees, without affecting the ability of the arbitral tribunal to charge other additional costs as listed in article 38 (A/CN.9/646, paras. 31-36).

Deposit of costs

Article 41 [42]

1. The arbitral tribunal, on its establishment, may request the parties to deposit an equal amount as an advance for the costs referred to in article 38, paragraphs (a), (b) and (c).

2. During the course of the arbitral proceedings the arbitral tribunal may request supplementary deposits from the parties.

3. If an appointing authority has been agreed upon by the parties or designated by the Secretary-General of the PCA, and when a party so requests and the appointing authority consents to perform the function, the arbitral tribunal shall fix the amounts of any deposits or supplementary deposits only after consultation with the appointing authority, which may make any comments to the arbitral tribunal which it deems appropriate concerning the amount of such deposits and supplementary deposits.

4. If the required deposits are not paid in full within 30 days after the receipt of the request, the arbitral tribunal shall so inform the parties in order that one or more of them may make the required payment. If such payment is not made, the arbitral tribunal may order the suspension or termination of the arbitral proceedings.

5. After the award has been made, the arbitral tribunal shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties.

Remarks on draft article 41

42. The Working Group adopted article 41 in substance at its forty-eighth session (A/CN.9/646, para. 37).

Draft additional provisions

General Principles [43]

Questions concerning matters governed by these Rules which are not expressly settled in them are to be settled in conformity with the general principles on which these Rules are based.

Remarks

43. The Working Group agreed at its forty-eighth session to consider whether a gap-filling provision should be included in the Rules (A/CN.9/646, paras. 50-53).

Liability of arbitrators [44]

The members of the arbitral tribunal, the appointing authority, the Secretary-General of the PCA and experts appointed by the tribunal shall not be liable for any act or omission in connection with the arbitration, to the fullest extent permitted under the applicable law.

Remarks

44. The provision on liability seeks to address comments made in the Working Group at its forty-eighth session that the provision establishing immunity should cover the broadest possible range of participants in the arbitration process and preserve exoneration in cases where the applicable law allows contractual exoneration from liability, to the fullest extent permitted by such law (A/CN.9/646, paras. 38-45).

C. Note by the Secretariat on settlement of commercial disputes: Revision of the UNCITRAL Arbitration Rules — Proposal by the Government of Switzerland, submitted to the Working Group on Arbitration at its forty-ninth session

(A/CN.9/WG.II/WP.152) [Original: English]

I. Introduction

1. In preparation for the forty-ninth session of the Working Group the Government of Switzerland submitted two proposals concerning the Revision of the UNCITRAL Arbitration Rules regarding articles 19 and 26 for consideration by the Working Group. The English language version of these proposals was submitted to the Secretariat on 8 September 2008. The text communicated by the Government of Switzerland is reproduced as an annex to this note, in the form in which it was received by the Secretariat.

Annex

UNCITRAL Arbitration Rules — Revision

Article 19, paragraph 3 — proposed amended version

3. In its statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counter-claim or rely on a claim for the purpose of a set-off.

The arbitral tribunal shall have jurisdiction to hear a set-off defence even if the claim on which the set-off is based does not fall within the scope of the arbitration agreement, and even if such claim is the object of a different arbitration agreement or of a forum selection clause, provided that the requirements for a set-off under the substantive law applicable to the main claim are fulfilled.

A counter-claim is admissible only if it falls within the scope of an arbitration agreement between the parties to arbitrate under these Rules and has a sufficient link to the main claim.

Article 26 — proposed short version

1. The arbitral tribunal may, at the request of a party, grant interim measures that it considers necessary for a fair and efficient resolution of the dispute. Upon application of any party or, in exceptional circumstances, on its own initiative, it may also modify, suspend or terminate the measures granted.

2. Before ruling on a request for interim measures, the arbitral tribunal may order any other party not to frustrate the requested measure. Such preliminary orders may be made before the request has been communicated to any other party, provided the communication is made at the latest together with the preliminary order and such other party is afforded immediately an opportunity to be heard.

[alternatively: delete article 15 (3) which in any event is in conflict with the practice of those arbitral institutions and arbitral tribunals which require the parties to make

their submissions to the institution or tribunal which then passes copies to the other parties.]

3. The arbitral tribunal may require the party requesting an interim measure or a preliminary order to provide appropriate security.

4. The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the interim measure or preliminary order was requested or granted.

5. The arbitral tribunal may rule at any time on claims for compensation of any damage wrongfully caused by the interim measure or preliminary order.

6. A request for interim measures of whatever kind addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

D. Report of the Working Group on Arbitration on the work of its fiftieth session (New York, 9-13 February 2009)

(A/CN.9/669) [Original: English]

CONTENTS

I. 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 UNCITRAL Arbitration Model Law"), as well as the use of the UNCITRAL Arbitration Rules ("the UNCITRAL Arbitration Rules" or "the 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] When the Commission discussed that topic, it left open the question of what form its future work might take. It was agreed that decisions on

[1] *Official Records of the General Assembly, Fifty-third Session, Supplement No. 17* (A/53/17), para. 235.

[2] Ibid., *Fifty-fourth Session, Supplement No. 17* (A/54/17), para. 337.

the matter should be taken later as the substance of proposed 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).[3]

3. At its thirty-ninth session (New York, 19 June-7 July 2006), the Commission agreed that the topic of revising the UNCITRAL Arbitration Rules should be given priority. The Commission noted that, as one of the early instruments elaborated 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, 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 carefully define the list of topics which might need to be addressed in a revised version of the UNCITRAL Arbitration Rules.[4]

4. 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 define 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 studying the question of arbitrability in the context of immovable property, unfair competition and insolvency could provide useful guidance for States. 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 predefined list of arbitrable matters could unnecessarily restrict a State's ability to meet certain public policy concerns that were likely to evolve over time.[5]

5. 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 United Nations Convention on the Use of Electronic Communications in International Contracts, already accommodated a number of issues arising in the online context. Another topic was the issue of arbitration in the field of insolvency. Yet another suggestion was made to address the impact of anti-suit injunctions on international arbitration. A further suggestion was made 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

---

[3] Ibid., para. 338.
[4] Ibid., *Sixty-first Session, Supplement No. 17* (A/61/17), para. 184.
[5] Ibid., para. 185.

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.[6]

6. 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 resume its work on the question of a revision of the UNCITRAL Arbitration Rules. It was also agreed that the issue of arbitrability was a topic which 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, deal with the implications of electronic communications in the context of the revision of the UNCITRAL Arbitration Rules.[7]

7. At its fortieth session (Vienna, 25 June-12 July 2007), the Commission noted that the UNCITRAL Arbitration Rules had not been amended since their adoption in 1976 and that the review should seek to modernize the Rules and to promote greater efficiency in arbitral proceedings. The Commission generally agreed that the mandate of the Working Group to maintain the original structure and spirit of the UNCITRAL Arbitration Rules had provided useful guidance to the Working Group in its deliberations to date and should continue to be a guiding principle for its work.[8] The Commission noted that broad support had been expressed in the Working Group for a generic approach that sought to identify common denominators that applied to all types of arbitration irrespective of the subject matter of the dispute, in preference to dealing with specific situations. However, the Commission noted that the extent to which the revised UNCITRAL Arbitration Rules should take account of investor-State dispute settlement or administered arbitration remained to be considered by the Working Group at future sessions.[9]

8. At its forty-first session (New York, 16 June-3 July 2008), the Commission noted that the Working Group had decided to proceed with its work on the revision of the UNCITRAL Arbitration Rules in their generic form and to seek guidance from the Commission on whether, after completion of its current work on the Rules, the Working Group should consider in further depth the specificity of treaty-based arbitration and, if so, which form that work should take.[10] After discussion, the Commission agreed that it would not be desirable to include specific provisions on treaty-based arbitration in the UNCITRAL Arbitration Rules themselves and that any work on investor-State disputes which the Working Group might have to undertake in the future should not delay the completion of the revision of the UNCITRAL Arbitration Rules in their generic form. As to timing, the Commission agreed that the topic of transparency in treaty-based investor-State arbitration was worthy of future consideration and should be dealt with as a matter of priority immediately after completion of the current revision of the UNCITRAL Arbitration Rules. As to the scope of such future work, the Commission agreed by consensus on the importance of ensuring transparency in investor-State dispute resolution. The Commission was of the view that, as noted by the Working Group at its

---

6 Ibid., para. 186.
7 Ibid., para. 187.
8 Ibid., *Sixty-second Session, Supplement No. 17* (A/62/17), part one, para. 174.
9 Ibid., para. 175.
10 Ibid., *Sixty-third Session, Supplement No. 17* (A/63/17), para. 313.

forty-eighth session (A/CN.9/646, para. 57), the issue of transparency as a desirable objective in investor-State arbitration should be addressed by future work. As to the form that any future work product might take, the Commission noted that various possibilities had been envisaged by the Working Group (ibid., para. 69) in the field of treaty-based arbitration, including the preparation of instruments such as model clauses, specific rules or guidelines, an annex to the UNCITRAL Arbitration Rules in their generic form, separate arbitration rules or optional clauses for adoption in specific treaties. The Commission decided that it was too early to make a decision on the form of a future instrument on treaty-based arbitration and that broad discretion should be left to the Working Group in that respect.[11]

II. Organization of the session

9. The Working Group, which was composed of all States members of the Commission, held its fiftieth session in New York, from 9 to 13 February 2009. The session was attended by the following States members of the Working Group: Armenia, Australia, Austria, Bahrain, Belarus, Benin, Bolivia, Bulgaria, Cameroon, Canada, Chile, China, Colombia, Czech Republic, Ecuador, Egypt, El Salvador, Fiji, France, Germany, Greece, Guatemala, Iran (Islamic Republic of), Italy, Japan, Kenya, Lebanon, Malaysia, Mexico, Namibia, Nigeria, Norway, Pakistan, Poland, Republic of Korea, Russian Federation, Senegal, Singapore, Spain, Switzerland, Thailand, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

10. The session was attended by observers from the following States: Angola, Argentina, Belgium, Brazil, Burkina Faso, Costa Rica, Croatia, Finland, Ghana, Haiti, Holy See, Indonesia, Kuwait, Libyan Arab Jamahiriya, Mauritius, Netherlands, Nicaragua, Peru, Philippines, Qatar, Romania, Saudi Arabia, Sweden, Togo, Tunisia, Turkey and Yemen.

11. The session was attended by observers from the following organizations of the United Nations System: the United Nations Office of Legal Affairs and the World Bank.

12. The session was attended by observers from the following international intergovernmental organizations invited by the Commission: Asian-African Legal Consultative Organization (AALCO), Central American Court of Justice (CCJ), European Commission (EC), International Cotton Advisory Committee (ICAC), MERCOSUR and Permanent Court of Arbitration (PCA).

13. The session was also attended by observers from the following international non-governmental organizations invited by the Commission: Alumni Association of the Willem C. Vis International Commercial Arbitration Moot (MAA), American Arbitration Association (AAA), American Association of Private International Law (ASADIP), American Bar Association (ABA), Arab Association for International Arbitration (AAIA), Asia Pacific Regional Arbitration Group (APRAG), Association for the Promotion of Arbitration in Africa (APAA), Association of the Bar of the City of New York (ABCNY), Center for International Environmental Law (CIEL), Center for International Legal Studies (CILS), *Centre pour l'Étude et la Pratique de*

[11] Ibid., para. 314.

l'Arbitrage National et International (CEPANI), Construction Industry Arbitration Council (CIAC), Corporate Counsel International Arbitration Group (CCIAG), Council of Bars and Law Societies of Europe (CCBE), European Company Lawyers Association (ECLA), European Law Students' Association (ELSA), Forum for International Commercial Arbitration C.I.C. (FICACIC), Gulf Cooperation Council (GCC) Commercial Arbitration Centre, ICC International Court of Arbitration, Inter-American Bar Association (IABA), Inter-American Commercial Arbitration Commission (IACAC), International Bar Association (IBA), Kuala Lumpur Regional Centre for Arbitration (KLRCA), London Court of International Arbitration (LCIA), Milan Club of Arbitrators, School of International Arbitration of the Queen Mary University of London, Swiss Arbitration Association (ASA) and *Union Internationale des Avocats* (UIA).

14. The Working Group elected the following officers:

Chairman: Mr. Michael E. Schneider (Switzerland);

Rapporteur: Mr. Abbas Bagherpour Ardekani (Islamic Republic of Iran).

15. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.II/WP.153); (b) notes by the Secretariat on a revision of the UNCITRAL Arbitration Rules (A/CN.9/WG.II/WP.151, A/CN.9/WG.II/WP.151/Add.1, A/CN.9/WG.II/WP.152 and A/CN.9/WG.II/WP.154).

16. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Revision of the UNCITRAL Arbitration Rules.
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

17. The Working Group resumed its work on agenda item 4 on the basis of the notes prepared by the Secretariat (A/CN.9/WG.II/WP.151, A/CN.9/WG.II/WP.151/Add.1, A/CN.9/WG.II/WP.152 and A/CN.9/WG.II/WP.154). The deliberations and decisions of the Working Group with respect to this item are reflected in chapter IV. The Secretariat was requested to prepare a draft of revised UNCITRAL Arbitration Rules, based on the deliberations and decisions of the Working Group. The deliberations and decisions of the Working Group in respect of agenda item 5 are reflected in chapter V.

IV. Revision of the UNCITRAL Arbitration Rules

18. The Working Group recalled that it had concluded a second reading of articles 1 to 17 at its forty-ninth session (A/CN.9/665) and agreed to resume discussions on the revision of the Rules on the basis of

document A/CN.9/WG.II/WP.151/Add.1 and the proposed revisions to the Rules contained therein.

Section III. Arbitral proceedings

Statement of claim — Article 18

Paragraph (1)

19. The Working Group considered the last sentence of paragraph (1) which had been added to deal with the situation where the claimant decided to treat its notice of arbitration as a statement of claim. The purpose of that sentence was to allow a claimant to postpone its decision on whether its notice of arbitration constituted a statement of claim until the time the arbitral tribunal required the claimant to submit its statement of claim, instead of having to make that decision at the time of the notice of arbitration. It was said that that provision was useful in practice, as it clarified that a party did not need to produce a statement of claim if it considered that its notice of arbitration already fulfilled that purpose.

20. It was observed that a notice of arbitration, treated as a statement of claim, should nonetheless comply with the requirements contained in article 18, paragraph (2) and it was proposed to clarify that matter by adding at the end of paragraph (1) language along the following lines: "provided that it meets the requirements of paragraph (2)". It was further observed that such a notice of arbitration should also meet the requirements contained in article 18, paragraph (3).

21. The necessity to provide such additional language was questioned. A view was expressed that it would be for the arbitral tribunal to deal with the general question of the consequences of an incomplete statement of claim, and that the Rules should not dwell into such details. That view was not supported.

22. After discussion, the Working Group generally agreed that a notice of arbitration treated as a statement of claim should comply with the provisions of article 18 and the Working Group requested the Secretariat to revise the last sentence of paragraph (1) to reflect that decision. The Working Group also took note of the remark that the provisions on the content of the notice of arbitration, as contained in article 3, and the provisions on the content of the statement of claim as contained in article 18 might overlap and that there might be a need to consider that question at a further stage of discussions on article 3.

Paragraph (2)

23. The Working Group adopted the substance of paragraph (2), without modifications.

Paragraph (3)

24. The Working Group agreed that the words "other evidentiary materials" under paragraph (3) should be replaced by the words "other evidence" as used in the 1976 version of the Rules, for the reason that it covered all evidence that could be submitted at the stage of the statement of claim, whereas the term "evidentiary materials" might be construed in a more limitative manner, for instance, excluding testimony or written witness statements.

Statement of defence

Article 19

Paragraph (1)

25. It was observed that the last sentence of paragraph (1) was added to deal with the situation where the respondent decided to treat its response to the notice of arbitration as its statement of defence. The Working Group agreed that that sentence should be revised to parallel the modifications adopted in respect of the last sentence of article 18, paragraph (1) (see paragraphs 19-22 above).

Paragraph (2)

26. The Working Group adopted paragraph (2) in substance with the modification to replace the words "other evidentiary materials" by the words "other evidence", to be consistent with the change agreed upon in article 18, paragraph (3) (see paragraph 24 above).

Paragraph (3)

Claims relied on for the purpose of a set-off and counterclaims

27. The Working Group recalled its previous discussions that paragraph (3) should contain a provision on set-off and that the arbitral tribunal's competence to consider claims for the purpose of a set-off and counterclaims should, under certain conditions, extend beyond the contract from which the principal claim arose and apply to a wider range of circumstances (A/CN.9/614, paras. 93 and 94; A/CN.9/619, paras. 157-160). The Working Group noted that paragraph (3) contained two options. Under the first option, the respondent might rely on a claim for the purpose of a set-off or make a counterclaim "arising out of the same legal relationship, whether contractual or not". Under the second option, a claim for the purpose of a set-off or a counterclaim might be presented "provided that it [fell] within the scope of the arbitration agreement".

28. The Working Group had also before it a proposal made by a delegation, contained in document A/CN.9/WG.II/WP.152. Under that proposal, a claim relied on for the purpose of a set-off should be admissible even if it did not fall within the scope of the arbitration agreement, was the object of a different arbitration agreement or of a forum selection clause, provided that the requirements for a set-off under the substantive law applicable to the main claim were fulfilled. It was explained that a claim for set-off was a defence and that in some legal systems, set-off extinguished the claim at the time when the set-off situation had arisen. In such situation, it was said that there was no need for an examination of the application of the arbitration agreement. A counterclaim, however, was viewed as a different claim going beyond a mere defence and would thus require to be within the scope of an arbitration agreement between the parties and to have a sufficient link to the main claim.

29. The proposal received some support on the ground that it offered different rules in relation to claims for set-off and counterclaims, and would therefore provide guidance to the arbitral tribunals on issues of jurisdiction. It was widely felt, however, that the proposal went too far and might not be easily accepted in all legal systems. It was observed that claims for set-off and counterclaims were matters of procedural domestic law, and it might not be appropriate to provide

substantive universal rules on those questions. It was stated that in both cases, the arbitral tribunal would have to first decide on its competence, treating both claims for set-off and counterclaims alike. Further, it was observed that the proposal might invite challenges under the New York Convention with respect to the scope of the arbitration agreement even if the parties would have accepted such extension by agreeing on the application of the Rules.

30. The Working Group considered options 1 and 2 of article 19, paragraph 3 as contained in A/CN.9/WG.II/WP.151/Add.1. Some support was expressed for option 2. A proposal was made to replace the word "the" appearing before the words "arbitration agreement" in option 2 by the word "an" in order to clarify that the notion of arbitration agreement should be construed broadly, not being limited to the arbitration agreement on which the main claim was based. Another proposal was made to combine options 1 and 2 in order to better address the consequences of broadly drafted arbitration agreements on admissibility of claims for the purpose of a set-off and counterclaims. Another suggestion was made to allow claims for set-off and counterclaims under the conditions that they fell within the scope of the arbitration agreement and had a sufficient link to the main claim. Though some support was expressed for that proposal, it was viewed as being too restrictive. In addition, it was noted that the term "sufficient link" might give rise to different interpretations.

31. It was observed that a better approach would be to avoid substantive rules on the determination of the arbitral tribunal's competence, which could be understood in a variety of manners under different legal systems. Towards that end, it was suggested to include in paragraph (3), in replacement of the two options, the following words: "provided that the tribunal has jurisdiction." Although some concern was expressed that such provision did not provide sufficient guidance for the determination of the arbitral tribunal's jurisdiction, the proposal found wide support. Further, it was found broad enough to encompass a wide range of circumstances and did not require substantive definitions of the notions of claims for set-off and counterclaims and could take account of the situation where the claim had been extinguished by the set-off.

32. After discussion, the Working Group agreed that paragraph (3) should be amended along the following lines: "In its statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counterclaim or rely on a claim for the purpose of a set-off provided that the tribunal has jurisdiction over it."

Paragraph (4)

33. The Working Group adopted the substance of paragraph (4), without modifications.

Amendments to the claim or defence — Article 20

"Scope of the arbitration agreement" — "Jurisdiction of the arbitral tribunal"

34. The Working Group agreed that, following the revision adopted under article 19, paragraph (3) (see paragraph 32 above), the last sentence of article 20 should be amended accordingly, and the reference to the scope of the arbitration agreement should be replaced by a reference to the competence of the arbitral

tribunal, so that a claim might be amended or supplemented provided that it fell within the jurisdiction of the arbitral tribunal.

"Claim or defence"

35. The Working Group further agreed that the words "or defence" should be added in the second sentence of article 20 to align it with the wording of the first sentence of that article.

Pleas as to the jurisdiction of the arbitral tribunal — Article 21

Paragraph (1)

"or a legal instrument"

36. The Working Group recalled its earlier decision that paragraph (1) should be redrafted along the lines of article 16, paragraph (1) of the UNCITRAL Arbitration Model Law in order to clarify that the arbitral tribunal had the power to raise and decide upon issues regarding the existence and scope of its own jurisdiction (A/CN.9/614, para. 97). For the sake of consistency with modifications adopted by the Working Group under articles 1, 3 and 18, it was suggested to add the words "or legal instrument" after the word "contract" in the second and third sentences of paragraph (1). Inclusion of those words was said to avoid limiting the types of disputes that parties could submit to arbitration, and could in particular usefully address disputes arising under international investment treaties.

37. Although consistency was viewed as important in the revision of the Rules, the Working Group agreed that the suggested modification might have far-reaching consequences in the field of public international law. It was stated that the separability principle contained in article 21, paragraph (1), which applied in the context of commercial contracts, was not intended to be transposed to international treaties by amending the UNCITRAL Arbitration Rules. The Working Group took no position as to whether the substantive rights conferred to investors by a treaty, including the right to refer a dispute to arbitration, would be extinguished when the treaty terminated. In that regard, it was emphasized that the principle of separability was not necessarily recognized in the context of international treaties. Further, it was widely felt that it would not be appropriate for an instrument as the Rules, to attempt regulating such matters of public international law.

"admissibility of parties' claims" — "and the exercise of its jurisdiction"

38. It was noted that article 21 dealt with the power of the arbitral tribunal to decide upon issues regarding the existence and scope of its own jurisdiction. For the purpose of clarity, it was suggested also to include a reference to the power of the arbitral tribunal to decide upon the admissibility of parties' claims. In that regard, a suggestion was made to insert in the first sentence of paragraph (1), after the words "may rule on its own jurisdiction", the words "and the exercise thereof". To the same end, another proposal was made to provide that the arbitral tribunal might "rule on the scope of its own jurisdiction". Those proposals did not receive support. It was pointed out that matters of jurisdiction and admissibility of claims were distinct issues that arose at different points in time of the arbitral proceedings. Therefore, it was stated that it would not be appropriate to deal with both issues in paragraph (1).

39. Although it was decided that no change should be made to the text of the Rules, the Working Group confirmed its understanding that the general power of the arbitral tribunal, referred to in paragraph (1), to decide upon its jurisdiction should be interpreted as including the power of the arbitral tribunal to decide upon the admissibility of the parties' claims or, more generally to exercise its own jurisdiction. The Working Group further confirmed its understanding that article 21 applied also to the objections made by a party that the tribunal should not exercise its jurisdiction to examine a claim on the merits.

"non-existent or invalid" — "null and void" [defects of a contract]

40. A suggestion was made that the words "null and void" in the third sentence of article 21, paragraph (1) should be replaced by the words "non-existent or invalid". In support of that suggestion, it was stated that the terms "null and void" had given rise to particular difficulties of application, in particular in certain common law jurisdictions. It was pointed out that there were situations that might not necessarily be captured by the term "null and void", for instance, a contract having expired with the passage of time. It was stated that the notions of a contract being "invalid" or "non-existent" would better reflect the general understanding that no defect in a contract should entail of itself the invalidity of the arbitration clause. Further, it was said that the words "non-existent or invalid" should be used to be consistent with the words "existence or validity" in the first sentence of article 21, paragraph (1).

41. In response, it was noted that the notion of "non-existence of a contract" gave rise to particular difficulties in some legal systems. It was further noted that the words "null and void" had not caused any problems in practice and that they were also found in article II, paragraph (3) of the New York Convention and article 8, paragraph (1) of the UNCITRAL Arbitration Model Law. It was also observed that the first sentence related to the question of existence or validity of the arbitration agreement, whereas the third sentence related to the validity of the contract in which the arbitration clause was contained. Therefore, no alignment of wording was viewed necessary.

42. After discussion, the Working Group agreed that the defects of a contract referred to in the third sentence of paragraph (1) should be construed as broadly as possible to cover all situations where a contract could be considered null, void, non-existent, invalid or non-effective. Towards that end, it was suggested to delete the words "and void" in the third sentence of paragraph (1), and retain the word "null". It was said that the term "null" was wide enough to cover all contractual defects. That deletion, it was further said, would align the English version with other language versions of that paragraph and promote a broad interpretation of the concept of defects of a contract. A delegation observed that the term "null" had been given a wider interpretation in case law than the term "null and void".

43. After discussion, the Working Group agreed that the words "and void" in the third sentence of paragraph (1) should be deleted.

"ipso jure"

44. The Working Group recalled the decision at its forty-sixth session to replace the words "ipso jure" with wording along the lines of "of itself" in the interests of simplicity (A/CN.9/619, para. 162). It was observed that the word "automatically" instead of the words "of itself" would better translate the Latin term "ipso jure". After discussion, the Working Group agreed that the words "ipso jure" would be

replaced by "automatically". However, "ipso jure" should be retained in the Spanish version of the Rules. The appropriate words for the French version of the Rules would be "de plein droit".

Paragraph (2)

45. The Working Group adopted the substance of paragraph (2), without modifications.

Paragraph (3)

46. The Working Group adopted the substance of paragraph (3), without modifications.

Further written statements — Article 22

47. The Working Group adopted the substance of article 22, without modifications.

Periods of time — Article 23

48. The Working Group adopted the substance of article 23, without modifications.

Evidence — Article 24

Paragraphs (1) and (3)

49. The Working Group adopted the substance of article 24, with the modifications discussed under paragraphs 70 to 75 below.

Proposed deletion of paragraph (2) as contained in the 1976 version of the Rules

50. In response to a question whether article 24, paragraph (2), as contained in the 1976 version of the Rules should be deleted, it was recalled that the prevailing view in the Working Group was that paragraph (2) should be deleted, as it might not be common practice for an arbitral tribunal to require parties to present a summary of documents (A/CN.9/641, paras. 22-25). It was also recalled that paragraph (2) was predicated on an expectation that substantial evidence might not be introduced until the hearings, which was contrary to the provisions of revised articles 18 and 19, which encouraged parties "as far as possible" to submit with their statement of claim or of defence "all documents and other evidence relied upon by the [parties]".

51. It was further recalled that the deletion of paragraph (2) should not be understood as diminishing the discretion of the arbitral tribunal to request the parties to provide summaries of their documents and evidence on the basis of article 15. The Working Group confirmed its decision to delete paragraph (2) as contained in the 1976 version of the Rules.

Hearings, witnesses and experts — Article 25

Comments on article 25

52. The Working Group heard a number of comments on article 25 on the following issues.

"Parties' appointed experts and expert witnesses" (title to article 25)

53. It was suggested that experts appointed by the parties belonged to the more general category of witnesses, and that therefore the title of article 25 should be modified along the following lines: "Hearings, witnesses, including expert witnesses". It was also pointed out that the words "witnesses, including expert witnesses" were used in article 15, paragraph (2). It was further said that the same wording as proposed in the title should be used where relevant in the text of article 25. On the other hand, it was pointed out that experts would normally not provide testimony but opinions and that therefore the term "testify" might not be appropriate.

54. It was observed that the terminology to be used in the title and in the provision should make it clear that article 25 applied to witnesses and experts presented by a party, and not to tribunal-appointed experts. It was added that witnesses under article 25 included individuals testifying on an issue of fact or of expertise.

General rule on the organization of hearings (paragraph (1))

55. Paragraph (1) expressed the general principle that the arbitral tribunal should give parties adequate advance notice of oral hearings, whereas paragraphs (2) and (3) contained provisions on the organization of hearings. It was said that the arbitral tribunal should enjoy wide discretion in organizing hearings, and the provisions in paragraphs 2 and 3, which were said to be too detailed, were proposed to be deleted and replaced by a more generic provision placed in paragraph (1), so that paragraph (1) would read as follows: "In the event of an oral hearing, the arbitral tribunal shall give the parties adequate advance notice of the date, time and place thereof and shall organize the proceedings to ensure the parties have timely notice of witnesses and experts anticipated to appear, the languages of the hearings and the procedures to be employed therein."

56. A concern was expressed that such a generic provision, if it were to replace paragraphs (2) and (3) would not provide sufficient guidance to arbitral tribunals, and that paragraphs (2) and (3) served a useful educational purpose. In response, it was observed that the UNCITRAL Notes on Organizing Arbitral Proceedings provided for guidance on such matters, and that there was no need to insert detailed provisions in the Rules on organizational aspects of the hearings.

Conditions for hearing witnesses (paragraph (1 bis))

57. It was noted that paragraph (1 bis) expressed the general principle that the arbitral tribunal should set the conditions for hearing witnesses. It was observed that the first sentence of paragraph (1 bis) and the last sentence of paragraph (4) both provided a general rule on hearing witnesses, and it was suggested that both sentences should be merged along the following lines: "Witnesses and experts presented by the parties may be heard under conditions and examined in the manner set by the arbitral tribunal." That suggestion received support.

Definition of witnesses (paragraph (1 bis))

58. It was noted that the reference to "individual" in the second sentence of paragraph (1 bis) might be read as excluding legal persons, which might not be the intention of that phrase.

59. A proposal was made to simplify the second sentence of paragraph (1 bis) by replacing it with a sentence along the following lines: "For the purposes of these Rules, any person may be a witness or an expert witness". It was noted that a similar provision was found in article 25 (2) of the Swiss Rules of International Arbitration ("Swiss Rules").

60. On the question whether a party or a representative of a party could be heard as a witness as provided under paragraph (1 bis), it was observed that divergences existed between legal systems on that question, and for that reason, concerns were expressed with regard to the inclusion of a provision on that point in the Rules. In response, it was noted that such a provision was found expressed in similar terms in article 4 of the IBA Rules on the Taking of Evidence in International Commercial Arbitration (1 June 1999), article 25 (2) of the Swiss Rules and article 20.7 of the Arbitration Rules of the London Court of International Arbitration ("LCIA Rules").

Cross-examination of witnesses (paragraph (2))

61. It was suggested that paragraph (2) should include provisions on the procedure in relation to cross-examination of witnesses, and to that end, the following language should be added at the end of paragraph (2): "and the names of witnesses and experts which it proposes to examine." However, it was observed that the Rules did not preclude cross-examination of witnesses and the need to include such a provision was questioned.

Contact details (paragraph (2))

62. For the sake of consistency with the language used in articles 3 and 18 of the Rules, it was proposed to replace the word "addresses" appearing in paragraph (2) by the words "contact details".

Detailed arrangements for the organization of hearings (paragraph (3))

63. Paragraph (3) detailed the practical arrangements that the arbitral tribunal might make to organize oral hearings. That paragraph was proposed for deletion for the reason that it provided too many details, which were said to be seldom found in modern arbitration rules. Against deletion, it was pointed out that paragraph (3) might provide useful guidance to arbitral tribunals. If it were to be retained, it was suggested to replace the word "translation" by the word "interpretation" which was said to be more appropriate.

"save when the witness is a party to the arbitration" (paragraph (4))

64. In relation to the second sentence of paragraph (4), it was proposed to place the words "save when the witness is a party to the arbitration" appearing at the end of the second sentence of paragraph (4) before the words "during the testimony of other witnesses". Delegations which opposed the inclusion of a provision in the Rules permitting a party to be heard as a witness suggested deletion of those words.

Videoconference (paragraph (5))

65. It was noted that paragraph (5) permitted evidence of witnesses to be presented in the form of oral statements that did not require the presence of witnesses. It was further noted that paragraph (5) was drafted in generic terms and that it might be necessary to clarify that the intention of the provision was to allow

hearings of witnesses by means of communication, such as videoconferences. To further clarify the meaning of that paragraph, it was proposed to add the word "physical" before the word "presence". Those proposals received support.

66. It was observed that the right of the parties to present witnesses by means that did not require their presence should be subject to the agreement of the tribunal. To that end, it was proposed to insert the words "unless the arbitral tribunal determines that it is not appropriate to do so" at the end of paragraph (5). Doubts were expressed regarding the need to add the proposed wording, as paragraph (4) already expressed the general principle that the arbitral tribunal was free to determine the manner in which witnesses and experts were to be examined.

67. In that context, it was pointed out that communication of information by the parties in relation to witnesses proposed to be heard by means that did not require their physical presence should be expressly addressed in paragraph (2).

Presentation of evidence (paragraph (6))

68. It was observed that admissibility of evidence under paragraph (6) should be construed in a wide manner. It was suggested that paragraph (6) might need to be amended to include a determination of a period of time for the presentation of evidence. It was noted that the arbitral tribunal should have discretion to refuse evidence that was submitted late. It was further pointed out that such reference to that specific power of the arbitral tribunal might be helpful with regard to the principle of due process, in particular in civil law countries. It was also observed that the Rules were silent on the question of sanctions in case of non-compliance with the provisions on submission of evidence.

Alternative proposal to article 25

69. As a result of the extensive discussion on article 25, it was questioned in the Working Group whether that article presented the risk of over regulating the procedure for hearings and whether a different approach should be adopted. It was said that certain provisions, in particular paragraphs 2 and 3 of article 25 contained a number of details on the procedure for hearings that could overburden the Rules, reduce their flexibility and were not commonly found in modern international arbitration rules. A better approach, it was said, might be to establish a general framework leaving discretion to the arbitral tribunal to organize hearings in an appropriate manner taking account of the circumstances of the case. Many delegations suggested that provisions of article 25 that expressed fundamental principles should be retained, whereas provisions that included only details of a procedural nature should be deleted. But other delegations cautioned that existing provisions should not be deleted absent compelling reasons. A concern was expressed that retention of only the main principles would not provide sufficient guidance to arbitral tribunals in the conduct of hearings. In response, it was said that the Rules were not an instrument designed primarily for educational purpose.

70. After discussion, the Working Group agreed that article 25 should aim at establishing a general framework on the conduct of hearings, and that that article should be amended to reflect that goal. To that end, articles 24 and 25 were proposed to be modified along the following lines ("the new proposal"):

Article 24:

- Paragraph (1) would remain unchanged.

- It was proposed to insert as a second paragraph of article 24 the following sentence: "Unless otherwise directed by the arbitral tribunal, statements by witnesses and experts may be presented in writing and signed by them."
- Paragraph (3) would remain unchanged.
- The content of paragraph (6) of article 25 would be placed as a fourth paragraph under article 24.

Article 25:

- Article 25 would be titled "Hearings".
- Paragraph (1) would remain unchanged.
- Paragraph (1 bis) would read: "Witnesses and party appointed experts may be heard under the conditions and examined in the manner set by the arbitral tribunal. Any individual admitted to testify to the arbitral tribunal on any issue of fact or expertise shall be treated as a witness under these Rules, notwithstanding that the individual is a party to the arbitration or in any way related to a party."
- Paragraph (2) would read: "At least 15 days before the hearing, the arbitral tribunal, after having invited the parties' views, shall draw up a list of persons, if any, who are to be examined at the hearing and the languages in which they are to do so."
- Paragraph (3) would be omitted.
- Paragraph (4) would read: "Hearings shall be held in camera unless the parties agree otherwise."
- Paragraph (5) would read: "The arbitral tribunal may direct that witnesses and experts be examined through means that do not require their physical presence at the hearing, such as videoconferencing."
- Paragraph (6) would be omitted and its content be placed as a fourth paragraph under article 24.

71. It was explained that the new proposal aimed at clarifying the various stages of organizing hearings in respect of the time when witnesses and experts would be made known, as covered under article 18, the form in which the statements of witnesses and experts would be presented under article 24 and the organization of the hearings under article 25.

Article 24, paragraph (2) of the new proposal

72. It was questioned whether the word "expert" used in article 24, paragraph (2) of the new proposal referred to both party-appointed experts and tribunal-appointed experts as article 27 on tribunal-appointed experts already contained a provision on the presentation of statements by tribunal-appointed experts. It was clarified that the purpose of article 24, paragraph (2) of the new proposal was to deal with party-appointed experts. After discussion, the Working Group adopted the substance of article 24, paragraph (2) of the new proposal.

Article 24, paragraph (4) of the new proposal

73. A reservation on the placement of paragraph (6) of article 25 under article 24 was expressed on the ground that that paragraph did not constitute a general rule on evidence. Despite that reservation, the placement of paragraph (6) of article 25 as a fourth paragraph of article 24 received wide support.

74. The suggestion that that provision should clarify that the arbitral tribunal was expressly empowered to refuse late submission was reiterated. To that end, it was proposed to add at the end of article 24, paragraph (4) a sentence along the lines of "The arbitral tribunal may disregard evidence that is submitted late." In response to that suggestion, it was pointed out that that matter was already dealt with under article 24, paragraph (3), which provided that "at any time during the arbitral proceedings the arbitral tribunal may require the parties to produce (…) evidence within such a period of time as the tribunal shall determine." It was said that, for instance, the US-Iran Claims Tribunal that was functioning under the UNCITRAL Arbitration Rules had exercised the power to refuse late evidence on the basis of that provision.

75. After discussion, the Working Group agreed that it was not necessary to add a provision on late submission in the Rules. The Working Group confirmed its understanding that the power of the arbitral tribunal to refuse late submission was provided for under article 24, paragraph (3).

Article 25, paragraph (1 bis) of the new proposal

"Expert witnesses"

76. The Working Group agreed to further consider the question of expert witnesses and whether the word "expertise" used in the second sentence of paragraph (1 bis) of the new proposal should be further clarified. In that respect, concern was expressed that the word "expertise" had broader meaning than what might be intended to be captured in that provision. The Working Group requested the Secretariat to find appropriate wording, which would clarify the distinction between experts appointed by a party and by the arbitral tribunal.

"Witness, being a party to the arbitration"

77. Concerns were expressed on a provision allowing an individual which was a party to the arbitration to be heard as a witness, or even as an expert, in its own case. It was said that that provision might have as consequence that a party requested to be heard as a witness instead of producing evidence. It was also said that it would be contrary to procedural rules in certain jurisdictions according to which information provided by such individual should be received as information provided by the party and not as testimony of witness. With a view to addressing that concern, it was proposed to add as opening words of the second sentence of article (1 bis) of the new proposal the words "Subject to the provision of article 24, paragraph (4)". It was also suggested to replace the word "shall" appearing after the word "expertise" in the second sentence of paragraph (1 bis) by the word "may". Those suggestions received some support. It was said that the arbitral tribunal had full power to determine the weight of the evidence offered under article 24, paragraph (4) of the new proposal. It was also said that hearing parties as witnesses was a common practice in international commercial arbitration. However, it was observed that the provision was drafted in a very broad manner, allowing for instance, legal counsel of parties to testify as witness. The Working Group was

reminded of its discussion at its forty-sixth session on the matter (A/CN.9/641, paras. 29-37) and its decision to empower the arbitral tribunal to hear a party as a witness (A/CN.9/641, para. 38). After discussion, it was agreed to replace the word "testifying" by the words "admitted to testify" in order to clarify that the Rules were not intended to trump on the power of the arbitral tribunal to rule on the admissibility of witnesses.

"Witness, being related to a party"

78. It was explained that the words "or in any way relating to any party" in the second sentence of paragraph (1 bis) of the new proposal had been inserted as an encompassing term that avoided listing persons that acted on behalf of a legal person. It was further explained that such an encompassing term would also avoid the difficulties encountered with the different functions and descriptions of persons acting on behalf of a legal person in different legal systems. It was recalled that the Working Group had agreed to a more neutral formulation at its forty-seventh session (A/CN.9/641, para. 38).

79. After discussion, the Working Group agreed to adopt paragraph (1 bis), subject to further consideration of matters mentioned in paragraphs 76 and 77 above.

Paragraph (2) of the new proposal

80. With respect to paragraph (2) of the new proposal, it was noted that the requirement for the arbitral tribunal to send advance notice to the parties in the event of an oral hearing in paragraph (1) also covered the identification of persons who were to be examined at the hearing. It was further noted that the Rules already contained a provision on languages in article 17. Therefore, the Working Group agreed to delete paragraph (2).

Paragraph (3)

81. It was observed that article 25, paragraph (3) had been found too detailed to be included in modern arbitration rules. Consequently, the Working Group agreed that paragraph (3) should be deleted.

Paragraph (4) of the new proposal

82. It was noted that paragraph (4) of the new proposal did not mention the power of the arbitral tribunal to require the retirement of any witness or witnesses during the testimony of other witnesses as included in the second sentence of article 25, paragraph (4) (as contained in document A/CN.9/WG.II/WP.151/Add.1). As retaining the clause that referred to that power of the arbitral tribunal was viewed as very important, it was suggested to include the second sentence of article 25, paragraph (4) in paragraph (4) of the new proposal. In support of that suggestion, it was stated that the inclusion would provide the necessary guidance to the arbitral tribunal on its powers with respect to hearings. It was stated that requiring witnesses to retire might be seen as interfering with the right of a party and that, therefore, their method of examining deserved to be expressly mentioned, while other methods, equally acceptable, would not give rise to that concern. In response, it was explained that that sentence was intentionally omitted for two reasons. First, the arbitral tribunal could view it as important to have a representative of a party required to retire during the testimony of another representative of the same party, which was not possible under article 25, paragraph (4). Second, that method of

examination might not be the most frequent one and the reference to it in the Rules would run the risk of implying that it was regarded as the preferred method. The inclusion of that sentence was further viewed as unnecessary, because there was sufficient jurisprudence to turn to for guidance. It was also noted that arbitral tribunals had broad discretion to deal with those matters and that there was existing practice in international arbitration to guide the exercise of that discretion. The first two explanations were not disputed in themselves but nevertheless were not considered sufficient to support the deletion of the second sentence of article 25, paragraph (4). It was said that requiring the retirement of a witness during the testimony of other witnesses in article 25, paragraph (4) was not prescriptive, which could be seen from the use of the word "may", and could, thus, not be taken as the preferred method of examination. The argument of jurisprudence used against inclusion of the sentence was not supported, as any jurisprudence had been developed under the provisions of article 25, paragraph (4) as contained in the 1976 version of the Rules. It was further said that there was no reason to burden the arbitral tribunal with searching for relevant case law for guidance. In addition, it was stated that the omission of any reference to that method of examination in the Rules would create legal uncertainty, because users of the Rules would be led to think that that method should not be applied. The Working Group was recalled of its mandate only to modify the 1976 version of the Rules if necessary.

83. After discussion, the Working Group agreed to keep the second sentence of paragraph (4) as contained in the 1976 version of the Rules and request the Secretariat to include a sentence to the effect that a party appearing as a witness should not generally be requested to retire during the testimony of other witnesses, which would also address the concerns expressed in the discussion (see paragraph 82 above).

Paragraph (5) of the new proposal

84. The Working Group adopted paragraph (5) of the new proposal in substance and requested the Secretariat to find appropriate wording to cover the example of examination by video transmission.

Interim measures — Article 26

Placement of article 26

85. The Working Group agreed that article 26 on interim measures should be placed after article 23, or alternatively after either articles 27 or 29, in order to group together the articles relating to evidence, hearings, and tribunal appointed experts.

Alternative proposal

86. The Working Group noted that article 26 mirrored the provisions on interim measures of chapter IV A of the UNCITRAL Arbitration Model Law. The Working Group had before it an alternative proposal made by a delegation contained in document A/CN.9/WG.II/WP.152 ("the alternative proposal"). Under that alternative proposal, article 26 was simplified and shortened. It did not contain paragraphs (2), (3) and (4) of article 26. It was explained that the proposed deletion of paragraph (2) was based on the assumption that a definition of interim measures was not necessary in the Rules, as such a definition would normally be found in applicable domestic law. It was further explained that paragraphs (3) and (4) were proposed for deletion,

because the alternative proposal sufficiently covered the conditions under which the arbitral tribunal could grant interim measures by adding the words "that it considers necessary for a fair and efficient resolution of the dispute" at the end of the first sentence in paragraph (1).

87. The alternative proposal received support from some delegations for the reason that its drafting style corresponded to the style of the Rules and it adopted a simplified approach to the question of interim measures, leaving to applicable domestic law matters of definition of interim measures and conditions for granting such measures. It was observed that the Rules should not be overloaded by provisions as contained in article 26, designed initially for use in a legislative context and aimed at establishing in detail the power for an arbitral tribunal to grant interim measures, so that such measures could be recognized and enforced by State courts. It was said that the Rules served a different purpose, and the alternative proposal appropriately summarized the core rules on interim measures. It was also observed that the definition of interim measures in article 26 might limit the power of arbitral tribunals to grant interim measures in jurisdictions that adopted a more liberal approach to the granting of interim measures than the UNCITRAL Arbitration Model Law. In that regard, it was observed that the provisions of the UNCITRAL Arbitration Model Law on interim measures had been recently adopted, and there was no experience with issues that might arise in the application of those provisions.

88. Although it was widely felt that article 26 might be considered too long, in particular in view of the length of the other provisions of the Rules, reservations were expressed on the alternative proposal. It was observed that the details included in article 26 did not serve only an educational purpose, but were intended to provide necessary guidance and legal certainty to the arbitrators and the parties. That purpose, it was emphasized, was particularly important in respect of many legal systems, which were unfamiliar with the use of interim measures in the context of international arbitration. In line with that proposal, it was also stated that a definition of interim measures was needed. It was recalled that the definition in article 26 consisted in a generic and exhaustive list intended to cover all instances in which an interim measure might need to be granted. Reservations on the alternative proposal were further expressed on the ground that it did not include a provision on conditions for granting such measures, which could lead to difficulties of interpretation and application.

89. The view was expressed that the alternative proposal constituted an unnecessary departure from the provisions on interim measures contained in chapter IV A of the UNCITRAL Arbitration Model Law, and that a better approach would be to duplicate the provisions of the UNCITRAL Arbitration Model Law so as to encourage development of practice in that area, in accordance with the standards developed by UNCITRAL. To address the concern regarding the length of article 26, it was proposed to divide article 26 into two separate articles, one establishing the power of arbitral tribunals to grant interim measures and the other defining the manner in which arbitral tribunals might grant such measures.

90. After discussion, the Working Group agreed to continue its deliberations on interim measures on basis of article 26 (as contained in document A/CN.9/WG.II/WP.151/Add.1), taking into consideration whether possible simplifications as contained in the alternative proposal could be made.

Paragraph (1)

91. The Working Group noted that paragraph (1) provided the right for an arbitral tribunal to grant interim measures and adopted the paragraph without modifications.

Paragraph (2)

"includes, without limitation"

92. A proposal was made to combine article 26, paragraph (1) of the alternative proposal and article 26, paragraph (2) (as contained in document A/CN.9/WG.II/WP.151/Add.1) in order to make it clear that the definition of interim measures in the Rules would be construed widely. It was proposed to insert the words "that it considers necessary for a fair and efficient resolution of the dispute" in the chapeau of paragraph (2). Another proposal was made to add to the list contained in paragraph (2) an additional item along the following lines: "(e) any other interim measure that the tribunal considers necessary for the fair and efficient resolution of the dispute." Although reservations were expressed on the latter proposed amendment to paragraph (2) because the definition of interim measures had been the subject of extensive discussion in the Working Group when revising the UNCITRAL Arbitration Model Law and was therefore believed to be comprehensive, it was found advisable to adopt in the Rules wording that contemplated the possibility of other types of interim measures not identified in the list.

93. To that end, a suggestion was made to replace the word "is" in the first line of paragraph (2) by the word "includes". It was further proposed to insert after the word "includes" the words "without limitation", to emphasize the non-exclusive nature of paragraph (2).

94. After discussion, the Working Group agreed to include in the first sentence the words "includes, without limitation", and adopted paragraph (2) in that form.

Paragraph (2) (b)

95. Concerns were expressed that the actions to be prevented or refrained from in paragraph (2) (b) could be understood as referring only to prejudice to the arbitral process. To clarify the meaning intended by the drafters of the UNCITRAL Arbitration Model Law, it was suggested to introduce an editorial change to paragraph (2) (b) by inserting "(i)" before the word "current" and "(ii)" before the word "prejudice" so that the situation of "prejudice to the arbitral process" would appear as distinct from "current or imminent harm".

Paragraphs (3) and (4)

96. It was noted that the conditions for granting interim measures in paragraph (3) applied equally to different kinds of interim measures. A view was expressed that such approach might be problematic in certain jurisdictions which adopted specific criteria in relation to measures granted for the preservation of assets out of which a subsequent award might be satisfied, as referred to under paragraph (2) (c). It was thus suggested to delete paragraph (3). An alternative suggestion was to delete the reference to paragraph (2) (c) in paragraph (3) and to place it into paragraph (4).

97. Support was expressed for the deletion of paragraphs (3) and (4) on the ground that those paragraphs might conflict with applicable domestic law. Opposition was

expressed to the deletion of those paragraphs. It was said that paragraph (3) was helpful, as it provided guidance to the arbitral tribunals on the conditions under which they could order interim measures. It was further stated that subparagraphs (a) and (b) were key provisions, which were useful for resolving issues which arose in practice. The balancing of harm proposed under paragraph (3) (a) was an important provision and it was said that since it was less rigid than the criterion of irreparable harm, it was important that it be set out specifically.

98. To reconcile both positions, a proposal was made to change the wording of paragraph (3), so that it would be non-mandatory in nature, along the lines of paragraph (4). Another proposal was made to include at the end of the chapeau of paragraph (3) the words "unless the tribunal determines that other criteria are applicable". It was said that those words would provide a gap-filling device in case the domestic law would require application of other conditions for the granting of interim measures. The proposals received some support. The Working Group was also reminded of its decision to retain paragraph (3) at a previous session (A/CN.9/641, para. 52).

99. After discussion, the Working Group adopted paragraphs (3) and (4) without modifications.

Paragraph (5)

General discussion

100. The Working Group recalled that, pursuant to the revised UNCITRAL Arbitration Model Law adopted by the Commission in 2006, preliminary orders might be granted by an arbitral tribunal upon request by a party, without notice of the request to any other party, in the circumstances where it considered that prior disclosure of the request for the interim measure to the party against whom it was directed risked frustrating the purpose of the measure. The Working Group considered whether paragraph (5), which dealt with preliminary orders, should be included in the Rules. Diverging views were expressed.

101. Against the inclusion of paragraph (5), it was stated that the Rules were of a contractual nature and directed to the parties whereas the UNCITRAL Arbitration Model Law was an instrument of a legislative nature, directed to legislators, and the need to provide detailed regulation as existed in the context of the revision of the UNCITRAL Arbitration Model Law did not apply in the context of the revision of the Rules. It was pointed out that the characteristics of preliminary orders ran counter to the consensual nature of arbitration and that many legal systems did not permit such orders under their arbitration law. It was observed that, of the States having enacted legislation based on the UNCITRAL Arbitration Model Law as amended in 2006, some had chosen or were considering not to include the section of chapter IV A of the UNCITRAL Arbitration Model Law dealing with preliminary orders. In that regard, the Working Group was cautioned not to deviate from the general approach to the revision of the Rules to retain their universal applicability, which was one of the main factors for their success. It was also said that, in some jurisdictions, granting preliminary orders could give rise to objections based on violation of the principle of due process.

102. It was argued that not inserting any provision on preliminary orders in the Rules would best accommodate the different approaches to the issue in different legal systems. The view was also expressed that preliminary orders, in certain

jurisdictions, were within the competence of State courts, and the procedure for granting such orders contained many safeguards that might not be present to the same extent as in the arbitration procedure. Such court orders could be enforceable against both the parties to an arbitration and third parties. For instance, the judge in a State court deciding over a preliminary order was not necessarily the same deciding subsequently on the merits of the case. In arbitration, however, the same arbitrator would make both decisions, which could lead to a prejudiced outcome of the proceedings. In response, it was stated that in some legal systems, judges rendered decisions on both preliminary orders and the merit of the dispute, and that such practice had not caused any concern. It was also stated that it would be inconsistent to allow parties to agree on arbitration, and at the same time to oblige them to turn to the State court system for obtaining preliminary orders.

103. In further support of paragraph (5), it was stated that paragraph (5) only reflected existing practice. In that regard, it was noted that the removal of paragraph (5) from article 26 would not necessarily prevent arbitrators from issuing preliminary orders. It was considered desirable to provide useful guidance to arbitrators in relation to the possible granting of such preliminary orders. It was also said that inclusion of provisions on preliminary orders was necessary for the sake of consistency with the UNCITRAL Arbitration Model Law. In response to the argument that inclusion of paragraph (5) could lead to conflicts with applicable arbitration law, it was stated that, in any event, arbitration law would, if it did not allow preliminary orders to be granted by an arbitral tribunal, supersede the Rules. It was further stated that the deletion of paragraph (5) could give rise to an undesired interpretation of the Rules, as generally disallowing preliminary orders.

104. Concern was expressed that introducing paragraph (5) in the Rules could undermine their acceptability, particularly by States in the context of treaty-based investor-State dispute resolution. In response, it was observed that the question of treaty-based investor-State disputes was to be discussed as a matter of priority after completion of the revision of the Rules, and that the question of preliminary orders in the context of treaty-based investor-State disputes could be further considered at that stage. The Working Group was reminded that the mandate given to the Working Group by the Commission at its forty-first session was limited to the question of transparency in treaty-based investor-State disputes (see paragraph 8 above).

105. It was proposed that, failing an agreement on a revised version of article 26, the version of that article as contained in the 1976 version of the Rules should be retained. In response, it was observed that the need to update the provision on interim measures was one of the important reasons why it was felt that the UNCITRAL Arbitration Rules should be revised. Consequently, the proposal to retain the 1976 version of that article received little support.

106. Some opponents to the inclusion of provisions on preliminary orders in the Rules indicated their willingness to accept the inclusion of paragraph (5) in the Rules, if the paragraph was either modified to clarify that it would not be possible for an arbitral tribunal to grant preliminary orders in legal systems that did not allow them, or if a commentary to the Rules would clarify that the power to grant preliminary orders had to be derived from legislation. In that regard, a view was expressed that the explanation given to that provision in the second sentence of paragraph 15, of document A/CN.9/WG.II/WP.151/Add.1 (which could also be found in document A/CN.9/641, para. 59) would more correctly express the understanding of the Working Group if it stated that “if permitted by the applicable law, bearing in mind the broad discretion with which the arbitral tribunal was

entitled to conduct the proceedings under article 15, paragraph (1), the Rules, in and of themselves, did not prevent the arbitral tribunal from issuing preliminary orders."

Revised draft — alternative proposal

107. Reservations were expressed by those favouring full adoption of an ex parte regime in the Rules both in relation to paragraph (5) and to paragraph (2) of the same article contained in document A/CN.9/WG.II/WP.152 ("the alternative proposal") which were said to insufficiently mirror the text of the UNCITRAL Arbitration Model Law.

108. Although the alternative proposal was considered to express in a simplified and unambiguous manner a right for an arbitral tribunal to grant preliminary orders, the text of that proposal received limited support. Some preference was expressed in the Working Group for the provision on preliminary orders as contained in paragraph (5). However, it was pointed out that paragraph (5) contained ambiguous wording, and that it was drafted in a negative manner, which did not reflect the approach adopted under the UNCITRAL Arbitration Model Law.

109. With a view to reconciling the diverging views expressed in the Working Group on the question of preliminary orders, the proposal was made to replace paragraph (5) by a wording along the following lines: "Nothing in these Rules shall have the effect of creating, (where it does not exist), or limiting, (where it does exist), any right of a party to apply to the arbitral tribunal for, and any power of the arbitral tribunal to issue, an interim measure without prior notice to a party."

110. A view was expressed that the proposed new wording could be inserted in the explanatory material accompanying the Rules, while retaining the text of paragraph (5). In response, it was however stated that it might not be good practice to rely on explanatory material to express an essential clarification that could be expected to be found in a self-contained instrument such as the Rules.

111. After discussion, the Working Group was generally of the view that the proposed wording mentioned in paragraph 109 above constituted an acceptable solution, because it promoted a neutral approach to the question of preliminary orders. Various drafting comments were made on that proposed wording. It was observed that not all users of the UNCITRAL Arbitration Rules would be familiar with the term "preliminary order" and therefore a better approach might be to clarify its meaning by a descriptive phrase, which was proposed to be added after the word "issue" and would read as follows: ", in either case without prior notice to a party, a preliminary order that the party not frustrate the purpose of a requested interim measure." That suggestion received support. Another suggestion was made that, in order to avoid the bracketed text contained in the proposal in paragraph 109 above, the bracketed text be deleted, and that the words "which existed outside these Rules" be inserted after the words "any right". That suggestion received support.

112. After discussion, the Working Group adopted paragraph (5) and agreed that it would read as follows: "Nothing in these Rules shall have the effect of creating a right, or of limiting any right which may exist outside these Rules, of a party to apply to the arbitral tribunal for, and any power of the arbitral tribunal to issue, in either case without prior notice to a party, a preliminary order that the party not frustrate the purpose of a requested interim measure." The Working Group agreed that references to paragraph (5) in the remainder of article 26, namely in paragraphs (3), (6) to (9) and (10), should be amended to ensure consistency of

those paragraphs with the new text adopted on preliminary orders.

Paragraph (6)

113. The Working Group adopted paragraph (6) in substance, subject to the adjustment referred to in paragraph 112 above.

Paragraph (7)

114. The Working Group adopted paragraph (7) in substance, subject to the adjustment referred to in paragraph 112 above.

Paragraph (8)

115. The Working Group adopted paragraph (8) in substance, subject to the adjustment referred to in paragraph 112 above.

Paragraph (9)

116. It was observed that paragraph (9) might have the effect that a party requesting an interim measure be liable to pay costs and damages in situations where, for instance, the conditions of article 26 had been met but the requesting party lost the arbitration. To address that concern, it was suggested to add a provision to the effect that the determination of the arbitral tribunal under paragraph (9) should be made "in light of the outcome of the case". That proposal did not receive support.

117. It was further observed that the alternative proposal for a paragraph (5) contained in document A/CN.9/WG.II/WP.152 provided a preferable solution in that it did not deal with the conditions triggering liability for costs and damages, and left those aspects to be dealt with under applicable law. That proposal read as follows: "The arbitral tribunal may rule at any time on claims for compensation of any damage wrongfully caused by the interim measure or preliminary order." The suggestion to delete the word "wrongfully" was supported for the reason that that word could receive a variety of interpretations and created legal uncertainty. It was proposed that the explanatory material should clarify the meaning of the words "at any time", as referring to any point in time during the proceedings, and not to the period immediately following the measure.

118. After discussion, the Working Group requested the Secretariat to prepare a note to assist further discussion on how the different leges arbitri dealt with the matters of liability for damages that might result from the granting of interim measures.

Paragraph (10)

119. The Working Group adopted paragraph (10) in substance, subject to the adjustment referred to in paragraph 112 above.

V. Organization of future work

120. At the close of its deliberations, the Working Group noted that it had dealt successfully with a number of difficult points. It further noted that it could not complete its review of the Rules at its current session in a manner that would bring the draft text to the level of maturity and quality required for submission to the next

session of the Commission in 2009. While the session of the Working Group had been conducted bearing in mind the hope expressed by the Commission at its forty-first session[12] and the encouragement provided by the General Assembly (A/RES/63/120) that the revised text of the Rules be finalized in 2009, the Working Group was generally of the view that it should complete its reading of the text before submitting it to the Commission. Since the Rules in their new version should remain in use for many years, the Working Group believed that the time required should be taken for meeting the high standard of UNCITRAL. The Working Group agreed to request the Commission for sufficient time to complete its work on the Rules.

121. It was clarified that, under the mandate received from the Commission at its forty-first session, the question of transparency in treaty-based investor-State arbitration was to be considered by the Working Group as a matter of priority after completion of its work on the revision of the Rules. The Working Group further considered whether it would be advisable to adopt a broader approach to the question of treaty-based investor-State arbitration. It was anticipated that additional issues might arise in the context of a discussion on transparency. However, it was also considered important not to suggest opening a broad discussion of treaty-based investor-State arbitration to preserve the general applicability of the generic Rules.

---

[12] Ibid., para. 315.

E. Note by the Secretariat on settlement of commercial disputes: Revision of the UNCITRAL Arbitration Rules, submitted to the Working Group on Arbitration at its fiftieth session (A/CN.9/WG.II/WP.154) [Original: English]

CONTENTS

I. Introduction

1. At its thirty-ninth session (New York, 19 June-7 July 2006), the Commission agreed that, in respect of future work of the Working Group, priority be given to a revision of the UNCITRAL Arbitration Rules (1976) ("the UNCITRAL Arbitration Rules" or "the Rules").[1] At its fortieth session (Vienna, 25 June-12 July 2007), the Commission noted that the UNCITRAL Arbitration Rules had not been amended since their adoption in 1976 and that the review should seek to modernize the Rules and to promote greater efficiency in arbitral proceedings. The Commission generally agreed that the mandate of the Working Group to maintain the original structure and spirit of the UNCITRAL Arbitration Rules had provided useful guidance to the Working Group in its deliberations to date and should continue to be a guiding principle for its work.[2] At its forty-first session (New York, 16 June-3 July 2008), the Commission expressed the hope that the Working Group would complete its work on the revision of the UNCITRAL Arbitration Rules in their generic form, so that the final review and adoption of the revised Rules would take place at the forty-second session of the Commission, in 2009.[3]

2. At its forty-fifth session (Vienna, 11-15 September 2006), the Working Group undertook to identify areas where a revision of the UNCITRAL Arbitration Rules

[1] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17* (A/61/17), paras. 182-187.
[2] Ibid., *Sixty-second Session, Supplement No. 17* (A/62/17), part one, para. 175.
[3] Ibid., *Sixty-third session, Supplement No. 17* (A/63/17), paras. 308-316.

might be useful. At that session, the Working Group gave preliminary indications as to various options to be considered in relation to proposed revisions, on the basis of documents A/CN.9/WG.II/WP.143 and Add.1, in order to allow the Secretariat to prepare a draft of revised Rules taking account of such indications. The report of that session is contained in document A/CN.9/614. At its forty-sixth (New York, 5-9 February 2007), forty-seventh (Vienna, 10-14 September 2007) and forty-eighth (New York, 4-8 February 2008) sessions, the Working Group discussed a draft of revised Rules, as contained in documents A/CN.9/WG.II/WP.145 and Add.1. The reports of these sessions are contained in documents A/CN.9/619, A/CN.9/641 and A/CN.9/646, respectively. At its forty-ninth session (Vienna, 15-19 September 2008), the Working Group commenced its second reading of draft articles 1 to 17 of the revised Rules on the basis of document A/CN.9/WG.II/WP.151. The report of that session is contained in document A/CN.9/665.

3. This note contains an annotated draft of revised UNCITRAL Arbitration Rules, based on the deliberations of the Working Group at its forty-ninth session. Unless otherwise indicated, all references to deliberations by the Working Group in this note are to deliberations made at the forty-ninth session of the Working Group.

II. General remarks

(a) Numbering of articles

4. The Working Group may wish to consider whether the articles of the revised Rules should be renumbered as proposed in this note. The cross references contained in the draft articles have been amended accordingly. If the Working Group decides that the articles should be renumbered, it may wish to consider whether to include in the revised Rules a table, as proposed in an annex to this note, showing the concordance between the articles of the 1976 version of the Rules and those of the revised version.

(b) Placement of the model arbitration clause and the statement of independence, and of additional provisions

5. The Working Group may wish to decide where to place the model arbitration clause and the statements of independence (A/CN.9/665, para. 22), as well as the additional provisions, if adopted, on general principles and liability of arbitrators (as contained in document A/CN.9/WG.II/WP.151/Add.1).

(c) Default rule on the role of the Secretary-General of the Permanent Court of Arbitration as appointing authority

6. It is recalled that, at the forty-sixth session of the Working Group, a proposal was made to provide as default rule that, if the parties were unable to agree on an appointing authority, the Secretary-General of the Permanent Court of Arbitration ("PCA") should act directly as the appointing authority, instead of designating an appointing authority (A/CN.9/619, para. 71). With a view to accommodating concerns expressed in relation thereto, the proposal was amended to provide that the parties should retain the right to request the Secretary-General of the PCA to appoint another appointing authority, and that the Secretary-General of

the PCA itself should be empowered to designate another appointing authority, if it considered it appropriate (A/CN.9/619, para. 72). At the forty-ninth session of the Working Group, those proposals were reiterated (A/CN.9/665, paras. 46-50). The Working Group agreed that they might need to be re-examined after completion of the second reading of the draft revised Rules, on the basis of a written proposal to be submitted to the Secretariat in time for translation before the next session of the Working Group (A/CN.9/665, para. 50).

III. Draft revised UNCITRAL Arbitration Rules

Section I. Introductory rules

Scope of application

Article 1

1. Where parties have agreed that disputes between them in respect of a defined legal relationship, whether contractual or not, shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree.

2. Unless the parties have agreed to apply a particular version of the Rules, the parties to an arbitration agreement concluded after [date of adoption by UNCITRAL of the revised version of the Rules] shall be presumed to have referred to the Rules in effect on the date of commencement of the arbitration. That presumption does not apply where the arbitration agreement has been concluded by accepting after [date of adoption by UNCITRAL of the revised version of the Rules] an offer made before that date.

3. These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.

Remarks on draft article 1

7. The Working Group adopted the substance of paragraph (1), without any modification (A/CN.9/665, para. 18).

8. The Working Group agreed to replace the word “another” by the words “a particular” in the first line of paragraph (2) (numbered paragraph (1 bis) in the former drafts of revised Rules) and with that modification, the Working Group adopted the substance of that paragraph (A/CN.9/665, para. 19).

9. The Working Group adopted the substance of paragraph (3) (numbered paragraph (2) in the 1976 version of the Rules), without any modification (A/CN.9/665, para. 20).

MODEL ARBITRATION CLAUSE FOR CONTRACTS

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules.

Note — Parties should consider adding:

(a) The appointing authority shall be ... (name of institution or person);

(b) The number of arbitrators shall be ... (one or three);

(c) The place of arbitration shall be ... (town and country);

(d) The language(s) to be used in the arbitral proceedings shall be ...

Remarks on the draft model arbitration clause for contracts

10. The Working Group agreed to replace the words "may wish to" appearing in the chapeau of the note to the model arbitration clause by the word "should", in order to indicate to the parties the importance of agreeing on the items listed. With that modification, the draft model arbitration clause was adopted in substance by the Working Group (A/CN.9/665, para. 21).

Notice and calculation of periods of time

Article 2

1. Any notice, including a notification, communication or proposal shall be delivered by any means of communication that provide a record of its transmission.

2. For the purposes of these Rules, any notice, including a notification, communication or proposal, is deemed to have been received if it is physically delivered to the addressee or if it is delivered at its habitual residence, place of business or designated address, or, if none of these can be found after making reasonable inquiry, then at the addressee's last-known residence or place of business. Notice shall be deemed to have been received on the day it is so delivered.

3. For the purposes of calculating a period of time under these Rules, such period shall begin to run on the day following the day when a notice, notification, communication or proposal is received. If the last day of such period is an official holiday or a non-business day at the residence or place of business of the addressee, the period is extended until the first business day which follows. Official holidays or non-business days occurring during the running of the period of time are included in calculating the period.

Remarks on draft article 2

11. Paragraph (1) (numbered paragraph (1 bis) in the former drafts of revised Rules) seeks to reflect the decision of the Working Group to expressly include language which authorizes delivery of notice by any means of communication that provide a record of transmission (A/CN.9/665, para. 29). It is placed as the first paragraph of that article to take account of the decision to describe the acceptable means of communication and only thereafter to provide for a presumption regarding receipt of notice delivered through such means of communication (A/CN.9/665, paras. 28 and 29).

12. At its forty-eighth session, the Working Group agreed to replace the word "mailing" appearing before the word "address" by the word "designated" in the first sentence of paragraph (2) (numbered paragraph (1) in the 1976 version of the

Rules) (A/CN.9/646, para. 82), and this constitutes the only modification made to that paragraph compared to its original version. The Working Group may wish to consider whether additional language should be included in paragraph (2) to provide more guidance to parties, and in particular to limit the risk of communication in arbitration being made through general e-mail addresses that would not be expected to be used for such purposes. Such additional language could provide that any notice may also be delivered to any address agreed by the parties, or failing such agreement, according to the practice followed by the parties in their previous dealings.

13. Paragraph (3) (numbered paragraph (2) in the 1976 version of the Rules) is reproduced without any modification from the 1976 version of the Rules, and was adopted in substance by the Working Group (A/CN.9/665, para. 31).

Notice of arbitration

Article 3

1. The party or parties initiating recourse to arbitration (hereinafter called the "claimant") shall give to the other party or parties (hereinafter called the "respondent") a notice of arbitration.

2. Arbitral proceedings shall be deemed to commence on the date on which the notice of arbitration is received by the respondent.

3. The notice of arbitration shall include the following:

(a) A demand that the dispute be referred to arbitration;

(b) The names and contact details of the parties;

(c) Identification of the arbitration agreement that is invoked;

(d) Identification of any contract or other legal instrument out of or in relation to which the dispute arises or, in the absence of such contract or instrument, a brief description of the relevant relationship;

(e) A brief description of the claim and an indication of the amount involved, if any;

(f) The relief or remedy sought;

(g) A proposal as to the number of arbitrators, language and place of arbitration, if the parties have not previously agreed thereon.

4. The notice of arbitration may also include:

(a) A proposal for the appointment of an appointing authority referred to in article 6, paragraph (1);

(b) A proposal for the appointment of a sole arbitrator referred to in article 8, paragraph (1);

(c) Notification of the appointment of an arbitrator referred to in article 9 or article 10.

5. The constitution of the arbitral tribunal shall not be hindered by any controversy with respect to the sufficiency of the notice of arbitration, which

shall be finally resolved by the arbitral tribunal. In the event of such a controversy, the arbitral tribunal shall proceed as it considers appropriate.

Remarks on draft article 3

14. The Working Group adopted the substance of paragraphs (1), (2) and (3), without any modification (A/CN.9/665, paras. 34 and 35).

15. The Working Group agreed that the decision by the claimant that its notice of arbitration would constitute its statement of claim should be postponed until the stage of proceedings reflected in article 18. It therefore agreed to delete from paragraph (4) its last subparagraph, which read: "The statement of claim referred to in article 18" (A/CN.9/665, para. 36). With that modification, the Working Group adopted the substance of paragraph (4) (A/CN.9/665, para. 37).

16. The Working Group may wish to consider whether, as a result of the proposal to insert the provisions on the response to the notice of arbitration in a separate article (A/CN.9/665, para. 32), the provision formerly numbered article 3, paragraph (7), dealing with the consequences of an incomplete notice of arbitration or incomplete or missing response thereof, should be split into two paragraphs: article 3, paragraph (5) would deal with the consequences of an incomplete notice of arbitration, and article 4, paragraph (3) would deal with the consequences of a missing, incomplete or late response thereof (see below, para. 19).

Response to the notice of arbitration

Article 4

1. Within 30 days of the receipt of the notice of arbitration, the respondent shall communicate to the claimant a response to the notice of arbitration, which shall include:

(a) The name and contact details of each respondent;

(b) A response to the information set forth in the notice of arbitration, pursuant to article 3, paragraph (3) (c), (d), (e), (f) and (g).

2. The response to the notice of arbitration may also include:

(a) Any plea that an arbitral tribunal constituted under these Rules lacks jurisdiction;

(b) A proposal for the appointment of an appointing authority referred to in article 6, paragraph (1);

(c) A proposal for the appointment of a sole arbitrator referred to in article 8, paragraph (1);

(d) Notification of the appointment of an arbitrator referred to in article 9 or article 10;

(e) A brief description of counterclaims or claims for the purpose of a set-off, if any, including where relevant, an indication of the amounts involved, and the relief or remedy sought.

3. The constitution of the arbitral tribunal shall not be hindered by failure of the respondent to communicate a response to the notice of arbitration, or by

an incomplete or late response to the notice of arbitration. In either event, the arbitral tribunal shall proceed as it considers appropriate.

Remarks on draft article 4

17. In the former drafts of the revised Rules, the provisions on response to the notice of arbitration were included in article 3. The Working Group noted that it may be preferable to insert those provisions in a separate article (A/CN.9/665, para. 32).

18. Paragraphs (1) and (2) (numbered article 3, paragraphs (5) and (6) in the former drafts of revised Rules) take account of comments made in the Working Group to:

- provide that any plea that an arbitral tribunal lacks jurisdiction be part of optional items under paragraph (2) (A/CN.9/665, para. 39);
- include in paragraph (1) (b) a reference to article 3, paragraph (3) (g) in order to put it beyond doubt that the respondent should provide a response to the claimant on the number of arbitrators (A/CN.9/665, para. 67).

19. The Working Group may wish to consider whether, as a result of the proposal to insert the provisions on the response to the notice of arbitration in a separate article (A/CN.9/665, para. 32), the provision formerly numbered article 3, paragraph (7) dealing with the consequences of an incomplete notice of arbitration or incomplete or missing response thereto should be split into two paragraphs: article 3, paragraph (5) would deal with the consequences of an incomplete notice of arbitration, and article 4, paragraph (3) would deal with the consequences of a missing, incomplete or late response thereof (see above, para. 16).

Representation and assistance

Article 5

Each party may be represented or assisted by persons chosen by it. The names and addresses of such persons must be communicated to all parties and to the members of the arbitral tribunal. Such communication must specify whether the appointment is being made for purposes of representation or assistance. Where a person is to act as a representative of a party, the arbitral tribunal, itself or at the request of any party, may at any time require proof of authority granted to the representative in such a form as the arbitral tribunal may determine.

Remarks on draft article 5 [numbered article 4 in the 1976 version of the Rules]

20. Article 5 includes the drafting modifications agreed by the Working Group (A/CN.9/665, paras. 43-45).

Designating and appointing authorities

Article 6

1. Unless the appointing authority has already been agreed, a party may at any time propose the name or names of one or more institutions or persons, including the Secretary-General of the Permanent Court of Arbitration at the Hague (hereinafter called the “the PCA”), one of whom would serve as

appointing authority.

2. If all parties have not agreed on the choice of an appointing authority within 30 days after a proposal made in accordance with paragraph (1) has been received by all other parties, any party may request the Secretary-General of the PCA to designate the appointing authority.

3. If the appointing authority refuses to act, or if it fails to appoint an arbitrator within 30 days after it receives a party's request to do so, any party may request the Secretary-General of the PCA to designate an appointing authority. If the appointing authority refuses or fails to make any decision on the fees of the members of the arbitral tribunal within 30 days after it receives a party's request to do so under article 39, paragraph (4), any party may request the Secretary-General of the PCA to make that decision.

4. In exercising its functions under these Rules, the appointing authority may require from any party the information it deems necessary and it shall give the parties an opportunity to present their views in any manner it considers appropriate. All communications between a party and the appointing authority or the Secretary-General of the PCA shall also be provided by the sender to all other parties.

5. When the appointing authority is requested to appoint an arbitrator pursuant to articles 8, 9, 10 or 15, the party making the request shall send to the appointing authority copies of the notice of arbitration and, if it exists, any response to the notice of arbitration.

6. The appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.

Remarks on draft article 6 [numbered article 4 bis in the former drafts of revised Rules]

21. Paragraphs (1) and (4) include the drafting modifications agreed by the Working Group (A/CN.9/665, paras. 51 and 54, respectively). With those modifications, article 6 was adopted in substance by the Working Group (A/CN.9/665, paras. 51-56).

Section II. Composition of the arbitral tribunal

Number of arbitrators

Article 7

1. If the parties have not previously agreed on the number of arbitrators, and if within 30 days after the receipt by the respondent of the notice of arbitration the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed.

2. Notwithstanding paragraph (1), if no party has responded to a proposal to appoint a sole arbitrator within the time limit provided for in paragraph (1) and the party or parties concerned have failed to appoint a second arbitrator in accordance with article 9 or article 10, the appointing authority may, at the

request of a party, appoint a sole arbitrator pursuant to the procedure provided for in article 8 if it determines that, in view of the circumstances of the case, this is more appropriate.

Remarks on draft article 7 [numbered article 5 in the 1976 version of the Rules]

22. Paragraph (1) reflects the decision of the Working Group to maintain the default rule, as contained in article 5 of the 1976 version of the Rules, with the adjustment that the three-arbitrator default rule would apply if the parties failed to reach an agreement on the number of arbitrators, and did not agree that there should be only one arbitrator within the 30-day time limit provided for responding to the notice of arbitration under article 4, paragraph (1) (A/CN.9/665, paras. 57-61, 65-67).

23. Paragraph (2) provides for a corrective mechanism involving the appointing authority in case a party (or parties in case of multi-party arbitration), more likely the respondent, does not participate in the determination of the composition of the arbitral tribunal, and the arbitration case does not warrant the appointment of a three-member arbitral tribunal (A/CN.9/665, paras. 62-64).

Appointment of arbitrators (Articles 8 to 10)

Article 8

1. If the parties have agreed that a sole arbitrator is to be appointed, and if within 30 days after receipt by all other parties of a proposal for the appointment of a sole arbitrator, the parties have not reached agreement on the choice of a sole arbitrator, the sole arbitrator shall, at the request of a party, be appointed by the appointing authority.

2. The appointing authority shall appoint the sole arbitrator as promptly as possible. In making the appointment the appointing authority shall use the following list-procedure, unless the parties agree that the list-procedure should not be used or unless the appointing authority determines in its discretion that the use of the list-procedure is not appropriate for the case:

(a) The appointing authority shall communicate to each of the parties an identical list containing at least three names;

(b) Within 15 days after the receipt of this list, each party may return the list to the appointing authority after having deleted the name or names to which it objects and numbered the remaining names on the list in the order of its preference;

(c) After the expiration of the above period of time the appointing authority shall appoint the sole arbitrator from among the names approved on the lists returned to it and in accordance with the order of preference indicated by the parties;

(d) If for any reason the appointment cannot be made according to this procedure, the appointing authority may exercise its discretion in appointing the sole arbitrator.

Remarks on draft article 8 [numbered article 6 in the 1976 version of the Rules]

24. The Working Group agreed to add the words "at the request of a party" in paragraph (1) and to delete them from both the first sentence of the chapeau to paragraph (2), and paragraph (2) (a). With those modifications, the Working Group adopted the substance of article 8 (A/CN.9/665, para. 68).

Article 9

1. If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the arbitral tribunal.

2. If within 30 days after the receipt of a party's notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator it has appointed, the first party may request the appointing authority to appoint the second arbitrator. [The first party may also request the appointing authority to appoint a sole arbitrator in accordance with article 7, paragraph (2).]

3. If within 30 days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the presiding arbitrator, the presiding arbitrator shall be appointed by the appointing authority in the same way as a sole arbitrator would be appointed under article 8.

Remarks on draft article 9 [numbered article 7 in the 1976 version of the Rules]

25. The Working Group adopted the substance of article 9, without any modification (A/CN.9/665, para. 69). The Working Group may wish to decide whether the words in square brackets in paragraph (2) should be added, for the sake of consistency with article 7, paragraph (2).

Article 10

1. For the purposes of article 9, paragraph (1), where three arbitrators are to be appointed and there are multiple parties as claimant or as respondent, unless the parties have agreed to another method of appointment of arbitrators, the multiple parties jointly, whether as claimant or as respondent, shall appoint an arbitrator.

2. If the parties have agreed that the arbitral tribunal is to be composed of a number of arbitrators other than one or three, the arbitrators shall be appointed according to the method agreed upon by the parties.

3. In the event of any failure to constitute the arbitral tribunal under paragraphs (1) and (2), the appointing authority shall, at the request of any party, constitute the arbitral tribunal, and in doing so, may revoke any appointment already made, and appoint or reappoint each of the arbitrators and designate one of them as the presiding arbitrator. [The appointing authority may also decide, at the request of a party, to appoint a sole arbitrator pursuant to article 7, paragraph (2).]

Remarks on draft article 10 [numbered article 7 bis in the former drafts of revised Rules]

26. The Working Group adopted the substance of article 10, without any modification (A/CN.9/665, para. 71). The Working Group may wish to decide whether the words in square brackets in paragraph (2) should be added, for the sake of consistency with article 7, paragraph (2).

Remarks on article 8 of the 1976 version of the Rules

27. The Working Group agreed to the deletion of article 8 of the 1976 version of the Rules (A/CN.9/665, para. 72). The substance of article 8, paragraph (1) has been placed in article 6 on the designating and appointing authorities. The Working Group might wish to decide whether article 8, paragraph (2) of the 1976 version of the Rules should be retained, and if so, under which article that paragraph should be placed. One option could be to place that paragraph under article 11 below. That paragraph reads as follows: "Where the names of one or more persons are proposed for appointment as arbitrators, their full names, addresses and nationalities shall be indicated, together with a description of their qualifications."

Disclosures by and challenge of arbitrators (Articles 11 to 14)

Article 11

When a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator, from the time of his or her appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties and the other members of the arbitral tribunal unless they have already been informed by him or her of these circumstances.

Model statements of independence pursuant to article 11 of the Rules

No circumstances to disclose: I am impartial and independent of each of the parties and intend to remain so. To the best of my knowledge, there are no circumstances, past or present, likely to give rise to justifiable doubts as to my impartiality or independence. I hereby undertake promptly to notify the parties and the other members of the arbitral tribunal of any such circumstances that may subsequently come to my attention during this arbitration.

Circumstances to disclose: I am impartial and independent of each of the parties and intend to remain so. Attached is a statement made pursuant to article 11 of the UNCITRAL Arbitration Rules of (a) my past and present professional, business and other relationships with the parties and (b) any other relevant circumstances. [Include statement] I hereby undertake promptly to notify the parties and the other members of the arbitral tribunal of any such further relationships or circumstances that may subsequently come to my attention during this arbitration.

Remarks on draft article 11 [numbered article 9 in the 1976 version of the Rules] and the model statements of independence

28. The Working Group agreed to add the words "disclosures by" in the title of article 11 and the words "and the other members of the arbitral tribunal" after the

word "parties" in the second sentence of article 11. With those modifications, the Working Group adopted article 11 in substance (A/CN.9/665, paras. 73 and 74).

29. The model statements of independence seek to reflect the discussions of the Working Group (A/CN.9/665, paras. 75-80). The purpose of the second statement of independence is to allow parties to decide whether there are actually circumstances that give rise to justifiable doubts as to the arbitrator's impartiality or independence. The modifications made to the second statement of independence aim at ensuring consistency of the statement with article 11.

Article 12

1. Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.

2. A party may challenge the arbitrator appointed by it only for reasons of which it becomes aware after the appointment has been made.

Remarks on draft article 12 [numbered article 10 in the 1976 version of the Rules]

30. The Working Group adopted the substance of article 12, without any modification (A/CN.9/665, para. 81).

Article 13

1. A party that intends to challenge an arbitrator shall send notice of its challenge within 15 days after the appointment of the challenged arbitrator has been notified to the challenging party or within 15 days after the circumstances mentioned in articles 11 and 12 became known to that party.

2. The notice of challenge shall be communicated to all other parties, to the arbitrator who is challenged and to the other members of the arbitral tribunal. The notice of challenge shall state the reasons for the challenge.

3. When an arbitrator has been challenged by a party, all parties may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his or her office. In neither case does this imply acceptance of the validity of the grounds for the challenge. In both cases the replacement of the arbitrator shall be made in accordance with the procedure provided in article 15.

Remarks on draft article 13 [numbered article 11 in the 1976 version of the Rules]

31. The Working Group adopted the substance of article 13, with the following modifications:

- in paragraph (2), deletion of the words "shall be in writing and" (A/CN.9/665, para. 84);
- in the first sentence of paragraph (3), inclusion of the words "all parties" (A/CN.9/665, paras. 85-88);
- in paragraph (3), deletion of the last sentence, as it was considered redundant with article 15 (1) (formerly numbered article 13 (1)), and reference to the procedure in article 15 for the replacement of the arbitrator (A/CN.9/665, para. 91).

32. The Working Group may wish to note that, for the sake of consistency with the language used in paragraph (1), paragraph (2) has been modified as follows: the words “The challenge shall be notified” have been replaced by the words “The notice of challenge shall be communicated” in the first sentence, and the words “The notification” have been replaced by the words “The notice of challenge” in the second sentence.

Article 14

1. If, within 15 days from the date of the notice of challenge, any party does not agree to the challenge or the challenged arbitrator does not withdraw, the party making the challenge may pursue the challenge. In that case, it shall seek a decision on the challenge by the appointing authority within 30 days from date of the notice of challenge. If no appointing authority has been appointed or designated, a decision may be sought within 15 days from the appointment or designation of the appointing authority. In case of successful challenge, the replacement of the arbitrator shall be made in accordance with the procedure provided in article 15.

2. In the event that an arbitrator fails to act or in the event of de jure or de facto impossibility of his performing his functions, the procedure in respect of the challenge of an arbitrator as provided in the preceding articles and in paragraph 1 shall apply.

Remarks on draft article 14 [numbered article 12 in the 1976 version of the Rules]

33. The Working Group adopted the substance of article 14, with the following modifications (A/CN.9/665, para. 98):

- inclusion of the words “any party” after the words “notice of challenge” in the first sentence (A/CN.9/665, para. 93);
- replacement in the first sentence of the word “and” by the word “or”, in order to clarify the applicable procedure (A/CN.9/665, para. 97);
- reference to the procedure in article 15 for the replacement of the arbitrator in case of successful challenge (A/CN.9/665, para. 91).

Replacement of an arbitrator

Article 15

1. Subject to paragraph (2), in the event that it is necessary to replace an arbitrator during the course of the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the procedure provided for in articles 8 to 11 that was applicable to the appointment or choice of the arbitrator being replaced. This procedure shall apply even if during the process of appointing the arbitrator to be replaced, a party had failed to exercise its right to appoint or to participate in the appointment.

2. If, at the request of a party, the appointing authority determines that, in view of the exceptional circumstances of the case, it would be justified for a party to be deprived of its right to appoint a substitute arbitrator, the appointing authority may, after giving an opportunity to the parties, the arbitrators, and the arbitrator being replaced to express their views: (a) appoint the substitute arbitrator; or (b) if the same occurs after the closure of the

hearings, authorize the other arbitrators to proceed with the arbitration and make any decision or award.

Remarks on draft article 15 [numbered article 13 in the 1976 version of the Rules]

34. Paragraph (1) establishes a general rule on the appointment of a substitute arbitrator, "when it is necessary to replace an arbitrator", regardless of the cause for such replacement. Paragraph (1) was adopted in substance by the Working Group (A/CN.9/665, para. 103).

35. Paragraph (2) corresponds to a proposal made in the Working Group to address the situation where a party, in exceptional circumstances, has to be deprived of its right to appoint the substitute arbitrator. The Working Group agreed to give further consideration to that proposal (A/CN.9/665, paras. 104-117).

Repetition of hearings in the event of the replacement of an arbitrator

Article 16

If an arbitrator is replaced, the proceedings shall resume at the stage where the arbitrator who was replaced ceased to perform his or her functions, unless the arbitral tribunal decides otherwise.

Remarks on draft article 16 [numbered article 14 in the 1976 version of the Rules]

36. The Working Group adopted the substance of article 16, without any modification (A/CN.9/665, para. 118).

Section III. Arbitral proceedings

General provisions

Article 17

1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given an opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.

2. The arbitral tribunal may, at any time, after inviting the parties to express their views, extend or abridge any period of time prescribed under the Rules or agreed by the parties.

3. If at an appropriate stage of the proceedings any party so requests, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials.

4. All communications to the arbitral tribunal by one party shall at the same time be communicated by that party to all other parties, except for communication under article [26, paragraph (5)].

5. The arbitral tribunal may, at the request of any party, allow one or more third persons to be joined in the arbitration as a party provided such person is a party to the arbitration agreement, unless the arbitral tribunal finds, after giving all parties including the person or persons to be joined the opportunity to be heard, that joinder should not be permitted because of prejudice to any of those parties. The arbitral tribunal may make a single award or several awards in respect of all parties so involved in the arbitration.

Remarks on draft article 17 [numbered article 15 in the 1976 version of the Rules]

37. Paragraph (1) was adopted in substance by the Working Group, without any modification (A/CN.9/665, para. 119).

38. Paragraph (2) (numbered paragraph (1 bis) in the former drafts of revised Rules) includes the modifications agreed by the Working Group A/CN.9/665, paras. 123 and 125).

39. Paragraph (3) (numbered paragraph (2) in the former drafts of revised Rules) was adopted in substance by the Working Group, without any modification (A/CN.9/665, para. 126).

40. In paragraph (4) (numbered paragraph (3) in the former drafts of revised Rules), the words “except for communication under article [26, paragraph (5)]” are proposed to be included for the sake of consistency with that article, should the Working Group decide to include a provision on preliminary orders in article 26, paragraph (5) (A/CN.9/665, para. 127).

41. The Working Group may wish to further consider the language in paragraph (5) on joinder (numbered paragraph (4) in the former drafts of revised Rules) which seeks to reflect the decision made by the Working Group that the arbitral tribunal may decide that a party be joined in the arbitration without the consent of that party, but before making its decision, the tribunal should provide that party with an opportunity to be heard and decide on the prejudice (A/CN.9/665, paras. 128-135).

Place of arbitration

Article 18

1. If the parties have not previously agreed on the place of arbitration, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case. The award shall be deemed to be made at the place of arbitration.

2. The arbitral tribunal may meet at any location it considers appropriate for deliberations. Unless otherwise agreed by the parties, the arbitral tribunal may meet at any location it considers appropriate for hearings and meetings.

Remarks on draft article 18 [numbered article 16 in the 1976 version of the Rules]

42. The Working Group adopted the substance of paragraph (1), with the deletion of the words "including the convenience of the parties" (A/CN.9/665, para. 136).

43. Paragraph (2) is split into two sentences, to reflect the decision of the Working Group to clarify that the arbitrators may deliberate at any location they consider appropriate (A/CN.9/665, para. 137). As decided by the Working Group, the words "consultations" and the words "Notwithstanding the provisions of paragraph (1)" have been deleted (A/CN.9/665, paras. 138 and 139).

Language

Article 19

1. Subject to an agreement by the parties, the arbitral tribunal shall, promptly after its appointment, determine the language or languages to be used in the proceedings. This determination shall apply to the statement of claim, the statement of defence, and any further written statements and, if oral hearings take place, to the language or languages to be used in such hearings.

2. The arbitral tribunal may order that any documents annexed to the statement of claim or statement of defence, and any supplementary documents or exhibits submitted in the course of the proceedings, delivered in their original language, shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

Remarks on draft article 19 [numbered article 17 in the 1976 version of the Rules]

44. The Working Group agreed to maintain the references to "languages" in plural and adopted the substance of article 19 (A/CN.9/665, paras. 140 and 141).

Annex

Table of concordance

Revised version of the UNCITRAL Arbitration Rules	*1976 version of the UNCITRAL Arbitration Rules*
Section I. Introductory rules	**Section I. Introductory rules**
Scope of application (article 1) [and model arbitration clause for contracts]	Scope of application (article 1) and model arbitration clause
Notice and calculation of periods of time (article 2)	Notice, calculation of periods of time (article 2)
Notice of arbitration (article 3)	Notice of arbitration (article 3)
Response to the notice of arbitration (article 4)	-
Representation and assistance (article 5)	Representation and assistance (article 4)
Designating and appointing authorities (article 6)	-
Section II. Composition of the arbitral tribunal	**Section II. Composition of the arbitral tribunal**
Number of arbitrators (article 7)	Number of arbitrators (article 5)
Appointment of arbitrators (articles 8 to 10)	Appointment of arbitrators (articles 6 to 8)
Disclosure by and challenge of arbitrators (articles 11 to 14) – [Model statements of independence]	Challenge of arbitrators (articles 9 to 12)
Replacement of an arbitrator (article 15)	Replacement of an arbitrator (article 13)
Repetition of hearings in the event of the replacement of an arbitrator (article 16)	Repetition of hearings in the event of the replacement of an arbitrator (article 14)
Section III. Arbitral proceedings	**Section III. Arbitral proceedings**
General provisions (article 17)	General provisions (article 15)
Place of arbitration (article 18)	Place of arbitration (article 16)
Language (article 19)	Language (article 17)

III. INSOLVENCY LAW

A. Report of the Working Group on Insolvency Law on the work of its thirty-fifth session (Vienna, 17-21 November 2008)

(A/CN.9/666) [Original: English]

CONTENTS

I. Introduction

1. At its thirty-ninth session in 2006, the Commission agreed that the topic of the treatment of corporate groups in insolvency was sufficiently developed for referral to Working Group V (Insolvency Law) for consideration 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.

2. The Working Group agreed at its thirty-first session, held in Vienna from 11 to 15 December 2006, that the UNCITRAL Legislative Guide on Insolvency Law and the UNCITRAL Model Law on Cross Border Insolvency provided a sound basis for the unification of insolvency law, and that the current work was intended to complement those texts, not to replace them (see A/CN.9/618, para. 69). A possible method of work would entail the consideration of those provisions contained in existing texts that might be relevant in the context of corporate groups and the identification of those issues that required additional discussion and the preparation

of additional recommendations. Other issues, although relevant to corporate groups, could be treated in the same manner as in the Legislative Guide and Model Law. It was also suggested that the possible outcome of that work might be in the form of legislative recommendations supported by a discussion of the underlying policy consideration (see A/CN.9/618, para. 70).

3. The Working Group continued its consideration of the treatment of corporate groups in insolvency at its thirty-second session in May 2007, on the basis of notes by the Secretariat covering both domestic and international treatment of corporate groups (A/CN.9/WG.V/WP.76 and Add.1). For lack of time, the Working Group did not discuss the international treatment of corporate groups contained in document A/CN.9/WG.V/WP.76/Add.2.

4. At its thirty-third session in November 2007 and at its thirty-fourth session in March 2008, the Working Group continued its discussion of the treatment of enterprise groups, previously referred to as corporate groups, in insolvency, on the basis of notes by the Secretariat covering domestic treatment of enterprise groups (A/CN.9/WG.V/WP.78 and Add.1 and A/CN.9/WG.V/WP.80 and Add.1 respectively).

II. Organization of the session

5. Working Group V (Insolvency Law), which was composed of all States members of the Commission, held its thirty-fifth session in Vienna from 17 to 21 November 2008. The session was attended by representatives of the following States members of the Working Group: Algeria, Austria, Belarus, Bolivia, Bulgaria, Canada, China, Colombia, Czech Republic, France, Germany, Greece, Guatemala, India, Iran (Islamic Republic of), Italy, Japan, Kenya, Latvia, Lebanon, Malaysia, Mexico, Mongolia, Morocco, Nigeria, Norway, Poland, Republic of Korea, Russian Federation, Republic of Serbia, Spain, Switzerland, Thailand, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

6. The session was also attended by observers from the following States: Angola, Argentina, Belgium, Congo, Côte d'Ivoire, Denmark, Dominican Republic, Indonesia, Iraq, Ireland, Jordan, Kiribati, Lithuania, Netherlands, Peru, Qatar, Romania, Saudi Arabia, Slovakia, Slovenia, Togo, Tunisia and Yemen.

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

(a) **Organizations of the United Nations system**: International Monetary Fund (IMF);

(b) **Intergovernmental organizations**: European Central Bank (ECB), International Association of Insolvency Regulators (IAIR), and Organization For Economic Co-operation and Development (OECD);

(c) Invited **international non-governmental organizations**: Alumni Association of the Willem C. Vis International Commercial Arbitration Moot (MAA), American Bar Association (ABA), American Bar Foundation (ABF), Centre for International Legal Studies (CILS), INSOL International (INSOL), International Bar Association (IBA), International Credit Insurance and Surety Association

(ICISA), International Insolvency Institute (III), International Women's Insolvency & Restructuring Confederation (IWIRC), International Working Group on European Insolvency Law (IWGEIL), and Union internationale des avocats (UIA).

8. The Working Group elected the following officers:

Chairman: Mr. Wisit Wisitsora-At (Thailand)

Rapporteur: Mr. Kofo Salam-Alada (Nigeria)

9. The Working Group had before it the following documents:

(a) Annotated provisional agenda (A/CN.9/WG.V/WP.81);

(b) A note by the Secretariat on the treatment of enterprise groups in insolvency (A/CN.9/WG.V/WP.82 and Add.1-4);

(c) A note by the Secretariat on cooperation, communication and coordination in cross-border insolvency proceedings (A/CN.9/WG.V/WP.83);

(d) An extract from the Report of Working Group VI (Security Interests) on the work of its fourteenth session (Vienna, 20-24 October 2008) (A/CN.9/667, paragraphs 129-143).

10. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of cooperation, communication and coordination in cross-border insolvency proceedings, the treatment of enterprise groups in insolvency and the impact of insolvency on a security right in intellectual property.
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

11. The Working Group commenced its discussion of cooperation, communication and coordination in insolvency proceedings on the basis of document A/CN.9/WG.V/WP.83 and continued its discussion of the treatment of enterprise groups in insolvency on the basis of documents A/CN.9/WG.V/WP.82 and Add.1-4 and other documents referred therein. The Working Group also considered the impact of insolvency on a security right in intellectual property on the basis of paragraphs 129-143 of document A/CN.9/667. The deliberations and decisions of the Working Group on these topics are reflected below.

IV. Cooperation, communication and coordination in cross-border insolvency proceedings

12. The Working Group commenced its discussion of cooperation, communication and coordination in insolvency proceedings on the basis of document A/CN.9/WG.V/WP.83, the draft UNCITRAL Notes on cooperation, communication and coordination in cross-border insolvency proceedings ("the Notes").

13. The Working Group expressed its appreciation for the completeness and comprehensiveness of the Notes and emphasized their importance in view of the current financial crisis and the increasing incidence of insolvency cases involving cross-border proceedings.

A. Format

14. The question was raised of how the Notes should be published, whether, for example, as a stand-alone publication or a complement to the UNCITRAL Legislative Guide on Insolvency Law ("the Guide") or the UNCITRAL Model Law on Cross-border Insolvency ("the Model Law"). Broad support was expressed in favour of publishing the Notes as a stand-alone publication on the basis that that approach would both recognize the important educational function of the Notes and facilitate and expedite their wide dissemination. It was observed that publication as a complement to the Model Law might unnecessarily limit the applicability of the Notes, as the Model Law had not yet been universally enacted. Moreover, care should be taken to ensure the Notes were not viewed as replacing the Model Law, but rather expanding upon articles 25-27 of that text. It was suggested that the Notes could be published in a form, for example on the UNCITRAL website, that would enable them to be regularly updated as practice with respect to cross-border agreements developed.

B. Content

15. The Working Group recalled that the Notes were based on the Commission's mandate that the Secretariat should compile practical experience with regard to the use and negotiation of cross-border insolvency agreements.[1] In that light, it was emphasized that the Notes constituted a descriptive, not a prescriptive, text.

16. The Working Group viewed the inclusion of references to individual cross-border agreements as particularly useful, as they constituted good illustrations of current practice. It was pointed out that some cross-border agreements were made between parties that might have had a vested interest in the content of the agreement and while most addressed legitimate topics, some went further, addressing substantive issues that might not always need to be included.

---

[1] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17* (A/61/17), subpara. 209 (c) and *Sixty-second Session, Supplement No. 17* (A/62/17), part I, paras. 190-191.

17. The Working Group noted that the use of cross-border agreements might vary from jurisdiction to jurisdiction, depending upon the respective powers of judges and insolvency representatives and the content of the insolvency law. The Notes only described existing practice with respect to the use of cross-border agreements and did not suggest that those practices could or should be applicable in all jurisdictions.

18. In addition it was noted that while cross-border agreements constituted informal contracts that could be freely negotiated, they were subject to applicable national law. The Notes did not suggest that an agreement could be used to circumvent national law or the obligations of the parties under that law.

19. It was observed that cross-border agreements could be used to facilitate coordination and cooperation in the case of a single debtor, as well as an enterprise group.

20. With respect to drafting, it was suggested that the language should not be prescriptive and should not offer guidance as to particular approaches. It was also suggested that the notion of comity should be broadly described to reflect the approach adopted in article 7 of the UNCITRAL Model Law. The Working Group agreed that additional sample clauses on procedural aspects of communication, drawing upon the relevant text of Part III of the Notes, should be included.

C. Title

21. With respect to the final title of the Notes, it was suggested that the possibility of referring to the text as a guide might be kept in mind. In response, it was said that since the Notes were descriptive in nature, they did not offer guidance and should not constitute a guide. The Working Group agreed to defer a decision on the title to a later stage.

D. Circulation of the Notes

22. The Working Group agreed that the Notes should be circulated to Governments for comment prior to its thirty-sixth session in 2009. A revised version should be presented to the Working Group at that session, with a view to consideration and adoption by the Commission at its forty-second session in 2009. In that regard, the Working Group noted that the Commission had decided to plan the work at its forty-second session in 2009 to allow it to devote, if necessary, time to discussing the recommendations of the Working Group on the Notes.[2]

V. Treatment of enterprise groups in insolvency

23. The Working Group continued its discussion of the treatment of enterprise groups in insolvency on the basis of documents A/CN.9/WG.V/WP.82 and Add.1-4 and other documents referred to therein, commencing with international issues as set forth in Add.4.

---

[2] Ibid., *Sixty-third Session, Supplement No. 17* (A/63/17), para. 321.

A. International issues

1. Centre of main interests (COMI)

24. The Working Group first considered the issue of "centre of main interests" as it related to an enterprise group, and in particular the purpose for which it might be important to determine the COMI of an enterprise group and how it might be defined.

25. Various suggestions were made with respect to the purposes for which it might be useful to determine the COMI of an enterprise group. Those included: to determine the jurisdiction for commencement of proceedings with respect to insolvent members of the enterprise group; to facilitate reorganization of the assets of the group; to reduce the scope for forum shopping; to facilitate coordination and cooperation by identifying the group member that would take the lead and determine how proceedings would be coordinated and cooperation would occur; to determine the law that might govern the proceedings; to determine issues relating to the conduct and management of the proceedings, including issues such as cash control, group reorganization plans and facilitating post-commencement finance or to facilitate substantive consolidation of group members.

26. It was generally agreed that, although perhaps desirable, it would be difficult to reach a definition of an enterprise group COMI in order to limit, for example, the commencement of parallel proceedings or to facilitate coordination and cooperation of multiple proceedings commenced with respect to group members. It was emphasized that one key issue with respect to a definition of enterprise group COMI would be the extent to which that definition was accepted, widely adopted and voluntarily enforced by the courts of States affected by it in particular cross-border insolvency cases.

27. In the absence of a system such as in the European Union with respect to automatic recognition of proceedings commenced in other jurisdictions, it was noted that it would be difficult to avoid parallel proceedings being commenced in multiple jurisdictions, with each seeking to be main proceedings. Such a situation underlined the importance of using cross-border agreements to facilitate coordination and cooperation. It was also noted that determining an enterprise group COMI would not necessarily simplify the number of different laws that might apply in insolvency proceedings and, in particular, that the rights and protection available to creditors in jurisdictions other than the location of the COMI could not be thereby affected. A further observation was that substantive consolidation would be very difficult to achieve without the unanimous support of the courts of all States in which insolvency proceedings had commenced with respect to group members.

28. Different suggestions were also made as to how the COMI of a group might be identified and whether a single factor would be sufficient. Factors suggested included: the place from which the financial affairs of the group were coordinated; the place where group policy was set and management decisions made; the place where manufacturing occurred; the place from which the group was controlled, in accordance with the explanation of control in the glossary (A/CN.9/WG.V/WP.82); and the place of the registered office of the group, as set forth in article 16 (3) of the Model Law.

29. In response, it was observed that a single factor, such as the financial focus of the group, might be too narrow. For example, the financial parent of the group might not be insolvent and therefore not involved in the insolvency proceedings, the financial focus might be in a location different to the main business activities of the group or there might be particular reasons, such as the availability of taxation advantages, for choosing one location over another for the financial centre of a group, unrelated to the location of its business activity.

30. It was also observed that while the presumption contained in article 16 (3) of the Model Law could apply to members of an enterprise group, it could not directly apply to an enterprise group as such, since groups generally did not have a registered office or habitual residence under national law. In that regard, however, it was proposed that article 16 (3) might form the basis of a rebuttable presumption concerning the centre of main interests of the member that was determined to control the enterprise group. The factors listed in paragraphs 6 and 13 of document A/CN.9/WG.V/WP.82/Add.4 might be relevant to rebuttal of that presumption.

31. Some support was expressed in favour of that proposal, with several qualifications. Those were: that the controlling group member should be regarded only as a first among equals that could lead the coordination and cooperation and not as having a number of additional powers with respect to the conduct or management of the proceedings; that the form of any such rule should adopt the same facilitative approach as the Model Law, i.e. supporting and encouraging the identification of such a controlling party, but not going so far as to suggest that that party should automatically be recognized in all jurisdictions; and that the factors that might be relevant to rebuttal of that presumption should be regarded collectively, rather than individually. The view was expressed that the use of the factor of third-party perception could create difficulties in practice.

32. The Working Group concluded: that the presumption contained in article 16 (3) of the Model Law was not directly applicable in the context of enterprise groups; that providing a rule on the COMI of an enterprise group could be useful to facilitate coordination of multiple insolvency proceedings with respect to group members; and that that rule might establish a rebuttable presumption along the lines of article 16 (3) for determining the seat of the controlling group member, with the factors relevant to rebutting that presumption being based upon those factors set forth in paragraphs 6 and 13 of A/CN.9/WG.V/WP.82/Add.4. Those factors should be considered collectively. The Secretariat was requested to prepare the draft text of a commentary and recommendation based upon the discussion in the Working Group.

2. Post-commencement finance

33. It was widely agreed that post-commencement finance was crucial to the reorganization of enterprise groups and, although raising issues of contractual law, should be addressed by the insolvency law.

34. The Working Group discussed whether it could formulate recommendations on post-commencement finance, perhaps on the basis of draft recommendations 10-13 on the provision of post-commencement finance in the domestic context as set forth in document A/CN.9/WG.V/WP.82/Add.2, or whether it should address the subject

only in the commentary. Broad support was expressed in favour of developing a recommendation to enhance predictability and provide the necessary authorization.

35. One view was that since the international context was different from the domestic situation, any recommendations addressing the former would have to depart from the approach of draft recommendations 10-13. It was observed, for example, that benefit to the creditors in the borrowing jurisdiction might cause prejudice to creditors in the lending jurisdiction. On that basis, coordination between the different jurisdictions was required and might involve agreement of all affected parties. A recommendation might provide that where such agreement was reached, the insolvency law should provide the necessary authorization for the parties to proceed. It was recalled that the recommendations of the Guide sought to provide that necessary authorization.

36. Another view was that draft recommendations 10-13 neither implicitly nor explicitly excluded post-commencement finance in the international context and needed only to be made subject to conflict of laws rules. The Working Group agreed to revisit the issue of a recommendation after discussion of draft recommendations 10-13.

37. It was suggested that the Working Group should, in addition to considering post-commencement finance, consider the question of post-application finance.

3. Coordination and cooperation

38. With respect to coordination and cooperation, the Working Group was of the view that while it might be possible to include in the work on enterprise groups a recommendation encouraging legislators and courts to draw inspiration from the Notes, it would be difficult to reach agreement on any specific text at the current session. It was agreed that that question should be considered at a future session. There was support for including a recommendation promoting the adoption of the Model Law.

4. Other issues

39. The Working Group agreed to take up the international aspects of procedural coordination, substantive consolidation, appointment of a single insolvency representative and a single reorganization plan at the same time as it considered the recommendations on the domestic treatment of those issues.

B. Domestic issues

40. The Working Group continued its consideration of the treatment of enterprise groups in insolvency proceedings in the domestic context as set forth in A/CN.9/WG.V/WP.82 and Add.1-3.

41. The Working Group agreed that the introduction to enterprise groups as set forth in A/CN.9/WG.V/WP.82 provided very useful background to the topic and should be retained in the final work product.

1. Glossary (A/CN.9/WG.V/WP.82)

42. With respect to the terms and explanations set forth in the glossary, the Working Group made the following suggestions.

(a) "Enterprise group"

43. (i) The last phrase should read "ownership and control" rather than "ownership or control", but if the disjunctive were to be retained some explanation or reference to the significance of the level of ownership (e.g. "majority" or "substantial") required should also be included.

(ii) The reference to "ownership" should be deleted, as ownership was only one example of how control might be obtained.

44. After discussion, the Working Group agreed that ownership should be retained in the disjunctive, but should be qualified by adding the word "significant".

(b) "Enterprise", "control" and "procedural coordination"

45. The Working Group approved the substance of the explanations of "enterprise", "control" and "procedural coordination" as set forth in paragraphs (b)-(d).

(c) "Substantive consolidation"

46. (i) The explanation should refer to the "treating" of assets as if they were part of a single insolvency estate, rather than to assets being combined to create a single insolvency estate.

(ii) To address partial substantive consolidation, the explanation should refer to "some or all of" the assets and liabilities.

47. The Working Group approved those two suggestions.

2. Joint application (A/CN.9/WG.V/WP.82/Add.1)

48. The Working Group discussed the application and commencement of insolvency proceedings of enterprise groups in the domestic context on the basis of draft recommendations 1 and 2.

Purpose Clause

49. The Working Group considered the revised purpose clause and approved it in substance. The Working Group further agreed to clarify in a footnote that each group member would preserve its separate legal entity in the context of a joint application for commencement of insolvency proceedings consistent with paragraph (a) of the purpose clause of the recommendations on substantive consolidation (A/CN.9/WG.V/WP.82/Add.3).

Recommendation 1

50. A request for clarification was made as to whether under draft recommendation 1 (b) the creditor making a joint application had to be a creditor of all group members included in the joint application. In response, it was confirmed

that that was the intention of draft recommendation 1 (b) and there had to be a direct relationship between a creditor and the concerned group member. After discussion, the Working Group requested the Secretariat to revise draft recommendation 1 to clarify that, in order to make an application, a creditor had to be a creditor of all group members included in the joint application.

Recommendation 2

51. It was noted that draft recommendation 2 did not provide criteria to identify the competent court for a joint application. It was noted, however, that those criteria were included in paragraph 23 of the commentary with respect to procedural coordination and would apply equally to joint applications.

52. It was observed that while draft recommendation 2 addressed the competent court, it did not address the question of the debtors covered by the insolvency law, two matters that insolvency laws generally addressed together. It was recalled that since the recommendations of the Guide applied automatically to enterprise groups if not otherwise stated, recommendation 10 of the Guide would address, in that context, the issue of which debtors were covered by the insolvency law. The Working Group agreed to include a reference to recommendation 10 of the Guide in the commentary.

3. Procedural coordination

Purpose clause

53. Noting that the purpose clause had not been revised from its previous session, the Working Group approved it in substance.

Recommendations 3 and 4

54. The question was raised as to whether the list included in draft recommendation 3 (b) was intended to be exhaustive. It was agreed that it was not so intended and that appropriate language should be found to ensure the list was indicative only.

55. It was pointed out that the order of draft recommendations 3 and 4 might be interpreted as suggesting that the court could initiate procedural coordination without having an application before it under draft recommendation 4. In that regard, the Working Group's attention was drawn to paragraph 22 of the commentary which also suggested that the court might have that power. It was recalled that the Guide generally did not provide for courts to act on their own initiative in insolvency matters, an issue that was referred to in paragraph 24 of A/CN.9/WG.V/WP.82/Add.3. After discussion, it was agreed that the approach of the Guide should be maintained. Accordingly, it was agreed that paragraph 22 should be revised and the order of draft recommendations 3 and 4 reversed, with some appropriate language being added to ensure that the court would only make its decision on the basis of an application as currently addressed under draft recommendation 4.

56. A question was raised as to whether the court, in making an order for procedural coordination, would be limited to making the orders sought in the

application. After discussion, it was agreed that that matter should be left to domestic law, but that some explanation could be included in the commentary.

57. A further question was raised as to whether the creditors referred to in draft recommendation 4 (c) should be only those creditors permitted to apply for commencement of insolvency proceedings, as there might be States where not all creditors could do so. It was recalled that the Guide recommended (recommendation 14) that all creditors of a debtor should be entitled to apply for commencement of insolvency proceedings. Since the recommendations on enterprise groups built upon the recommendations of the Guide, the distinction raised would not occur.

58. It was also questioned whether, since draft recommendation 3 (c) provided that an application for procedural coordination might be made at the time of application for commencement or later, a distinction should be made between the creditors entitled or qualified to apply at those two different times. After discussion, there was support for the view that procedural coordination should be available as widely as possible with respect to members of the same enterprise group. It was concluded that the limitation imposed by draft recommendation 4 (c), that a creditor could only apply for procedural coordination of two or more members of an enterprise group if it was a creditor of those two or more members, could not be sustained.

59. Where the application for procedural coordination was made at the time of the application for commencement, the issue of commencement should be treated separately from procedural coordination in terms of the eligibility of creditors. Similarly, once proceedings had commenced against two or more members, there should be no requirement that a creditor could only apply for procedural coordination with respect to the members of which it was a creditor. The decision to order procedural coordination should not be conditioned upon the qualifications of the creditor. Accordingly, it was agreed that draft recommendation 4 (c) should be revised to provide that an application for procedural coordination might be made by a creditor of a group member subject to insolvency proceedings.

Recommendation 5

60. The Working Group approved the substance of draft recommendation 5.

Recommendation 6

61. The Working Group approved the substance of draft recommendation 6.

Recommendations 7-9

62. The Working Group approved the substance of draft recommendations 7-9.

International issues

63. It was noted that draft recommendations 3-9 were not directly applicable in the international context, as they raised certain issues such as the determination of the competent court and the applicable law that had to be treated differently. It was further noted that a reference to the Model Law would not be sufficient to settle the coordination of proceedings involving different group members as it only addressed the coordination of parallel proceedings concerning the same debtor. A more

appropriate reference might be to the Notes, which described existing practices between different jurisdictions on coordinating parallel proceedings, including proceedings concerning enterprise group members. It was suggested that the interpretation of the parts of the Model Law on coordination might be expanded to apply to enterprise groups. It was observed that using the concept of COMI (centre of main interests) might cause unnecessary difficulties in the context of enterprise groups as it was generally equated with the site of the main proceeding. To address that concern, the COMI of a group could be considered as establishing the "primary proceeding", "centre of coordination" or "nerve centre" of the group.

64. The Working Group recalled its conclusion that it might be possible to include in the work on enterprise groups a recommendation concerning the Notes (see above, para. 38) and agreed that commentary on the international issues concerning procedural coordination should address the limited application of the Model Law in the context of enterprise groups.

4. Post-commencement finance (A/CN.9/WG.V/WP.82/Add.2)

Purpose clause

65. The substance of the purpose clause was approved by the Working Group.

Recommendations 10-13

66. A view was expressed that since draft recommendations 10-13 did not apply to lenders external to the enterprise group and the recommendations of the Guide were insufficient in that regard, the draft recommendations should be modified to include external lending and permit the consideration not only of the effect of such lending on each group member, but also the benefit of that lending to the group as a whole. In response, it was questioned whether the purpose of the provisions on post-commencement finance in the enterprise group context was, following the principle of the separate legal entity, the benefit to the individual group member or to the enterprise group overall. Recalling the Working Group's agreement on the key importance of the separate legal identity of each group member, consideration of group benefit would be, it was suggested, inconsistent with that agreement. It was also observed that if the recommendations were to address the issue of the benefit of the group as a whole, problems might arise with respect to obtaining the consent to post-commencement finance of all creditors and addressing any objections.

67. Some clarification was provided as to the scope of the draft recommendations. It was suggested, for example, that insolvent group members might be requested to guarantee finance provided to solvent group members, a situation not covered by the current draft. In response, it was observed that such a situation would amount to a disposal of the assets of the insolvent group member which would be covered by the recommendations of the Guide addressing that issue.

68. An example was given regarding the constraints on an insolvency representative to agree to external post-commencement finance due to the risk to the insolvency representative personally, because that post-commencement finance might be considered to be detrimental to creditors of the individual company to which the insolvency representative had been appointed, but which the insolvency representative could see, and the court could be persuaded, would be likely to lead

to better results for the group as a whole including ultimately the creditors of that particular member.

69. A question raised was whether the safeguards included in draft recommendations 10-13 were sufficient to protect the interests of creditors. One concern was that while they might be sufficient in the context of reorganization where the reorganization was successful, they might prove insufficient if that reorganization were to fail.

70. After discussion, the Working Group concluded that: the approach to post-commencement finance should be based upon the separate legal identity of each group member; recommendation 63 of the Guide was adequate to address external lending to an insolvent group member; draft recommendations 10 and 12 were sufficient to address the provision of a security interest or guarantee by an insolvent group member for post-commencement finance provided to another group member; and the commentary should address the question of disposal of assets.

71. With respect to draft recommendation 11, the Working Group agreed to replace "may" with "should" in the first line and to delete the last sentence to address the concern that it would not be acceptable in many jurisdictions to have the priority determined by the court.

72. With respect to draft recommendation 12, the Working Group agreed to delete the words "subject to insolvency proceedings" in the fourth line, so as not to unnecessarily limit the scope of application.

73. The Working Group approved draft recommendation 13 in substance.

Pre-commencement or post-application finance

74. In the course of the discussion of post-commencement finance, it was again suggested that pre-commencement or post-application finance should also be addressed (see above, para. 37). In response, it was observed that pre-commencement or post-application finance was already covered in the Guide by the recommendations on provisional measures (recommendation 39).

International issues

75. It was noted that draft recommendations 10-13 were not directly applicable in the international context, as various difficulties, such as matters of competence and priorities for certain types of claims under the applicable law, arose in that context. In that regard, it was noted that for the purposes of approving post-commencement finance, only the competent court would have the requisite authority and would have to apply the priorities applicable under its law. It was further noted that the issue of jurisdiction might be solved in a reorganization plan. The Working Group generally agreed that the Notes were very important in respect of post-commencement finance in the international context.

5. Avoidance proceedings

Purpose clause

76. The question was raised as to whether the reference to "persons" in paragraph (d) related only to group members or might also include natural persons,

such as management of group members or other insiders involved in transactions with group members. One view was that it only related to group members. A different view was that it should also include natural persons. In response, it was suggested that the recommendations of the Guide should be sufficient to address transactions between group members and individuals. After discussion, it was agreed that the focus of those recommendations should be transactions between group members and that in order to clarify the scope of paragraph (d), the words "including group members" could be added after the word "persons".

Recommendation 14

77. The question was raised as to what, in addition to the recommendations of the Guide, the draft recommendation sought to achieve. One view was that the recommendations of the Guide were sufficient to address all aspects of avoidance of transactions between group members and introducing additional considerations such as those in draft recommendation 14 might suggest different rules applied to single debtors and debtors that were enterprise group members. Another view was that draft recommendation 14 sought not to extend recommendation 87 of the Guide, but to set out the special considerations that might apply with respect to transactions occurring between group members. It was noted that group members would generally be considered to be "related persons" within the meaning of that term in the Guide.

78. After discussion, the Working Group agreed that draft recommendation 14 should be retained with the words "related persons in an enterprise group context" being replaced with the words "enterprise group members".

Recommendation 15

79. To reflect the clarifications agreed with respect to draft recommendation 14, it was agreed that the words "in the context of insolvency proceedings with respect to two or more enterprise group members" should be replaced with the words "between enterprise group members". With that revision, the substance of draft recommendation 15 was approved.

6. Subordination

80. The Working Group agreed that the commentary on subordination was useful and should be retained. A proposal that recommendations should also be developed did not receive support.

7. Substantive consolidation (A/CN.9/WG.V/WP.82/Add.3)

Purpose clause

81. Noting that the words "is available" in paragraph (c) should be replaced with the words "may be made available" to reflect the decision at its thirty-fourth session, the Working Group approved the substance of the purpose clause.

Recommendation 16

82. The Working Group approved the substance of draft recommendation 16.

Recommendation 17

83. Recalling the discussion with respect to the order of draft recommendations 3 and 4, it was questioned whether draft recommendations 17 and 18 should be reordered to address the same concerns (see above, para. 53) and whether substantive consolidation could be ordered at the initiative of the court. With respect to the latter point, it was noted that that issue had also been considered with respect to procedural coordination and that the Working Group had agreed that, consistent with the approach of the Guide, it should not be addressed, but left to national law. In that regard, reference was made to paragraph 24 of the commentary in A/CN.9/WG.V/WP.82/Add.3.

84. With respect to the ordering of the draft recommendations, the view was expressed that given the particular nature of substantive consolidation, draft recommendation 17 should clearly set forth the conditions under which substantive consolidation might be ordered by the court. Greater clarity as to the nature of draft recommendation 17 might be achieved by a heading along the lines of "Conditions under which substantive consolidation may be ordered". After discussion, it was agreed that the order of draft recommendations 17 and 18 could be considered in the light of the decision with respect to draft recommendations 3 and 4 to ensure it was clear that court orders for both procedural coordination and substantive consolidation could only follow upon an application by the specified parties.

85. A proposal to add the word "only" before the words "in the following circumstances" in the chapeau was not widely supported on the basis that that limitation was already apparent from the structure of draft recommendation 17 and from the last sentence of draft recommendation 16. A proposal to delete the words "of insolvency proceedings" in the chapeau was supported.

Recommendation 18

86. A proposal that the parties permitted to apply for substantive consolidation might include shareholders did not receive support. It was observed that since the parties most likely to have the information necessary to make an application for substantive consolidation would be the insolvency representative or the court itself, it was difficult to see why creditors were included in paragraph (a), but there was no support for deleting their inclusion.

87. With respect to paragraph (b), it was suggested that some further limitation needed to be added to the words "at any subsequent time" to take account of the practical impossibility of pursuing substantive consolidation at an advanced stage of the proceedings. It was suggested that since paragraph 25 of the commentary addressed that issue, no further qualification might be required.

Recommendation 19

88. The Working Group agreed that there might need to be some reordering of the paragraphs of draft recommendation 19 to ensure the key effect of substantive consolidation, i.e. the creation of a single consolidated estate, was clearly stated. With respect to paragraph (c), the question was raised as to how that might apply in practice, given the substantive effect of an order for substantive consolidation on the rights of different creditors. A proposal to add the words "in so far as possible" received some support. It was agreed that the words in square brackets at the end of the paragraph should be deleted. A question was raised with respect to the

interpretation of paragraph (c) in view of the extinguishment of intra-group debts and claims under paragraph (a).

89. With respect to paragraph (d), a suggestion that the word "combined" or "joint" would better explain the type of creditor meeting that was intended and avoid any suggestion that only one such meeting could be held, was widely supported.

Recommendation 20

90. The question was raised whether draft recommendation 20 could be deleted on the basis that draft recommendation 19 provided sufficient clarification as to the overall effect of substantive consolidation. One view was that paragraphs (a)-(c) could be deleted as they not only repeated principles expressed elsewhere and were clear and obvious consequences of substantive consolidation, but might also be misleading. In particular, it was suggested that paragraphs (a)-(c) might be regarded as establishing the only exceptions to the principle expressed in the chapeau. A different view was that the draft recommendation provided certainty and predictability for creditors and although stating principles that might be clear to some, they were not necessarily clear to all. After discussion, the Working Group agreed to retain the current text of draft recommendation 20 and to clarify in the commentary the illustrative nature of paragraphs (a)-(c).

91. It was suggested that the issue of whether draft recommendation 20 would result in a security interest over some or all of the assets of one group member extending to become a security interest over all of the consolidated assets should be addressed in the commentary.

Recommendation 21

92. The Working Group approved the substance of draft recommendation 21 and agreed that the reasons for making an order for partial substantive consolidation should be addressed in the commentary.

Recommendation 22

93. It was observed that the draft recommendation was unnecessarily complicated and that a statement of the principle in the chapeau would be sufficient. A different view was that because the draft recommendation dealt with a complex and difficult issue and the examples enhanced the understanding of the reader, it should be retained as drafted. The degree of specificity of the recommendation would help to avoid the suspect period being unjustifiably extended or shortened where substantive consolidation occurred. The Working Group approved the substance of draft recommendation 22.

Recommendations 23

94. In response to a question as to the scope of the draft recommendation, it was clarified that the term "modification" did not include termination of the order for substantive consolidation. It was suggested that the draft recommendation should address the issue of who may apply for an order for modification. After discussion, the Working Group approved the substance of the draft recommendation.

Recommendations 24-25

95. The Working Group approved draft recommendations 24-25 in substance.

International issues

96. It was noted that the Model Law did not apply to enterprise groups and currently had limited application. Moreover, the Model Law might only apply in terms of facilitating cooperation after substantive consolidation had been achieved in a domestic context. That was a complex issue and one that would require not only wide acceptance of substantive consolidation, but also agreement by all concerned States that particular group members should be substantively consolidated cross-border. Once that position had been reached, the Model Law and cross-border agreements could be used to facilitate cooperation. It was suggested that the commentary should address the situation where some members of an enterprise group were consolidated in one jurisdiction, while other members in a different jurisdiction were not.

8. Participants

Appointment of an insolvency representative

Purpose clause

97. The Working Group approved the purpose clause in substance.

Recommendation 26

98. In response to a question of whether it might be possible to extend the reference to "court" in the draft recommendation to other bodies, such as those responsible for supervising insolvency representatives, it was clarified that, in accordance with the explanation in the glossary to the Guide, the reference to "court" might also include a judicial or other authority competent to control or supervise insolvency proceedings.

99. The suggestion was made that the test of "the best interests of the administration" should be replaced with the more familiar test of "the best interests of creditors". That suggestion did not receive support on the basis that the purpose of draft recommendation 26 was efficient administration and the former test better captured the goals of insolvency proceedings in different jurisdictions.

[*a single*] [*the same*]

100. Support was expressed in favour of both alternatives and after discussion it was agreed that the two options should be retained as alternatives, with the square brackets deleted. The manner in which a single or the same insolvency representative was appointed to different group members, e.g. by a single or several orders, would depend on the domestic law.

Recommendation 27

101. It was noted that the use of the word "one" in draft recommendation 27 should be aligned with the approach agreed with respect to draft recommendation 26.

102. It was suggested that since more than one conflict of interest might arise in the context of the appointment of a single or the same insolvency representative, the word "any" should be used in the first line of the draft recommendation. With

respect to the commentary, it was suggested that the possibility of a conflict of interest arising in connection with the lodging and verification of claims and the need for an insolvency representative appointed to several group members to keep information on each enterprise group member separate (particularly in substantive consolidation), should be addressed. The Working Group agreed to those proposals.

Recommendation 28-29

103. The Working Group approved draft recommendations 28-29 in substance.

Recommendation 30

104. The Working Group approved draft recommendation 30 with replacement of "may" in the chapeau with "should", in order to emphasize the importance of cooperation.

International issues

105. It was noted that questions of competency would create difficulties with regard to the appointment of a single or the same insolvency representative in the international context. However, it was also noted that a single or the same insolvency representative could be appointed to proceedings in different jurisdictions provided they were qualified to be appointed in each of those jurisdictions and that that approach would be desirable to facilitate cooperation.

9. Reorganization of two or more enterprise group members

Purpose clause

106. To avoid any suggestion that the word "approval" in paragraph (d) would allow a single plan to be approved in some way other than by the creditors of each relevant member in accordance with the recommendations of the Guide, the Working Group agreed that "approval" should be replaced with "proposal".

107. Concerns were expressed with respect to the use of the word "single" and how it should be interpreted. It was suggested that the essence of the recommendation was coordination of the reorganization plan and that the "single" plan might be reached in different ways. The proposal of such a plan would not, however, affect the manner in which it had to be approved, as noted above.

Recommendation 31

108. In view of the conclusion reached with respect to the purpose clause, it was agreed that the word "approved" should be replaced with the word "proposed". It was suggested that the issue of approval should be addressed in the commentary, but not in the recommendations.

Recommendation 32

109. It was noted that the participation of a solvent group member as proposed in draft recommendation 32 could only occur voluntarily and as the result of a decision by management of that member in accordance with applicable law. Although a decision to so participate might affect the rights of creditors and shareholders, the solvent member should nevertheless be bound by the reorganization plan once approved. To the extent the final sentence of the draft recommendation might dilute

that consequence, it should be deleted. The Working Group agreed to that proposal, suggesting that the commentary should elaborate upon the relevant issues. It was also suggested that the ways in which a solvent member might participate under draft recommendation 32 should be discussed in the commentary. A further suggestion was that the voluntary nature of the participation was clear from the commentary, but not from the drafting of the recommendation. The Secretariat was requested to prepare a revision of the draft recommendation that would better reflect the voluntary nature of the participation.

International issues

110. It was noted that provided the proceedings commenced in different jurisdictions were reorganization proceedings, all group members could propose the same plan, subject to domestic law with respect, for example, to priorities. The Working Group agreed that that approach should be discussed in the commentary, together with the role of cross-border agreements, cooperation and coordination.

10. Format of work on enterprise groups

111. The Working Group agreed that the recommendations and commentary on enterprise groups should be published as part III of the Guide, with the recommendations following in sequence from those of the Guide. That approach to publication would emphasize not only that the work on enterprise groups was complementary and closely related to the treatment of single debtors in the Guide, but also that it was an integral part of the legislative guidance provided by UNCITRAL on insolvency law reform.

VI. The impact of insolvency on a security right in intellectual property

112. The Working Group commenced its discussion on the issues concerning the impact of insolvency on a security right in intellectual property that had been referred to it by Working Group VI (Security interests) on the basis of paragraphs 129-143 of document A/CN.9/667, the Report of Working Group VI (Security Interests) on the work of its fourteenth session.

113. As a preliminary matter, the Working Group welcomed the reference of those insolvency questions by Working Group VI and the manner in which the questions were posed, noting that it was particularly helpful that the questions posed were specific rather than generic, thus facilitating the provision of an accurate answer that would be useful to Working Group VI. Working Group V agreed that all insolvency issues arising in the course of Working Group VI's deliberations should be referred to Working Group V for consideration.

114. The first of the issues referred was the consideration of four scenarios outlined in the table included at the end of document A/CN.9/667. Those scenarios concerned the impact of the recommendations of the Guide with respect to treatment of contracts in situations where either a licensor or a licensee was subject to insolvency proceedings and the licensor or the licensee had granted a security right in its rights under the licence. The table set forth a draft response to a series of questions relating to those scenarios. The Working Group confirmed that the draft responses accurately reflected the legal impact of the Guide with respect to the

questions posed. It was observed, however, that the legal position might usefully be augmented by various practical considerations. Accordingly, it was suggested that those considerations might be included in any commentary prepared on the basis of the legal answers.

115. The second issue was raised in paragraph 133 of document A/CN.9/667 and concerned the possibility that a licensee to a contract rejected by the insolvency representative of the licensor might be permitted, under some laws, to continue to perform that contract notwithstanding the rejection. The Working Group agreed that it was not in a position to properly consider that question without better understanding of the scope and extent of the issues involved and the commentary being proposed by Working Group VI. Particular reference was made to paragraph 134 of part two, chapter II of the Guide, which indicated that various approaches were taken to the question of rejection. To assist its deliberations, the Working Group requested the Secretariat to prepare a working paper, for consideration at its next session that would provide background information on the discussion of the treatment of contracts that had taken place in the course of the development of the Guide and the recommendations that had been adopted.

116. The Working Group reached the same conclusion with respect to the third issue referred to in paragraphs 137-138 of document A/CN.9/667, and requested the Secretariat to include in the working paper to be prepared background information and explanatory material from the Guide that would be relevant to a consideration of those proposals.

117. In reaching the above conclusions, the Working Group took note of the work programme of Working Group VI and the need to consider those issues as soon as possible.

B. Note by the Secretariat on the treatment of enterprise groups in insolvency, submitted to the Working Group on Insolvency Law at its thirty-fifth session

(A/CN.9/WG.V/WP.82 and Add.1-4) [Original: English]

CONTENTS

I. Introduction

1. This note draws upon the material contained in documents A/CN.9/WG.V/WP.74 and Add.1 and 2; A/CN.9/WG.V/WP.76 and Add.1 and 2; A/CN.9/WG.V/WP.78 and Add.1; A/CN.9/WG.V/WP.80 and Add.1; the *UNCITRAL Legislative Guide on Insolvency Law* (the *Legislative Guide*); the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law); and the Reports of Working Group V (Insolvency Law) on the work of its thirty-first to thirty-fourth sessions (A/CN.9/618, A/CN.9/622, A/CN.9/643 and A/CN.9/647 respectively). It includes a revision of the recommendations discussed at the thirty-fourth session of the Working Group (New York, 3-7 March 2008) together with a draft commentary prepared on the basis of material contained in previous working papers and comments and suggestions made by the Working Group in its previous sessions.

2. The following material addressing the issues particular to the treatment of enterprise groups in insolvency is presented as part three of the *Legislative Guide* and follows the structure of parts one and two of the *Legislative Guide*, that is, commentary discussing relevant issues followed by legislative recommendations. Where an approach different to that taken in the *Legislative Guide* might be required with respect to a particular issue in the context of enterprise groups or where the treatment of enterprise groups in insolvency raises issues additional to those addressed in parts one and two of the *Legislative Guide*, they are discussed in this part. Where the treatment of issues in the context of enterprise groups would be the same as discussed in parts one and two, they are not repeated in this part. The

recommendations of parts one and two of the *Guide* are therefore applicable in the context of enterprise groups, unless indicated otherwise in this part. The Working Group may wish to consider how this material should be presented. If it should appear as part three to the *Legislative Guide*, appropriate changes to references and format would be required. References to "the *Legislative Guide*", for example, would be deleted and appropriate references to the relevant paragraphs and recommendations of parts one and two included.

II. Glossary

1. Notes on terminology

3. Since terms may have fundamentally different meanings in different jurisdictions, the explanations of the following additional terms are included in this part to provide orientation to the reader and assist in ensuring that the concepts discussed are clear and widely understood. The notes on terminology and the terms and explanations set forth in the glossary to the *Legislative Guide* should also be consulted as they may be relevant to the issues discussed below.

2. Terms and explanations

(a) "Enterprise group": two or more enterprises, that are interconnected by ownership or control.

(b) "Enterprise": any entity, regardless of its legal form, that is engaged in economic activities and may be governed by the insolvency law.[1]

(d) "Control": the capacity to determine, directly or indirectly, the operating and financial policies of an enterprise.

(e) "Procedural coordination": coordination of the administration of two or more insolvency proceedings in respect of enterprise group members. Each of those members, including its assets and liabilities, remains separate and distinct.[2]

(f) Substantive consolidation: [the combining of the assets and liabilities of two or more enterprise group members to create a single insolvency estate.][3]

III. Enterprise groups: general features

A. Introduction

4. Most jurisdictions recognize the legal concept of "corporation", an entity which has a legal personality separate from the individuals comprising it, whether

---

[1] Consistent with the approach adopted in the *UNCITRAL Legislative Guide on Insolvency Law*, the focus is upon the conduct of economic activities by entities that would conform to the types of entities described as an "enterprise". It is not intended to include consumers or other entities that would not be governed by an insolvency law pursuant to recommendations 8 and 9 of the *Legislative Guide*.

[2] See discussion below, in A/CN.9/WG.V/WP.82/Add.1, paras. 18-21.

[3] For the effects of substantive consolidation and the treatment of security interests, see recommendations 18 and 19.

as owners, managers, or employees. As a legal or juristic person, a corporation is capable of enjoying and being subject to certain legal rights, duties, and liabilities, such as the capacity to sue and be sued, to hold and transfer property, to sign contracts and to pay taxes. The corporation also enjoys the characteristic of perpetuity, in the sense that its existence continues, independent of its members at any given time and over time, and shareholders can transfer their shares without affecting the entity's corporate existence. Corporations may also have limited liability, whereby investors will only be liable for the amount they have intentionally put at risk in the enterprise, providing certainty and encouraging investment; without that limitation, investors would put their entire assets at risk for every business venture they entered into. A corporation depends on a legal process to obtain its legal persona and once formed, will be subject to the regulatory regime applying to entities so formed. That law generally will determine not only the requirements for formation, but also the consequences of formation, such as the powers and capacities of the company, the rights and duties of its members and the extent to which members may be liable for the company's debts. The corporate form can thus be seen as promoting certainty in the ordering of business affairs, as those dealing with a corporation know that they can rely upon its legal personality and the rights, duties and obligations that attach to it.

5. The business of corporations is increasingly conducted, both domestically and internationally, through "enterprise groups". The term "enterprise group" covers a large number of different forms of economic organization based upon the single entity and for a working definition may be loosely described as two or more corporations that are linked together by some form of control (whether direct or indirect) or ownership (see below). The size and complexity of enterprise groups may not always be readily apparent, as the public image of many is that of a unitary organization operating under a single corporate identity.

6. Enterprise groups have been in existence for some time, emerging in some countries, according to commentators, at the end of the 19th and beginning of the 20th century through a process of internal expansion, which involved companies taking control of their own financial, technical or commercial capacities. These single entity enterprises then expanded externally to take legal or economic control of other corporations. Initially these other corporations may have been in the same market, but eventually the expansion encompassed corporations working in related fields and later in fields that were different or unrelated, whether by reference to a product or geographical location or both. One of the factors supporting this expansion, at least in some jurisdictions, was the legitimatization of ownership of the shares of one corporation by another corporation; a phenomenon originally prohibited in both common law and civil law systems.

7. Throughout this expansion, corporations retained and continue to retain, their separate legal personality even though individual corporations are now probably the typical form of organization only for small private businesses. Enterprise groups are now ubiquitous in both emerging and developed markets, with common characteristics of operations across a large number of often-unrelated industries, often with family ownership in combination with varying degrees of participation by outside investors. The largest economic entities in the world include not only States, but also equal numbers of multinational enterprises. Major multinational groups may be responsible for significant percentages of Gross National Product

worldwide and have annual growth rates and annual turnovers that exceed those of many States.

8. Despite the reality of the enterprise group, however, much of the legislation relating to corporations and particularly to their treatment in insolvency, deals with the single corporate entity. Despite the absence of legislation, judges in many countries, faced with issues that may be addressed by reference to a single enterprise rather than a single corporate entity, have developed solutions to achieve results that better reflect the economic reality of modern business.

B. Nature of enterprise groups

9. Enterprise group structures may be simple or highly complex, involving numbers of wholly or partly owned subsidiaries, operating subsidiaries, sub-subsidiaries, sub-holding companies, service companies, dormant companies, cross-directorships, equity ownership and so forth. They may also involve other types of entity, such as special purpose entities (SPE),[4] joint ventures,[5] offshore trusts[6] and partnerships.

10. Enterprise groups may have a hierarchical or vertical structure, with succeeding layers of parent and controlled companies, which may be subsidiaries or other types of affiliated or related companies, operating at different points in a production or distribution process. They may also have a more horizontal structure,

---

[4] Special purpose entities (SPE, also known as a "special purpose vehicle" or "bankruptcy-remote entity") are created to fulfil narrow or temporary objectives, such as the acquisition and financing of specific assets, primarily to isolate financial risk or enhance tax efficiency. An SPE is typically a subsidiary owned almost entirely by the parent corporation; certain jurisdictions require that another investor own at least 3 per cent. Its asset and liability structure and legal status generally makes its obligations secure even if the parent becomes insolvent. The corporation establishing the SPE can accomplish its purpose without having to carry any of the associated assets or liabilities on its own balance sheet, thus they are "off-balance sheet." SPEs may also be used for competitive reasons to ensure intellectual property, such as for the development of new technology, is owned by a separate entity that is not affected by pre-existing licence agreements.

[5] A joint venture is often a contractual arrangement or partnership between two or more parties to pursue a joint business purpose. Such an arrangement may sometimes result in the formation of one or more legal entities that may involve both parties contributing equity, and sharing in the revenues, expenses, and control of the enterprise. The venture could be for one specific project only, or a continuing business relationship. Joint ventures are widely used in an international context, as some countries require foreign corporations to form joint ventures with a domestic partner in order to enter a market. This requirement often results in technology and managerial control being transferred to the domestic partner. Forming a joint venture might assist in spreading costs and risks; improving access to financial resources; providing economies of scale and advantages of size; and facilitating access to new technologies and customers or to innovative managerial practices. It may also serve competitive and strategic goals such as influencing structural evolution of an industry; pre-empting competition; creating stronger competitive units; and facilitating transfer of technology and skills, as well as diversification.

[6] An offshore trust is a conventional trust that is formed under the laws of an offshore jurisdiction. They are similar in nature and effect to onshore trusts, involving a transfer of assets to a trustee to manage for the benefit of a person or class of persons. Offshore trusts may be formed for tax purposes or asset protection. In practice the effectiveness of such trusts may be limited if the insolvency law of the home jurisdiction of the person transferring the assets operates to set aside transfers to the trusts, and transactions entered into to defraud creditors.

with many sibling group members, often with a high degree of cross-ownership, operating at the same level in that process. The businesses they conduct may be in a related field or in a diverse range of unrelated fields. It has been suggested that horizontal groups are more common in some parts of the world, such as Europe, while vertical groups are more common in others, such as the USA and Japan.

11. The research literature on enterprise groups clearly shows that they can be based on different types of alliances such as bank relationships, interlocking board directorates, owner alliances, information sharing, joint ventures, and cartels. The research also shows that enterprise group structures vary across corporate governance systems. In some States, they are organized either vertically or horizontally and develop across industries. They generally include a bank, a parent or holding company[7] (referred to as "parent company") or a trading company, and a diverse group of manufacturing firms. In contrast, in other States such groups are typically controlled by a single family or a small number of families and are uniformly vertically organized or have strong ties to the State, but not to particular families.

12. The degree of financial and decision-making autonomy in enterprise groups can vary considerably. In some groups, members may be active trading entities, with primary responsibility for their own business goals, activities and finances. In others, strategic and budgetary decisions may be centralized, with group members operating as divisions of a larger business and exercising little independent discretion within the cohesive economic unit. A parent company may exercise close control by allocating equity and loan capital to group members through a central group finance operation, deciding their operational and financial policies, setting performance targets, selecting directors and other key personnel, and continuously monitoring their activities. The power of the group may be centralized in the ultimate parent company or in a company further down the group chain, with the parent company owning the key group shares, but not having any direct productive or managerial role. The largest groups might have their own banks and perform the principal functions of a capital market. Group financing might involve intra-group lending between the parent company and subsidiaries, involving loans both from and to the parent company and the granting of cross-guarantees.[8] Intra-group lending might be working capital or unpaid short-term debt such as unpaid

---

[7] A holding company or parent company is a company that directly or indirectly owns enough voting stock in another firm to control management and operations by influencing or electing its board of directors. The term may signify a company that does not produce goods or services itself, but whose purpose is to own shares of other companies (or own other companies outright).

[8] In many countries a significant method of enterprise group capital raising is cross-guarantee financing, where each company within a group guarantees the performance of the others. Implementing cross-guarantee claims in liquidation has proved difficult in some jurisdictions and they have sometimes been set aside. In one jurisdiction, cross-guarantees may operate to reduce the regulatory burden on companies by bestowing accounting and auditing relief on companies that are party to the arrangement. The deed of cross-guarantee makes the group of companies that are party to that deed akin to a single legal entity in many respects and operates as a form of voluntary contribution or pooling in the event that one or more of the companies party to the deed goes into liquidation while the cross-guarantee is still operative. One advantage of this arrangement is that creditors and potential creditors can focus on the consolidated position for those entities, rather than on the individual financial statements of the wholly owned subsidiaries that are party to the deed.

dividends or credit in respect of intra-group trading; they may or may not involve the payment of interest.

13. In some States, family ties play an important connecting factor in enterprise groups and it may be the case, for example, that the more important family members and close associates of family members will sit on the board of the parent company of a group, with members of that board spread around the boards of group members so that there is a web of interlinked common directorships, enabling the family to maintain control over the group. For example, the chart of a large group in India shows a complex web of shared directorships between the board of the parent company and 45 other group members.

14. In some countries, enterprise groups have enjoyed close ties to governments and government policies, such as those affecting access to credit and foreign currency and competition, which have significantly influenced the development of groups. Equally, there are examples where government policies have targeted the operations of enterprise groups, removing certain type of preferential treatment, such as access to capital.

15. The structure of many enterprise groups shows the dimension and potential complexity of the arrangements. A 1997 survey in Australia of the Top 500 listed companies showed that 89 per cent of those companies controlled other companies; the greater the market capitalization of a listed company, the more companies it was likely to control (this ranged from an average of 72 controlled companies for those companies with the largest market capitalization to an average of 9 for the smallest); 90 per cent of controlled companies were wholly owned; the number of vertical subsidiary levels in an enterprise group ranged from 1 to 11, with an overall average of 3 to 4.[9] In other countries the figures are much larger. A study based upon the 1979 accounts and reports of a number of large British-based multinationals had to be abandoned with respect to two of the largest groups, with 1,200 and 800 subsidiaries respectively, because of the impossibility of completing the task. Researchers noted that few people inside the group could have had a clear understanding of the precise legal relationships between all group members and that none of the groups studied appeared to have its own complete chart. Similarly, the group charts of several Hong Kong property groups such as Carrian, which failed over 20 years ago, ran to several pages and a reader would have needed a good magnifying glass to identify the subsidiaries. The group chart of the Federal Mogul group, an automotive component supplier, when blown up to the point where you can read the names of all the subsidiaries, fills a wall of a small office. The group chart of Collins and Aikman, another automotive group, is printed in a book, with sub-sub-groups having the complexity of structure of many domestic enterprise groups.

16. The degree of integration of a group might be determined by reference to a number of factors, which might include the economic organization of the group (e.g., whether the administrative structure is arranged centrally or maintains the independence of the various members, whether subsidiaries depend on the enterprise group for financing or loan guarantees, whether personnel matters are handled centrally, the extent to which the parent makes key decisions on policy,

---

[9] Cited in Companies and Securities Advisory Committee (CASAC), Corporate Groups Final Report, 2000 (Australia), paragraph 1.2.

operations and budget and the extent to which the businesses of the group are integrated vertically or horizontally); how the group manages its marketing (e.g., the importance of intra-group sales and purchases, the use of common trademarks, logos and advertising programmes and the provision of guarantees for the products); and the public image of the group (e.g., the extent to which the group presents itself as a single enterprise, and the extent to which the activities of the constituent companies are described as operations of the group in external reports, such as those for shareholders, regulators and investors).

17. The legal structure of a group as a number of separate legal entities is not necessarily determinative of how the business of the group is managed. While each group member is a separate entity, management may be arranged in divisions along product lines and subsidiaries may have one or many product lines with the result that they fall across different divisions. In some cases, management may treat wholly owned subsidiaries as if they were branches of the parent company.

C. Reasons for conducting business through enterprise groups

18. Diverse factors shape the formation, operation and evolution of enterprise groups, ranging from legal and economic factors to societal, cultural, institutional and other norms. State leadership, inheritance customs, kinship structures (including inter-generational considerations), ethnicity and national ideology, as well as the level of development of the legal (e.g., effectiveness of contract enforcement) and institutional framework supporting commercial activity may influence enterprise groups in different environments. Some studies suggest that group structures can make up for under-developed institutions, with consequent benefits for transaction costs.

19. The advantages of conducting business through an enterprise group structure may include assisting to reduce commercial risk, or maximize financial returns, by enabling the group to diversify its activities into various types of businesses, each operated by a separate group company. One company may acquire another to expand and increase market power, at the same time preserving the acquired company and continuing to operate it as a separate entity to utilize its corporate name, goodwill and public image. Expansion may occur to acquire new or technical or management skills. Once formed, groups may continue to exist and proliferate because of the administrative costs associated with rationalizing and liquidating redundant subsidiaries.

20. A group structure may enable a group to attract capital to only part of its business without forfeiting overall control, by incorporating that part of the business as a separate subsidiary and allowing outside investors to acquire a minority shareholding in it. A group structure may enable a group to lower the risk of legal liability by confining high liability risks, such as environmental and consumer liability, to particular group members, thus isolating the remaining group assets from this potential liability. Better security for debt or project financing may be facilitated by moving specific assets into a separate member incorporated for that purpose, thus ensuring that the lender has a first priority over the whole or most of the new member's property. A separate group member may also be formed to undertake a particular project and obtain additional finance by means of charges

over its own assets and undertaking or may be required for the purpose of holding a government license or concession. A group structure can simplify the partial sale of a business as it may be easier, and sometimes more tax effective, to transfer the shares of a group member to the purchaser, rather than sell discrete assets. A group may also be formed incidentally when a company acquires another company, which in turn might be a parent company for various other companies.

21. Meeting prudential or other statutory requirements may be easier where the companies subject to those regulatory requirements are separate group members. In the case of multinational groups, the domestic law of particular countries in which the group wishes to conduct business may require that local businesses be conducted through separate subsidiaries (sometimes subject to minimum local equity requirements) or impose other requirements or limitations, relating for example to employment and labour regulation. Arrangements not involving equity have been used for foreign expansion because of, for example, local obstacles to equity participation, the level of regulation imposed upon foreign investment operations and the relative cost advantages of those types of arrangement. Another relevant factor for multinational groups may be geographical imperatives, such as the need to acquire raw materials or to market products through a subsidiary established in a particular location. A related consideration of increasing importance that perhaps relates more to where parts of the groups structure are to be located than to the question of whether or not to organize a business through a group structure, is the importance of local law on issues such as cost and simplicity of incorporation in the first instance, obligations of incorporations and treatment of the group in insolvency. Differences in law across different jurisdictions can significantly complicate these issues.

22. Other key drivers for complicated group structures include fiscal considerations and their influence on the flow of money within groups. The incidence of tax is often cited as the reason for the formation of and subsequent growth of enterprise groups and many legal systems have traditionally given weight to the economic unity of related entities. While separate taxation of individual entities might be the underlying principle, it may be qualified to fulfil basic purposes such as protecting the revenue interests of governments and alleviating the tax burden that would otherwise result from the separate taxation of each group member.[10] Measures that take into account the connections between parent and subsidiary companies include tax exemptions for intra-group dividends; group relief; and measures aimed at combating tax evasion. Tax exemptions may be available, for example, on the dividends paid by a company to its resident corporate shareholders and for intra-group dividends where companies are linked by substantial ownership. Tax credits may be allowed for the foreign tax paid on the underlying profits of the subsidiary and for the foreign tax that is charged directly on a dividend. Group relief might be available where related companies can be treated as a single fiscal unit and file consolidated accounts. Losses of one subsidiary may be offset against the income of another or profits and losses may be pooled among group members.

---

[10] International Investment and Multinational Enterprises — Responsibility of parent companies and their subsidiaries, OECD, 1979.

23. As a result of the importance of fiscal considerations, inter-group pricing policies and national taxation rates and policies often determine the distribution of assets and liabilities within enterprise groups. Differential corporate tax rates across jurisdictions, as well as certain exceptions (such as reduced tax rates for profits from manufacturing activities or financial services income) applicable in some jurisdictions may make those jurisdictions more attractive than others that have higher tax rates and fewer or no exceptions. Nevertheless, tax authorities may have the right to revisit transfer-pricing structures aimed at locating profits in low taxation domiciles.

24. Choices such as between establishing a branch or a subsidiary might also be affected by fiscal regulation where, for example, repatriation of profits from a foreign subsidiary may be effected tax free by loan repayments to a parent company or may be tax free provided the parent owns a specified percentage (ranging from 5-20 per cent) of the foreign company's share capital; interest on funds borrowed to finance the acquisition of a subsidiary can be offset against their profits and as already noted, the subsidiaries profits and losses can be offset against each other in a consolidated tax return. Business activities have also been divided between two or more corporations to exploit tax allowances, limits imposed on the amounts of tax allowances or progressive rates of taxation. Other reasons might include: taking advantage of differences in accounting methods, taxable years, depreciation methods, inventory valuation methods and foreign tax credits; segregating activities that if combined in a single taxable entity, might be disadvantageous in fiscal terms; and taking advantage of favourable treatment for certain activities (e.g., anticipated or potential sales, mergers, liquidations or intra-family gifts or bequests) that is available for some operations, but not for others.

25. Accounting requirements also have a role to play in determining the structure of enterprise groups. In some jurisdictions, certain devices such as "agent only" subsidiaries might be created to manage certain aspects of the business and enable the parent company to avoid submitting detailed trading accounts for that subsidiary, which is just an agent of the parent company that owns all of the relevant assets.

26. Many of these benefits of conducting business through an enterprise group may be illusory. Protection against devastating losses may fall away as a result of group financing agreements; intra-group trading; cross-guarantees; and letters of comfort[11] given to group auditors and the inclination of major creditors, and particularly bankers, to ensure that they have the indemnity of the top member in any group.

27. To avoid doubt, group structures are not required from the accounting point of view — accountants are just as happy with consolidating branches as groups of subsidiaries. It seems probable that the banking, commercial and legal sectors often

---

[11] A letter of comfort is generally provided by a parent company to persuade another entity to enter into a transaction with a subsidiary. It may include various types of undertaking, none of which would amount to a guarantee, which may include an undertaking to maintain its shareholding or other financial commitment to a subsidiary; using its influence to see that the subsidiary meets its obligation under a primary contract; or confirming that it is aware of a contract with the subsidiary, but without any express indication that it will assume any responsibility for the primary obligation.

fail to appreciate the accounting aspects of enterprise groups. The opportunities for misunderstanding will increase in the transition to new international financial reporting standards and many groups change their consolidation approach from one that has regard for the substance of transactions, to one that requires legal form to prevail over substance. It was the "off-balance" accounting structures that made Enron, WorldCom and other failures possible and the need for clarity of financial statements is widely acknowledged.

D. Defining the "enterprise group" — ownership and control

28. Although the existence of enterprise groups and the importance of relationships between the group members are increasingly acknowledged, both in legislation and court decisions, there is no coherent body of rules that directly governs those relationships in a comprehensive manner. In jurisdictions where there is legislation that recognizes enterprise groups, it may not specifically deal with the regulation of such groups, by way of commercial or corporate legislation, but rather be contained in legislation on taxation, corporate accounting, competition and mergers or other issues; legislation addressing the treatment of enterprise groups in insolvency is rare. Furthermore, an analysis of legislation that does address aspects of enterprise groups reveals a diversity of approaches to the various issues associated with groups, not only between jurisdictions, but also on a comparison of the different legislation within a single jurisdiction. Thus different tests may apply to what constitutes a group for different purposes, although there may be common elements, and where those tests employ a particular concept, such as "control", definitions may be broader or narrower, depending upon the purpose of the legislation, as noted above.

29. While much legislation avoids specifically defining the term "enterprise group", several concepts are common to determining what relationships between companies will be sufficient to constitute them as an enterprise group for certain specific purposes, such as extending liability, accounting purposes, taxation and so on. These concepts are found both in legislation and in numerous court decisions on groups in various countries and generally include aspects of ownership and control or influence, both direct and indirect, although in some examples only direct ownership or control or influence is considered. The choice between the two concepts often reflects a balance between the desirability of certainty, which can be achieved by setting a prescribed level of ownership, and flexibility, which might be better achieved by referring to control and acknowledging the diverse economic realities of enterprise groups.

30. Some examples consider ownership by reference to a formal relationship between the companies, such as what constitutes a parent-subsidiary relationship. This may be determined by reference to a formal standard — the holding, whether directly or indirectly, of a specified percentage of capital or votes. Examples of those percentages vary from as little as 5 per cent to more than 80 per cent. Those specifying lower percentages generally consider additional factors such as the ones discussed below as indicators of control. In some examples, the percentages establish a rebuttable presumption as to ownership, while higher percentages establish a conclusive presumption.

31. Other examples of what constitutes an enterprise group adopt a more functional approach and focus on aspects of control, or controlling or decisive influence (referred to in this note as control), where "control" is often a defined term. The key elements of control include actual control or capacity to control, either directly or indirectly, financial and operating policy and decision-making. Where the definition includes capacity to control, it generally envisages a passive potential for control, rather than focusing upon control that is actively exercised. Control may be obtained by ownership of assets, or through rights or contracts that give the controlling party the capacity to control. What is important is not so much the strict legal form of the relationship, such as parent-subsidiary, between the entities, but rather the substance of that relationship.

32. Factors that might indicate the existence of control of one entity by another could include: the ability to dominate the composition of the board of directors or governing body of the second entity; the ability to appoint or remove all or a majority of the directors or governing members of the second entity; the ability to control the majority of the votes cast at a meeting of the board or governing body of the second entity; and the ability to cast or regulate the casting of, a majority of the votes that are likely to be cast at a general meeting of the second entity, irrespective of whether that capacity arises through shares or options. Information that may be relevant to consideration of these factors might include: the group member's incorporation documents; details about the member's shareholding; information relating to substantive strategic decisions of the member; internal and external management agreements; details of bank accounts and their administration and authorized signatories; and information relating to employees.

E. Regulation of enterprise groups

33. Regulation of enterprise groups is generally based on one of two approaches or in some cases on a combination of the two: the separate entity approach (which is the traditional approach and by far the most prevalent) and the single enterprise approach.

34. The separate entity approach relies on several basic principles, foremost of which is the separate legal personality of each group company. It is also based upon the limited liability of shareholders of each group company and the duties of directors of each separate group entity to that entity.

35. The separate legal personality of a corporation generally means that it has its own rights and duties, irrespective of who controls it or owns it (i.e., whether it is wholly or partly owned by another company) and its participation in the activities of the enterprise group. The debts it incurs are its debts and the assets of the group generally cannot be pooled to pay for these debts. Contracts entered into with external persons do not automatically involve the parent company or other group members. A parent company cannot take into account the undistributed profits of other group companies in determining its own profits. Limited liability of a corporation means that unlike in a partnership or sole proprietorship, enterprise group members have no liability for the group's debts and obligations, with the result that their potential losses cannot exceed the amount they contributed to the corporation by purchasing shares.

36. The single enterprise approach, in comparison, relies upon the economic integration of enterprise group members, treating the group as a single economic unit that operates to further the interests of the group as a whole, or of the dominant corporate body, rather than of individual members. Borrowing may be conducted on a group basis, with group treasury arrangements being used to offset the credit and debit balances of each group member; group members may be permitted to operate at a loss, or be undercapitalized, as part of the overall group financial structure and strategy; assets and liabilities may be moved between group members in various ways; and intra-group loans, guarantees or other financial arrangements may be entered into on essentially preferential terms.

37. While many countries follow the separate entity approach, there are some countries that recognize exceptions to strict application of that approach and others that have introduced, either by legislation or through the courts, a single enterprise approach that applies to certain situations.

38. Some of the circumstances in which strict application of the separate entity approach has been overridden may include: consolidation of enterprise group accounts for a company and any controlled entity; related party transactions (where a public company is otherwise prohibited from giving any financial benefit, including intra-group loans, guarantees, indemnities, releases of debt or asset transfers, to a related company unless that transaction is approved by shareholders or is otherwise exempt); cross-shareholding (where group members are generally prohibited from acquiring, or taking a security over, the shares of any controlling member or issuing or transferring their shares to any controlled member); and insolvent trading (where a parent company which ought to suspect the insolvency of a subsidiary can be made liable for the debts of that subsidiary incurred when it was insolvent).

39. A few countries have established various categories of enterprise groups that can operate as a single enterprise, in exchange for enhanced protection of creditors and minority shareholders. In one, enterprise group structures involving public companies are divided into 3 categories: (a) integrated groups; (b) contract groups; and (c) de facto groups, to which a set of harmonized single enterprise principles dealing with corporate governance and liability applies:

(a) Integrated groups are based upon a vote, by a specified proportion of shareholders of the parent company, which in turn owns a specified proportion of the shares of the subsidiary, to approve the complete integration of the subsidiary. The parent company will have unlimited power to direct the subsidiary, in return for the parent company being jointly and severally liable for the debts and obligations of the subsidiary;

(b) Contract groups can be formed by a specified proportion of shareholders of each of two companies entering into a contract that grants one company (the parent) the right to direct the other company, provided the directions are consistent with the interest of the parent company or the group as a whole. In return for giving the parent company the right of control, minority shareholders and creditors are given enhanced protection;

(c) De facto groups are those where one company exercises, either directly or indirectly, a dominant influence over another company. Although not created by

any formal arrangement, there must nevertheless be systematic involvement by the parent in the affairs of the controlled company.

40. In one country where single enterprise principles have been introduced into corporate legislation, directors of wholly or partly owned subsidiaries may act in the interests of the parent company rather than their subsidiary company; there are provisions for streamlined group mergers; and legislation also permits contribution and pooling orders.

41. In another country, commercial regulatory laws affecting enterprise groups increasingly use single enterprise principles to ensure that the policy underlying specific commercial legislation cannot be undermined or avoided by the use of enterprise groups. The courts have assisted in this development, selectively introducing the single enterprise concept to achieve the underlying policies of the legislation. The concept has been applied to insolvency law to avoid specified intra-group transactions, to support intra-group guarantees and in limited cases, to achieve substantive consolidation. The courts also have the power to alter the priority of claims in the liquidation of a group entity, either by treating some intra-group loans to that entity as equity rather than debt, or by subordinating intra-group loans to that entity to the claims of its external creditors.

[*A/CN.9/WG.V/WP.82/Add.1 addresses application and commencement of insolvency proceedings (joint applications and procedural coordination); Add.2 addresses treatment of assets on commencement of insolvency proceedings (protection and preservation of the insolvency estate, use and disposal of assets, post-commencement finance), avoidance and subordination; Add.3 addresses remedies (extension of liability, contribution orders and substantive consolidation), participants (single insolvency representative) and reorganization plans and Add.4 addresses international issues.*]

A/CN.9/WG.V/WP.82/Add.1 (Original: English)

Note by the Secretariat on the treatment of enterprise groups in insolvency, submitted to the Working Group on Insolvency Law at its thirty-fifth session

ADDENDUM

CONTENTS

IV. Addressing the insolvency of groups

1. Enterprise groups may be structured in ways that minimize the threat of insolvency to one or more group members, by entering into cross-guarantees, indemnities and similar types of arrangements. Where problems do arise, a parent company may seek to avoid the insolvency of any of its group members in order to preserve its reputation and maintain its credit in commercial and financial spheres by providing additional finance and agreeing to subordinate intra-group claims to other external liabilities.

2. However, if the complexity of an enterprise group's structure is disturbed by the onset of financial difficulty affecting one or more, or even all of the group members that leads to insolvency, problems arise simply because the group is constituted by members that are each recognized as having a separate legal personality and existence. Since, as noted above, the great majority of domestic insolvency and corporate laws do not address the insolvency of enterprise groups, even though group issues might be addressed outside the insolvency area in relation to accounting treatment, regulatory issues and taxation, the absence of legislative authority to the contrary or judicial discretion to intervene in insolvency means that each entity has to be separately considered and, if necessary, separately administered in insolvency. In certain situations, such as where the business activity of group members is closely integrated, that approach may not always achieve the best result for the business of the group as a whole, unless the individual proceedings can be closely coordinated.

3. Much of what already exists in domestic law regarding the insolvency of enterprise groups concentrates on the circumstances in which it might be appropriate to consolidate insolvency estates. What is lacking is more guidance on how the insolvency of enterprise groups should be considered more

comprehensively and in particular, whether and in what circumstances enterprise groups should be treated differently from a single corporate entity.

4. A second key issue in the treatment of enterprise groups in insolvency is the degree to which the group is economically and organizationally integrated and how that level of integration might affect treatment of the group in insolvency and in particular, the extent to which a highly integrated group should be treated differently to a group where individual members retain a high degree of independence. In some cases, where for example the structure of a group is diverse, involving unrelated businesses and assets, the insolvency of one or more group members may not affect other members or the group as a whole and the insolvent members can be administered separately. In other cases, however, the insolvency of one group member may cause financial distress in other members or in the group as a whole, because of the group's integrated structure, with a high degree of interdependence and linked assets and debts between its different parts. In those circumstances, it might often be the case that the insolvency of several or many group members would lead inevitably to the insolvency of all members (the "domino effect") and there may be some advantage in judging the imminence of the insolvency by reference to the group situation as a whole or to coordinate the consideration with respect to multiple members.

A. Application and commencement

1. Joint application for commencement

5. As a general rule, insolvency laws respect the separate legal status of each enterprise group member and a separate application for commencement of insolvency proceedings is required to be made for each of those members that satisfy the standard for commencement of insolvency proceedings. There are some limited exceptions that allow a single application to be extended to other group members where, for example, all interested parties consent to the inclusion of more than one group member; the insolvency of one group member has the potential to affect other group members; the parties to the application are closely economically integrated, such as by intermingling of assets or a specified degree of control or ownership; or consideration of the group as a single entity has special legal relevance, especially in the context of reorganization plans.

6. The recommendations of the *Legislative Guide* concerning application for and commencement of insolvency proceedings would apply to debtors that are enterprise group members in the same manner as they apply to debtors that are individual commercial enterprises. Recommendations 15 and 16 establish the standards for debtor and creditor applications for commencement of insolvency proceedings and form the basis upon which an application could be made for each group member that satisfied those standards, including imminent insolvency in the case of an application by a debtor. In the enterprise group context, the insolvency of a parent enterprise may affect the financial stability of a subsidiary or the insolvency of a number of subsidiaries might affect the solvency of others, so that insolvency is imminent more widely across the group. That situation is likely to be covered by the terms of recommendation 15 if, at the time of the application with

respect to the insolvent group members, it could be said of the other group members that they would be unable to pay their debts as they mature.

7. Permitting those group members that satisfy the commencement standard to make a joint application for commencement of insolvency proceedings would facilitate the consideration of those applications by the court, without affecting the separate identity of the applicants. Such a joint application might include, where permitted under the law and feasible in the circumstances, a single application covering all group members that satisfy the commencement standard or parallel applications made at the same time in respect of each of those members. The latter approach may be appropriate where the group members are not located in the same domestic jurisdiction and different courts have competence (as discussed below) or where other circumstances of the case, such as that there is a significant number of proceedings to be coordinated, suggest that a single application would not be practical. In both cases, the insolvency law should facilitate the court undertaking a coordinated consideration of whether the commencement standards with respect to the individual group members are satisfied, taking into account the group context where relevant.

(a) Joint application and procedural coordination

8. The making of a joint application for commencement of insolvency proceedings should be distinguished from what is referred to below as procedural coordination. The purpose of permitting a joint application is to facilitate coordination of commencement considerations and potentially reduce costs. Commencement of multiple proceedings on the basis of a joint application should also facilitate coordination of those proceedings; the commencement date, and any other dates calculated by reference to that date, such as those relating to the suspect period, would be the same for each member. Permitting a joint application is not intended to predetermine how, if the proceedings commence, they will be administered and, in particular, whether they will be subject to procedural coordination. Nevertheless, a joint application for commencement might include an application for procedural coordination, as noted below, and might facilitate the court taking a decision on procedural coordination.

(b) Including a solvent group member in a joint application

9. An additional question that is often discussed in the group context is whether a solvent group member can be included in an application for commencement of insolvency proceedings with respect to other group members and if so, in what circumstances. Where a group member appears to be solvent but further investigation shows insolvency to be imminent, inclusion of that member in the application would be covered by recommendation 15 of the *Legislative Guide*, as noted above.

10. Where imminent insolvency is not an issue however, different approaches may be taken. Where a group is closely integrated, an insolvency law may permit an application for commencement to include group members that do not satisfy the commencement standard, on the basis that it is desirable in the interests of the group as a whole that those members be included in the proceedings. Factors relevant to determining whether the necessary degree of integration exists might include: that there is a relationship between the group members that is variously described, but

involves, for example, a significant degree of interdependence or control; intermingling of assets; the fictitious nature of the group; unity of identity, reliance on management and financial support or other similar factors that need not necessarily arise from the legal relationship (such as parent-subsidiary) between the group members.

11. Such an approach may facilitate the preparation of a comprehensive reorganization plan, addressing the assets of both solvent and insolvent group members. It could also facilitate development of an insolvency solution for the whole of the group, avoiding piecemeal commencement of proceedings over time, if and when additional group members became affected by the insolvency proceedings initiated against the originally insolvent members.

12. One of the problems with such an approach, however, is that the insolvency law will generally only cover those entities properly regarded as satisfying the standard for commencement of insolvency proceedings. A solvent group member may, however, be voluntarily included in a reorganization plan, where a commercial decision is taken by that member that it should participate in the plan (see below, A/CN.9/WG.V/WP.82/Add.3, paras. 54-55).

13. A joint application for commencement might also be permitted where all interested group members consent to the inclusion of one or more other members, whether they are insolvent or not, or all parties in interest, including creditors, so consent. An insolvency law might also consider whether a group member not involved at the time of commencement of insolvency proceedings against other group members might later be joined in those proceedings if it is subsequently affected by those proceedings or it is determined that its joiner would be in the interests of the group as a whole.

(c) Persons permitted to make a joint application

14. Consistent with the approach of recommendation 14 of the *Legislative Guide*, an insolvency law may permit a joint application to be made by two or more enterprise group members that satisfy the commencement standard of the insolvency law and any creditor of two or more such members.

(d) Competent courts

15. A joint application for commencement with respect to two or more enterprise group members may raise issues of jurisdiction, even in the domestic context, if those group members are located in different places with different courts being competent to consider the respective applications. Some jurisdictions may allow those applications for commencement to be transferred to a single court where they can be centralized for consideration. Although that approach is desirable, it will ultimately be a question of whether domestic law would allow joint applications involving different courts to be treated in such a way. The fees payable and other associated issues arising out of a joint application for commencement may also need to be addressed.

16. Although the issue of which court is competent to consider a joint application for commencement where the subject group members are located in different jurisdictions might be addressed by law other than the insolvency law, it is desirable that the approach of recommendation 13 of the *Legislative Guide* be followed. This

would require the insolvency law to clearly indicate or include a reference to the relevant law that establishes the court with jurisdiction over such an application. Adoption of that approach should make it clear to all relevant parties where and how such an application can be pursued.

(e) Notice of application

17. The recommendations of the *Legislative Guide* with respect to notification of an application for commencement of insolvency proceedings would apply to a joint application. A joint application by a creditor should be notified to the group members which are the subject of the application in accordance with recommendation 19 (a). Where group members make a joint application, notice would not be required until proceedings commenced on the basis of that application, in accordance with recommendation 22.

Recommendations

Purpose of legislative provisions

The purpose of provisions on joint application for commencement of insolvency proceedings with respect to two or more enterprise group members is:

(a) To facilitate coordinated consideration of those applications for commencement of insolvency proceedings;

(b) To enable the court to obtain information concerning the enterprise group that would facilitate determination of whether commencement should be ordered;

(c) To facilitate efficiency and reduce the costs associated with commencement of those insolvency proceedings; and

(d) To provide a mechanism for the court to assess whether procedural coordination of those insolvency proceedings might be appropriate.

Contents of legislative provisions

Joint application for commencement of insolvency proceedings

1. The insolvency law may specify that a joint application for commencement of insolvency proceedings may be made with respect to two or more enterprise group members. A joint application may be made by:

(a) Two or more enterprise group members, provided that each of those members satisfies the commencement standard in recommendation 15 of the *Legislative Guide*; or

(b) A creditor of two or more enterprise group members provided that each of those members satisfies the commencement standard in recommendation 16 of the *Legislative Guide*.

Competent courts

2. The insolvency law should indicate that for the purposes of applying recommendation 13 of the *Legislative Guide* in the context of enterprise groups, the words “commencement and conduct of insolvency proceedings, including matters

arising in the course of those proceedings" include joint applications for commencement of insolvency proceedings.

2. Procedural coordination

(a) Purpose of procedural coordination

18. Procedural coordination, as noted in the glossary, may refer to varying degrees of integration of multiple insolvency proceedings commenced with respect to enterprise group members. Procedural coordination is intended to promote procedural convenience and cost efficiency and may facilitate comprehensive information being obtained on the business operations of the group members subject to the insolvency proceedings; assist the valuation of assets and the identification of creditors and others with legally recognized interests; and avoid duplication of effort. Although administered together, the assets and liabilities of each group member involved in the procedural coordination remain separate and distinct, thus preserving the integrity of the individual enterprises of the group and the substantive rights of claimants. Accordingly, the effect of procedural coordination is limited to administrative aspects of the proceedings and does not touch upon substantive issues.

19. Multiple proceedings may be streamlined in various ways through an order for procedural coordination, facilitating sharing of information to obtain a more comprehensive picture of the situation of the various debtors; combining of hearings and meetings, including joint meetings of creditors; compiling of a single list of creditors and other parties in interest for the provision of notice and coordination of the provision of notice; establishment of joint deadlines; agreement on a joint claims procedure and coordinated sale of assets; and the holding of a single creditor committee or coordination among creditor committees. It may also be facilitated by appointment of a single insolvency representative to administer the insolvency proceedings or facilitate coordination between insolvency representatives where two or more are appointed (see below, A/CN.9/WG.V/WP.82/Add.3, paras. 42-46) and may involve cooperation between two or more courts or, in the domestic context, administration of the proceedings concerning group members in a single court.

20. Various factors might be relevant to considering whether procedural coordination is appropriate in a particular case. These may relate, for example, to information substantiating the existence of the group and identifying the linkages between group members and the position in the group of each member covered by the application, particularly where one of them was the controlling entity or parent. Although the provision of such detail might be difficult where creditors are permitted to apply for procedural coordination, the essence of the application is that the debtors are group members and the court would generally need to be satisfied as to that relationship when determining whether proceedings should commence.

21. With respect to creditor participation, the interests of creditors of the different entities have the potential to diverge and it is unlikely that those interests could be represented in a single committee. It may be the case, however, that in cases of procedural coordination involving many group members, establishing a separate committee for the creditors of each member might prove to be extremely costly and inefficient for administration of the proceedings. For that reason, the courts in some States have the discretion not to establish a creditor committee for each separate

entity in appropriate circumstances. Accordingly, the general principle may be that it is desirable that the insolvency law permit a single creditor committee to be established in suitable cases.

(b) Timing of application and persons permitted to apply

22. The benefits to be derived from procedural coordination may be apparent at the time an application for commencement is made or may arise after proceedings have commenced. In either case, it is desirable that the court be given the discretion to consider whether the various proceedings should be procedurally coordinated. The court may consider whether to order procedural coordination on its own initiative, or in response to an application from authorized parties, such as any group member subject to insolvency proceedings, the insolvency representative of a member, who would generally possess the information most relevant for making such an application, or a creditor. In the case of creditors, it may be both desirable and practical to limit a creditor application to those group members of which it is a creditor, since a creditor is generally only likely to have relevant information with respect to those entities.

(c) Competent courts

23. Procedural coordination may also raise the issues of jurisdiction noted above with respect to joint applications for commencement (see paras. 15-16 above), where different courts have competence over the various group members subject to insolvency proceedings. In jurisdictions where those issues arise, they would generally be determined by reference to domestic procedural law. In some States, different proceedings may be consolidated or transferred to an appropriate court, for example, the court with competence to administer insolvency proceedings with respect to the parent of a group. A range of other criteria, such as priority of filing, size of indebtedness or centre of control, might also be chosen to establish the prevailing competence of one court in the domestic setting. A key element of consolidating or transferring proceedings to a single court would be establishing communication between the courts involved. Creditors of different group members might also be located in different places, raising issues of representation and the location in which creditor committees would meet or be constituted.

24. Although these issues might be addressed by law other than the insolvency law, it is desirable, as noted above with respect to joint applications (para. 16), that the approach of recommendation 13 of the *Legislative Guide* be followed. That would require the insolvency law to clearly indicate or include a reference to the relevant law that establishes the court with jurisdiction over an application for procedural coordination.

(d) Notice of applications and orders for procedural coordination

25. An application for procedural coordination may be subject to the same requirements for giving of notice as an application for commencement of proceedings under the *Legislative Guide*. When made at the same time as the application for commencement of proceedings, only an application for procedural coordination by creditors would require notice to be given to the relevant debtors. An application by group members should not require creditors to be notified.

26. When an application for procedural coordination is made subsequent to commencement of proceedings, the same considerations would generally apply, since procedural coordination does not affect the substantive rights of creditors.

27. When an order is made for procedural coordination, it may be desirable to provide that notice of that order be given to creditors, even though such an order is not intended to affect their substantive rights. It may be possible, however, to draw a distinction between orders for procedural coordination made at the time of the application for commencement of insolvency proceedings and those made subsequently. In the former case, specific notice may not be required, but relevant information could be included with the notice of commencement of proceedings. Where the order is made subsequent to commencement of proceedings, giving notice may be appropriate. This may be particularly important where the law makes provision, as noted above, for cases commenced in different jurisdictions to be transferred to, or administered by, a single jurisdiction and that transfer may affect procedural aspects of the proceedings of interest to creditors, such as location of meetings of a creditor committee or the place for submission of claims.

28. Provision of notice to all creditors may be satisfied with collective notification, such as by notice in a particular legal publication, when domestic legislation so permitted and when appropriate for instance in case of a large number of creditors with very small claims. In addition to the information required by the recommendations of the *Legislative Guide* addressing provision of notice on commencement of proceedings, notice of an order for procedural coordination might include the terms of the order and information relevant to, for example, coordination of hearings and meetings, and arrangements to be made with respect to lending.

(e) Modifying or terminating an order for procedural coordination

29. Given that the purpose of procedural coordination is to promote administrative convenience and cost efficiency, an insolvency law may include provisions relating to modification or reversal of such an order to accommodate changed circumstances. Such an approach might be appropriate when, for example, a coordinated reorganization is not successful and the individual members should be liquidated separately. Reversal of such an order, although rarely required, should be possible as the initial order is not intended to affect substantive rights. As a safeguard, the insolvency law could provide that reversal or modification would be possible, provided it was without prejudice to actions taken or rights affected by the initial order.

Recommendations

Purpose of legislative provisions

The purpose of provisions on procedural coordination is:

(a) To facilitate coordination of insolvency proceedings with respect to two or more enterprise group members in the interests of creditors and debtors, while respecting the separate legal identity of each group member; and

(b) To promote procedural convenience and cost efficiency.

Contents of legislative provisions

Procedural coordination of two or more insolvency proceedings

3. The insolvency law should specify that:

(a) The court may order or authorize the administration of insolvency proceedings with respect to two or more enterprise group members to be coordinated for procedural purposes. The scope and extent of the procedural coordination should be specified by the court;

(b) Procedural coordination may involve some or all of the following: provision of notice, information sharing, coordination of hearings, negotiations, procedures for filing of claims, and cooperation of insolvency representatives;

(c) An application for procedural coordination may be made at the time of an application for commencement of those insolvency proceedings or at any subsequent time.

Parties permitted to apply for procedural coordination

4. The insolvency law should specify that an application for procedural coordination may be made by:[1]

(a) An enterprise group member that has applied for or is subject to insolvency proceedings;

(b) The insolvency representative of an enterprise group member that is subject to insolvency proceedings; or

(c) A creditor but only with respect to those enterprise group members of which it is a creditor.

Consideration of applications for procedural coordination

5. The insolvency law should specify that the court may take appropriate steps to facilitate coordinated consideration of an application for procedural coordination.

6. For the purposes of recommendation 5, appropriate steps might include: coordinated and joint hearings; sharing and disclosing information; […].

Modification or termination of procedural coordination

7. The insolvency law should specify that the court may modify or terminate an order for procedural coordination, provided that any actions or decisions taken pursuant to the order for procedural coordination should not be affected by the order for modification or termination.

Competent courts

8. The insolvency law should indicate that for the purposes of applying recommendation 13 of the *Legislative Guide* to enterprise groups, the words "commencement and conduct of insolvency proceedings, including matters arising

---

[1] It is also a matter for domestic law to determine the power courts may have with respect to initiating procedural coordination of insolvency proceedings (see below, A/CN.9/WG.V/WP.82/Add.3, para. 24, with respect to court power to initiate).

in the course of those proceedings" include applications and orders for procedural coordination.

Notice of procedural coordination

9. The insolvency law should establish requirements for giving notice with respect to applications and orders for procedural coordination and modification or termination of an order for procedural coordination, including the scope and extent of the order; to whom notice should be given; who is responsible for giving notice and the content of the notice.

[*A/CN.9/WG.V/WP.82 provides an introduction to enterprise groups; Add.2 addresses treatment of assets on commencement of insolvency proceedings (protection and preservation of the insolvency estate, use and disposal of assets, post-commencement finance), avoidance, and subordination; Add.3 addresses remedies (extension of liability, contribution orders and substantive consolidation), participants (single insolvency representative) and reorganization plans; and Add.4 addresses international issues*.]

A/CN.9/WG.V/WP.82/Add.2 (Original: English)

Note by the Secretariat on the treatment of enterprise groups in insolvency, submitted to the Working Group on Insolvency Law at its thirty-fifth session

ADDENDUM

CONTENTS

V. Treatment of assets on commencement of insolvency proceedings

1. The manner in which the commencement of insolvency proceedings will affect the debtor and its assets are discussed in detail in the *Legislative Guide* (see part two, chap. I). In general, those effects would apply equally to commencement of insolvency proceedings against two or more enterprise group members. Some of the effects that might differ in the group context are discussed below, with respect to protection and preservation of the insolvency estate; post-commencement finance; avoidance; subordination; and remedies, including substantive consolidation orders.

A. Protection and preservation of the insolvency estate

2. The *Legislative Guide* notes (see part two, chap. II, para. 26) that many insolvency laws include a mechanism to protect the value of the insolvency estate that not only prevents creditors from commencing actions to enforce their rights through legal remedies during some or all of the period of insolvency proceedings,

but also suspends actions already under way against the debtor. The provisions of the *Legislative Guide* relating to the application of that mechanism, referred to as a "stay", would apply generally in the case of insolvency proceedings against two or more enterprise group members (see recommendations 39-51).

3. One issue that might arise in the context of the insolvency of enterprise groups, but not in the case of individual debtors, is the extension of the stay to an enterprise group member that is not subject to the insolvency proceedings (where the insolvency law permits a group member that is not insolvent to be included in the proceedings, this issue will not arise). The issue may be of particular relevance to enterprise groups because of the interrelatedness of the business of the group. For example, when finance arranged on a group basis by way of cross-guarantees or cross-collateralization, the finance provided to one member might affect the liabilities of another, or actions affecting the assets of group members not subject to insolvency proceedings may also affect the assets and liabilities or the ability to continue their ordinary course of business of group members against which applications for commencement have been made or insolvency proceedings have commenced.

4. Extension of the stay might be sought in a number of situations, for example, to protect an intra-group guarantee that relies upon the assets of the solvent group member providing the guarantee; to restrain a lender seeking to enforce an agreement against a solvent group member, where that enforcement might affect the liability of a member subject to an application for insolvency proceedings; and to restrain enforcement of a security interest against assets of a solvent entity that are central to the business of the group, including the business of group members subject to an application for insolvency proceedings. Such extension of the stay has the potential to affect the business of the solvent member and the interests of its creditors, depending upon the nature of the solvent member and its function within the group structure. The day-to-day activities of a trading group member, for example, may be more adversely affected than those of a subsidiary established to hold certain assets or obligations.

5. In some jurisdictions, ordering insolvency-related relief against a solvent group member (not included in insolvency proceedings) might not be possible as it might conflict, for example, with the protection of property rights or raises issues of constitutional rights. Nevertheless, it might be possible to achieve the same effect if a court could order measures of protection in conjunction with the commencement of insolvency proceedings against other enterprise group members in certain cases, such as where there is an intra-group guarantee. The measures may be available at the courts' discretion, subject to such conditions as the court determines appropriate.

6. Such measures might be covered by recommendation 48 of the *Legislative Guide*, which provides for the court to grant relief in addition to any relief that might be applicable automatically on commencement of insolvency proceedings (such as that addressed in recommendation 46). As the footnote to recommendation 48 points out, that additional relief would depend upon the types of measures available in a particular jurisdiction and the measures that might be appropriate in a particular insolvency proceeding.

7. Measures might also be available on a provisional basis. Recommendation 39 of the *Legislative Guide* addresses provisional measures, specifying the types of

relief that might be available "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".

8. Protection for the interests of the creditors, both secured and unsecured, of the solvent group member, might be found in the relevant provisions of the *Legislative Guide*; recommendation 51 for example specifically addresses the issue of protection of secured creditors and grounds for relief from the stay applicable on commencement and might be extended to secured creditors of the solvent group member. Other grounds for relief from the stay might relate to the financial situation of the solvent member and the continuing effect of the stay on its day-to-day operations and, potentially, its solvency.

9. Where a secured creditor is at the same time another member of the same enterprise group, a different approach to the question of protection might be required, especially where the insolvency law permits consolidation or subordination of related person claims (see below).

B. Use and disposal of assets

10. The *Legislative Guide* notes (see part two, chap. II, para. 74) that, although as a general principle it is desirable that an insolvency law not interfere unduly with the ownership rights of third parties or the interests of secured creditors, the conduct of insolvency proceedings will often require assets of the insolvency estate, and assets in the possession of the debtor being used in the debtor's business, to continue to be used or disposed of (including by way of encumbrance) in order to enable the goal of the particular proceedings to be realized.

11. Where insolvency proceedings concern two or more enterprise group members, issues may arise with regard to the use of assets belonging to a group member not subject to insolvency proceedings to support ongoing operations of those members subject to such proceedings, pending resolution of the proceedings. Where those assets are in the possession of one of the group members subject to insolvency proceedings, recommendation 54 of the *Legislative Guide*, which addresses the use of third-party owned assets in the possession of the debtor, may be sufficient.

12. Where those assets are not in the possession of any of the group members subject to insolvency proceedings, recommendation 54 generally will not apply. There may be circumstances, however, where the solvent group member is included in the insolvency proceedings and the provisions of a group reorganization plan would cover the assets. Where the solvent group member is not included in the proceedings, the question will be whether those assets can be used to support those group members subject to insolvency proceedings and if so, the conditions to which that use would be subject. The use of those assets might raise questions of avoidance, particularly where the supporting member subsequently became insolvent, and also raises concerns for creditors of that member.

C. Post-commencement finance

13. The *Legislative Guide* recognizes that the continued operation of the debtor's business after the commencement of insolvency proceedings is critical to reorganization and, to a lesser extent, liquidation where the business is to be sold as a going concern. To maintain its business activities, the debtor must have access to funds to enable it to continue to pay for crucial supplies of goods and services, including labour costs, insurance, rent, maintenance of contracts and other operating expenses, as well as costs associated with maintaining the value of assets. The *Guide* notes, however, that many jurisdictions restrict the provision of new money in insolvency or do not specifically address the issue of new finance or the priority for its repayment in insolvency. Of those laws that do address post-commencement finance, very few, if any, specifically address the issue in the context of enterprise groups.

14. Recommendations 63-68 of the *Legislative Guide* aim to promote the availability of finance for continued operation or survival of the debtor's business and provide appropriate protection for the providers of post-commencement finance, as well as appropriate protection for those parties whose rights may be affected by the provision of post-commencement finance.

15. Post-commencement finance may be even more important in the group context than it is in the context of individual proceedings. If there are no ongoing funds there is very little prospect of reorganizing an insolvent enterprise group or selling all or parts of it as a going concern and the economic impact of that failure is likely to be much greater, especially in large groups, than it would be in the case of an individual debtor. The reasons for promoting the availability of post-commencement finance in the group context are therefore similar to the case of the individual debtor, although a number of issues different to those relating to the individual debtor are likely to arise. These may include: balancing the interests of individual enterprise group members with what is required for the reorganization of the group as a whole; the provision of post-commencement finance by solvent group members, especially in cases where issues of control might arise, such as where that solvent member was controlled by the insolvent parent of the group; treatment of transactions that are essentially between related parties (see glossary, para. (jj)); provision of finance by group members subject to insolvency proceedings; the possibility of conflict of interest between the needs of the different debtors with respect to ongoing finance where a single insolvency representative is appointed to several group members; and the desirability of maintaining, in insolvency proceedings, the financing structure that the group had before the onset of insolvency, especially where that structure involved pledging all of the assets of the group for finance that was channelled through a centralized group entity with treasury functions.

1. Provision of post-commencement finance by a solvent group member

16. As noted above, one of the questions with respect to post-commencement finance in the enterprise group context is whether the assets of a solvent group member can be used, such as by provision of a security interest or guarantee, to obtain financing for an insolvent member from an external source or to fund the insolvent member directly and, if so, the implications for the recommendations of

the *Legislative Guide* concerning priority and security. A solvent group member might have an interest in the financial stability of the parent, other group members or the group as a whole in order to ensure its own financial stability and the continuation of its business. Different types of solvent entities, such as special purpose entities with few liabilities and valuable assets, could be involved in granting a guarantee or security interest.

17. However, use of the assets of a solvent group member as a basis for obtaining finance for an insolvent member raises a number of questions, especially where that solvent member is likely to become, or subsequently becomes, insolvent. While the solvent entity would provide that finance on its own authority under relevant company law in a commercial context and not under the insolvency law, the consequences of that provision of finance may be regulated by the insolvency law. A question may arise, for example, as to whether a solvent subsidiary group member would be entitled to the priority provided under recommendation 64 of the *Legislative Guide* if it provided funding to an insolvent group member; whether the claim arising from that transaction would be subject to special treatment because the transactions occurred between related parties under recommendation 184; or whether such a transaction might be considered a preferential transaction in any subsequent insolvency of the member providing that finance. Under some laws, providing such finance may constitute a transfer of the assets of that solvent entity to the insolvent entity to the detriment of the creditors and shareholders of the solvent entity and thus be prohibited.

18. Some of the difficulties associated with provision of finance by a solvent group member might be solved if addressed in the context of a reorganization plan, in which the solvent group member, as well as finance providers, could participate on a contractual basis. However, while there might be situations where that approach could be appropriate, the requirement for post-commencement finance at any early stage of the insolvency proceedings and before a plan could be negotiated and in cases such as liquidation on a going concern basis, where there would not be a reorganization plan, suggests it would be of limited application.

19. Recommendation 63 of the *Legislative Guide* establishes the basis for obtaining post-commencement finance (that the insolvency representative determines it to be necessary for the continued operation or survival of the business of the debtor or the preservation or enhancement of the value of the estate) and how it might be authorized (by the court or by creditors). Those requirements remain relevant in the context of enterprise groups, and for the avoidance of doubt, it might be made clear that, in the enterprise group context, recommendation 63 should be interpreted as applying to the provision of post-commencement finance to a group member subject to insolvency proceedings by both an external lender and a solvent group member.

2. Provision of post-commencement finance by an insolvent group member

20. Provision of post-commencement finance by one group member subject to insolvency proceedings to another such member is not directly addressed by the *Legislative Guide*. Some of the difficulties under existing laws associated with insolvent entities borrowing and lending funds may need to be further considered to facilitate provision of post-commencement finance in that situation. Under some insolvency laws, for example, the provision of such finance is likely to raise issues

of liability of both the provider of finance and the debtor being financed. As the *Legislative Guide* notes (see part two, chap. II, para. 96), some insolvency laws provide, for example, that where a lender advances funds to an insolvent debtor in the period before commencement of proceedings, the lender may be responsible for any increase in the liabilities of other creditors or the advance may be subject to avoidance in any ensuing insolvency proceedings as a preferential transaction. In other examples, the insolvency representative is required to borrow the money, potentially involving personal liability for repayment.

21. While it may generally be expected that a group member subject to insolvency proceedings would not have the ability to provide post-commencement finance to another such member, there may be circumstances where it would be both possible, and desirable, particularly when the group is considered as a whole. To the extent that the provision of such finance has an impact on the rights of existing creditors, both secured and unsecured, of both members, it must be balanced against the prospect that preservation of going concern value by continued operation of the business will ultimately provide benefit to those creditors. A balance should also be achieved between sacrificing one group member for the benefit of other members and achieving a better overall result for all members. Although difficult to achieve, the goal should be fair apportionment of the harm that might arise from such post-commencement finance in the short term with a view to the long term gain, rather than the sacrifice of one member (and its creditors) for the benefit of others.

22. For the avoidance of doubt, it should be made clear that, in the enterprise group context, recommendation 63 should be interpreted as applying, in addition to the circumstances noted above, to the provision of post-commencement finance by a group member subject to insolvency proceedings to another such member.

(a) Conflict of interest

23. The provision of such finance also raises issues concerning possible prejudice and conflict of interest that do not arise in the context of a single debtor. A conflict of interest might arise, for example, where a single insolvency representative is appointed to the insolvency proceedings of a number of group members. For example, the insolvency representative of the member providing the finance might also be the insolvency representative of the receiving member. That situation might be addressed by the appointment of an additional insolvency representative (discussed below, see A/CN.9/WP.82/Add.3, paras. 42-46), whether to address that specific conflict or more generally, to achieve a better balance between the interests of the creditors of the different group members.

(b) Priority for post-commencement finance

24. Recommendation 64 of the *Legislative Guide* specifies the need to establish the priority to be accorded to post-commencement finance and the level of that priority, i.e. ahead of ordinary unsecured creditors, including those with administrative priority. While priority generally provides an important incentive for the provision of such financing, the inducement required in the group context is perhaps slightly different than in the situation of the individual debtor. The particular interest of the group member providing finance may relate more to the insolvency outcome for the group as a whole (including that member), than to commercial considerations of profit or short-term gains. In such circumstances, it

might be necessary to consider whether the level of priority recommended by the *Legislative Guide* would be appropriate. One view might be that the same priority would be appropriate as there must be incentives for the provision of finance and such a priority would afford greater protection to the creditors of the provider. Another view might be that because of the related party nature of the transaction and the group context (including the finance provider's self-interest in the outcome of the insolvency proceedings for the group as a whole), a lower priority should be accorded to protect the interests of creditors more generally and achieve a balance between the interests of the finance provider's creditors and those of the group member receiving the finance. Whichever approach is adopted, it is desirable that the insolvency law accord priority to such lending and specify the appropriate level.

(c) Security for post-commencement finance

25. Recommendations 65-67 of the *Legislative Guide* address issues relating to the granting of security for post-commencement finance and would be generally applicable in the enterprise group context. The granting of a security interest of the type referred to in recommendation 65 by one group member subject to insolvency proceedings for repayment of post-commencement finance provided to another such member may be distinguished from the same financing transaction between an external lender and an individual debtor. In the group context, the group member is granting the security over its unencumbered assets but is not directly receiving the benefit of the post-commencement finance and is potentially diminishing the pool of assets available to its creditors. It may, however, derive an indirect benefit in the group context when the provision of finance facilitates a better solution for the insolvency of the group as a whole and, as noted above, any short-term detriment is offset by the long-term gain for creditors, including its own creditors. The member receiving the finance is deriving a direct benefit, but increasing its indebtedness to the potential detriment of its creditors, although they should also benefit in the longer term.

26. To achieve a balance between the interests of the finance provider's creditors and those of the group member receiving the finance, it may be desirable to require, with respect to recommendation 65, that creditors should consent to the grant of such a security interest or that the harm to creditors must be offset by the benefit to be derived from the granting of the security interest. The question of harm or benefit is linked to the determination of the necessity of post-commencement finance and its authorization pursuant to recommendation 63 and it is therefore desirable that the parties responsible under that recommendation are also responsible for making the determination as to harm. Consistent with recommendation 63, that could be the insolvency representative, with the possibility of requiring authorization also from creditors or the court.

27. Given that new finance may be required on a fairly urgent basis to ensure the continuity of the business, it is desirable that the number of authorizations required be kept to a minimum. The *Legislative Guide* (see part two, chap. II, paras. 105-106) discusses the advantages and disadvantages of the different considerations with respect to authorization that would also apply in the group context. It may be added that since the issues to be determined are likely to be more complex in that context, involving as they do a larger number of parties and complex interrelationships, it is most likely to be the insolvency representatives of the relevant group members that

will be in the best position to assess the impact of the proposed financing arrangement, in much the same way as they are with respect to determining the need for new finance under recommendation 63. If the involvement of the courts or creditors is considered desirable, however, it should be borne in mind that issues of delay may be encountered where there are a large number of creditors to be consulted or where the court does not have the ability to make speedy decisions.

28. Where it is considered desirable to accord a security interest granted to secure new finance a priority ahead of an existing security interest over the same asset, as contemplated by recommendation 66, the safeguards applicable under that recommendation and recommendation 67 would apply in the group context.

(d) Guarantee or other assurance of repayment for post-commencement finance

29. The granting of a guarantee by one group member for payment of new finance to another is not a situation that arises in the case of an individual debtor and is therefore not addressed in the *Legislative Guide*. However, since the considerations that arise are similar to those discussed above with respect to the granting of a security interest, it may be appropriate to adopt the same approach, that is, to require the consent of creditors or a determination that the potential harm will be offset by the benefit to be derived.

Recommendations

Purpose of legislative provisions

The purpose of provisions on post-commencement finance for enterprise groups is:

(a) To facilitate finance to be obtained for the continued operation or survival of the business of the enterprise group members subject to insolvency proceedings or the preservation or enhancement of the value of the assets of the estates of those members;

(b) To facilitate the provision of finance by enterprise group members, including members subject to insolvency proceedings;

(c) To ensure appropriate protection for the providers of post-commencement finance and for those parties whose rights may be affected by the provision of that finance; and

(d) To advance the objective of fair apportionment of benefit and detriment among all group members.

Contents of legislative provisions

Provision of post-commencement finance by a group member subject to insolvency proceedings

10. The insolvency law should permit an enterprise group member subject to insolvency proceedings to:

(a) Advance post-commencement finance to other enterprise group members subject to insolvency proceedings;

(b) Pledge its assets as security for post-commencement finance provided to other enterprise group members subject to insolvency proceedings; and

(c) Provide a guarantee or other assurance of repayment for post-commencement finance obtained by other enterprise group members subject to insolvency proceedings, provided the insolvency representative of the member advancing finance, pledging assets or providing a guarantee determines it to be necessary for the continued operation or survival of the business of that enterprise group member or for the preservation or enhancement of the value of the estate of that enterprise group member. The insolvency law may require the court to authorize or creditors of the lending, pledging or guaranteeing group member to consent.

Priority for post-commencement finance

11. The insolvency law may specify the priority that should apply to post-commencement finance provided by one enterprise group member subject to insolvency proceedings to another group member that is also subject to insolvency proceedings. Where the priority is not specified by the insolvency law, the court should be authorized to determine that priority.

Security for post-commencement finance

12. The insolvency law should specify that a security interest of the type referred to in recommendation 65 of the *Legislative Guide* may also be granted by an enterprise group member subject to insolvency proceedings for repayment of post-commencement finance provided to another group member that is also subject to insolvency proceedings, provided creditors consent or a determination is made in accordance with the insolvency law that any harm to creditors is offset by the benefit to be derived from the granting of the security interest.[1]

Guarantee or other assurance for repayment of post-commencement finance

13. The insolvency law should specify that an enterprise group member subject to insolvency proceedings may guarantee or provide other assurance of repayment for post-commencement finance obtained by another group member subject to insolvency proceedings, provided creditors consent or a determination is made in accordance with the insolvency law that harm to creditors is offset by the benefit to be derived from the provision of the guarantee or other assurance of repayment.

D. Avoidance proceedings

30. Recommendations 87-99 of the *Legislative Guide* relating to avoidance would generally apply to avoidance of transactions in the context of an enterprise group, although additional considerations may apply to transactions between group members. A significant expenditure of time and money may be required to disentangle the layers of intra-group transactions in order to determine which, if any, are subject to avoidance. Some transactions that might appear to be preferential or undervalued as between the immediate parties might be considered differently when viewed in the broader context of a closely integrated group, where the benefits

[1] Recommendations 66-67 of the *Legislative Guide* set forth the safeguards to apply to the granting of a security interest to secure post-commencement finance. Those safeguards would apply to the granting of a security interest in the enterprise group context.

and detriments of transactions might be more widely assigned. Those transactions may involve different terms and conditions than the same contracts entered into by unrelated commercial parties on usual commercial terms, for example, contracts entered into for purposes of transfer pricing.[2] Similarly, some legitimate transactions occurring within a group may not be commercially viable outside the group context if the benefits and detriments were analysed on normal commercial grounds.

31. Intra-group transactions may represent trading between group members; channelling of profits upwards from the subsidiary to the parent; loans from one member to another to support continued trading by the borrowing member; asset transfers and guarantees between group members; payments by one group member to a creditor of a related group member; a guarantee or mortgage given by one group member to support a loan by an outside party to another group member; or a range of other transactions. A group may have the practice of putting all available money and assets in the group to the best commercial use in the interests of the group as a whole, as opposed to the benefit of the group member to which they belong. This might include sweeping cash from subsidiaries into the financing group member. Although this might not always be in the best interests of the subsidiary, some laws permit directors of wholly owned subsidiaries, for example, to act in that manner, provided it is in the best interests of the parent.

32. Some of the transactions occurring in the group context may be clearly identified as falling within the categories of transactions subject to avoidance under recommendation 87 of the *Legislative Guide*. Other transactions may not be so clearly within the scope of recommendation 87 and may raise issues concerning the extent to which the group was operated as a single enterprise or the assets and liabilities of group members were closely intermingled, thus potentially affecting the nature of the transactions between members and between members and external creditors. There may also be transactions that are not covered by the terms of avoidance provisions. Some insolvency laws, for example, provide for avoidance of preferential payments to a debtor's own creditors, but not to the creditors of a related group member, unless the payment is made, for example, pursuant to a guarantee. It is desirable that an insolvency law includes these factors as matters to be taken into account in determining whether a particular transaction between group members would be subject to avoidance under recommendation 87.

33. An issue that may need to be considered in the group context is whether the goal of avoidance provisions is to protect intra-group transactions in the interests of the group as a whole or subject them to particular scrutiny because of the relationship between group members. Transactions between group members might be covered by those provisions of an insolvency law dealing with transactions between related persons. The *Legislative Guide* defines "related person" to include enterprise group members such as a parent, subsidiary, partner or affiliate of the insolvent group member against which insolvency proceedings have commenced or a person, including a legal person, that is or has been in control of the debtor. Those

---

[2] Transfer pricing refers to the pricing of goods and services within a multi-divisional organization. Goods from the production division may be sold to the marketing division, or goods from a parent company may be sold to a foreign subsidiary. The choice of the transfer prices affects the division of the total profit among the parts of the company. It can be advantageous to choose them so that, in terms of bookkeeping, most of the profit is made in a country with low taxes.

transactions are often subject, under the insolvency law, to stricter avoidance rules than other transactions, in particular with regard to the length of suspect periods, as well as presumptions or shifted burdens of proof to facilitate avoidance proceedings and dispensing with requirements that the debtor was insolvent at the time of the transaction or was rendered insolvent as a result of the transaction. A stricter regime may be justified on the basis that these parties are more likely to be favoured and tend to have the earliest knowledge of when the debtor is, in fact, in financial difficulty.

34. Recommendation 97 addresses the elements to be proven to avoid a particular transaction and defences to avoidance and it may be appropriate to consider how they would apply in the group context and whether a different approach is required. One approach to the burden of proof in the case of transactions with related persons, for example, might be to provide that the requisite intent or bad faith is deemed or presumed to exist where certain types of transactions are undertaken within the suspect period and the counterparty to the transaction will have the burden of proving otherwise. In the context of enterprise groups, some laws have established a rebuttable presumption that certain transactions among group members and the shareholders of that group would be detrimental to creditors and therefore subject to avoidance. A different approach would be to acknowledge, as noted above, that transactions occurring within a group, although not always commercially viable if occurring outside the group context, are generally legitimate, especially when occurring within the limits of relevant applicable law and within the ordinary course of business of the group members concerned, but should nevertheless be subjected to special scrutiny (in much the same way as is recommended for claims by related persons in recommendation 184 of the *Legislative Guide*). Some laws also permit claims of the related group member to be subjected to special treatment and the rights of related group members under intra-group debt arrangements to be deferred or subordinated to the rights of external creditors of the insolvent members.

35. Recommendation 93 makes limited provision for a creditor to commence an avoidance proceeding with the approval of the insolvency representative or leave of the court. In the group context, the level of integration of the group may have the potential to significantly affect the ability of creditors to identify the group member with which they dealt and thus provide the requisite information for commencing avoidance proceedings.

Recommendations

Purpose of legislative provisions

The purpose of avoidance provisions is:

(a) To reconstitute the integrity of the estate and ensure the equitable treatment of creditors;

(b) To provide certainty for third parties by establishing clear rules for the circumstances in which transactions occurring prior to the commencement of insolvency proceedings involving the debtors or the debtors' assets may be considered injurious and therefore subject to avoidance;

(c) To enable the commencement of proceedings to avoid those transactions; and

(d) To facilitate the recovery of money or assets from persons involved in transactions that have been avoided.

Contents of legislative provisions

Avoidable transactions

14. The insolvency law should specify that, in considering whether a transaction of the kind referred to in recommendation 87 (a), (b) or (c) of the *Legislative Guide* that took place between related persons in an enterprise group context should be avoided, the court may have regard to the circumstances of the enterprise group in which the transaction took place. Those circumstances may include: the degree of integration between the enterprise group members that are parties to the transaction; the purpose of the transaction; and whether the transaction granted advantages to the enterprise group members that would not normally be granted between unrelated parties.

Elements of avoidance and defences

15. The insolvency law may specify the manner in which the elements referred to in recommendation 97 of the *Legislative Guide* would apply to avoidance of transactions in the context of insolvency proceedings with respect to two or more enterprise group members.[3]

E. Subordination

36. The *Legislative Guide* notes (see part two, chap. V, para. 56) that subordination refers to a rearranging of creditor priorities in insolvency and does not relate to the validity or legality of the claim. Notwithstanding the validity of a claim, it might nevertheless be subordinated because of a voluntary agreement or a court order. Two types of claims that typically may be subordinated in insolvency are those of persons related to the debtor and of owners and equity holders of the debtor.

1. Related person claims

37. In the enterprise group context, subordination of related person claims might mean, for example, that the rights of group members under intra-group arrangements could be deferred to the rights of external creditors of those group members subject to insolvency proceedings.

38. As noted above, the term “related person” as used in the *Legislative Guide* would include enterprise group members. However, the mere fact of a special relationship with the debtor, including, in the group context, being another member of the same group, may not be sufficient in all cases to justify special treatment of a creditor’s claim. In some cases, these claims will be entirely transparent and should be treated in the same manner as similar claims made by creditors who are not related persons; in other cases they may give rise to suspicion and will deserve special attention. An insolvency law may need to include a mechanism to identify

[3] That is, the elements to be proved in order to avoid a transaction, the burden of proof, specific defences to avoidance, and the application of special presumptions.

those types of conduct or situation in which claims will deserve additional attention. Similar considerations apply, as noted above, with respect to avoidance of transactions occurring between enterprise group members.

39. The *Legislative Guide* identifies a number of situations in which special treatment of a related person's claim might be justified (e.g. where the debtor is severely undercapitalized and where there is evidence of self-dealing). In the group context, additional considerations might include, as between a parent and a controlled subsidiary: the parent's participation in the management of the subsidiary; whether the parent has sought to manipulate intra-group transactions to its own advantage at the expense of external creditors; or whether the parent has otherwise behaved unfairly, to the detriment of creditors and shareholders of the controlled group member. Under some laws, the existence of those circumstances might result in the parent having its claims subordinated to those of unrelated unsecured creditors or even minority shareholders of the controlled company.

40. Some laws include other approaches to intra-group transactions such as permitting debts owed by a group member that borrowed funds under an intra-group lending arrangement to be involuntarily subordinated to the rights of external creditors of that borrowing member; permitting the court to review intra-group financial arrangements to determine whether particular funds given to a group member should be treated as an equity contribution rather than as a loan, where the law subordinates equity contributions to creditor claims (on treatment of equity, see below); and allowing voluntary subordination of intra-group claims to those of external creditors.

41. The practical result of a subordination order in an enterprise group context might be to reduce or effectively extinguish any repayment to those group members whose claims have been subordinated if the claims of secured and unsecured external creditors are large in relation to the funds available for distribution. In some cases this might threaten the viability of the subordinated group member and be detrimental not only to its own creditors, but also its shareholders and, in the case of reorganization, to the group as a whole. The adoption of a policy of subordinating such claims may have the effect of discouraging intra-group lending.

2. Treatment of equity

42. The *Legislative Guide* notes (see part two, chap. V, para. 76) that many insolvency laws distinguish between the claims of owners and equity holders that may arise from loans extended to the debtor or their ownership interest in the debtor. With respect to claims arising from equity interests, many insolvency laws adopt the general rule that the owners and equity holders of the business are not entitled to a distribution of the proceeds of assets until all other claims that are senior in priority have been fully repaid (including claims of interest accruing after commencement). As such, these parties will rarely receive any distribution in respect of their interest in the debtor. Where a distribution is made, it would generally be made in accordance with the ranking of shares specified in the company law and the corporate charter. Debt claims, such as those relating to loans, however, are not always subordinated.

43. Few insolvency laws specifically address subordination of equity claims in the enterprise group context. One law that does allow the courts to review intra-group

financial arrangements to determine whether particular funds given to a group member subject to insolvency proceedings should be treated as an equity contribution, rather than as an intra-group loan, enabling it to be postponed behind creditors' claims. Those funds are likely to be treated as equity where the original debt to equity ratio was high before the funds were contributed and the funds would reduce the ratio; if the paid-up share capital was inadequate; if it is unlikely that an external creditor would have made a loan in the same circumstances; and if the terms on which the advance was made were not reasonable and there was no reasonable expectation of repayment.

44. The *Legislative Guide* discusses subordination in the context of treatment of claims and priorities, but does not recommend the subordination of any particular types of claims under the insolvency law, simply noting that subordinated claims would rank after claims of ordinary unsecured creditors (recommendation 189).

[*A/CN.9/WG.V/WP.82 provides an introduction to enterprise groups; Add.1 addresses application and commencement of insolvency proceedings (joint applications and procedural coordination); Add.3 addresses remedies (extension of liability, contribution orders and substantive consolidation), participants (single insolvency representative) and reorganization plans; and Add.4 addresses international issues.*]

A/CN.9/WG.V/WP.82/Add.3 (Original: English)

Note by the Secretariat on the treatment of enterprise groups in insolvency, submitted to the Working Group on Insolvency Law at its thirty-fifth session

ADDENDUM

CONTENTS

VI. Remedies

1. Because of the nature of enterprise groups and the way in which they operate, there may be a complex web of financial transactions between group members, and creditors may have dealt with different members or even with the group as a single economic entity, rather than with members individually. Disentangling the ownership of assets and liabilities and identifying the creditors of each group member may involve a complex and costly legal inquiry. However, because adherence to the separate entity approach means that each group member is only liable to its own creditors, it may become necessary, where insolvency proceedings have commenced with respect to one or more of the group members, to disentangle the ownership of their assets and liabilities.

2. When this disentangling can be effected, adherence to the separate entity principle operates to limit creditor recovery to the assets of that specific group member. Where it cannot be effected or other specified reasons exist to treat the group as a single enterprise, some laws include remedies that allow the single entity approach to be set aside. Historically, these remedies have been developed to overcome the perceived inefficiency and unfairness of the traditional separate entity approach in specific group cases. In addition to setting aside intra-group transactions or subordinating intra-group lending, the remedies may include: the extension of liability for external debts to solvent group members, as well as to office holders and shareholders; contribution orders; and pooling or substantive consolidation orders. Some of these remedies require findings of fault to be made, while others rely upon the establishment of certain facts with respect to the operations of the enterprise group. In some cases, particularly where misfeasance of management is involved, other remedies might be more appropriate, such as removal of the offending directors and limiting management participation in reorganization.

3. Because of the potential inequity that may result when one group member is forced to share assets and liabilities with other group members that may be less solvent, remedies setting aside the single entity approach are not universally available, generally not comprehensive and apply only in restricted circumstances. Those remedies involving extension of liability may involve "piercing" or "lifting the corporate veil", which may result in shareholders, who are generally shielded from liability for the enterprise's activities, being held liable for certain activities. The other remedies discussed below do not involve lifting the corporate veil, although in some circumstances the effect may appear to be similar.

A. Extension of liability

4. Extending the liability for external debts and, in some cases, the actions of the group members subject to insolvency proceedings to solvent group members and relevant office holders is a remedy available under some laws to individual creditors on a case-by-case basis and depends upon the circumstances of that creditor's relationship with the debtor.

5. Many laws recognize circumstances in which exceptions to the limited liability of corporate entities are available and one group member and relevant office holders

could be found liable for the debts and actions of another group member. Some laws adopt a prescriptive approach and the circumstances are strictly limited; other laws adopt a more expansive approach and courts are given broad discretion in evaluating the circumstances of a particular case on the basis of specific guidelines. In both cases, however, the basis for extending liability beyond the insolvent entity is the relationship between the group member subject to insolvency proceedings and related group members in terms of both ownership and control. A further relevant factor may be the conduct of the related company to the creditors of the member subject to insolvency proceedings.

6. Whilst there are different formulations of the circumstances in which liability might be extended, examples generally fall into the following categories, although it should be noted that not all laws reflect all of these categories and to some extent they may overlap:

(a) Exploitation or abuse by one group member (perhaps the parent) of its control over another group member, including operating a subsidiary continually at a loss in the interests of the controlling entity;

(b) Fraudulent conduct by the dominant shareholder, which might include fraudulently siphoning off a subsidiary's assets or increasing its liabilities, or conducting the affairs of the subsidiary with an intent to defraud creditors;

(c) Operating a subsidiary as the parent company's agent, trustee or partner;

(d) Conducting the affairs of the group or of a subsidiary in such a way that some classes of creditors might be prejudiced (for example, incurring liabilities to employees of one group member);

(e) Artificial fragmentation of a unitary enterprise into several entities for the purposes of insulating the single entity from potential liabilities; failure to follow the formalities of treating group members as separate legal entities, including disregarding the limited liability of subsidiaries or confusing personal and corporate assets; or where the enterprise group structure is a mere sham or facade, such as where the corporate form is used as a device to circumvent statutory or contractual obligations;

(f) Inadequate capitalization of an entity, so that it does not have an adequate capital basis for carrying out its operations. This may apply at the time of establishment, or be the result of depletion of the capital by way of refunds to shareholders or by shareholders drawing more than distributable profits;

(g) Misrepresentation of the real nature of the enterprise group, leading creditors to believe that they are dealing with a single enterprise, rather than with a member of a group;

(h) Misfeasance, where any person, including another group member, can be required to compensate for any loss or damage to an entity arising from fraud, breach of duty or other misfeasance, such as actions causing significant injury or environmental damage;

(i) Wrongful trading, where directors, including shadow directors of an entity have a duty to monitor, for example, whether the entity can properly continue carrying on business in the light of its financial condition and are required to apply for insolvency within a specified period once the entity has become insolvent.

Permitting or directing a group member to incur debts when it is or is likely to become insolvent would fall into this category; and

(j) Failing to observe regulatory requirements, such as keeping regular accounting records of a subsidiary.

7. Generally, the mere incidence of control or domination of a subsidiary by a parent, or other form of close economic integration within an enterprise group, is not regarded as sufficient reason to justify disregarding the separate legal personality of each group member and piercing the corporate veil.

8. In a number of the examples where liability might be extended to the parent or other entity in control of an insolvent subsidiary, that liability may include the personal liability of the members of the board of directors of the parent or controlling entity (who may be described as de facto or shadow directors). While directors of an entity may generally owe certain duties to that entity, directors of a group member may be faced with balancing those duties against the overall commercial and financial interests of the group. Achieving the general interests of the group, for example, may require that the interests of individual members be sacrificed in certain circumstances. Some of the factors that might be relevant to determining whether directors of a controlling entity will be personally liable for the debts or actions of a controlled entity subject to insolvency proceedings include: whether there was active involvement in the management of the controlled entity; whether there was grievous negligence or fraud in the management of the insolvent entity; whether the parent's management could be in breach of duties of care and diligence or there was abuse of managerial power; or whether there was a direct relationship between the management of the controlled entity and its insolvency. In some jurisdictions, directors may also be found criminally liable. One of the principal difficulties with extending liability in such cases is proving the behaviour in question to show that the controlling entity was acting as a de facto or shadow director.

9. There are also laws that provide for parent entities to accept liability for debts of subsidiaries by contract, especially where the creditors involved are banks, or by entering into voluntary cross-guarantees. Under other laws, which provide for various forms of integration of enterprise groups, the principal entity can be jointly and severally liable to the creditors of the integrated entities, for liabilities arising both before and after the formalization of the integration.

B. Contribution orders

10. A contribution order is an order by which a court can require a solvent group member to contribute specific funds to cover all or some of the debts of other group members subject to insolvency proceedings. Although contribution orders are not widely available under insolvency laws, a few jurisdictions have adopted or are considering adopting these measures and they are generally available only in liquidation proceedings.

11. A number of the issues noted below may not require specific provisions to be included in the insolvency law as remedies may already exist under other laws, such as those addressing liability and wrongful trading.

12. Under those laws that do permit contribution orders, the problem, as noted above, of reconciling the interests of the two sets of unsecured creditors that have dealt with the two separate group members, has meant that the power to make a contribution order is not commonly exercised. Courts have also taken the view that a full contribution order may be inappropriate if the effect is to threaten the solvency of the group member not already in liquidation, although it might be possible to order a partial contribution that is limited to certain assets, such as the balance remaining after meeting bona fide obligations.

13. Under one law that does provide for contribution orders, the court must take into account certain specified circumstances in considering whether to make an order. These include: the extent to which a related group member took part in the management of the group member in liquidation; the conduct of the related group member towards the creditors of the member in liquidation, although creditor reliance on the existence of a relationship between the group members is not sufficient grounds for making an order; the extent to which the circumstances giving rise to liquidation are attributable to the actions of the related group member; the conduct of a solvent group member after commencement of liquidation proceedings with respect to another group member, particularly if that conduct indirectly or directly affects the creditors of the group member subject to insolvency proceedings, such as with respect to failure to perform a contract; and such other matters as the court thinks fit.[1] Such an order might also be possible, for example, in cases when the subsidiary had incurred significant liability for personal injury or the parent had permitted the subsidiary to continue trading whilst insolvent.

C. Substantive consolidation

1. Introduction

14. As noted above, when procedural coordination is ordered, the assets and liabilities of the debtors remain separate and distinct, with the substantive rights of claimants unaffected. Substantive consolidation, however, permits the court, in insolvency proceedings involving two or more enterprise group members, to disregard the separate identity of each group member in appropriate circumstances and consolidate their assets and liabilities, treating them as though held and incurred by a single entity. This has the effect of creating a single estate for the general benefit of all creditors of the consolidated group members. Few jurisdictions provide statutory authority for consolidation orders and in those where the remedy is available, it is not widely used. A principal concern is that consolidation overturns the principle of the separate legal identity of each group member, which is often used to structure an enterprise group to respond to various business considerations, serving different purposes and having important implications, in terms for example of taxation law, corporate law and corporate governance rules. If the courts routinely agreed to substantive consolidation, many of the benefits to be derived from the flexibility of enterprise structure could be undermined.

15. Notwithstanding the absence of direct statutory authority or a prescribed standard for the circumstances in which substantive consolidation orders can be

[1] New Zealand Companies Act 1993, Sections 271 (1) (a) and 272 (1).

made, the courts of some jurisdictions have played a direct role in developing these orders and delimiting the appropriate circumstances. This practice reflects increased judicial recognition of the widespread use of interrelated corporate structures for taxation and business purposes. The circumstances that would support a consolidation order are, nevertheless, very limited and tend to be those where a high degree of integration of the group members, through control or ownership, would make it difficult, if not impossible, without expending significant time and resources, to disentangle the assets and liabilities of the different group members.

16. Consolidation is typically discussed in the context of liquidation and the legislation that authorizes it does so only in that context. There are, however, legislative proposals that would permit consolidation in the context of various types of reorganization. In jurisdictions without specific legislation, consolidation orders may be available in both liquidation and reorganization, where such an order would, for example, assist the reorganization of the group. While typically requiring a court order, consolidation may also be possible on the basis of consensus of the relevant interested parties. Some commentators suggest that consolidation by consensus frequently occurs in cases involving enterprise groups, and often in situations where the courts would generally uphold creditor objections to consolidation if a formal application were made. It may also be possible by way of a reorganization plan. Some laws permit a plan to include proposals for a debtor to be consolidated with other group members, whether insolvent or solvent, which could be implemented with creditor approval.

17. Consolidation might be appropriate where it leads to greater return of value for creditors, either because of the structural relationship between the group members and their conduct of business and financial relationships or because of the value of assets common to the whole group, such as intellectual property in both a process conducted across numerous group members and the product of that process. A further ground might be where there is no real separation between the group members, and the group structure is being maintained solely for dishonest or fraudulent purposes.

18. The principal concerns with the availability of such orders, in addition to those associated with the fundamental issue of overturning the separate entity principle, include the potential unfairness caused to one creditor group when forced to share pari passu with creditors of a less solvent group member and whether the savings or benefits to the collective class of creditors outweighs incidental detriment to individual creditors. Some creditors might have relied on the separate assets or separate legal entity of a particular group member when trading with it, and should therefore not be denied a full payout because of their trading partner's relationship with another group member of which they were unaware. Other creditors might have relied upon the assets of the whole group and it would be unfair if they were limited to recovery against the assets of a single group member.

19. Because it involves pooling the assets of different group members, consolidation may not lead to increased recovery for each creditor, but rather operate to level the recoveries across all creditors, increasing the amount distributed to some at the expense of others. Additionally, the availability of consolidation may enable stronger, larger creditors to take advantage of assets that should not be available to them; encourage creditors who disagree with such an order to seek its review, thus prolonging the insolvency proceedings; and damage the certainty and

enforceability of security interests (where intra-group claims disappear as a result of consolidation, creditors that have security interests in those claims would lose their rights).

20. Consolidation would generally involve the group members subject to insolvency proceedings, but in some cases and as allowed in some insolvency laws might extend to an apparently solvent group member, when the affairs of that member were so closely intermingled with those of other group members that it would be beneficial to include it in the consolidation, when further investigation showed it to be actually insolvent because of the intermingling of assets or where the legal entity is a sham. Where that occurs, the creditors of that solvent group member may have particular concerns and a limited approach might be taken so that the consolidation order extended only to the net equity of the solvent group member in order to protect the rights of those creditors.

2. Circumstances supporting consolidation

21. A number of elements have been identified as relevant to determining whether or not substantive consolidation is warranted, both in the legislation that authorizes consolidation orders and in those cases where the courts have played a role in developing those orders. In each case it is a question of balancing the various elements to reach a just and equitable decision; no single element is necessarily conclusive and all of the elements do not need to be present in any given case. Those elements have included: the presence of consolidated financial statements for the group; the use of a single bank account for all group members; the unity of interests and ownership between the group members; the degree of difficulty in segregating individual assets and liabilities; sharing of overhead, management, accounting and other related expenses among different group members; the existence of intra-group loans and cross-guarantees on loans; the extent to which assets were transferred or funds shifted from one member to another as a matter of convenience without observing proper formalities; adequacy of capital; commingling of assets or business operations; appointment of common directors or officers and the holding of combined board meetings; a common business location; fraudulent dealings with creditors; the practice of encouraging creditors to treat the group as a single entity, creating confusion among creditors as to which of the group members they were dealing with and otherwise blurring the legal boundaries of the group members; and whether consolidation would facilitate a reorganization or is in the interests of creditors.

22. While these many factors remain relevant, some courts have begun to focus on a limited number and in particular on whether the affairs of the group members are so intermingled that separating assets and liabilities can only be achieved at extraordinary cost and expenditure of time or group members are engaged in fraudulent schemes or business activity that has no legitimate business purpose. The type of fraud contemplated is not fraud occurring in the daily operations of a company, but rather the total absence of a legitimate business purpose, which may relate to the reasons for which the company was formed or, once formed, the activities it undertakes. Examples of such fraud may include where the debtor transfers substantially all of its assets to a newly formed entity or to separate entities owned by itself for the purpose of preserving and conserving those assets for its own benefit and to hinder, delay and defraud its creditors. Fraudulent schemes also

include engagement in simulation, which may involve a contract that either does not express the true intent of the parties and has no effect between the parties or produces different effects between the parties than those expressed in the contract, i.e. sham contracts.

3. Persons permitted to apply and timing of an application

23. An insolvency law should address the question of who may apply for substantive consolidation and at what time. With respect to the parties permitted to apply, it would seem appropriate to follow the approach of recommendation 14 of the *Legislative Guide* concerning the parties permitted to apply for commencement of insolvency proceedings. In the group context, that would include a group member and a creditor of any such group member. In addition, it would be appropriate to permit applications by the insolvency representative of any group member, since in many instances, it will be the insolvency representative or representatives appointed to administer group members that will have the most complete information on group members and are therefore in the best position to assess the appropriateness or desirability of substantive consolidation.

24. Although in some States it might be possible for the court to act on its own initiative to order substantive consolidation, the serious impact of such an order requires that a fair and equitable process be followed and that parties in interest have the opportunity to be heard and to object to such an order. Accordingly, it is desirable that courts not have the power to act on their own initiative. It should be noted that the *Legislative Guide* generally does not provide for courts to act on their own initiative in insolvency matters of that gravity.

25. Since the factors supporting substantive consolidation might not always be apparent or certain at the time insolvency proceedings commence, it is desirable that an insolvency law adopt a flexible approach to the timing of an application for substantive consolidation. An application might be made at the same time as an application for commencement of proceedings or at any subsequent time, although the possibility of applying for substantive consolidation might be limited, in practice, by the state reached in administration of the proceedings, particularly for example, with respect to implementation of a reorganization plan. When substantive consolidation is ordered subsequent to commencement of proceedings, certain matters may already have been resolved, such as submission and admission of claims or certain decisions taken and acted upon with respect to individual group members. It is desirable that the order consolidate the separate proceedings already in progress and preserve existing rights. Claims already admitted against a group member, for example, might therefore be treated as claims admitted against the consolidated estate.

26. The same approach might apply to adding group members to an existing substantive consolidation. As the administration proceeds, it may become apparent that additional group members should be included, provided the grounds for the initial order are satisfied with respect to those members. If the consolidation order is made with the consent of the creditors, or if creditors are given the opportunity to object to a proposed order, the addition of another group member at a later stage of the proceedings has the potential to vary the pool of assets from what was originally agreed or notified to creditors. In that situation, it is desirable that creditors have a further opportunity to consent or object to the addition to the consolidation. Where

substantive consolidation is ordered subsequent to a partial distribution to creditors, the introduction of a hotchpot rule might be desirable. This would ensure that a creditor who has received a partial distribution in respect of its claim against the single group member may not receive payment for the same claim in the consolidated proceedings so long as the payment of the other creditors of the same class is proportionately less than the partial distribution the creditor has already received.

4. Competing interests in consolidation

27. In addition to the competing interests of the creditors of different group members, the competing interests of different stakeholders warrant consideration in the context of consolidation, in particular those of creditors and shareholders; of shareholders of the different group members, and in particular those who are shareholders of some of the members but not of others; and of secured and priority creditors of different consolidated group members.

(a) Owners and equity holders

28. Many insolvency laws adopt the general rule that the rights of creditors outweigh those of owners and equity holders, with owners and equity holders being ranked after all other claims in the order of priority for distribution. Often this results in owners and equity holders not receiving a distribution. In the enterprise group context, the shareholders of some group members with many assets and few liabilities may receive a return, while the creditors of other group members with fewer assets and more liabilities may not. If the general approach of ranking shareholders behind unsecured creditors were to be extended in consolidation to the group as a whole, all creditors could be paid before the shareholders of any group member received a distribution.

(b) Secured creditors

29. The *Legislative Guide* discusses the position of secured creditors in insolvency proceedings and adopts the approach that, as a general principle, the effectiveness and priority of a valid security interest should be recognized and the economic value of the encumbered assets should be preserved in insolvency proceedings. That approach will also apply to the treatment of secured creditors in the enterprise group context. The *Legislative Guide* also recognizes that an insolvency law may nevertheless affect the rights of secured creditors in order to implement business and economic policies, subject to appropriate safeguards (see part two, chap. II, para. 59).

30. Questions arising with respect to consolidation might include: whether a security interest over some or all of the assets of one group member could extend to include assets of another group member where a consolidation order was made or whether that security interest should be limited to the defined pool of assets upon which the secured creditor had originally relied; whether secured creditors with insufficient security could make a claim against the pooled assets as unsecured creditors; and whether internal secured creditors (i.e. creditors that are at the same time group members) should be treated differently to external secured creditors. In this respect, it might be useful to consider devising different solutions for security interests encumbering specific assets and security interests encumbering the whole

estate. To allow a secured creditor's security interest to be extended to the consolidated assets upon consolidation, could improve that creditor's position at the expense of other creditors.

31. One solution with respect to external secured creditors might be to exclude them from the process of consolidation, thus achieving what might be a partial consolidation. Individual secured creditors that relied upon the separate identity of group members, such as where they relied upon an intra-group guarantee, might require special consideration. Where encumbered assets are required for reorganization, a different solution might be possible, such as allowing the court to adjust the consolidation order to make specific provision for such assets or requiring the consent of the affected secured creditor. A secured creditor could surrender its security interest following consolidation, and the debt would become payable by all of the consolidated entities.

32. The interests of internal secured creditors might also need to be considered. Under some laws those internal security interests might be extinguished, leaving the creditors with an unsecured claim, or they might be modified or subordinated.

(c) Priority creditors

33. Similar questions arise with respect to the treatment of priority creditors. Practically, they might benefit or lose from the pooling of the group's assets in the same way as other unsecured creditors. Where priorities, such as those for employee benefits or tax, are based on the single entity principle, a question arises as to how they should be treated across the group, especially where they interact with each other. For example, employees of a group member that has many assets and few liabilities will potentially compete with those of a group member in the opposite situation, with few assets and many liabilities, if there is consolidation. While priority creditors generally might obtain a better result at the expense of unsecured creditors without priority, the different groups of those priority creditors might have to adjust any expectations arising out of their priority position with respect to the assets of a single entity.

5. Notification of creditors

34. An application for substantive consolidation may be subject to the same requirements for giving notice as an application for commencement of proceedings under the *Legislative Guide*. When made at the same time as the application for commencement of proceedings, only an application by creditors would require notice to be given to the relevant debtors, consistent with recommendation 19. An application by group members made at the same time as the application for commencement should not require creditors to be notified, consistent with recommendations 22 and 23 of the *Legislative Guide*, which do not mandate notification of an application for commencement of insolvency proceedings to the creditors of the concerned entity.

35. The potential impact of consolidation on creditor rights suggests that affected creditors should have the right to be notified of any order for consolidation made at the time of commencement and have the right to appeal, consistent with recommendation 138. One issue to be considered is whether a single objection would be sufficient to prevent consolidation from occurring. It may be possible, for

example, to provide objecting creditors who will be significantly disadvantaged by the consolidation relative to other creditors with a greater level of return than other unsecured creditors, thus departing from the strict policy of equal distribution. It may also be possible to exclude specific groups of creditors with certain types of contracts, for example limited recourse project financing arrangements entered into with clearly identified group members at arm's length commercial terms.

36. Where the application is made by creditors after proceedings have commenced, it might be desirable for notice of the application to be given to insolvency representatives of the entities to be consolidated. Notice should be given in an effective and timely manner in the form determined by domestic law.

6. Effect of an order for substantive consolidation

37. The insolvency law should establish the effects of an order for substantive consolidation. These would include: the establishment of a single consolidated insolvency estate; the extinguishment of intra-group claims; claims against the individual group members to be consolidated will be treated as claims against the consolidated estate; priorities established against the individual group members should be recognized as priorities against the consolidated estate; and a single meeting of creditors may be convened for all consolidated group members. Concerning liquidation value for the purposes of recommendation 152 (b) of the *Legislative Guide*, that value in substantive consolidation would be the liquidation value of the consolidated entity, and not the liquidation value of the individual members before substantive consolidation.

38. Where substantive consolidation is ordered after the commencement of proceedings or where group members are added to a substantive consolidation at different times, the choice of the date from which the suspect period would be calculated may need to be considered to provide certainty for lenders and other third parties. The issue may become more important as the period of time between application for or commencement of individual insolvency proceedings and the order for substantive consolidation increases. Choosing the date of the order for substantive consolidation for calculation of the suspect period for avoidance purposes may create problems with respect to transactions entered into between the date of application for or commencement of insolvency proceedings for individual group members and the date of the substantive consolidation. One approach might be to calculate that date in accordance with recommendation 89 of the *Legislative Guide*. Another approach may be to establish a common date by reference to the earliest date on which there was an application for commencement or commencement of insolvency proceedings with respect to those group members to be consolidated. In either case, the date should be specified in the insolvency law to ensure transparency and predictability.

7. Modification of an order

39. Although, given the substantive effect of an order for substantive consolidation, modification of that order might not always be possible or desirable, there may be cases where circumstantial changes or new information that becomes available indicate the desirability of modifying the original order. Any such modification should be subject to the condition that any actions or decision taken pursuant to the initial order should be unaffected by the order for modification.

8. Partial substantive consolidation

40. Some laws make provision for what may be termed "partial substantive consolidation", that is, a limited order for substantive consolidation that excludes certain assets or claims from the consolidation. Consolidation might be limited, for example, to those assets and liabilities that are intermingled, excluding those assets whose ownership is clear. Another approach excludes certain assets from substantive consolidation if otherwise creditors would be unfairly prejudiced.

9. Competent court

41. The issues discussed above (see A/CN.9/WG.V/WP.82/Add.1, paras. 15-16 and 23-24) with respect to both joint applications and procedural coordination would apply also to substantive consolidation.

Recommendations

Purpose of legislative provisions

The purpose of provisions on substantive consolidation is:

(a) To ensure respect, as a basic principle, for the separate legal identity of each enterprise group member;

(b) To provide legislative authority for substantive consolidation;

(c) To specify the very limited circumstances in which substantive consolidation is available as a remedy; and

(d) To specify the objective standards and procedures upon which substantive consolidation should be based to ensure transparency and predictability.

Contents of legislative provisions

Separate legal identity in enterprise groups

16. The insolvency law should respect the separate legal identities of enterprise group members. Exceptions to that general principle should be limited to the grounds set forth in recommendation 17.

Substantive consolidation

17. The insolvency law may specify that the court may order substantive consolidation of insolvency proceedings with respect to two or more enterprise group members in the following circumstances:

(a) Where the court is satisfied that the assets or liabilities of the enterprise group members are intermingled to such an extent that the ownership of individual assets and responsibility for liabilities cannot be identified without disproportionate expense or delay; or

(b) Where two or more enterprise group members are engaged in fraudulent schemes or activity with no legitimate business purpose and the court is satisfied that substantive consolidation is essential to rectify that scheme or activity.

Application for substantive consolidation

18. The insolvency law should specify:

(a) The persons permitted to make an application for substantive consolidation, which may include an enterprise group member, the insolvency representative of any enterprise group member or a creditor of any such group member;

(b) That an application for substantive consolidation may be made at the time of an application for commencement of insolvency proceedings with respect to two or more enterprise group members or at any subsequent time.

Effect of an order for substantive consolidation

19. The insolvency law should specify that an order for substantive consolidation should have the following effects:

(a) Claims and debts between group members included in the order are extinguished;

(b) Claims against group members included in the order are treated as claims against the single consolidated estate;

(c) Priorities established in the individual insolvency proceedings should be recognized in the substantive consolidation [notwithstanding the effect of the substantive consolidation]; and

(d) A single meeting of creditors may be convened for all consolidated group members.

Treatment of security interests in substantive consolidation

20. The insolvency law should respect the rights and priorities of a creditor holding a security interest over an asset of an enterprise group member that is subject to an order for substantive consolidation, unless:

(a) The secured indebtedness is owed solely between enterprise group members and is extinguished by an order for substantive consolidation; or

(b) The court determines the security was obtained by fraud in which the creditor participated; or

(c) The transaction granting the security is subject to avoidance in accordance with recommendation 88 of the *Legislative Guide*.

Partial substantive consolidation

21. The insolvency law may specify that the court may exclude specified assets or claims from an order for substantive consolidation.

Calculation of suspect period in substantive consolidation

22. The insolvency law should specify the date from which the suspect period with respect to avoidance of transactions of the type referred to in recommendation 87 of the *Legislative Guide* should be calculated when substantive consolidation is ordered:

(a) When substantive consolidation is ordered at the same time as commencement of insolvency proceedings, the specified date from which the suspect period is calculated retrospectively should be determined in accordance with recommendation 89 of the *Legislative Guide*;

(b) When substantive consolidation is ordered subsequent to commencement of insolvency proceedings, the specified date from which the suspect period is calculated retrospectively may be:

(i) A different date for each enterprise group member included in the substantive consolidation, being either the date of application for or commencement of insolvency proceedings with respect to each such group member, in accordance with recommendation 89 of the *Legislative Guide*; or

(ii) A common date for all enterprise group members included in the substantive consolidation order, being the earliest of the dates of application for or commencement of insolvency proceedings with respect to those group members.

Modification of an order for substantive consolidation

23. The insolvency law should specify that the court may modify an order for substantive consolidation, including partial substantive consolidation, provided that any actions or decisions taken pursuant to the order for substantive consolidation are not affected by the order for modification.

Competent court

24. The insolvency law should indicate that for the purposes of applying recommendation 13 of the *Legislative Guide* to enterprise groups, the words "commencement and conduct of insolvency proceedings, including matters arising in the course of those proceedings" include applications and orders for substantive consolidation.

Notice

25. The insolvency law should establish requirements for giving notice with respect to applications and orders for substantive consolidation and applications and orders for modification of substantive consolidation, including the parties to whom notice should be given; who is responsible for giving notice; and the content of the notice.

VII. Participants

A. Appointment of an insolvency representative

1. Coordination of proceedings

42. The *Legislative Guide* discusses a number of issues relating to the appointment and role of the insolvency representative and recommendations 115-125 would generally apply in the group context. When multiple proceedings commence with respect to group members, an order for procedural coordination may be made, or it may not. In either case, coordination of those proceedings may be facilitated if the insolvency law were to include specific provisions promoting coordination and indicating how it might be achieved, along the lines of article 27 of the Model Law. That approach could be adopted with respect to coordination between the different courts involved in administering proceedings for different group members or between different insolvency representatives appointed to those proceedings. Where insolvency representatives are appointed, their obligations under the *Legislative Guide* (specifically, recommendations 111, 116-117, and 120) might be extended to include: sharing and disclosure of information; approval or implementation of agreements with respect to division of the exercise of powers and allocation of responsibilities between insolvency representatives; cooperation on use and disposal of assets; proposal and negotiation of coordinated reorganization plans (unless preparation of a single group plan is possible as discussed below); coordination of the use of avoidance powers; obtaining of post-commencement finance; coordination of the submission and admission of claims and distributions to creditors. The insolvency law could also address timely resolution of disputes between the different insolvency representatives appointed.

43. Where a number of insolvency representatives are appointed to the different proceedings, the insolvency law may permit one of them, for example, the representative of the parent company, to take a leading role in the coordination of the proceedings relating to group members. While such a leading role might reflect the economic reality of the enterprise group, equality under the law of all insolvency representatives should be preserved. Coordination under the leadership of one insolvency representative may also be achieved on a voluntary basis, to the extent possible under applicable law.

44. In certain jurisdictions, courts, rather than insolvency representatives, may have the principal authority to coordinate insolvency proceedings. Where the insolvency law so provides, and different courts are involved in administering proceedings for different group members, it is desirable that the provisions concerning coordination of proceedings apply also to the courts and that they have powers along the lines of article 27 of the Model Law.

2. Appointment of a single insolvency representative

45. Coordination of multiple proceedings might be facilitated by the appointment of a single insolvency representative. In practice, it might be possible to appoint one insolvency representative to administer multiple proceedings or it might be necessary to appoint the same insolvency representative to each of the proceedings to be coordinated, depending upon procedural requirements. Such an appointment

would ensure coordination of the administration of the various group members, reduce related costs and facilitate the gathering of information on the group as a whole. While many insolvency laws do not address this question, there are some jurisdictions where appointment of a single insolvency representative in the group context has become a practice. This has also been achieved to a limited extent in some cross-border insolvency cases.

46. Where a single insolvency representative is appointed to administer a group involving multiple debtors with complex financial and business relationships and different groups of creditors, conflicts may arise, for example, with respect to cross-guarantees, intra-group debts, post-commencement finance or the wrongdoing by one group member with respect to another group member. As a safeguard against possible conflicts, the insolvency representative could be required to provide an undertaking or be subject to a practice rule or statutory obligation to seek direction from the court. Additionally, the insolvency law could provide for the appointment of one or more further insolvency representatives to administer the entities in conflict. That appointment might relate to the specific area of conflict, with the appointment being limited to its resolution, or be an appointment for the duration of the proceedings. The obligation of disclosure contained in recommendations 116 and 117 of the *Legislative Guide* may be relevant to conflict situations arising in a group context.

3. Debtor in possession

47. When the insolvency law permits the debtor to remain in possession of the business, and no insolvency representative is appointed, special consideration may be required to determine how multiple proceedings should be coordinated and to what extent the obligations applicable to the insolvency representative, including those additional obligations referred to above, will apply to the debtor in possession (see *Legislative Guide*, part two, chap. III, paras. 16-18). To the extent that the debtor in possession performs the functions of an insolvency representative, consideration might also be given to how provisions of an insolvency law permitting the appointment of a single insolvency representative or one of several insolvency representatives to take a lead role in coordinating proceedings might apply to the debtor in possession context.

Recommendations

Purpose of legislative provisions

The purpose of provisions on insolvency representatives in an enterprise group context is:

(a) To facilitate coordination of insolvency proceedings commenced with respect to two or more enterprise group members; and

(b) To encourage cooperation where two or more insolvency representatives are appointed, with a view to avoiding duplication of effort; facilitating gathering of information on the financial and business affairs of the enterprise group as a whole; and reducing costs.

Contents of legislative provisions

Appointment of a single insolvency representative

26. The insolvency law should specify that, where the court determines it to be in the best interests of the administration of the insolvency estates of two or more enterprise group members, [a single] [the same] insolvency representative may be appointed.

Conflict of interest

27. The insolvency law should specify measures to address a conflict of interest that might arise when only one insolvency representative is appointed to administer insolvency proceedings with respect to two or more enterprise group members. Such measures may include the appointment of one or more additional insolvency representatives.

Cooperation between two or more insolvency representatives in a group context

28. The insolvency law may specify that where insolvency proceedings are commenced with respect to two or more enterprise group members, the insolvency representatives appointed to those proceedings should cooperate to the maximum extent possible.[2]

Cooperation between two or more insolvency representatives in procedural coordination

29. The insolvency law should specify that, when more than one insolvency representative is appointed in insolvency proceedings subject to procedural coordination, the insolvency representatives should cooperate to the maximum extent possible.

Forms of cooperation

30. To the extent permitted by law, cooperation to the maximum extent possible may be implemented by any appropriate means, including:

(a) Sharing and disclosing information;

(b) Approval or implementation of agreements with respect to division of the exercise of powers and allocation of responsibilities between insolvency representatives, including one insolvency representative taking a coordinating or lead role;

(c) Coordination with respect to proposal and negotiation of reorganization plans; and

(d) Coordination with respect to administration and supervision of the affairs of the group members subject to insolvency proceedings, including day-to-day operations where the business is to be continued; post-commencement financing; safeguarding of assets; use and disposition of assets; use of avoidance powers; submission and admission of claims; and distributions to creditors.

---

[2] In addition to the provisions of the insolvency law with respect to cooperation and coordination, the court generally may indicate measures to be taken to that end in the course of administration of the proceedings.

VIII. Reorganization of two or more enterprise group members

48. Recommendations 139-159 of the *Legislative Guide* address issues specific to the preparation, proposal, content, approval and implementation of a reorganization plan. In general, these recommendations will be applicable in the context of an enterprise group, although it may be desirable to consider whether, in the particular circumstances of enterprise groups, additional recommendations or further explanation of the application of existing recommendations are required.

1. Single reorganization plan

49. When reorganization proceedings commence with respect to two or more enterprise group members, irrespective of whether or not those proceedings are to be procedurally coordinated, one issue not addressed by the *Legislative Guide* is whether it will be possible to reorganize the debtors through a single reorganization plan. A single plan has the potential to deliver savings across the group's insolvency proceedings, ensure a coordinated approach to the resolution of the group's financial difficulties, and maximize value for creditors. Although several insolvency laws permit the negotiation of a single reorganization plan, under some laws this approach is only possible where the proceedings are procedurally coordinated or substantively consolidated, while under other laws it would generally only be possible where the proceedings could be coordinated on a voluntary basis.

50. If an insolvency law were to permit a single reorganization plan to be prepared and approved with respect to several group members, consideration would need to be given to the application of a number of the provisions of the *Legislative Guide* relating to reorganization of a single debtor to the case of a group, in particular those relating to: coordination of the preparation of the plan, including the parties competent to propose the plan or participate in its proposal; nature and content of a plan and accompanying documentation; convening and conduct of creditors' meetings in respect of a plan; classification of claims and classes of creditors; voting of creditors and approval of a plan, particularly when group members are creditors of each other and therefore "related persons"; applicable safeguards; objections to approval of the plan (or confirmation where it is required); and implementation of a plan.

51. In practice, the concept of a single reorganization plan would require the same or a similar reorganization plan to be prepared and approved in each of the proceedings concerning group members covered by the plan. Approval of such a plan would be considered on a member-by-member basis with the creditors of each group member voting in accordance with the voting requirements applicable to a plan for a single debtor; it would not be desirable to consider approval on a group basis and allow the majority of creditors of the majority of members to compel approval of a plan for all members. The process for preparation of the plan and solicitation of approval should take into account the need for all group members to approve the plan and it will accordingly need to address the benefits to be derived from such approval and the information required to obtain that approval. Those issues would be covered by recommendations 143 and 144 of the *Legislative Guide* concerning content of the plan and the accompanying disclosure statement. Additional details that could relevantly be disclosed in the group context might

include details with respect to group operations and functioning of the group as such.

52. A single reorganization plan would need to take into account the different interests of the different groups of creditors, including the possibility that providing varying rates of return for the creditors of different group members might be desirable in certain circumstances. Achieving an appropriate balance between the rights of different groups of creditors with respect to approval of the plan, including appropriate majorities, both among the creditors of a single group member and between creditors of different group members is also desirable. Calculation of applicable majorities in the group context may require consideration of how creditors with the same claim against different group members, where the claims may have different priorities, should be counted for voting purposes. Some consideration may also need to be given to whether rejection by the creditors of one of several group members might prevent approval of the plan across the group and the consequences of that rejection. One approach might be based upon provisions applicable to the approval of a reorganization plan for a single debtor. Another approach might be to devise different majority requirements that are specifically designed to facilitate approval in the group context. Safeguards analogous to those in recommendation 152 of the *Legislative Guide* could also be included, with an additional requirement that the plan should be fair as between the creditors of different group members.

53. In the group context, a related person would include a person who is or has been in a position of control of the debtor or a parent, subsidiary or affiliate of the debtor. The *Legislative Guide* discusses voting by related persons on approval of the plan (see part two, chap. IV, para. 46) and notes that although some insolvency laws restrict their ability to vote in various ways, most insolvency laws do not specifically address the issue. The *Legislative Guide* does not recommend that the voting rights of related persons should be restricted, but where the insolvency law includes such restrictions they might cause difficulty when a group member has only creditors classified as related persons or a very limited number of creditors who are not related persons.

2. Inclusion of a solvent group member in a reorganization plan

54. Although a solvent entity generally could not be included in a reorganization plan by order of the court, because it would not be subject to the insolvency law and not part of the insolvency proceedings there may be circumstances in which such an inclusion would be appropriate and, in fact, is not unusual in practice. A solvent entity could be included in a reorganization plan on a voluntary basis in order to aid the reorganization of other enterprise group members. The decision of a solvent group member to participate in a reorganization plan would be an ordinary business decision of that member, and the consent of creditors would not be necessary unless required by applicable company law. With respect to any disclosure statement accompanying a plan that includes a solvent group member, caution would need to be exercised in disclosing information relating to that solvent group.

55. An insolvency law might also include provisions addressing the consequences of failure to approve such a reorganization plan as addressed by recommendation 158 of the *Legislative Guide*. One law, for example, provides that the consequence of failure to approve a plan is the liquidation of all insolvent group

members. Where solvent members are included in the plan by consent, special provisions may be required to prevent undue advantages arising from that liquidation.

Recommendations

Purpose of legislative provisions

The purpose of provisions relating to the reorganization plan in an enterprise group context is:

(a) To facilitate the coordinated rescue of the businesses of enterprise group members subject to the insolvency law, thereby preserving employment and, in appropriate cases, protecting investment;

(b) To facilitate the negotiation and approval of a single reorganization plan in insolvency proceedings with respect to two or more enterprise group members.

Contents of legislative provisions

Reorganization plan

31. The insolvency law should permit a single reorganization plan to be approved in insolvency proceedings with respect to two or more enterprise group members.

32. The insolvency law may provide that an enterprise group member that is not subject to insolvency proceedings may participate in a reorganization plan proposed for two or more enterprise group members subject to insolvency proceedings. This paragraph does not affect the rights of shareholders or creditors of that member.

[*A/CN.9/WG.V/WP.82 provides an introduction to enterprise groups; Add.1 addresses application and commencement of insolvency proceedings (joint applications and procedural coordination); Add.2 addresses treatment of assets on commencement of insolvency proceedings (protection and preservation of the insolvency estate, use and disposal of assets, post-commencement finance), avoidance, and subordination; Add.4 addresses international issues.*]

A/CN.9/WG.V/WP.82/Add.4 (Original: English)

Note by the Secretariat on the treatment of enterprise groups in insolvency, submitted to the Working Group on Insolvency Law at its thirty-fifth session

ADDENDUM

CONTENTS

IX. International issues

1. Many of the issues relating to the international treatment of enterprise groups are discussed in documents A/CN.9/WG.V/WP.74/Add.2 and A/CN.9/WG.V/WP.76/Add.2. As requested by the Working Group at its thirty-fourth session (A/CN.9/647, paras. 90-91), the material below presents a summary of the previous discussions, identifying issues, the manner in which they have already been addressed in UNCITRAL texts and possible solutions with respect to 3 key topics — centre of main interests (COMI), post-commencement finance and coordination and cooperation. Other issues addressed in the context of domestic groups, but which might also be addressed in the cross-border context, i.e. procedural coordination, single reorganization plan and substantive consolidation, are also discussed.

A. Jurisdiction to commence insolvency proceedings

(UNCITRAL references: A/CN.9/WG.V/WP.74/Add.2, paras. 5-12; A/CN.9/WG.V/WP.76/Add.2, paras. 2-17)

2. The following discussion considers the possibility of achieving a definition of, or greater certainty with respect to, the concept of COMI (a) for individual group members, and (b) for the group as such.

1. COMI of individual enterprise group members

(a) Issues

3. The international models that have been developed to address cross-border insolvency issues have stopped short of dealing with enterprise groups. Accordingly, there is currently no means of commencing insolvency proceedings against an enterprise group as such. Separate proceedings must be commenced against each group member in the relevant jurisdiction, based on the applicable commencement standards, with recognition of those proceedings being sought, where relevant, in other jurisdictions (using the Model Law, where applicable).

4. The *Legislative Guide* recommends that the insolvency law should specify those debtors that have sufficient connection to the State to be subject to the insolvency law (recommendation 10). The two approaches included are taken from the Model Law: COMI or establishment in a State. Commencement standards are addressed in recommendations 15 and 16 of the *Legislative Guide*.

5. There is no single, internationally agreed definition of what constitutes COMI; it is not defined in the Model Law nor the *Legislative Guide*. The EC Regulation, however, does include an indication that it should be "the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties" (recital 13). Both the *Legislative Guide* (recommendation 11) and the Model Law (article 16 (3)) include a rebuttable presumption that a debtor's registered office is its centre of main interests. One issue in the cross-border context is identifying the appropriate court to make the determination as to COMI with respect to enterprise group members and whether other courts would follow that determination.

6. Factors identified as relevant to the rebuttal of the presumption have included: the extent of a subsidiary's independence with respect to financial, management and policy decision-making; financial arrangements between parent and subsidiary, including capitalization, location of bank accounts and accountancy services; the division of responsibility with respect to provision of technical and legal documentation and signature of contracts; and the location where design, marketing, pricing, delivery of products and office functions were conducted.

7. In contrast to COMI, both the *Legislative Guide* and the Model Law define establishment (recommendation 12/article 2 (f)).

(b) Solutions

8. To provide more certainty as to what constitutes a debtor's COMI, a definition of what constitutes COMI or a recommendation identifying the factors to be considered in determining what is the COMI in a given case could be developed.

9. To be successful, that definition or recommendation would need to be internationally recognized, accepted and widely adopted. Should the Working Group wish to consider developing such a definition or recommendation, it may also consider what type of text might best achieve that wide acceptance and application.

2. COMI of an enterprise group

(a) Issues

10. As an alternative to multiple proceedings, it might be possible in some cases to commence, in a single State, insolvency proceedings against different group members located in different States. Neither the *Legislative Guide* nor the Model Law addresses that issue. The key issue is identifying the State in which those proceedings should commence.

(b) Solutions

11. Identifying the jurisdiction most central for an enterprise group might be assisted by developing a concept of an "enterprise group COMI" or developing a rule deeming the COMI of the group to be a specific location, for example, the place of registration of the parent of the group or the place where it conducts its business activities. Consideration might need to be given to how that concept or rule might best be implemented to achieve wide support and adoption, as noted in paragraph 9 above. Developing a COMI for an enterprise group might support reduction of the costs of parallel proceedings; coordination of a global sale of assets; maximization of the value of all group members; reduction of forum shopping; and global reorganization of the group.

12. At the same time, however, there might be certain disadvantages. Creditors would need to investigate the connections of a company with which they deal to ascertain whether or not it is part of a group; there may be a disconnection between the place of business of a group member and the place in which insolvency proceedings with respect to that member could be commenced; where the COMI was to be determined by reference to a basket of factors, it might not always be possible to ascertain the proper location of the COMI before insolvency proceedings commenced; the standard would require global recognition in order to avoid further risk of disconnection and overlapping and conflicting claims and procedures; and a definition of "enterprise group" would be required to ensure a common understanding as to what constituted a group member, including specifying the requisite level of integration if close integration was a determinative factor. Where the COMI of the group was specified to be the location of the parent, difficulties might arise where the parent was not insolvent, but group members located elsewhere were insolvent.

13. If a group COMI could only be determined for a group that was closely integrated, factors establishing the requisite degree of integration would need to be identified. These might include: the extent of group members' independence with respect to financial, management and policy decision-making ("head of the office functions"); financial arrangements between group members, including capitalization, location of bank accounts and accountancy services; the division of responsibility with respect to provision of technical and legal documentation and signature of contracts; the location where design, marketing, pricing, delivery of products and office functions were conducted; and third-party perceptions, in particular those of creditors, concerning that location.

14. The "*Transnational Insolvency Principles of Cooperation among NAFTA countries*" (the NAFTA Principles) recommend two rules that might be considered.[1]

> Principle 23 provides that a subsidiary should be permitted to apply for insolvency in the jurisdiction in which the parent's insolvency proceedings have commenced, so that reorganization can be administered on a group basis. The possibility of parallel proceedings is acknowledged, in which case coordination should facilitate achievement of the benefits of consolidation as far as possible.[2]
>
> Principle 24 provides that enterprise groups should be reorganized from a global perspective, subject to the necessity of allocating value with regard to the corporate form.[3]

15. The Principles provide an exception for those situations where either the main jurisdiction or the subsidiary's jurisdiction requires insolvency as a condition of making an application for commencement of proceedings or the court of the main proceeding will not ordinarily accept jurisdiction over a company that is not registered and does not do business in that country, which will often be true of the subsidiary.

B. Post-commencement finance

(UNCITRAL references: A/CN.9/WG.V/WP.74/Add.2, paras. 15-22; A/CN.9/WG.V/WP.76/Add.2, paras. 20-25)

16. Many jurisdictions do not address the issue of new finance in insolvency or restrict its provision. Even where insolvency laws permit post-commencement finance on a domestic basis, there are different approaches to the priority that might be accorded or the security that might be granted to facilitate the provision of post-commencement finance, as well as issues of applicable law, that are potentially difficult to address when post-commencement finance is provided in a cross-border context.

1. Issues

(a) Obtaining and authorizing post-commencement finance

17. Recommendation 63 of the *Legislative Guide* provides that post-commencement finance may be obtained by an insolvency representative and authorized by the court or consented to by creditors. This recommendation would

---

[1] Developed by the American Law Institute, 2003, as part of its transnational insolvency project, available at www.ali.org.

[2] Procedural Principle 23: Coordination with Subsidiaries.
It should be permissible to file bankruptcy for a subsidiary in the same jurisdiction as the parent's bankruptcy, and to have either procedural or substantive consolidation under applicable law, absent a proceeding involving the subsidiary in the country of its main interests. Where the subsidiary is in a parallel proceeding in the country of its main interests, coordination between the two proceedings should achieve the benefits of consolidation where possible.

[3] Procedural Principle 24: Principles as Applied to Subsidiaries
The principles of coordination and cooperation should include parallel proceedings involving a subsidiary of a foreign parent debtor to the same extent as with parallel proceedings involving the debtor, although certain decisions, such as allocation of value, may be differently determined because of the need to honour the corporate form.

apply in the case of a single debtor and also in the group context where post-commencement finance is provided by a solvent group member to another group member, whether that member was solvent or subject to insolvency proceedings. Draft recommendation 10 above (A/CN.9/WG.V/WP.82/Add.2) covers provision of post-commencement finance by a group member subject to insolvency proceedings to another such group member.

18. A number of questions arise with respect to obtaining and authorizing post-commencement finance in the cross-border group context. These might include:

(a) Could one group member obtain finance in its own jurisdiction and provide it to a group member in another jurisdiction?

(b) Which insolvency representative would be regarded as obtaining the finance and what implications of personal liability would there be for the insolvency representative or for officers and directors of the two group members?

(c) Would court approval or creditor consent be required in the jurisdiction of the group member obtaining the finance or in the jurisdiction of the group member receiving the finance or perhaps both?

(d) Would one court's approval of post-commencement finance have effects in the other jurisdiction?

(e) Would both jurisdictions recognize orders made in the other affecting the provision of post-commencement finance in the group context?

(f) To what extent, if any, would the requirement for authorization depend on the terms of the post-commencement finance?

(g) Are there any particular issues that might arise where it was possible for a single insolvency representative to be appointed with respect to group members in different States?

(b) Priority for post-commencement finance

19. Recommendation 64 of the *Legislative Guide* specifies the level of priority to be accorded to post-commencement finance that would apply where post-commencement finance was provided by a solvent group member to a group member subject to insolvency proceedings. Draft recommendation 11 above (A/CN.9/WG.V/WP.82/Add.2) provides that in the case of post-commencement finance provided by one group member subject to insolvency proceedings to another such group member, the insolvency law should specify the level of priority to be accorded; where not specified by the law, the level of the priority should be determined by the court. The specific level of priority is not indicated in the draft recommendation.

20. Several questions may need to be considered with respect to priority, including:

(a) Will the priority accorded in one State be recognized in another where the finance transaction takes place within the same enterprise group?

(b) Will the distinction, in terms of the priority to be accorded, between provision of finance by a solvent group member and provision by a group member subject to insolvency proceedings, be affected by the cross-border nature of the transaction?

(c) Is the question of authorization affected where different priorities are accorded in different jurisdictions?

(c) Security for post-commencement finance

21. Recommendations 65-66 of the *Legislative Guide* address the granting of security for post-commencement finance. Recommendation 67 addresses the procedure to be followed where priority over existing security interests is sought. These recommendations would apply in the group context where the security interest was granted by a solvent group member to secure finance provided to another solvent group member or to a group member subject to insolvency proceedings.

22. Draft recommendation 12 above (A/CN.9/WG.V/WP.82/Add.2) addresses the granting of a security interest by one group member subject to insolvency proceedings to secure finance provided to another such group member. It permits the type of security interest referred to in recommendation 65 of the *Legislative Guide* to be granted, provided creditors consent or a determination is made that any harm to creditors is offset by the benefit to be derived from the granting of the security interest.

23. Questions relating to granting of a security interest that might need to be considered include:

(a) Would a security interest granted in one jurisdiction be recognized as valid and enforceable in another jurisdiction?

(b) If the existing secured creditors in one jurisdiction objected to the encumbrance of assets in that jurisdiction (in accordance with recommendation 66 of the *Legislative Guide*) to secure finance provided in another jurisdiction, would the court approve that security interest and in what circumstances and subject to what conditions? If the court in the jurisdiction receiving the benefit of the security interest was required to approve that transaction, could it do so and on what basis?

(c) Are there any special considerations that would arise in the situation contemplated by recommendations 66-67 of the *Legislative Guide* where a cross-border grant of security is contemplated?

(d) Provision of guarantees

24. Draft recommendation 13 above (A/CN.9/WG.V/WP.82/Add.2) provides that an enterprise group member subject to insolvency proceedings may guarantee repayment of post-commencement finance obtained by another such member, with the same proviso as applies to the granting of a security interest (draft recommendation 12). The questions raised above with respect to the granting of a security interest might also arise with respect to provision of a guarantee.

2. Solutions

25. The draft recommendations concerning provision of post-commencement finance in the context of enterprise groups in the domestic context (i.e. draft recommendations 10-13) might be revised appropriately to address some of the situations raised above. The Working Group might wish to consider the recommendations of the UNCITRAL Legislative Guide on Secured Transactions

concerning conflict-of-laws rules applicable to security interests and their application to cross-border provision of post-commencement finance.

C. Coordination and cooperation

26. Achieving a coordinated result for the insolvency of one or more enterprise group members located in different States depends upon whether the different proceedings commenced with respect to each member can be recognized in other jurisdictions and whether parties involved in the various proceedings can cooperate to ensure coordination of the proceedings. In those States that have adopted the Model Law,[4] the answer should be relatively straightforward; proceedings commenced where the debtor has its COMI could be recognized as foreign main proceedings, while proceedings commenced where the debtor has an establishment could be recognized as non-main proceedings and the effects of recognition provided by the Model Law would apply.[5] Where the Model Law has not been adopted, however, reference must be had to national laws, many of which do not contain provisions equivalent to those provided in the Model Law with respect to recognition, assistance, cooperation or coordination.[6] Because of the absence of such provisions, achieving a coordinated result can be time-consuming, costly and, in some cases, impossible.

27. With reference to the discussion of group COMI above, it should be noted that in practice a high level of coordination of multiple proceedings with respect to group members has been achieved in several cases through the use of cross-border agreements, with the result that proceedings concerning many, if not all, group members could be managed from a single location.

28. The Working Group will have before it a note by the Secretariat "Draft UNCITRAL Notes on cooperation, coordination and communication in cross-border insolvency cases" (A/CN.9/WG.V/WP.83). The Working Group may wish to consider the extent to which that document sufficiently addresses the issues of coordination and cooperation in the enterprise group context.

D. Other issues

1. Procedural coordination

29. As an alternative to giving greater definition to COMI with respect to each individual enterprise group member, some form of procedural coordination across borders might also be possible. Procedural coordination of insolvency proceedings with respect to enterprise group members in the domestic context is discussed above (draft recommendations 3-9, A/CN.9/WG.V/WP.82/Add.1).

---

[4] Adopted in Australia (2008), British Virgin Islands, overseas territory of the United Kingdom of Great Britain and Northern Ireland (2005), Eritrea (1998), Colombia (2006), Great Britain (2006), Japan (2000), Mexico (2000), Montenegro (2002), New Zealand (2006), Poland (2003), Republic of Korea (2006), Romania (2003), Serbia (2004), South Africa (2000) and United States of America (2005).

[5] See Model Law: art. 17 on decision to recognize and arts. 20 and 21 on effects of recognition.

[6] For an analysis of the law of 39 jurisdictions, see "Cross-Border Insolvency: A Guide to Recognition and Enforcement", INSOL International, 2003.

30. The Working Group might wish to consider whether draft recommendations 3-9 above on procedural coordination might be extended to address cross-border situations and what, if any, conditions might apply.

2. Substantive consolidation

31. This issue is addressed in the enterprise group context by draft recommendations 16-25 above (A/CN.9/WG.V/WP.82/Add.3). The Working Group may wish to consider the desirability of seeking to achieve substantive consolidation in cross-border cases and, if so, whether the draft recommendations might be revised to achieve that goal.

3. Appointment of a single insolvency representative

32. This issue is addressed in the enterprise group context by draft recommendations 26-30 above (A/CN.9/WG.V/WP.82/Add.3). Of those draft recommendations, recommendations 28-30 build upon the coordination and cooperation provisions of the Model Law. The Working Group may wish to consider the desirability of seeking to appoint a single insolvency representative in cross-border insolvency cases and, if so, how those draft recommendations might be revised for application in that context.

4. Single reorganization plan

33. This issue is addressed in the enterprise group context by draft recommendations 31-32 above (A/CN.9/WG.V/WP.82/Add.3). The Working Group may wish to consider the desirability of achieving a single reorganization plan in cross-border insolvency proceedings and, if so, how those draft recommendations might be revised for application in that context.

34. One approach, at a regional level, that might be considered is proposed by the NAFTA Principles, which address the possibility of making a reorganization plan approved in a main proceeding binding in non-main proceedings, provided certain safeguards are met.

> "Recommendation 5: Binding Effect of Plans
>
> The NAFTA countries should adopt provisions requiring approval of main-proceeding reorganization plans by courts in non-main proceedings despite a lack of compliance with rules for approval of such plans under domestic law if (a) the plan distribution will include significant value from assets or operations from outside the approving country; (b) the plan has been approved under the voting requirements of the law of the main proceeding; (c) creditors and other interested parties from the approving country have had a fair and reasonable opportunity to participate in the main proceeding; and (d) the plan does not discriminate unfairly on the basis of national citizenship, residence, or domicile. The provisions should also make such a plan final and binding in the approving country on the rights of all parties interested in the debtor's affairs to the same extent as it is under the law of the main proceeding."

35. Where there is only a main proceeding, and no parallel proceedings within NAFTA, the Principles provide, firstly, that the plan should be final and binding upon the debtor and upon every creditor who participates in any way in the main proceeding. For this purpose, participation includes filing a claim, voting or

accepting a distribution of money or property under a plan. The Principles provide further that the plan should also be final and binding as to the claims against the debtor of every unsecured creditor who was given adequate individual notice of the case and who would be considered within the jurisdiction of the courts in ordinary commercial matters under the law of the country of the main proceeding, with respect to the type of claims asserted by that creditor.

36. The operation of the Principles would mean that every creditor that participated in the specified manner in the main proceedings could be bound by the plan approved in those proceedings even if they did not support the plan, as could any creditor that was notified of the proceedings and had sufficient contacts with the country of the main proceeding to make the operation of its insolvency jurisdiction over that creditor reasonable.

C. Note by the Secretariat on draft UNCITRAL Notes on cooperation, communication and coordination in cross-border insolvency proceedings, submitted to the Working Group on Insolvency Law at its thirty-fifth session

(A/CN.9/WG.V/WP.83) [Original: English]

1. These Notes have been prepared by the Secretariat in response to a proposal made to the thirty-eighth session of the Commission (2005) that further work should be undertaken on coordination and cooperation in cross-border insolvency cases, particularly with regard to the use and negotiation of cross-border insolvency agreements, noting that that topic was closely related and complementary to the promotion and use of the UNCITRAL Model Law on Cross-Border Insolvency (the UNCITRAL Model Law) and, in particular, implementation of article 27 (c).

2. At its thirty-ninth session (2006) the Commission agreed that initial work to compile information on practical experience with negotiating and using cross-border insolvency agreements should be facilitated informally through consultation with judges and insolvency practitioners and that a preliminary progress report on that work should be presented to the Commission for further consideration at its fortieth session, in 2007.[1]

3. At the first part of its fortieth session (2007) the Commission considered a preliminary report reflecting experience with respect to negotiating and using cross-border insolvency protocols (A/CN.9/629) and expressed its satisfaction with respect to the progress made on the work of compiling practical experience with negotiating and using cross-border insolvency agreements and reaffirmed that that work should continue to be developed informally by the Secretariat in consultation with judges, practitioners and other experts.[2]

4. At its forty-first session, the Commission had before it a note by the Secretariat reporting on further progress with respect to that work (A/CN.9/654). The Commission noted that further consultations had been held with judges and insolvency practitioners and a compilation of practical experience, organized around the outline of contents annexed to the previous report to the Commission (A/CN.9/629), had been prepared by the Secretariat. The Commission decided that the compilation should be presented as a working paper to Working Group V (Insolvency Law) at its thirty-fifth session (Vienna, 17-21 November 2008) for an initial discussion. Working Group V could then decide to continue discussing the compilation at its thirty-sixth session in April and May of 2009 and make its recommendations to the forty-second session of the Commission, in 2009, bearing in mind that coordination and cooperation based on cross-border insolvency agreements were likely to be of considerable importance in searching for solutions in the international treatment of enterprise groups in insolvency. The Commission decided to plan the work at its forty-second session, in 2009, to allow it to devote, if necessary, time to discussing recommendations of Working Group V.[3]

5. The compilation of practice is set forth below as the draft UNCITRAL Notes on cooperation, coordination and communication in cross-border insolvency

---

[1] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17* (A/61/17), subpara. 209 (c).

[2] Ibid., *Sixty-second Session, Supplement No. 17* (A/62/17), Part I, paras. 190 and 191.

[3] Ibid., *Sixty-third Session, Supplement No. 17* (A/63/17), para. 321.

proceedings. The introduction to the Notes explains the scope of the Notes, the content of each part and the manner in which the text is organized.

UNCITRAL Notes on Cooperation, Communication and Coordination in Cross-Border Insolvency Proceedings

CONTENTS

Introduction

A. Organization and scope of the Notes

1. The purpose of these Notes is to provide guidance for practitioners and judges on practical aspects of cooperation and communication in cross-border insolvency cases, i.e. cases where the insolvent debtor has assets in more than one State or where some of the debtor's creditors are not from the State in which the insolvency proceedings have commenced. Such cases might involve individual debtors, but typically they involve enterprise groups with offices, business activities and assets in multiple States. The guidance is based upon collected experience and practice and focuses upon the use and negotiation of cross-border agreements, providing an analysis of a number of those agreements, ranging from written agreements approved by courts to oral arrangements between parties to the insolvency proceedings that have been entered into in cross-border insolvency cases over the last decade. A number of the insolvency cases to which these agreements relate are summarized in the annex to the Notes.

2. Part I of the Notes discusses the increasing importance of coordination and cooperation in cross-border insolvency cases and provides an introduction to the various international texts relating to cross-border insolvency that have been developed in recent years. These texts address various aspects of cross-border insolvency, from elaborating a legislative framework to facilitate cooperation and coordination in cross-border insolvency to providing guidance on issues that could be included in cross-border agreements or adopted by courts to guide cross-border communication.

3. Part II amplifies article 27 of the UNCITRAL Model Law on Cross-Border Insolvency, discussing various ways in which cooperation in cross-border cases might be achieved.

4. Part III examines in detail the issues addressed by cross-border agreements entered into to date. This part includes a number of what are termed "sample clauses", which are based to varying degrees upon provisions found in different cross-border agreements, notably those mentioned in the annex. These clauses are included to illustrate how different issues have been addressed or might be addressed, but are not intended to serve as model provisions for direct incorporation into protocols.

B. Glossary

1. Notes on terminology

5. The following terms are intended to provide orientation to the reader of the Notes. Since many terms have fundamentally different meanings in different jurisdictions, an explanation of the use of the term in the Notes may assist in ensuring that the concepts discussed are clear and widely understood. These Notes use terminology common to the UNCITRAL Model Law on Cross-Border Insolvency and the UNCITRAL Legislative Guide on Insolvency Law (the UNCITRAL Legislative Guide), where relevant. For ease of reference, these terms are repeated below.

(a) References in the Notes to "court"

6. The Legislative Guide assumes that there is reliance on court supervision throughout the insolvency proceedings, which may include the power to commence insolvency proceedings, to appoint the insolvency representative, to supervise its activities and to take decisions in the course of the proceedings. Although this reliance may be appropriate as a general principle, alternatives may be considered where, for example, the courts are unable to handle insolvency work (whether for reasons of lack of resources or lack of requisite experience) or supervision by some other authority is preferred (see part one, chap. III, Institutional framework).

7. For purposes of simplicity, the Guide uses the word "court" in the same way as article 2, subparagraph (e), of the UNCITRAL Model Law on Cross-Border Insolvency to refer to a judicial or other authority competent to control or supervise insolvency proceedings. An authority which supports or has specified roles in insolvency proceedings, but which does not have adjudicative functions with respect to those proceedings, would not be regarded as within the meaning of the term "court" as that term is used in the Guide.

(b) Rules of interpretation

8. Use of the singular also includes the plural; "include" and "including" are not intended to indicate an exhaustive list; "such as" and "for example" are to be interpreted in the same manner as "include" or "including".

9. "Creditors" should be interpreted as including both the creditors in the forum State and foreign creditors, unless otherwise specified.

10. References to "person" should be interpreted as including both natural and legal persons, unless otherwise specified.

(c) References to texts

11. These Notes include references, where relevant, to several international texts that address various aspects of coordination of cross-border insolvency cases, including:

(i) "Court-to-Court Guidelines": Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases, published by the American Law Institute (16 May 2000) and adopted by the International Insolvency Institute (10 June 2001);

(ii) "EC Regulation": European Council Regulation (EC) No. 1346/2000 of May 2000 on insolvency proceedings;

(iii) "CoCo Guidelines": European Communication and Cooperation Guidelines for Cross-Border Insolvency, prepared by INSOL Europe, Academic Wing (2007);

(iv) "Concordat": Cross-Border Insolvency Concordat adopted by the Council of the International Bar Association Section on Business Law (Paris, 17 September 1995) and by the Council of the International Bar Association (Madrid, 31 May 1996);

(v) "UNCITRAL Model Law": UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment (1997);

(vi) "UNCITRAL Legislative Guide": UNCITRAL Legislative Guide on Insolvency Law (2004).

2. Terms and explanations

12. The following paragraphs explain the meaning and use of certain expressions that appear frequently in the Notes:

(a) "Assets of the debtor": 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;

(b) "Avoidance provisions": provisions of the insolvency law that permit transactions for the transfer of assets or the undertaking of obligations prior to insolvency proceedings to be cancelled or otherwise rendered ineffective and any assets transferred, or their value, to be recovered in the collective interest of creditors;

(c) "Centre of main interests": the place where the debtor conducts the administration of its interests on a regular basis and that is therefore ascertainable by third parties;

(d) "Claim": a right to payment from the estate of the debtor, whether arising from a debt, a contract or other type of legal obligation, whether liquidated or unliquidated, matured or unmatured, disputed or undisputed, secured or unsecured, fixed or contingent;

(e) "Commencement of proceedings": the effective date of insolvency proceedings whether established by statute or a judicial decision;

(f) "Creditor": a natural or legal person that has a claim against the debtor that arose on or before the commencement of the insolvency proceedings;

(g) "Creditor committee": representative body of creditors appointed in accordance with the insolvency law, having consultative and other powers as specified in the insolvency law;

(h) "Cross-border agreement": an agreement entered into, either orally or in writing, intended to facilitate the coordination of cross-border insolvency proceedings and cooperation between the courts, between the courts and insolvency representatives and between insolvency representatives, sometimes also involving other parties in interest;

(i) "Debtor in possession": a debtor in reorganization proceedings, which retains full control over the business, with the consequence that the court does not appoint an insolvency representative;

(j) "Deferral": when one court accepts the limitation of its responsibility with respect to certain issues, including for example, the ability to hear certain claims and issue certain orders, in favour of another court;

(k) "Encumbered asset": an asset in respect of which a creditor has a security interest;

(l) "Establishment": any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services;

(m) "Insolvency": when a debtor is generally unable to pay its debts as they mature or when its liabilities exceed the value of its assets;

(n) "Insolvency estate": assets of the debtor that are subject to the insolvency proceedings;

(o) "Insolvency proceedings": collective proceedings, subject to court supervision, either for reorganization or liquidation;

(p) "Insolvency representative": a person or body, including one appointed on an interim basis, authorized in insolvency proceedings to administer the reorganization or the liquidation of the insolvency estate;

(q) "Main proceeding": an insolvency proceeding taking place in the State where the debtor has the centre of its main interests;

(r) "Non-main proceeding": an insolvency proceeding, other than a main proceeding, taking place in a State where the debtor has an establishment. Non-main proceedings conducted in European Union Member States under the EC Regulation are referred to as "secondary proceedings";

(s) "Ordinary course of business": transactions consistent with both:

(i) the operation of the debtor's business prior to insolvency proceedings; and

(ii) ordinary business terms;

(t) "Party in interest": any party whose rights, obligations or interests are affected by insolvency proceedings or particular matters in the insolvency proceedings, including the debtor, the insolvency representative, a creditor, an equity holder, a creditor committee, a government authority or any other person so affected. It is not intended that persons with remote or diffuse interests affected by the insolvency proceedings would be considered to be a party in interest;

(u) "Priority": the right of a claim to rank ahead of another claim where that right arises by operation of law;

(v) "Reorganization": the process by which the financial well-being and viability of a debtor's business can be restored and the business continue to operate, using various means possibly including debt forgiveness, debt rescheduling, debt-equity conversions and sale of the business (or parts of it) as a going concern;

(w) "Reorganization plan": a plan by which the financial well-being and viability of the debtor's business can be restored;

(x) "Secondary proceedings": non-main proceedings conducted in European Union Member States under the EC Regulation;

(y) "Stay of proceedings": a measure that prevents the commencement, or suspends the continuation, of judicial, administrative or other individual actions concerning the debtor's assets, rights, obligations or liabilities, including actions to make security interests effective against third parties or to enforce a security interest; and prevents execution against the assets of the insolvency estate, the termination of a contract with the debtor, and the transfer, encumbrance or other disposition of any assets or rights of the insolvency estate.

I. Background

A. The legislative framework for cross-border insolvency

1. Although the number of cross-border insolvency cases has increased significantly since the 1990s, the adoption of legal regimes, either domestic or international, equipped to address cases of a cross-border nature has not kept pace. The lack of such regimes has often resulted in inadequate and uncoordinated approaches that have not only hampered the rescue of financially troubled businesses and the fair and efficient administration of cross-border insolvencies, but also impeded the protection and maximization of the value of the assets of the insolvent debtor and are unpredictable in their application. Moreover, the disparities in and conflicts between national laws have created unnecessary obstacles to the achievement of the basic economic and social goals of insolvency proceedings. There has often been a lack of transparency, with no clear rules on recognition of the rights and priorities of existing creditors, the treatment of foreign creditors and the law that will be applicable to cross-border issues. While many of these inadequacies are also apparent in domestic insolvency regimes, their impact is potentially much greater in cross-border cases, particularly where reorganization is involved.

2. In addition to the inadequacy of existing laws, the absence of predictability as to how they will be implemented and the potential cost and delay of implementation has added a further layer of uncertainty that can impact upon capital flows and cross-border investment. Acceptance of different types of proceedings, understanding of key concepts and the treatment accorded to parties with an interest in insolvency proceedings differs. Reorganization or rescue procedures, for example, were more prevalent in some countries than others. The involvement of, and treatment accorded to, secured creditors in insolvency proceedings varied widely. Different countries also recognized different types of proceedings with different effects. An example in the context of reorganization proceedings has been the case in which the law of one State envisages a debtor in possession continuing to exercise management functions, while under the law of another State in which contemporaneous insolvency proceedings are being conducted with respect to the same debtor, existing management will be displaced or the debtor's business liquidated. Many national insolvency laws have claimed, for their own insolvency proceedings, application of the principle of universality, with the objective of a unified proceeding where court orders would be effective with respect to assets located abroad. At the same time, those laws did not accord recognition to universality claimed by foreign insolvency proceedings. In addition to differences between key concepts and treatment of participants, some of the effects of insolvency proceedings, such as the application of a stay or suspension of actions against the debtor or its assets, regarded as a key element of many laws, could not be applied effectively across borders.

3. In addition to the lack of national law reform efforts, there has also been a lack of multilateral treaty arrangements with global effect. A few treaties have been negotiated at a regional level, but those arrangements are generally only possible (and suitable) for countries of the particular region whose insolvency law regimes and general commercial laws are similar (see para. 19 below). Experience has shown that despite the potential of international treaties to provide a vehicle for widespread harmonization, the effort in negotiating such agreements is generally

substantial and, as one commentator has noted, the greater the degree of practical utility that is pursued by means of a treaty, the greater the difficulty in bringing it to fruition and the greater the risk of ultimate failure. The search for comity in insolvency in Europe provides a good example. From 1960 the intention was to develop a bankruptcy convention that would parallel the 1968 Convention on Jurisdiction and Enforcement of Judgements and Civil Commercial Matters. These efforts led to the 1990 European Convention on Certain International Aspects of Bankruptcy (the Istanbul Convention). Following only one ratification (Cyprus), the Convention was superseded by a draft European Union convention on insolvency proceedings. Although European member States came close to adopting such a Convention in November 1995, implementation ultimately proved impossible. The Convention was revived in the form of a regulation in May 1999, which was adopted by the Council on 29 May 2000 and came into effect on 31 May 2002 (see para. 20 below).

4. To address the lack of national law reform efforts, several international initiatives were launched by certain non-governmental organizations to provide a legal framework for harmonization of cross-border insolvency proceedings. One such project was the Model International Insolvency Cooperation Act (MIICA) developed under the auspices of Committee J of the Section on Business Law of the International Bar Association in the 1980s. Although failing to gain wide and active acceptance from governments and legislators, the MIICA ensured that the model law concept came to be perceived as a viable way of solving the impasse caused by persistent failure to successfully conclude a global treaty in the area of insolvency. Experience with MIICA also indicated the importance to the success of a project of involving Governments in the negotiation process (a key element of the UNCITRAL process), particularly where the text being developed required action by governments for its adoption, whether legislative or otherwise.

B. International initiatives

1. UNCITRAL Model Law on Cross-Border Insolvency

5. The UNCITRAL Model Law was adopted by UNCITRAL in 1997. It focuses on the legislative framework needed to facilitate cooperation and coordination in cross-border cases, with a view to promoting the general objectives of:

(a) Cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;

(b) Greater legal certainty for trade and investment;

(c) Fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;

(d) Protection and maximization of the value of the debtor's assets; and

(e) Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

6. These principles raise a number of issues that relate to the extent to which courts, in exercising their powers with respect to administration of the cases before them, are permitted or authorized to interact with or relate to foreign courts that might be administering a related case involving the same debtor. Are courts able, for

example, to treat common stakeholders equitably, give foreign stakeholders access to their courts on the same basis as domestic stakeholders or permit another jurisdiction to take principal charge of administering reorganization? Experience has shown, for example, that some courts are often reluctant or unable to defer to a foreign court and may therefore prefer parallel insolvency proceedings or treat primary and secondary proceedings as if they were concurrent or parallel proceedings. Such a preference may be based upon applicable law or a desire to protect the interests of domestic creditors.

7. In its resolution of 1997[4] recommending that States adopt the UNCITRAL Model Law, the United Nations General Assembly provided a compelling statement of the need for the text, its timeliness and its fundamental purpose. Specifically, the General Assembly noted that increased cross-border trade and investment led to a greater incidence of cases where enterprises and individuals had assets in more than one State and there was often an urgent need for cross-border cooperation and coordination to facilitate the supervision and administration of the insolvent debtor's assets and affairs. Inadequate coordination and cooperation in those cases not only reduces the possibility of rescuing financially troubled but viable businesses, but also impedes a fair and efficient administration of cross-border insolvencies, making it more likely that the debtor's assets would be concealed or dissipated, and hinders reorganization or liquidation of debtor's assets and affairs that would be the most advantageous for the creditors and other interested persons, including the debtor and the debtor's employees.

8. The General Assembly went on to note that many States lacked a legislative framework that would make possible or facilitate effective cross-border coordination and cooperation. It made clear its conviction that fair and internationally harmonized legislation on cross-border insolvency that respected the national procedural and judicial systems and was acceptable to States with different legal, social and economic systems would not only contribute to the development of international trade and investment, but would also assist States in modernizing their legislation on cross-border insolvency.

9. An intergovernmental working group, including representatives of 72 States, seven intergovernmental organizations and ten non-governmental organizations, negotiated the UNCITRAL Model Law between 1995 and 1997. As a model law, it requires enactment into domestic law to provide a unilateral legislative framework for cross-border insolvency. The UNCITRAL Model Law focuses upon what is required to facilitate the administration of cross-border insolvency cases and provide an interface between jurisdictions and as such respects the differences among national procedural laws and does not attempt a substantive unification of insolvency law (substantive insolvency law is addressed in the UNCITRAL Legislative Guide).

10. The text of the UNCITRAL Model Law offers solutions that help in several modest but significant ways, organized around four key elements: (a) Access to local courts for representatives of foreign insolvency proceedings and for creditors; (b) According recognition to certain orders issues by foreign courts; (c) Providing relief to assist foreign proceedings; and (d) Facilitating cooperation among the courts of States where the debtor's assets are located.

---

[4] General Assembly resolution 52/158 of 15 December 1997.

11. The solutions offered by the UNCITRAL Model Law include the following:

(a) Providing the person administering a foreign insolvency proceeding ("foreign representative") with access to the courts of the enacting State, thereby permitting the foreign representative to seek a temporary "breathing space", and allowing the courts in the enacting State to determine what coordination among the jurisdictions or other relief is warranted for optimal disposition of the insolvency;

(b) Determining when a foreign insolvency proceeding should be accorded "recognition" and what the consequences of recognition may be;

(c) Establishing simplified procedures for recognition;

(d) Providing a transparent regime for the right of foreign creditors to commence, or participate in, an insolvency proceeding in the enacting State;

(e) Permitting courts and insolvency representatives in the enacting State to cooperate more effectively with foreign courts and foreign representatives involved in an insolvency matter;

(f) Authorizing courts in the enacting State and persons administering insolvency proceedings in the enacting State to seek assistance abroad;

(g) Providing for court jurisdiction and establishing rules for coordination where an insolvency proceeding in the enacting State is taking place concurrently with an insolvency proceeding in a foreign State; and

(h) Establishing rules for coordination of relief granted in the enacting State in favour of two or more insolvency proceedings that may take place in foreign States regarding the same debtor.

12. A widespread limitation on cooperation and coordination between judges from different jurisdictions in cases of cross-border insolvencies derives from a lack of a legislative framework, or from uncertainty regarding the scope of the existing legislative authorization, for pursuing cooperation with foreign courts. As noted above, the UNCITRAL Model Law is designed to assist States to equip their insolvency laws with that modern, harmonized legislative framework.

13. The Guide to Enactment of the UNCITRAL Model Law emphasizes the centrality of cooperation to cross-border insolvency cases, in order to achieve efficient conduct of those proceedings and optimal results. A key element is cooperation between the courts involved in the various proceedings of the case (article 25) and between those courts and the insolvency representatives appointed in the different proceedings (article 26). An essential element of cooperation may be establishing communication among the administering authorities of the States involved. While the UNCITRAL Model Law provides the authorization for cross-border cooperation and communication between judges, it does not specify how that cooperation and communication might be achieved, leaving it up to each jurisdiction to determine or apply its own rules. It does note, however, that the ability of courts, with the appropriate involvement of the parties, to communicate "directly" and to request information and assistance "directly" from foreign court or foreign representatives, is intended to avoid the use of time-consuming procedures traditionally in use, such as letters rogatory. This ability is critical when courts consider that they should act with urgency.[5]

---

[5] UNCITRAL Model Law, Guide to Enactment, para. 179.

14. As at August 2008, legislation based upon the UNCITRAL Model Law has been enacted in: Australia (2008); British Virgin Islands, overseas territory of the United Kingdom of Great Britain and Northern Ireland (2005); Colombia (2006); Eritrea (1998); Great Britain (2006); Japan (2000); Mexico (2000); Montenegro (2002); New Zealand (2006); Poland (2003); Republic of Korea (2006); Romania (2003); Serbia (2004); South Africa (2000); and United States of America (2005).[6]

2. International Bar Association Cross-Border Insolvency Concordat

15. A different initiative was that of Committee J of the International Bar Association, which in the early 1990s developed a Cross-Border Insolvency Concordat based on rules of private international law. The purpose of the Concordat was to suggest guidelines for cross-border insolvencies and reorganizations that participants or courts could adopt as practical solutions to a variety of issues. These include: designation of the administrative forum; application of that forum's priority rules; rules for cases involving more than one administrative forum; and designation of applicable rules for avoidance of certain specified pre-insolvency transactions. The initial application of the Concordat was in cases that involved Canada and the United States, by some of the judges who had been instrumental in developing the Concordat. Cross-border insolvency protocols based on the Concordat model have been entered into between the United States and Canada on a number of occasions, as well as between the United States and Israel, the Bahamas, the Cayman Islands, England, Bermuda and Switzerland.

16. This form of cooperation has emerged as a common practice, at least in certain States. The absence of formal treaties or domestic legislation to address the problems arising from international insolvencies has encouraged insolvency practitioners to develop, on a case-by-case basis, strategies and techniques for resolving the conflicts that arise when the courts of different States attempt to apply different laws and enforce different requirements upon the same set of parties. The terms and duration of protocols vary, and amendment or modification in the course of the proceedings takes account of the changing dynamics of a multinational insolvency to facilitate solutions for unique problems that arise in the course of the proceedings.

17. The first time a protocol was used was in 1992 in the insolvency of the Maxwell Communication Corporation,[7] which was placed into administration in England and contemporaneously into Chapter 11 proceedings in New York, with administrators and an examiner appointed respectively. A protocol may not be the appropriate solution for all cases, being case specific as to its content and requiring time for it to be negotiated, a sufficient asset base to justify negotiation and cooperation between the two courts and between the insolvency practitioners in each jurisdiction. Nevertheless, the cases in which cross-border protocols have been used provide examples of how cooperation and coordination between the judges, courts and the insolvency profession can improve the international regime for insolvency in the absence of comprehensive national, regional or international law reform solutions. The protocols developed have often provided innovative solutions to cross-border issues and have enabled courts to address the specific facts of

---

[6] This information is regularly updated on the UNCITRAL website at www.uncitral.org under Status of Conventions.

[7] All case names referred to in the text are listed in the annex, where cases are not listed in the annex, full citation is provided in a footnote.

individual cases. Although there are limitations on the extent to which they can be used to achieve more widespread harmonization of international insolvency law and practice, protocols are being increasingly used and information about them more and more widely disseminated.

3. Regional arrangements

18. While a few treaties have been negotiated at a regional level, these arrangements are generally only possible (and suitable) for countries of the particular region whose insolvency law regimes and general commercial laws are similar. Of necessity, their application is limited to the regional group of contracting States.

19. Regional multilateral treaties include: in Latin America, the Montevideo Treaties of 1889 and 1940 and in the Nordic region, the Convention between Denmark, Finland, Iceland, Norway and Sweden regarding Bankruptcy (concluded in 1933, amended in 1977 and 1982). While no doubt improving the situation between those contracting States, the increasing globalization of business and investment and the consequent spread of international insolvencies is likely to include non-participating States, underlining the limitations inherent in any regional treaty regime. Nevertheless, regional arrangements may prove to be a useful starting point for broader cooperation.

20. As noted above, the EC Regulation regulates the complex problems of cross-border insolvency by creating a binding framework within which insolvency proceedings taking place in any Member State of the EU could be recognized and enforced throughout the rest of the Union. The EC Regulation recognizes that the proper functioning of its internal market requires the efficient and effective operation of cross-border insolvency proceedings. One impediment to that proper functioning, which the Regulation tries to prevent, is "forum shopping", where parties transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position.[8] The EC Regulation imposes a mandatory regime for the exercise of jurisdiction to open insolvency proceedings and choice of law rules, which determine the law that will govern each relevant aspect of insolvency proceedings to which the Regulation applies and recognizes the importance of cooperation between the proceedings. Article 31 establishes the duty of insolvency representatives of the different concurrent insolvency proceedings to cooperate and communicate information, but does not provide much guidance on the detail of that communication and cooperation. That is addressed by the European Communication and Cooperation Guidelines for Cross-Border Insolvency (CoCo Guidelines), developed under the aegis of the Academic Wing of INSOL Europe, which constitute a set of standards for communication and cooperation by insolvency representatives in cross-border insolvency cases.

4. Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases

21. In 2000, the American Law Institute (ALI) developed the Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases (the Court-to-Court Guidelines) as part of its work on transnational insolvency in the countries of the North American Free Trade Agreement (NAFTA). The Court-to-Court Guidelines are intended encourage and facilitate cooperation in international

---

[8] Preamble of the EC Regulation, recitals (2) and (4).

cases. They are not intended to alter or change the domestic rules or procedures that are applicable in any country, nor to affect or curtail the substantive rights of any party in proceedings before the courts.

II. UNCITRAL Model Law on Cross-Border Insolvency: possible forms of cooperation under article 27

1. A widespread limitation on cooperation and coordination between judges from different jurisdictions in cases of cross-border insolvencies derives from a lack of a legislative framework, or from uncertainty regarding the scope of the existing legislative authorization, for pursuing cooperation with foreign courts. As noted above, the UNCITRAL Model Law provides that legislative framework authorizing cross-border cooperation and communication between courts. It does not, however, specify how that cooperation and communication might be achieved. To assist those States that might have a limited tradition of direct cross-border judicial cooperation and States where judicial discretion has traditionally been constrained, article 27 of the UNCITRAL Model Law lists possible forms of cooperation that might be used to coordinate cross-border insolvency cases.

A. Article 27 (a): Appointment of a person to act at the direction of the court

2. Such a person may be appointed by a court to facilitate coordination of insolvency proceedings taking place in different jurisdictions concerning the same debtor. The person may have a variety of possible functions including: acting as a go-between for the courts involved, especially where issues of language are raised; developing a protocol; and promoting consensual resolution of issues between the parties. Where the court appoints such a person, typically the court order will indicate the terms of the appointment and the powers of the appointee. The person may be required to report to the court or courts involved in the proceedings on a regular basis, as well as to the parties.

3. In the *Maxwell* case, for example, the United States court appointed an examiner with expanded powers under chapter 11 of the United States Bankruptcy Code and directed them to work to facilitate coordination of the different proceedings. In the *Nakash* case, an examiner was also appointed by the United States court to, inter alia, attempt to develop a protocol for harmonizing and coordinating the United States chapter 11 proceedings with certain proceedings taking place in Israel and ultimately facilitate a consensual resolution of the United States chapter 11 case. In the *Matlack* case, cross-border agreement provided for the intermediary to periodically or upon request deliver to the court reports summarizing the status of the foreign insolvency proceedings and such other information as the court might order.

B. Article 27 (b): Communication of information as considered appropriate by the court

4. An essential element of cooperation may be establishing communication between the administering authorities of the States involved. Articles 25 and 26 of

the UNCITRAL Model Law authorize direct communication between courts, between courts and insolvency representatives and between insolvency representatives. Where the UNCITRAL Model Law has been adopted, these provisions establish the necessary legislative authorization for that communication, but they do not specify in any detail how that communication should take place beyond suggesting, in article 27, that it may be implemented by, for example, communicating information by any means considered appropriate by the court. The UNCITRAL Model Law envisages that communication as authorized would be subject to any mandatory rules applicable in an enacting State, such as rules restricting the communication of information for reasons, inter alia, of protection of privacy or confidentiality.[9] The ability of courts to communicate "directly" and to request information and assistance "directly" from foreign court or foreign representatives, avoiding the use of time-consuming procedures traditionally in use, such as letters rogatory, may be critical when courts consider that they should act with urgency.[10]

5. Establishing communication in cross-border cases may assist cross-border proceedings in many ways. It may assist parties to better understand the implications or application of foreign law, particularly the differences or overlaps that may otherwise lead to litigation; facilitate resolution of issues through a negotiated result acceptable to all; provoke more reliable responses from parties, avoiding inherent bias and adversarial distortion that may be apparent where parties represent their own particular concerns in their own jurisdictions. It may also serve international interests by facilitating better understanding that will assist in encouraging international business and preserving value that would otherwise be lost through fragmented judicial action. Some of the potential benefits may be hard to identify at the outset, but may become apparent once the parties have communicated. Cross-border communication may reveal, for example, some fact or procedure that will substantially inform the best resolution of the case and may, in the longer term, serve as an impetus to law reform.

6. Communication of information may take place by exchange of documents (e.g. copies of formal orders, judgements, opinions, reasons for decisions, transcripts of proceedings, affidavits and other evidence) or orally. The means of communication may be by post, fax or e-mail, or by telephone or videoconference. Copies of written communications may also be provided to the parties in accordance with applicable notice provisions. Communication may be affected directly between judges or between or through court officials (or a court appointed intermediary, as noted above) or insolvency representatives, subject to local rules. The development of new communication technologies supports various aspects of cooperation and coordination, with the potential to reduce delays and, as appropriate, facilitate face-to-face contact. As global litigation multiplies, these methods of direct communication are increasingly being used.

7. Communication of information between judges or other interested parties raises a number of issues that need to be considered to ensure any communication is open, effective and credible and that proper procedures are followed. At a general level, it might be appropriate to consider whether communication should be treated as a matter of course in cross-border proceedings or resorted to only where determined to be strictly necessary; whether it should cover only issues of procedure

---

[9] UNCITRAL Model Law, Guide to Enactment, para. 182.

[10] Ibid., para. 179.

or may also deal with substantive matters; whether a judge may advocate that a particular course of action be taken; and, with respect to safeguards, such as those mentioned below (see part III, paras. 30-32, 185-188 below), whether they should apply in all cases or whether there might be exceptions.

8. In any particular case it will be necessary to determine, as appropriate to a particular jurisdiction: the correct procedures to be followed, including the persons who are to be party to the communication and any limitations that will apply; the questions to be considered; whether the parties share the same intentions or understanding with respect to communication; any safeguards that will apply to protect the substantive and procedural rights of the parties; the language of the communication and any consequent need for translation of written documents or interpretation of oral communications; and acceptable methods of communication. Safeguards might provide that parties are entitled to be notified of any proposed communication (e.g. all parties and their representatives or counsel), object to the proposed communication, be present when the communication takes place and to participate and that a record of the communication should be made, becoming part of the records of the proceedings and available to counsel in both courts subject to any measure to protect confidentiality the courts may deem appropriate.

9. Where the UNCITRAL Model Law has not been enacted, the legislative authorization for communication in cross-border proceedings might be lacking. The different approaches taken to communication between the courts and parties serve to illustrate some of the problems that might be encountered. In addition to the absence of specific authorization, there is very often hesitance or reluctance on the part of courts of different jurisdictions to communicate directly with each other. That hesitance or reluctance may be based upon ethical considerations; legal culture; language; or lack of familiarity with foreign laws and their implementation. Some States have a relatively liberal approach to communication between judges, while in other States judges may not communicate directly with parties or insolvency representatives or indeed with other judges. In some States, ex parte communications with the judge are considered normal and necessary, while in other States such communications would not be acceptable.[11] Within States, judges and lawyers may have quite different views about the propriety of contacts between judges without the knowledge or participation of the attorneys for the parties. Some judges, for example, accept that there is no difficulty with private contact among themselves, while some lawyers would strongly disagree with that practice. Courts typically focus on the matters before them and may be reluctant to provide assistance to related proceedings in other States, particularly when the proceedings for which they are responsible do not appear to involve an international element in the form of a foreign debtor, foreign creditors or foreign operations.

10. Courts may adopt guidelines, such as the Court-to-Court Guidelines, to coordinate their activities, foster efficiency and ensure stakeholders in each State are treated consistently. Such guidelines typically are not intended to alter or change the domestic rules or procedures that are applicable in any country, and are not intended to affect or curtail the substantive rights of any party in proceedings before the courts. Rather, they are intended to promote transparent communication between

---

[11] For example, in the NAFTA countries, ex parte communications with the judge are accepted in Mexico, while in Canada and the United States they are not. See The American Law Institute's Principles of Cooperation Among the NAFTA Countries, Procedural Principle 10, Topic IV.B., Comment, pp. 57-58.

courts, permitting courts of different jurisdictions to communicate with one another and may be adopted by court for general use or incorporated into specific cross-border agreements.

C. Article 27 (c): Coordination of administration and supervision of the debtor's assets

11. The conduct of cross-border insolvency proceedings will often require assets of the different insolvency estates to continue to be used, realized or disposed of in the course of the proceedings. Coordination of such use, realization and disposal will help to avoid disputes and ensure that the benefit of all parties in interest is the key focus, particularly in reorganization. Some of the issues to be considered in facilitating coordination will include: the location of the various assets; determination of the law governing the assets and the parties responsible for determining how they can be used or disposed of (e.g. the insolvency representative, the courts or in some cases the debtor), including the approvals required; the extent to which responsibility for those assets can be shared among or allocated to those different parties in different States; and how information can be shared to ensure coordination and cooperation. Coordination may also be relevant to investigating the debtor's assets and considering possible avoidance actions.

D. Article 27 (d): Approval or implementation of agreements concerning coordination of proceedings

12. As noted above, the insolvency community, faced with the daily necessity of dealing with insolvency cases and attempting to coordinate administration of cross-border insolvencies in the absence of widespread adoption of facilitating national or international laws, has developed cross-border agreements to address the potential procedural and substantive conflicts arising in those cross-border cases, facilitating their resolution through cooperation between the courts, the debtor and other stakeholders across jurisdictional lines to work efficiently and increase realizations for stakeholders in potentially competing jurisdictions.

13. These cross-border agreements do not replace enactment of the UNCITRAL Model Law as a means of facilitating cross-border cooperation and coordination, but may be used in conjunction with enactment of the Model Law and, in fact, complement its enactment. They are discussed in detail in Part III below.

E. Article 27 (e): Coordination of concurrent proceedings

14. When there are concurrent cross-border proceedings with respect to the same debtor, the UNCITRAL Model Law aims to foster decisions that would best achieve the objectives of both proceedings. Article 29 provides guidance to a court that is dealing with cases where the debtor is subject to both foreign and local proceedings, addressing ways in which those proceedings should be coordinated, particularly with respect to the provision of relief, to ensure steps required in the different proceedings can proceed without being unnecessarily suspended by the operation of a stay. For example, investigation of the debtor's assets may involve assets located in a number of different jurisdictions and such investigation may be hampered by the operation of a stay in one or more of those jurisdictions. In order to proceed with

the investigation, relief from the stay might be required. Similarly, proceedings commenced in one State might be assisted by the application of a stay in another State where no insolvency proceedings have commenced with respect to the debtor, but where the debtor has assets. Recognition of the stay in that second State would assist in protecting the assets for the benefit of all creditors. In recognizing and implementing a stay ordered by another court, a court might consult with the issuing court regarding (a) the interpretation and application of the stay and possible modification of the stay or relief from the stay, and (b) the enforcement of the stay.

15. Concurrent proceedings may also be coordinated by way of joint hearings (see part III, paras. 145-150 below) and in the case of reorganization, by coordinating reorganization plans, particularly where the same or a similar plan is required in each State involved in the insolvency. Coordination may be relevant to preparation of the plan; negotiation with creditors; procedures for approval; the role to be played by the courts, particularly with respect to approval of the plan and its implementation.

16. Chapter V of the UNCITRAL Model Law (articles 28-32) addresses certain specific aspects of coordination of concurrent proceedings, namely commencement of local proceedings after recognition of foreign main proceedings; coordination of relief; coordination of multiple proceedings; the application of a presumption of insolvency; and rules of payment in concurrent proceedings.

F. Article 27 (f): Other forms of cooperation

17. Forms of cooperation not specifically mentioned in article 27 might include the following.

(a) Questions of jurisdiction and allocation of disputes among cooperating courts for resolution

18. Reaching an appropriate level of cooperation may require courts in the States in which insolvency proceedings have commenced to coordinate their efforts and avoid the sorts of conflict that might arise from the traditional approaches of reciprocity and the first-to-judgement rule (which permits parallel litigation involving the same parties and issues to proceed in two countries, with the result governed by the first court past the post). In some countries the anti-suit injunction, restraining a party from commencing or continuing proceedings in another jurisdiction, may also be relevant. Cooperation may involve, for example, identifying different matters to be brought before respective courts (which might be agreed at the level of the parties and not involve a decision by the courts); courts deferring to the jurisdiction or to decisions of other courts; and to the extent permitted, allocating responsibility for various matters between the courts to facilitate coordination and avoid duplication of effort. Among some States, there is a trend of some courts in multinational cases attempting to determine the optimal forum for each case rather than relying on the traditional rules. This solution has been used most frequently in insolvency cases because of the universal jurisdiction characteristic of insolvency.

19. Determining the most appropriate forum may involve one court deferring to another. This might involve dismissing a legal action commenced in one court to

allow a decision in the other court in which a parallel action has been commenced.[12] It might also involve one court giving jurisdiction to another court where, for example, an action may be possible in the second court, but not in the first. In the *Maxwell* case, for example, a creditor would have been subject to an avoidance action in the United States, but not in the United Kingdom; the United Kingdom court gave jurisdiction to the United States court, all parties agreeing that the use of the United States law in this case would be territorial. After considering the matter, however, the United States court concluded that the law of the jurisdiction having the greatest interest in the outcome of the controversy, in this case English law, should govern. The United States court acknowledged, "in an age of multinational corporations, it may be that two or more countries have equal claim to be the home country of the debtor". The approach of determining which substantive law of the different jurisdictions involved in a cross-border case should apply, based on greatest interest, has been followed in other cases.[13]

20. Deferring to another court might not be possible in all cases, as courts are often obligated to exercise jurisdiction or exclusive control over some matters. Some legal systems also have procedural rules that limit their ability to defer to another court. In particular, civil law jurisdictions may lack the ability to defer to a foreign court. However the insolvency representative may have discretion to simply not pursue a given action in his home court, electing to let the representative of a related proceeding in another country pursue the action there.

(b) Coordination of the filing, determination and priority of claims

21. Coordinating the procedures for verification and admission of claims may assist the administration of multiple cross-border insolvency proceedings involving large number of creditors in different States. Various measures could be adopted, for example: determining a single jurisdiction for the submission, verification and admission of claims and allocating responsibility for that process to the court or the insolvency representative; coordinating that process where claims are to be submitted in more than one proceeding, including requiring insolvency representatives to share lists of creditors and claims admitted, and aligning submission deadlines and procedures; providing for recognition of claims verified and admitted in one State in other States; establishing priorities of claims; and so forth. Coordination of treatment of claims is on of the issue commonly addressed in cross-border agreements (see part III, paras. 120-131 below).

---

[12] Two examples: Victrix Steamship Co., S.A. v. Salen Dry Cargo A.B., 825 F.2d 709 (2d Cir. 1987), in which a United States court approved dismissal of a claim against a debtor in a Swedish insolvency proceeding in deference to that proceeding; Cunard Steamship Co. v. Salen Reefer Serv. A. B., 773 F.2d 452 (2d Cir. 1985), which involved a similar dismissal of an arbitration in favour of an insolvency proceeding.

[13] See In re Lernout & Hauspie Speech Products N.V., 301 B.R. 651, (Bankr. D. Del., 2003), affirmed 308 B.R. 672 (U.S. D. Del. (2004)).

III. Cross-border agreements used to facilitate multiple cross-border insolvencies

A. Preliminary issues

1. As noted above, one tool for facilitating the management of multiple cross-border insolvencies are *cross-border agreements*.

2. As noted above, some of the international projects targeting the facilitation of cross-border insolvency proceedings touch more or less explicitly on issues of these agreements, referring in particular to cross-border protocols, and in some cases recommending their use. Some, for example, have developed principles to assist with the negotiation of protocols, including in particular, the Concordat. The CoCo Guidelines recommend the use of a protocol as the best means of achieving cooperation, while the Court-to-Court Guidelines make reference to the use of a protocol in the context of joint hearings. As discussed below, some agreements incorporate the terms of these instruments by reference; others model specific provisions upon the drafting used in these texts.

3. Drawing upon practical experience, the following part examines what cross-border agreements are, describes their use, outlines some of the conditions supporting the use of cross-border agreements and identifies the range of issues included in existing cross-border agreements, reflecting on the manner in which they have been treated in different cases.

1. What is a cross-border agreement?

4. Cross-border agreements are generally agreements entered into for the purpose of facilitating cross-border cooperation and coordination of multiple insolvency proceedings in different States concerning the same debtor. Typically, they are designed to assist in the management of those proceedings and are intended to reflect the harmonization of procedural rather than substantive issues between the jurisdictions involved (although in limited circumstances, substantive issues may be addressed). They vary in form (written versus oral) and scope (generic to specific) and may be entered into by different parties. Simple generic agreements may emphasize the need for close cooperation between the parties, without addressing specific issues, while more detailed, specific agreements establish a framework of principles to govern multiple insolvency proceedings and are approved by the courts involved. They may reflect agreement between the parties to take certain steps or actions, as well as agreement to refrain from taking certain steps or actions.

5. Though differing in form, these agreements are nearly always intended to be binding on the parties that enter into them and regulate a similar range of issues. They are most commonly referred to as “protocols”, although a number of other titles have been used including insolvency administration contract, cooperation and compromise agreement, and memorandum of understanding. Since the use of the term “protocol” does not necessarily reflect the diverse nature of the agreements being used in practice, these Notes use the more general term “cross-border agreement”.

6. Cross-border agreements have been successfully used in insolvency proceedings concerning both reorganization or liquidation and in a variety of situations, including cases involving: multiple plenary proceedings; ancillary

proceedings commenced in different States affecting the same parties; main and non-main proceedings; and insolvency proceedings in one State and non-insolvency proceedings against the same debtor in another State. They have also been used in cases involving States with different legal traditions, that is, both common law and civil law.

7. In addition to promoting the efficient worldwide coordination and resolution of multiple proceedings against a debtor, they are also intended to protect the fundamental local rights of each of the parties involved in those proceedings. As such, they are considered by many practitioners who have been involved with their use as the key to developing appropriate solutions for particular cases, without which a successful conclusion to the proceedings would have been very unlikely. Their increasing use suggests that in time they may become the norm in cases with a significant international element, although their use is not ubiquitous, currently being limited to a handful of States.

8. Typically, cross-border agreements are tailored to address the specific issues of a case and the needs of the parties involved. They may be used:

(a) To promote certainty and efficiency with respect to management and administration of the proceedings;

(b) To help clarify the expectations of parties;

(c) To reduce disputes and promote their effective resolution where they do occur;

(d) To assist in preventing jurisdictional conflict. The agreement in the Maxwell proceedings, for example, resulted in the English and United States insolvency representatives performing in such a way that no conflict requiring judicial resolution arose;

(e) To facilitate restructuring;

(f) To assist in achieving cost savings by avoiding duplication of effort and competition for assets and avoiding unnecessary delay;

(g) To promote mutual respect for the independence and integrity of the courts and avoid jurisdictional conflicts;

(h) To promote international cooperation and understanding between judges and insolvency representatives;

(i) To facilitate the development of a framework of general principles to address basic administrative issues arising out of the cross-border and international nature of the insolvency proceedings; and

(j) To contribute to the maximization of value of the estate. In the Everfresh proceedings, for example, it has been estimated that enhancement of value through the agreement, which involved the creditors and managed to restrain unsecured creditors from taking detrimental actions, was in the order of 40 per cent.

9. Unfamiliarity with the use of such agreements has led to some misapprehension that they are used to enable a party to circumvent its legal obligations, duties or limitations or to defer or impose them on the parties in another jurisdiction in a way not permitted under the domestic law of either party. However, a cross-border agreement is not a tool for circumventing legal obligations, but rather a tool for working out the best possible means of coordinating the proceedings in

the States involved, within the limitations of the legal regime of those States. This principle applies to all parties, including the courts, which must abide by the provision of their domestic laws. The extent to which courts might interpret that law to facilitate cross-border cooperation is a different issue.

2. Circumstances that might support use of a cross-border agreement

10. Despite the case-specificity of cross-border agreements, the existence of certain circumstances in a particular case might be regarded as supporting the use of an agreement to facilitate cross-border cooperation and coordination. These should not be regarded as an inclusive or determinative checklist, but rather as signs that an agreement might be helpful; notwithstanding the existence of a number of these factors in a particular case, might be decided that for other reasons a cross-border agreement is not required or desirable. The circumstances supporting an agreement might include:

(a) Cross-border insolvency proceedings with a considerable number of international elements;

(b) Complex debtor structure (for example, an enterprise group with numerous subsidiaries);

(c) Different types of insolvency procedures in the States involved, for example, reorganization with replacement of the management by insolvency representatives in one forum and the debtor in possession in the other;

(d) Assets are sufficient to cover the costs of drafting the agreement;

(e) Time for the negotiations is available. Cross-border agreements may not always be an option as they require time for negotiation. This might be problematic where urgent action is required;

(f) Substantive insolvency laws are similar;

(g) Contradictory stays have been ordered in the different proceedings; and

(h) Insolvency representatives appointed to the different proceedings are employed by the same international company. This has occurred between jurisdictions with very similar insolvency laws, for example the Hong Kong Special Administrative Region of China (the Hong Kong SAR) and the British Virgin Islands or the Hong Kong SAR and Bermuda.[14]

3. Timing of negotiation

11. An agreement may be negotiated at the beginning of a case or during the case as issues arise and more than one agreement may be negotiated to cover different issues. Although there are some examples of protocols negotiated in the course of proceedings, for example, in the *Maxwell* case, most cross-border agreements are negotiated prior to proceedings being commenced, in order to prevent potential disputes from the outset. The timing of negotiation depends on how much time is available prior to the commencement of the proceedings or for the resolution of disputes in proceedings already commenced. For example, in the *Federal Mogul* case, the parties had six months to negotiate the cross-border agreement, with the commencement of formal proceedings always available as an alternative. The time

---

[14] See, for example, GBFE, Peregrine.

available for negotiation, reflected in the level of detail evident in the agreement, enabled the parties to negotiate some complex and sensitive issues, such as the extent to which the insolvency representative could delegate its powers to another insolvency representative or party. In the case of *Collins and Aikman*,[15] a protocol could not be negotiated because the parties only had four days prior to commencement of the proceedings. In other cases, proceedings such as non-main proceedings may be commenced on the application of the insolvency representative of the main proceeding with the sole purpose of assisting that main proceeding.[16] The insolvency representative of the main proceeding may have a clear idea of what cooperation and coordination is required before applying for commencement of the non-main proceeding and negotiation of a cross-border agreement may be relatively quick and uncontroversial.

12. The time required for negotiation of an agreement varies from case to case and depends on a number of factors such as the knowledge of the parties of the key features of the debtor and of the potential conflicts that are likely to be encountered in the course of the proceedings. In simple cases, obtaining this degree of knowledge and the ensuing negotiation may be possible within a few days, but typically, the time frame would be longer.

4. Parties to a cross-border agreement

13. Very often the negotiation of cross-border agreements is initiated by the parties to the proceedings, including the insolvency practitioners or insolvency representatives and in some cases the debtor (including a debtor in possession), or at the suggestion or with the encouragement of the court; some courts have explicitly encouraged the parties to negotiate an agreement and seek the courts' approval.[17] The early involvement of the courts may, in some cases, be a key factor in the success of the agreement.

14. Typically, the parties that enter into a cross-border agreement vary depending upon the applicable law and what is permitted, for example, with respect to the powers of the insolvency representatives, the courts and other interested parties. Frequently, they are entered into by the insolvency representatives, sometimes by the debtor (usually a debtor in possession), and may involve the creditor committee. (For further detail, see Part B comparing the contents of different cross-border agreements). It is rarely that case that a cross-border agreement is entered into between the courts, although in some jurisdictions this might be possible. However, negotiations between parties in cross-border cases are frequently assisted by the courts and courts may provide the impetus for reaching an agreement.

15. Some written arrangements are signed by the parties who conclude them; others are not. Although the signature reflects the agreement reached between the parties, in practice many agreements in writing are rendered effective by court approval constituting consent orders. Some agreements address the issue of signature of counterpart copies, each of which should be deemed an original and equally authentic and the manner in which it can be signed, including by facsimile signature, which may be deemed to constitute an original.[18] Identifying the parties required to sign an agreement or to be bound by it will be determined by the effect

---

[15] Proper citation to be provided later.
[16] See, for example, SENDO, EMTEC.
[17] See, for example, Solv-Ex, Nakash.
[18] See, for example, Inverworld, Federal Mogul.

of the agreement, both substantively and procedurally. For that reason, creditors generally are not parties to an agreement, although there are some examples involving creditors or the creditor committee. As they are often unfamiliar with the insolvency law of other States, including its aims, creditors can affect the success of global reorganization, and close cooperation, as exemplified in the *Singer*[19] case, with the creditor committee and creditors in general, will be desirable. Additional parties may join an agreement over time, but it is desirable that the agreement not be varied by the addition of those parties and that they do not seek to vary what has previously been agreed.

5. Capacity to enter into a cross-border agreement

16. For an agreement to be effective, the parties negotiating it should have the requisite authority or capacity to do so and to commit to what they agree. That capacity will depend on what those parties are permitted to do under applicable law, which may differ from State to State. In some States, for example, the insolvency representative's authority to negotiate and enter into an agreement will fall within its powers under the insolvency law; in other States, the insolvency representative may require the consent of creditors or authorization by the court.[20]

17. An agreement requiring approval by a court in a civil law jurisdiction may require the court to find appropriate statutory authorization for such approval, as it may not be covered by the court's "general equitable or inherent powers". Some commentators are sceptical of the feasibility of such agreements being approved by civil law courts because of the lack, in the absence of enactment of the UNCITRAL Model Law, of available judicial discretion comparable to that under the common law. Other commentators express the view that certain types of cross-border agreements, such as those dealing only with administrative issues, could be entered into by insolvency representatives or even the courts themselves. The underlying rationale is that these agreements would fall within the statutory competence of insolvency representatives, being part of their legal responsibility to protect and maximize the value of the estate, provided these responsibilities do not constitute personal, legal obligations. Some commentators take the view that the insolvency representative's responsibility to the insolvency estate could constitute a duty to enter into such an agreement.

18. It has also been suggested that a civil law judge could enter into a cross-border agreement with a foreign court on the basis of its statutory obligation to prevent actions detrimental to the estate. As noted above with respect to insolvency representatives, one obstacle for the courts in some civil law jurisdictions may be that judges can be held personally liable for malpractice. Although such a finding might be unlikely when the purpose of the cross-border agreement was to enhance the value of the estate within the terms of the applicable law, the existence of such provisions might help to explain a reluctance to enter into cross-border agreements in some civil law jurisdictions. Another reason may be a lack familiarity with cross-border agreements and the judicial discretion to enter into them.

---

[19] See In re The Singer Company N.V., No. 99-10578 (Bankr. S.D.N.Y., filed 13 Sept. 13, 1999).

[20] See, for example, the Decision authorizing the insolvency representatives in AKAI Holdings Limited to enter and implement a protocol, in the Matter of AKAI Holdings Limited, High Court of the Hong Kong Special Administrative Region, Court of First Instance, Companies (Winding-up) No. 49 of 2000.

19. Practice has shown that these agreements are possible between civil and common law jurisdiction. In the *Nakash* case, for example, the Israeli court found statutory authorization for such agreement. In the *AIOC* case, an agreement was reached between the United States and the Swiss insolvency representatives, with the explicit endorsement of the responsible Swiss insolvency authority. The agreements in the *ISA-Daisytek* and *SENDO* proceedings are further examples of agreements between civil and common law jurisdictions, involving the United Kingdom and Germany and France. There have also been agreements involving only civil law jurisdiction, for example in the *EMTEC* proceedings, involving France and Germany.

20. One factor key to the use of such agreements between civil and common law jurisdictions is the willingness of the courts and insolvency representatives to work to overcome potential jurisdictional obstacles. In the *Nakash* proceedings, for example, the Israeli court called upon the insolvency representatives to work out such an agreement, expressing the view that "it might be desirable to reach an agreement between the interested parties and the Courts in the United States and the State of Israel".[21] Many of the impediments that appeared to result from the differences between the insolvency laws of the fora involved were resolved by focussing on the goal common to both laws of maximizing value for the parties. Nevertheless, in practice agreements occur more frequently between common law jurisdictions, where courts have a wider discretion than in other jurisdictions, in which statutory authorization for entering into such arrangements is needed, such as would be provided by enactment of the UNCITRAL Model Law. However, commentators of civil law countries are generally of the view that cross-border agreements will become more common in the future due to their successful use in cross-border insolvency proceedings.

6. Format

21. As noted above, there is no prescribed format for these agreements and both oral and written agreements are used in practice, although some laws may include writing requirements for validity and enforceability. Each arrangement is individual to a particular case, identifying and facilitating solutions to the issues that are or are likely to become important in that case before the courts under the laws of the jurisdictions involved. Oral agreements may limit the parties to proceeding on a step-by-step basis, rather than being able to rely on a general framework of the sort provided by a written agreement and generally rely for their observance and implementation on the trust and confidence of the parties. Oral agreements are likely to prove harder to enforce than written ones and it may be difficult to bind parties to an oral agreement made in a cross-border context. The enforceability of written cross-border agreements depends on their legal nature. When approved by the courts, they would generally constitute an order of the court and be enforceable as such. If they are not approved by the courts, they have been considered as ordinary (procedural) agreements, i.e. contracts, between the parties and should be enforceable as such.

---

[21] See further the case of SunResorts [proper citation to be provided later] involving a United States and a Netherlands Antilles court, in which the latter court reacted positively to concerns expressed by the United States court and tightened custodial control to an unusual degree under Netherlands-Antilles law. This positive reaction has been associated with the Netherlands Antilles' court knowledge of the UNCITRAL Model Law and the Concordat.

22. A given case may be subject to a single agreement or a series of agreements addressing different issues that arise, as noted above, as the case progresses. In the *Maxwell* case, for example, an operating protocol was agreed at the start of the case to address issues of stabilization and asset preservation and a second at the end to address distribution to creditors and closure of the proceedings.

23. Reaching agreement on the content of a protocol may be the most important step in facilitating cooperation and coordination, as the process of negotiation often helps to manage the parties' expectations and facilitate the successful conclusion of the insolvency proceedings. Once negotiated, a protocol might simply form the backdrop to administration of the case and not be referred to again. It may also be possible to resolve matters in the protocol in such a way that the courts have minimal ongoing involvement, with the judges not required to communicate with each other on a continuing basis as the case progresses.[22]

7. Provisions commonly included in cross-border agreements

24. Cross-border agreements may include only general principles on how the cooperation and coordination should be handled, or also address specific issues such as court deferral, claims resolution procedures, procedures for communication between the courts, and so forth depending upon the needs of the particular case and the issues to be resolved. The issues discussed below in section B are illustrative of the issues that can be addressed in a cross-border agreement. Since cross-border agreements are very case specific, all of the issues discussed below do not necessarily need to be addressed in every cross-border agreement.

25. A survey of the agreements entered into to date indicates that the issues typically addressed include the following: allocation of responsibility for various aspects of the conduct and administration of the proceedings between the different courts involved and between insolvency representatives, including limitations on authority to act without the approval of the other courts or insolvency representatives; availability and coordination of relief; coordination of recovery of assets for the benefit of creditors generally; submission and treatment of claims; use and disposal of assets; methods of communication, including language, frequency, and means; provision of notice; coordination and harmonization of reorganization plans; and issues related specifically to the agreement, including amendment and termination, interpretation, effectiveness and dispute resolution; administration of proceedings, in particular with respect to stays of proceedings or agreement between the parties not to take certain legal actions, choice of applicable law; the allocation of responsibilities between the parties to the agreement; costs and fees; and safeguards. Agreements may also address issues such as the composition of the board of directors, the actions the board may take and the procedures to be followed, shareholder/management and shareholder/board relations and management of information flows.[23]

26. The choice of issues to be addressed by the agreement may be influenced by the similarities or dissimilarities between the laws and procedures of the States involved in the particular cross-border case. Where the courts involved share the same legal tradition, for example, the agreement may focus on providing more specific detail about substantive issues. Where legal traditions are different, the agreement may focus more on process and procedure, providing a framework for

---

[22] See, for example, Maxwell.

[23] See, for example, Olympia & York.

communication and cooperation. An agreement may require the laws of the relevant States to be analysed in order to determine whether and how a specific result can be achieved without causing insolvency representatives or other parties to breach their duties under those laws. The issues to be addressed may also require allocation of responsibility for their resolution between different courts, depending upon which substantive law should apply to a particular issue. Such a determination of substantive law might depend upon which State has the greatest interest in the outcome of a particular issue and may involve one court deferring to the jurisdiction of another, provided such deference does not deprive local creditors of due process or other fundamental rights (see part II, paras. 18-20 above; part III, paras. 71-74 below) or a particular action being pursued in one court as opposed to another. Agreements that are approved by the courts typically include provisions emphasizing the independence of the courts and the principle of comity; detailing the allocation of responsibilities between courts, in particular the right of parties in interest to appear and be heard in the respective proceedings.

8. Legal effect of cross-border agreements

27. Cross-border agreements may include a variety of different types of provisions, some of which may be intended to have legal effect and bind the parties and some of which may be simply statements of good faith or intent. Statements of good faith or intent, for example, may include provisions on the aim of the agreement, while provisions on the responsibilities of the insolvency representatives, on the costs or on stipulating the procedure required to render the protocol effective (e.g. through court approval) are generally intended to have legal effect.

28. To be effective, a cross-border agreement requires the consent of those parties to be covered by it and some agreements include an express stipulation that it is binding on the parties to the agreement and their respective successors, assigns, representatives, heirs, executors and insolvency representatives.[24] Some agreements expressly authorize the parties to take such actions and execute such documents as may be necessary and appropriate for it to be rendered effective and implemented or include a statement to the effect that the parties have agreed to take the appropriate actions to render it effective. In some jurisdictions, it may be sufficient for the insolvency representatives to enter into a cross-border agreement pursuant to their inherent powers, without the need for subsequent court approval. It should be noted that court approval for such arrangement does not always exist under applicable law. Some jurisdictions, in particular civil law jurisdictions, might require the approval of the debtor's creditors, for the agreement to be effective. The agreement in the *ISA-Daisytek* proceedings, for example, provided that its effectiveness was subject to the approval of the debtor's creditors pursuant to German law. The agreement further stipulated that the insolvency representative would report the terms of the agreement to the responsible court after the creditors' approval.

29. The agreement may require approval of each of the courts involved in the insolvency proceedings in accordance with the local law and practice of each State concerned. It is not uncommon for an agreement to include a provision that it should have no binding or enforceable legal effect until approved by specified courts, with notice being given in proper form to the parties involved so as to minimize the likelihood of challenges. Once approved, such arrangement would generally have

---

[24] See, for example, Everfresh, Federal Mogul.

the effect of a court order and bind the parties specified. One of the advantages of court approval of an agreement is that it removes the possibility for dissenting creditors or parties to litigate matters in a way that might otherwise undermine it.

9. Safeguards

30. The safeguards to be included in a cross-border agreement may be divided into those that should always be included and others that may be included as required.

31. Provisions that should be included might relate to ensuring that there is no derogation from court authority and public policy.

32. Provisions that may be included concern disclosure to interested parties; protection of rights of non-signatory third parties; and the ability to revert to the court in cases of dispute. The parties entering into a cross-border agreement want to be able to rely on the capacity of their counterparts to enter into such agreement, without undertaking costly and lengthy research of the applicable law in the other forum. Consequently, an agreement may include as a safeguard a provision warranting that the parties agreeing to it have the relevant capacity or, in cases where the insolvency representative needs court authorization to enter into the agreement, acknowledging this condition for its obligation under the agreement.[25] Similarly, agreements often explicitly provide that certain actions or divisions of power are permitted or limited to the extent provided by applicable law or that specified parties should respect and comply with the duties imposed upon them by applicable national laws.

10. Possible problems and means of resolution

33. Insolvency proceedings are ongoing proceedings and unforeseen events may occur, changing the course of the case. Therefore, a cross-border agreement needs to be flexible, allowing revision to accommodate changing circumstances as a case progresses. In addition to revising existing agreements, parties may recognize the need for additional agreements to cover issues not foreseen.

34. Conflicts may also arise in the course of implementation of the agreement. Conflicts can be manifold, relating to the terms of the agreements and their interpretation; the realization of its provisions and so forth. It is therefore important that the agreement include appropriate procedures for the resolution of disputes, to preserve what had been achieved at the time the conflict arose and to prevent further detriment. Those provisions may include specification of the courts competent to resolve certain issues or the use of other dispute resolution mechanisms.

B. Comparison of cross-border insolvency agreements

35. The purpose of this section is to provide an overview of the content and structure of a number of agreements used in recent cross-border cases. It identifies issues included in different agreements and discusses how they were treated. As noted above, because of the case-specific nature of these agreements, there is no standard or single format for cross-border agreements that could be presented here as a template. Nevertheless, although some of the issues discussed below are included in only a few agreements, others are common to most of the agreements

---

[25] See, for example, Financial Asset Management.

considered. The comparison of the contents of various agreements is intended to enhance the understanding of these tools for cross-border cooperation, communication and coordination, as they have been used and to guide future drafters in designing such an agreement in a specific case, so that the negotiating time to develop the agreement might be considerably shortened. The foundation of the comparison is largely written agreements (generally referred to as protocols) as they are the most widely and readily available, but where possible reference is made to other agreements.

1. Recitals

36. Recitals generally introduce the operative part of an agreement, giving details of the events leading up to the negotiation of the agreement, the reasons for the agreement, identifying the parties and so forth. While recitals differ from agreement to agreement, they typically address some or all of the following issues.

(a) Parties

37. Most agreements introduce the parties to the proceedings with varying levels of detail, including, for example, the name and nature of their business, the place of incorporation, the place of business and, where relevant, their position in relation to other members of an enterprise group.[26] Some agreements do not refer to the parties to the agreement as such, but specify that the agreement should govern the conduct of all parties in interest in the insolvency proceeding, naming the debtors, the insolvency representatives and the creditor committee.[27]

38. Different stakeholders to the proceedings may be parties to the agreement, depending upon the issues covered by it and the parties to be bound. However, as a general rule, it can be said that the parties are those whose obligations are concerned, and whose consent is needed. Some agreements indicate the agreement of the insolvency representatives[28] while others involve a wider range of parties in interest, including the creditor committee, a secured lender of the debtor and the debtor itself.[29]

39. The case specificity of agreements can be seen from the *Commodore* agreement — the creditor committee applied for commencement of insolvency proceedings in the United States, in response to which the Bahamian insolvency representatives requested the court to abstain from hearing the case and to order relief ancillary to foreign proceedings. Subsequently, the Bahamian insolvency representatives and the creditor committee entered into an agreement to resolve the contemplated litigation and establish a framework for the efficient and effective administration of the insolvency proceedings in the two jurisdictions. While involvement of the creditor committee may strengthen the legitimacy of those agreements in which the creditor committee or creditors are directly involved, it will not be required in every case.

---

[26] See, for example, Solv-Ex, Quebecor.

[27] See, for example, Laidlaw, Matlack.

[28] See, for example, AIOC, Inverworld, Maxwell. If the insolvency representatives agree to enter into a protocol, the objection of the debtor to the protocol may be disregarded, see for example, Nakash.

[29] See, for example, Commodore, 360Networks.

(b) Background/insolvency history

40. An introduction to the case, setting out the insolvency history of the case, might enhance the clarity and comprehensibility of the agreement. In many agreements, the introduction of the parties is followed by a summary of the different insolvency proceedings concerning the parties, either already commenced or imminent. Again varying degrees of detail are included, some agreements specifying the dates and places of filing, court orders made and so forth.

41. In the context of multinational enterprises, there might be two different situations in which insolvency proceedings take place in different States: in one, the debtor is the same in both proceedings; in the other the proceedings concern different group members. In the latter situation, the debtors are separate and distinct in each proceeding. However, the cooperation between these proceedings might nevertheless be important because of the linkages between the group members, even though they are legally separate and distinct entities. In particular, in reorganization cases, the resale value might be enhanced through such cooperation. The agreement might explain these different situations.

(c) Scope

42. Cross-border agreements typically address the question of scope, although different approaches are taken. Some agreements commence with a general statement to the effect that it should govern the conduct of all parties in interest in the insolvency proceedings. Others describe the scope more specifically. For example, the scope may be to establish a general framework of agreed principles to address a range of different issues that may include: the recovery and disposal or other realization of the debtor's assets, including sale to a specific person;[30] the admission, verification and classification of claims, including priority; coordination of preparation, approval, confirmation and implementation of a plan of reorganization or other similar arrangement; a litigation strategy with respect to any matter which could not be resolved through good faith efforts in the first instance; distribution of the proceeds; and general administrative matters. The scope provisions may also be directed to facilitating coordination by, for example, establishing coordinated procedures for addressing the matters listed above. The scope of an agreement often overlaps with its intent or purpose; by indicating what the agreement intends to regulate, it also defines its scope.

(d) Purpose

43. A provision on the parties' intent in drafting an agreement and, in particular, the objectives to be achieved, can encapsulate the common understanding of the parties with respect to the agreement, and provide assurance as to that understanding to a court from which approval might be sought.

44. Many agreements share several general goals and objectives, which include:[31]

(a) Harmonization and coordination of activities before the courts in which the different insolvency proceedings are pending;

(b) Promotion of fair, open, orderly and efficient administration of the

---

[30] See, for example, Solv-Ex.

[31] The CoCo Guidelines contain similar provisions relating to overriding objectives and aims (Guidelines 1 and 2).

insolvency proceedings for the benefit of all the debtors, their creditors and other interested parties, wherever located, to reduce cost and avoid duplication of effort;

(c) Protection of the rights and interests of all parties;

(d) Promotion of international cooperation and respect for judicial independence and comity; and

(e) Implementation of a framework of general principles to address basic administrative issues arising out of the cross-border and international nature of the insolvency proceedings.

45. Other examples of goals include: facilitating reorganization of the debtor's business as a global enterprise; protecting the integrity of the process of administration; consulting with and providing information to creditors concerning developments; ensuring that appropriate matters are brought before the relevant courts and that such actions shall take place in a timely and efficient manner; coordinating the activities between and among joint insolvency representatives, in order to minimize the costs and to avoid duplication of effort; recording various mutual agreements, including with respect to coordination of relief, to respect the obligations imposed by the laws of the respective countries or to act in conformity with certain principles, such as mutual trust, adherence to the duty to communicate information and to cooperate.[32]

46. Some agreements also clarify what the agreement is not intended to achieve, i.e. to create a binding precedent or to establish an agreement that could be considered appropriate for all of the non-main proceedings involved in a particular case, although acknowledging that it might be regarded as indicative of good practice.[33] Such a provision is responsive to the mistrust of parties with respect to the scope and admissibility of such agreements under domestic law and might, thus, facilitate parties agreeing to such an arrangement.

(e) Language of the agreement and of communication

47. Since cross-border insolvency proceedings often involve States that do not share a common language, a provision on the language to be used in the agreement and for communication between the parties could be included, though many examples concluded to date have been drafted in English or exist in two different language versions, without making any reference to the language as such.[34] This may be because the majority of agreements entered into to date have involved English-speaking States, but a provision on choice of language would be desirable where the States involved speak different languages.

Sample clauses

Parties

(1) Between

The office of the insolvency representative of State A, represented by the insolvency representative [name and address], acting in her capacity as insolvency representative under the main insolvency proceeding of the debtor, [address] in State

---

32 These principles are defined by Article 31 of the EC Regulation.

33 See, for example, SENDO.

34 See, for example, SENDO; the CoCo Guidelines also address the question of language (Guidelines 10.1 and 10.2).

A, appointed by decisions of the court of State A dated […], (the "Main Insolvency Representative"),

on the one hand

AND

The office of the insolvency representative of State B, represented by the insolvency representative [name and address], acting in his capacity as insolvency representative under the non-main insolvency proceeding of the debtor, [address] in State B, appointed by decisions of the court of State B dated […], (the "Non-Main Insolvency Representative"),

on the other hand

Herein referred to as the "Insolvency Representatives".

Background/insolvency history

(2A) X, a company [incorporated/with registered office] in State A, is the ultimate parent company of a multinational enterprise that operates, through its various subsidiaries and affiliates in States A, B, C and D.

X and certain of its direct and indirect subsidiaries and affiliates in State A have commenced insolvency proceedings by applying to the State A court under the insolvency law of State A and those cases have been procedurally coordinated under Case No. [...]. The State A debtors are continuing in possession of their respective properties and are operating and managing their businesses, pursuant to the insolvency law of State A. Committees of unsecured creditors (the "creditor committee") have been appointed in the State A proceedings.

Y (an indirect subsidiary of X in State B) and certain of its direct and indirect subsidiaries and affiliates in State B have commenced insolvency proceedings by applying to the State B court under the insolvency law of State B. Orders have been granted under which (a) State B debtors are entitled to relief under the insolvency law of State B, (b) Z was appointed as insolvency representative of the State B debtors, with the rights, powers, duties and limitations upon liabilities set forth in the insolvency law of State B and the order of the State B court.

The proceedings in States A and B are separate and distinct. Neither the State A debtors nor the State B debtors have sought recognition of their proceedings in the other jurisdiction. Neither the State A debtors nor the State B debtors are debtors in the other proceedings, although they have appeared before and submitted claims as creditors in the other proceedings.

(2B) X, a State A corporation, is the parent company of a business in State B that operates, through various State A and State B subsidiaries and affiliates, in States A and B. X and certain of its subsidiaries and affiliates (collectively, the "X Companies") are the largest independent provider of N services in the region, with approximately 90 per cent of the X Companies' revenue being generated in State A.

The X Companies develop, integrate and support systems for N services. The X Companies provide N services to their clients using new software from leading computer manufacturers.

The X Companies have commenced insolvency proceedings under the insolvency law of State A in the State A court. The X Companies are continuing in

possession of their respective properties and are operating and managing their businesses, pursuant to the insolvency law of State A. A committee of unsecured creditors has not been appointed, but is expected to be appointed in the State A proceedings (the "Creditor Committee").

Certain of the X Companies, including the parent company, X, have assets and carry on business in State B. X and five of its State B subsidiaries and affiliates (collectively, "the applicants") have commenced proceedings under the insolvency law of State B in the State B court. Upon request of the applicants, the State B ordered (a) that the State A proceedings are "foreign proceedings" for the purposes of the insolvency law of State B; and (b) a stay against actions against the applicants and their property.

The applicants are parties to the proceedings in States A and B.

Scope and purpose

While concurrent, parallel proceedings are pending in States A and B for the debtor, the implementation of basic administrative procedures is necessary to coordinate certain activities in the those two proceedings, protect the rights of the parties and ensure the maintenance of the courts' independent jurisdiction, a framework of general principles should be agreed upon to address:

(a) Sale of the debtor's assets;

(b) The admissibility and priority of claims asserted against the debtor;

(c) Harmonization of the submission, approval, confirmation and implementation of a reorganization plan under the insolvency laws of States A and B; and

(d) General administrative matters.

(4) The following terms and provisions shall apply to the proceedings in States A and B: […]

(5) The main and the non-main insolvency representatives have mutually decided to execute this agreement, with the purpose of establishing practical terms for the distribution of the assets among the company's creditors. The objective of this agreement is to organize the cooperation between the insolvency representatives. It is intended in particular to organize the exchange of information between the insolvency representatives regarding the verification of claims and the distribution of assets.

Purpose and goals

(6) While the insolvency proceedings are pending in States A and B and elsewhere for the debtor, the implementation of basic administrative procedures is necessary to coordinate certain activities in the insolvency proceedings, protect the rights of parties and ensure maintenance of the court's independent jurisdiction and comity. Accordingly, this agreement has been developed to promote the following mutually desirable goals and objectives, in the proceedings in States A and B and, to any extent necessary, in other proceedings:

(a) Harmonizing and coordinating activities in the insolvency proceedings;

(b) Promoting the orderly and efficient administration of the insolvency proceedings to, among other things, maximize efficiency, reduce associated

costs and avoid duplication of effort;

(c) Honouring the independence and integrity of the courts and other courts and tribunals of States A, B and others;

(d) Promoting international cooperation and respect for comity among the courts, the debtor, the creditor committee, the insolvency representatives and parties in interest in the insolvency proceedings;

(e) Facilitating the fair, open and efficient administration of the insolvency proceedings for the benefit of all of the creditors of the debtor and other parties in interest, wherever located; and

(f) Implementing a framework of general principles to address basic administrative issues arising out of the cross-border and international nature of the insolvency proceedings.

Language

(7) This agreement has been concluded in English and French (both texts are equally authentic). The language of communication between the parties shall be English.

2. Terminology and rules of interpretation

(a) Terminology

48. Insolvency laws rely on terminology and concepts that may have fundamentally different meanings in different States. Even where parties speak the same language, a term may be interpreted differently in different legal systems. To ensure a common understanding, many agreements define certain terms used, although methods of definition vary. Some arrangements include a comprehensive definition section, while others adopt an ad hoc approach to terminology, providing short explanations throughout the text as required.[35]

49. Terms often explained in arrangements include: applicable national laws; competent national courts; insolvency professionals; insolvency representatives; types of proceedings; the debtor; the parties; stays of proceedings; and involuntary proceedings.

(b) Rules of interpretation

50. General rules of interpretation are also often included, for example, that words importing the singular should be deemed to include the plural and vice versa; that headings are inserted for convenience only without any further meaning; that references to any party should, where relevant, be deemed to include, as appropriate, their respective successors or assigns; and that any use of the masculine gender should be deemed to include the feminine or neuter gender.[36]

---

[35] See, for example, GBFE, 360Networks; the Concordat contains a glossary of terms that includes the following: administrative rules, common claim, composition, discharge, distribution, insolvency proceeding, insolvency forum, international law, limited proceeding, liquidation, main forum/proceeding, non-local creditors, official representative, plenary forum/proceeding, privileged claim, ranking rules, secured claim, voiding rules; the CoCo Guidelines include a definition of an insolvency representative (Guideline 4).

[36] See, for example, GBFE.

51. Some agreements refer explicitly to the principles elaborated in the Concordat,[37] or to the Court-to-Court Guidelines,[38] incorporating them into the agreement to govern appropriate issues.

Sample clauses

Terminology

(8) In this agreement, unless the context requires otherwise, the following expressions have the following meanings: […]

Rules of interpretation

(9) (a) Whenever the context requires, words importing the singular shall be deemed to include the plural and vice versa. Any use of the masculine gender shall be deemed to include the feminine or neuter gender.

(b) The index to, and clause headings of this agreement are for convenience only and do not affect the construction of this agreement.

(c) References to clauses, paragraphs and recitals are to be construed as references to clauses, paragraphs and recitals of this agreement unless otherwise stated.

(d) References to any party shall, where relevant, be deemed to refer to or include, as appropriate, their respective successors or assigns.

(e) Save as otherwise expressly provided, references to this agreement or any other document include references to this agreement, its recitals and schedules or such other documents as each may be varied supplemented and/or replaced in any manner from time to time.

(f) In respect of any computation of periods of time from a specified date to a later specified date, the word "from" means "from and including" and each of the words "to" and "until" means "to but excluding".

3. Courts

52. Judicial cooperation is increasingly viewed as essential to the efficient and effective conduct of cross-border insolvency cases, increasing the predictability of the process, because debtors and creditors do not have to anticipate judicial reactions to foreign proceedings, and enhancing the equitable treatment of all parties. Cross-border agreements have adopted a variety of approaches to facilitating coordination and cooperation between the courts of the different States to ensure the proceedings are efficiently administered and disputes avoided.

(a) Comity and independence of courts

53. "*Comity*" in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, on the other, but the recognition which one State accords within its territory to the legislative, executive or judicial acts of another State, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection

---

[37] See, for example, AIOC, Everfresh.

[38] See, for example, Systech.

of its law. Many agreements emphasize the importance of comity and the independence of the courts, specifying that this independence is not to be negatively affected or diminished by the approval and implementation of the cross-border agreement. They also emphasize that each court is entitled to exercise its independent jurisdiction and authority at all times with respect to matters presented to it and the conduct of the parties appearing before it.[39] The purpose of including such a provision is to provide an assurance that each party to the agreement is acting in accordance with (and therefore within the limits of) applicable domestic law.

54. Agreements often address specifically what, in accordance with comity, the agreement should not be construed as doing, including:

(a) Altering the independence, sovereignty or jurisdiction of the courts;

(b) Requiring the debtors, the creditor committee or the insolvency representatives to breach any duties imposed on them by the national law under which they are constituted or appointed;

(c) Authorizing any action that requires specific approval of one or both courts; or

(d) Precluding any creditor or other interested party from asserting its substantive rights under the applicable laws.[40]

(b) Allocation of responsibilities between courts

55. Where insolvency proceedings with respect to the same debtor are commenced in a number of different jurisdictions, there will often be questions of the issues to be addressed by the different courts. In some cases, a single court will have the responsibility for determining or resolving certain matters. In other cases, it will not be so clear and several courts may be equally responsible or they may share responsibility or be jointly responsible for making certain determinations.[41] Notwithstanding the independence and sovereignty of each court, cross-border agreements often "allocate" responsibility for different matters between the competent courts to ensure efficient coordination of the proceedings, and avoid overlap, disputes and duplication of effort. This may be achieved by the courts approving the cross-border agreement or informally, by the parties agreeing to pursue certain matters in certain courts. Responsibility may be allocated broadly, such as for use and disposal of the debtor's assets in general or more specifically, such as for the verification and admission of claims or approval of particular transactions with regard to the use and disposal of certain assets, including pledging or charging any assets.[42]

---

39 See Hilton v. Guyot, 159 U.S. 113 (1895), a United States court decision dealing with the recognition of a French judgment and providing an early definition of comity; see also 360Networks, Matlack.

40 See, for example, AgriBioTech, Pioneer; the CoCo Guidelines include a similar statement (Guideline 3).

41 The Concordat recommends that a single administrative forum should have primary responsibility for coordinating all insolvency proceedings relating to one debtor (Principle 1). Where there is one main forum, the Concordat recommends that administration and collection of assets should be coordinated by the main forum (Principle 2A), where there is no main forum, it addresses the responsibilities of each court regarding the decision on value and admissibility of claims (Principle 8) and the administration of assets (Principle 4).

42 See, for example, Maxwell, Pioneer.

56. Even where certain matters are to be addressed by a specific court, the cross-border agreement may request that court, in addressing those matters, to seek and take into account the views of other courts and participants. For example, in a case involving both main and non-main proceedings, the cross-border agreement requested the court addressing assets in the context of non-main proceedings to take into account any proposals of the insolvency representatives in the main proceeding.[43] An agreement may also provide that the determination by only one court of any particular matter is desirable and should be achieved by cooperation between the courts.[44]

57. Some further examples illustrate how cross-border agreements may facilitate this coordination and cooperation between courts. In the *Inverworld* case, a cross-border agreement approved by the courts led to dismissal of the English insolvency proceeding, upon certain conditions relating to the treatment of claimants in those proceedings and the allocation of functions between the two remaining courts. The United States' court was to resolve the outstanding legal and factual issues relating to entitlements as among various classes of investors, while the Cayman Islands' court was to oversee the administration of the distribution of proceeds to claimants. Each court was to take the other court's actions as binding, thus avoiding parallel litigation. In the *Maxwell* case, an agreement approved by both the English and the United States' courts allocated functions between the courts and provided for cooperative administration. Inter alia, the agreement granted power to the English insolvency representative to administer all assets and operations of the debtor group's business, incur expenses, and so forth, subject to agreement by the United States' insolvency representative as to specific questions and to approval by the United States' court.

58. Some agreements specify the factors determining the competence of each court to act on certain matters. These factors may include the location of the debtor, its assets or creditors; the application of conflict-of-laws rules; agreement as to the governing law; or other connecting factors. For example, responsibility for conducting the insolvency proceedings may be exercised by the court of the State in which they are commenced; responsibility for approval of transactions may be allocated to the court of the State in which the assets, the subject of the transaction, are located; responsibility for distribution of the proceeds of assets and instructing the insolvency representatives regarding treatment of assets may be allocated to the court of the State in which the assets are located; responsibility for dealing with claims against the debtor may be allocated to the court of the State of which the debtor is a national, in which the claimants reside, are domiciled, or carry on business and have offices or in which the claims arise from the supply of goods and/or services to the debtor, or according to the type of contract and the nationality of the contractual partner.[45]

59. Some agreements provide that the courts should have joint responsibility for certain transactions, such as disposal of the debtor's assets or more specifically, the sale of the debtor's assets. An agreement may also provide that joint hearings should be held to determine and resolve particular matters, including the use and disposal of assets and allocation of the proceeds, where those assets are located in both

---

43 See, for example, SENDO.

44 See, for example, Laidlaw.

45 See, for example, AgriBioTech, Everfresh.

States or in a third State.[46] Because of the nature of the business of the debtor and in particular, the interconnectivity and interdependence of the lines of communications of its global business and internet operations, one agreement adopted the approach of identifying those matters to be resolved with the assistance of the different courts. The courts could conduct joint hearings to determine and resolve these issues and were able to jointly determine additional issues that should be included as the insolvency proceedings progressed.[47] The agreement further provided that certain specified matters (such the allocation of proceeds of sale solely between the debtors of one jurisdiction) that were not resolved by a joint hearing of both courts would be determined and resolved by one court only.

60. As a practical means of resolving issues raised by differences between legal systems, it may be possible for courts to make orders on a reciprocal basis, conditioned upon the issuance of appropriate orders in the other jurisdiction. This approach was taken in the *360Networks* case, in which contractors had been reluctant to renegotiate contracts without a formal decision by the debtor that such contracts would not subsequently be terminated in the United States' proceedings, permissible under United States' law, detrimentally affecting their rights. Such arrangements would require court approval.

(i) Treatment of claims

61. Treatment of claims might include the verification, admission and classification of claims and the manner in which they are to be addressed in any reorganization plan. An agreement may provide that each individual claim should be dealt with by only one of the courts concerned unless the claims have a substantial connection, under conflict-of-law rules, to another State or relate to a security or priority claimed pursuant to the laws of another State or it has been specifically agreed that the claim would be governed by the laws of another State.[48]

62. Where a claim is submitted in one proceeding, some agreements provide that the creditor is deemed to have elected to have the verification and admissibility of that claim determined by the court administering that proceeding. If submitted in more than one proceeding, the agreement may nominate which court should be responsible for the verification and admission of those claims.[49] Courts may also agree to develop rules on how certain aspects of the proceedings, such as the proof of claims, will be treated.[50] The parties to the proceedings may also adopt the approach of deferring those issues for future consideration and development of a claim resolution procedure generally or to address certain types of claims (e.g. inter-company claims in an enterprise group context).[51]

(ii) Avoidance proceedings

63. Some agreements include provisions on the responsibility for investigation and pursuit of assets allegedly belonging to the debtor's estate within the jurisdiction of the court.[52] Allocation of responsibility for investigation and commencement of

---

46 See, for example, Inverworld, PSINET.
47 See, for example, PSINet.
48 See, for example, Solv-Ex.
49 See, for example, Pioneer.
50 See, for example, Philip.
51 See, for example, Quebecor.
52 See, for example, Nakash.

proceedings may depend upon the relevant provisions of applicable law, including conflict-of-laws provisions.

(iii) Insolvency representatives

64. Agreements often refer to the powers of each court with respect to the insolvency representative appointed in proceedings before it. Those powers may relate to appointment, conduct and compensation, as well as the hearing and determination of any matters relating to those issues arising in the insolvency proceedings before that court.[53] In some cases they may also relate to the insolvency representative appointed to other proceedings. In one case without a written cross-border agreement, for example, one court was involved in approving the compensation of the insolvency representative in the other forum.[54]

(iv) Resolution of disputes

65. In order to ensure continuing cooperation between the proceedings and uphold the framework established by the agreement, the agreement may specify how disputes arising under it are to be resolved.[55] Disputes may arise with respect to the intent, interpretation or implementation of the agreement or with respect to administration of the proceedings or of the debtor's estate.

66. Cross-border agreements adopt different approaches to such dispute resolution. One approach may be to require the parties to make all reasonable attempts to reach an agreement before referring the matter to a court. If agreement cannot be reached, the dispute might be referred to the court specified in the agreement as having responsibility for enforcing the terms of the agreement or for resolving certain disputes, such as any act or decision of the insolvency representative. Another approach may be to provide that a dispute relating to a matter arising with respect to the proceedings commenced in one State should be referred to the responsible court of that State or where the dispute affects all proceedings covered by an agreement, the dispute should be resolved by the court best suited to do so.[56]

67. Responsibility for resolution of disputes may also be shared by the courts and, where appropriate, resolved by way of joint hearing. If, notwithstanding such a provision, the dispute were to be raised with only one of the courts, the agreement may further provide that the court could either (i) render a binding decision after consultation with the other court; (ii) defer to the other court by transferring the matter, in whole or in part, to the other court; or (iii) seek a joint hearing of both courts.[57]

68. A further approach may be to appoint a third-party to resolve disputes. The agreement can particularize the mediation procedure to be followed, addressing issues such as commencement; opting-out; timetable; choice and appointment of the

---

[53] See, for example, Commodore, Mosaic.

[54] See United Pan-Europe.

[55] See, for example, Solv-Ex; the CoCo Guidelines advise courts to operate in a cooperative manner to resolve any dispute relating to the intent or application of the terms of any cooperation agreement or protocol (Guideline 16.2).

[56] See, for example, GBFE, ISA-Daisytek.

[57] See, for example, Inverworld, Laidlaw.

mediator; compensation; and immunity, as well as the confidentiality of the process.[58]

69. In addition to the details above, some agreements suggest that the courts might provide each other with advice or guidance and specify the applicable procedure. To enhance transparency, the notice procedures of the agreement would generally apply and the debtor, the creditor committee or the insolvency representatives might make submissions to the appropriate court in response to or in connection with written advice or guidance received from the other court.[59]

70. An agreement may also indicate the parties that may raise an issue with respect to the agreement, such as the insolvency representatives[60] or other parties in interest.

(c) Deferral

71. Deferral consists of one court accepting the limitation of its responsibility with respect to certain issues, including for example, the ability to hear certain claims and issue certain orders, in favour of another court. Where it is available, deferral may be used to avoid conflicting rulings between the jurisdictions involved. Deferral is a sensitive issue, touching on issues of sovereignty and independence. It can only occur where the courts involved agree and may often occur on a reciprocal basis, where the court in the one jurisdiction agrees to defer on certain issues or to enforce the decisions of the other courts involved in response to similar agreement by the other court. A factor often supporting deferral is the recognition by courts that the proceedings would otherwise not be able to move forward and there would be loss of value to the detriment of the creditors. Cross-border agreements making provision for deferral would generally only be effective where the agreement was approved by the respective courts.

72. Deferring to another court might not be possible in all cases, as courts are often obligated to exercise jurisdiction or exclusive control over some matters. Some legal systems also have procedural rules that limit their ability to defer to another court. In particular, civil law jurisdictions may lack the ability to defer to a foreign court. However the insolvency representative may have discretion to simply not pursue a given action in his home court, electing to let the representative of a related proceeding in another country pursue the action there.

73. Cross-border agreements may address deferral with respect to very specific issues, identifying matters on which one court should defer to decisions of another, for example, the resolution of disputes arising under the agreement or stays of proceedings or issues of foreign law. They may also be general in scope, providing that one court should defer to the judgment of the other where appropriate or feasible.[61] In the *Inverworld* case noted above, a consequence of the agreement reached was that one of the three courts involved deferred to the other courts by dismissing the proceedings before it on certain conditions relating to the treatment of claimants and the allocation of functions among the two remaining courts.

74. Examples of deferral provisions include: an acknowledgment that it is in the interest of the debtors and their stakeholders for one of the courts to take charge of

---

[58] See, for example, Manhatinv.
[59] See, for example, Mosaic.
[60] See, for example, GBFE, Peregrine Investment.
[61] See, for example, Olympia & York, PSINet.

the principal administration of the reorganization;[62] a decision that appeals against rejection of a claim should be heard by the court of the jurisdiction whose laws governed the claim; an agreement that, if an appeal was presented to a different court, the matter would be referred to the competent court;[63] and an agreement that in certain cases the approval of the court of the forum involved would might be deemed to have been granted.[64]

(d) Right to appear and be heard

(i) Who has the right

75. Article 9 of the UNCITRAL Model Law on Cross-Border Insolvency provides that a foreign representative is entitled to direct access to the courts of the recognizing State to avoid that the representative has to satisfy formal requirements such as licences or consular action. Those requirements are typically lengthy and complicated, hindering the quick action that is often required in insolvency proceedings, whether domestic or cross-border. In States that have not adopted the Model Law, that right of direct access might be limited by formal requirements or by domestic law.

76. Agreements that address the issue of direct access do so to varying degrees and with respect to different parties in interest.[65] Some agreements address the issue explicitly, establishing the right to appear and be heard in each State involved in the agreement, to the same extent as the counterparts domiciled in those States have those rights. Such access might be granted to the insolvency representatives or to other interested parties, including the creditors, the debtor, the creditor committee and the post-petition lenders. Where the question is one of access for creditors, many agreements confer the right to appear regardless of whether the party has filed any claims in the particular proceedings. Another approach refers to the principles of the *Concordat* that give each party, creditor and the creditor committee the right, but not the obligation, to appear in proceedings in the different forums.[66]

77. A different approach notes the agreement of the insolvency representatives of one State to their foreign counterparts having standing in the local insolvency proceedings or provides that the insolvency representatives of one State will support a request by the insolvency representative of another State to appear in local proceedings.[67] The effect of agreements between the insolvency representatives on direct access to the court depends on the applicable law and might constitute no more than a good will provision or an assurance that one insolvency representative would not oppose the appearance of the other in their forum.

78. Some agreements also provide details such as where to file a notice of appearance, providing the exact address of the court.[68]

---

62 See, for example, Pioneer.
63 See, for example, GBFE.
64 See, for example, GBFE.
65 The CoCo Guidelines recommend direct access for a foreign insolvency representative (Guideline 5).
66 See, for example, Nakash, Quebecor; see also Concordat, Principles 3A, 3C and 3D.
67 See, for example, Manhatinv, Federal Mogul.
68 See, for example, Everfresh.

(ii) Submission to jurisdiction

79. Article 10 of the Model Law constitutes a "safe conduct" rule aimed at ensuring that the court in a State enacting the Model Law would not assume jurisdiction over all the assets of the debtor or the foreign representative on the sole ground that the foreign representative had made an application for recognition of a foreign proceeding. Where the Model Law has not been enacted, an insolvency representative or other party appearing before the courts of another jurisdiction, would be subject to the rules of that jurisdiction on this issue. An agreement that deals with the right to appear in the various States covered by it could address the question of submission to jurisdiction to the extent permitted by applicable domestic law in order to avoid potential conflict if the forum State had not enacted the Model Law. An agreement containing such a provision generally would need court approval to be effective.

80. Agreements differ in the manner in which they address this question. Some provide that an appearance before the court of a State or the filing of an application in that State might subject an interested party to the jurisdiction of that State for the purpose of those proceedings.[69] Other agreements provide that a party would be subject to the jurisdiction of another State only when they have submitted a claim in proceedings commenced in that other State.[70] If a party has not previously appeared in, or does not wish to appear in, a foreign court, an agreement may provide that the party is entitled to file written evidentiary materials in support of a submission without being deemed to have appeared in the foreign court in which such material is filed, provided that court is not requested to order affirmative relief.

81. Some agreements provide that the insolvency representatives are exempt from submission to the foreign jurisdiction generally,[71] whereas others provide that the court will have jurisdiction over the insolvency representative, but only with respect to the particular matters in which they appear before that court.[72] Such a provision can address the reluctance of an insolvency representative to subject itself to personal jurisdiction of a foreign State. Such reluctance might arise from unfamiliarity with the law of the foreign State, as well as from the desire to avoid doing anything in a foreign jurisdiction that might render them in violation of their domestic duties or to be in violation of the law of the foreign State because of an inability to take any action that might conflict with their domestic duties.

82. Some agreements extend the immunity from submission to jurisdiction to the creditor committee, providing that an appearance in the other forum should not form a basis for personal jurisdiction over the individual members of the committee.[73]

83. As a safeguard, some agreements provide that no person will be subject to a forum's substantive rules unless, under the forum's conflict-of-laws rules, they would be subject to those laws in a lawsuit on the same transaction in a non-insolvency proceeding.[74]

---

69 See, for example, Loewen, Matlack.

70 See, for example, Inverworld.

71 See, for example, Manhatinv; this approach is shared by the Court-to-Court Guidelines which provide that the appearance of an insolvency representative in a foreign proceeding would not subject it to the jurisdiction of the foreign court (Guideline 13).

72 See, for example, 360Networks, Livent.

73 See, for example, Pioneer, Systech; see also the Concordat, principles 3A and 3C.

74 See, for example, Solv-Ex.

(e) Future proceedings

84. Agreements may address the issues likely to arise where additional insolvency proceedings are commenced with respect to the debtor (for example, in additional jurisdictions or, in the case of an enterprise group, with respect to an additional member of the group). An agreement may address the question of its relationship to potential, future insolvency proceedings that are not specifically covered by the agreement, providing that if foreign proceedings are initiated, the procedures and policies of the agreement should extend to dealings related to those foreign proceedings, provided that all creditors of the foreign proceedings are treated equally irrespective of their place of domicile. An agreement may also address the situation in which one court later approves an additional agreement with a court of a different jurisdiction, requiring the court involved in only the initial agreement to honour the additional one to the extent permitted by its laws and consistent with the principles of comity and cooperation.[75]

85. A more general provision extends the obligation of the insolvency representatives of a non-main proceeding to send information as to value of claims lodged with them to the insolvency representatives of the main proceeding to any other non-main proceedings filed against the debtor in the future.[76] The purpose of such provision is merely to emphasize that the agreement does not contradict such obligation under existing law.

Sample clauses

Comity and independence of courts

(10) The approval and implementation of this agreement shall not divest or diminish the independent jurisdiction of the courts of States A and B. By approving and implementing this agreement, neither courts of States A or B, the debtor nor any creditors or parties in interest shall be deemed to have approved or engaged in any infringement of the sovereignty of States A or B.

In accordance with the principles of comity and independence established in paragraph 1 above, nothing in this agreement shall be construed to:

(i) Increase, decrease or otherwise modify the independence, sovereignty or jurisdiction of the courts of States A or B or of any other court or tribunal in States A or B, including the ability of any such court or tribunal to provide appropriate relief under applicable law;

(ii) Require the court of State A to take any action that is inconsistent with its obligations under the laws of State A;

(iii) Require the court of State B to take any action that is inconsistent with its obligations under the laws of State B;

(iv) Require the debtor, the creditor committee, or the insolvency representatives to take any action or refrain from taking any action that would result in a breach of any duty imposed on them by any applicable law; or

(v) Authorize any action that requires the specific approval of one or both of the courts under the insolvency laws of States A or B after appropriate

---

[75] See, for example, 360Networks.

[76] See, for example, SENDO.

notice and a hearing (except to the extent that such action is specifically described in this agreement).

The debtor, the creditor committee, the insolvency representatives and their respective employees, members, agents and professionals shall respect and comply with the duties imposed upon them by the laws of States A and B and other applicable laws, regulations or orders of tribunals of competent jurisdiction.

Allocation of responsibilities between courts

(11) The court of State A shall have sole and exclusive jurisdiction and power over the conduct and hearing of the State A proceeding. [*Repeat this clause for the State B court*.]

Allocation of responsibilities between courts: treatment of claims

(12) In order to coordinate the restructuring of the debtor's business and avoid any unnecessary duplication of effort and expense or inconsistent rulings by the courts, the following principles are applicable in connection with establishing the validity, amount and treatment of any claims against the debtors:

(a) Any claims against any of the debtors arising under or in connection with any guarantees granted by the State A debtor with respect to the obligations of the State B debtor under the law of State B or by the State B debtor with respect to the obligations of the State A debtor under the law of State A shall be determined by the State A court in the State A proceeding;

(b) All claims against the State A debtor shall be determined by the State A court in the State A proceeding;

(c) All claims against the State B debtor (with the exception of the claims described in paragraph (a) above) shall be determined in accordance with the following principles:

(i) Any person submitting a claim against the State B debtor in the State A proceeding shall be deemed to have elected to have the validity, amount and treatment of that claim determined by the State A court;

(ii) Any person submitting a claim against the State B debtor in the State B proceeding shall be deemed to have elected to have the validity, amount and treatment of such claim determined by the State B court;

(iii) Any person submitting a claim against the State B debtor in both the State A and State B proceedings shall be deemed to have elected to have the validity, amount and treatment of such claim determined by the State A court.

Avoidance proceedings

(13) The insolvency law of State A shall be the substantive law governing all transfers made to entities located in State A. [*Repeat this clause for State B*.]

Insolvency representatives

(14) The State A insolvency representative and professionals appointed in the State A proceeding shall be subject to the sole and exclusive jurisdiction of the State A court with respect to all matters, including:

(a) Their tenure in office;

(b) Their compensation;

(c) Their liability, if any, to any person or entity, including the debtor and any third parties, in connection with the insolvency proceeding; and

(d) The hearing and determination of any matters relating to those matters arising in the State A proceeding.

The State A insolvency representative and appointed professionals shall not be required to seek approval of their retention in the State B court. Additionally, the State A insolvency representative and professionals:

(a) Shall be compensated for their services solely in accordance with the insolvency law of State A and other applicable State A law or orders of the State A court; and

(b) Shall not be required to seek approval of their compensation in the State B court.

[*Repeat these 2 clauses for State B.*]

Resolution of disputes

(15A) Disputes relating to the terms, intent or application of this agreement shall be addressed by the parties to either the State A court, the State B court or both courts, upon notice in accordance with paragraph x above. Where an issue is addressed to only one court, that court, in rendering a determination in any such dispute:

(a) May consult with the other court; and

(b) May, in its sole discretion, either:

(i) Render a binding decision after such consultation;

(ii) Defer to the determination of the other court by transferring the matter, in whole or in part, to the other court; or

(iii) Seek a joint hearing of both courts.

Notwithstanding the foregoing, each court in making a determination shall have regard to the independence, comity or inherent jurisdiction of the other court established under existing law.

(15B) This agreement is governed exclusively by State A law. Any dispute concerning the validity, interpretation, performance or non-performance of this agreement will be subject to the exclusive jurisdiction of the State A court.

(15C) Disputes relating to the terms, intent or application of this agreement may be addressed by parties in interest to the courts of both States A and B upon notice.

Deferral

(16) To harmonize and coordinate the administration of the insolvency proceedings, the courts of States A and B each shall use their best efforts to coordinate activities with and defer to the judgment of the other court, where appropriate and feasible. The courts shall use their best efforts to coordinate activities in the insolvency proceedings, so that the subject matter of any particular matter may be determined in one court only.

Right to appear and be heard

(17) The debtor, its creditors and other parties in interest in the insolvency proceedings, including the creditor committee and the insolvency representatives, shall have the right and standing to (a) appear and be heard in insolvency proceedings before either the States A or B court to the same extent as creditors and other parties in interest domiciled in the forum country, subject to any local rules or regulations generally applicable to all parties appearing in the forum, and (b) file notices of appearance or other processes with the court of State A or B, provided however, that any appearance or filing may subject a creditor or an interested party to the jurisdiction of the court in which the appearance or filing occurs. Appearance by the creditor committee in the State B proceeding shall not form the basis for personal jurisdiction in State B over the members of the creditor committee. Notwithstanding the foregoing, and in accordance with the policies set forth in paragraph x above [*on court's responsibility for retention and compensation of the insolvency representatives*], (a) the State B court shall have jurisdiction over the State A insolvency representative solely with respect to the particular matters on which the State A insolvency representative appears before the State B court; and (b) [*Repeat (a) for the State A court.*]

Future proceedings

(18) To the extent that a foreign proceeding is initiated, all persons affected by this agreement shall, to the greatest extent possible, and provided that all creditors in such foreign proceeding are treated equally irrespective of their place of domicile, implement the procedures contemplated by this agreement in any foreign proceeding and be governed by the purpose and policies of this agreement in dealings related to the foreign proceeding.

If the State A court enters an order approving an agreement with the courts of a jurisdiction other than the State B court, the State B court shall honour such agreement to the extent permitted by the laws and treaties of State B and consistent with the principles of comity and cooperation. [*Repeat for the State B court.*]

4. Administration of the proceedings

86. The manner in which some procedural issues that arise in cross-border insolvency proceedings, including priority of proceedings, stays of proceedings and applicable law, are handled in practice may be a determining factor for the success of cross-border insolvency proceedings. For example, if a stay concerning the insolvency proceedings in one State is not upheld and respected in other States in which, for example, the debtor has assets, it can lead to a "race to the courthouse", damaging the value of the insolvency estate and the creditors' interests. These issues therefore lend themselves to being considered and addressed in an agreement.

(a) Priority of proceedings

87. As noted above, experience has shown that courts are often reluctant or unable to defer to a foreign court and may therefore prefer parallel insolvency proceedings or treat primary and secondary proceedings as if they were concurrent or parallel proceedings. Such a preference may be based upon applicable law or a desire to protect the interests of domestic creditors. To provide certainty, avoid potential conflict and simplify issues of coordination, an agreement can allocate responsibility for different matters between the courts or determine the priority between different proceedings. For example, the parties may agree which is the main proceeding and therefore has precedence over the other, non-main proceedings.[77]

88. Sometimes, the insolvency representatives appointed in one State may request commencement of insolvency proceedings in a foreign jurisdiction in order to avoid jurisdictional conflicts and any risk of the debtor's assets being dissipated to the detriment of creditors.[78] Since it may not be possible for the insolvency representative requesting commencement of those proceedings to be appointed in the other jurisdiction, it may be important for the foreign insolvency representative to reach agreement with the locally appointed insolvency representative in order to facilitate coordination of the proceedings and avoid frustrating the purpose of the ancillary proceedings. In the *SENDO* case, for example, the insolvency representatives concluded an agreement "for the purpose of defining a practical means of functioning which would allow for the efficient coordination of the two insolvency proceedings", as they recognized that the existing legal framework, i.e. the EC Regulation, established only very general operating principles.[79]

(b) Stays of proceedings

89. The UNCITRAL Legislative Guide notes that an essential objective of an effective insolvency law is protecting the value of the insolvency estate against diminution by the actions of the various parties to insolvency proceedings and facilitating administration of those proceedings in a fair and orderly manner. A stay or suspension of proceedings is one of the means by which those objectives are achieved. Cross-border insolvencies involving multiple proceedings often raise difficult questions concerning the stay, particularly with respect to implementing or respecting stays issued by foreign courts in foreign proceedings or issuing parallel stays in support of those foreign proceedings. National legislation may impose limitations on recognizing or respecting a stay issued by a foreign court or may not permit the court to grant a stay of proceedings based on the presumed validity of the filing of insolvency proceedings abroad. Moreover, the scope of a stay ordered in foreign proceedings may not find a direct parallel in a State in which its implementation is sought. The respect accorded to a stay ordered by a foreign court may be dependent upon political and economic considerations, as well as upon familiarity with the State ordering the stay or tangible business contacts with that State. Even where domestic law provides for the universal effect of an automatic stay, a foreign court might be inclined to protect the interests of its local creditors and disregard the foreign stay, even where that worked against maximizing the potential recovery for all creditors.

---

[77] See, for example, GBFE, Peregrine.

[78] See, for example, GBFE, Peregrine, SENDO.

[79] See, for example, SENDO.

90. The Model Law provides for an automatic stay on recognition of foreign proceedings and deals with a number of issues concerning coordination of relief between main and non-main proceedings.[80] In States enacting the Model Law, the position with regard to the stay should be relatively clear and transparent.[81] However, in other States, or in States where recognition of foreign proceedings will not be sought, the issue may be addressed in a cross-border agreement. Since recognition of a foreign stay of proceedings cannot be imposed on a court simply by agreement between the parties, the courts would generally need to approve an agreement including such provisions.

91. Agreements adopt different approaches to the question of the stay. Some provide for joint recognition of stays of proceedings, stipulating that the court of one State should extend and enforce the stay imposed in the other State involved in the agreement in its own territory and vice versa. A proviso might be that enforcement of the stay should take place only to the extent necessary and appropriate or to the same extent that it is applicable in the State in which it is ordered. In recognizing and implementing a stay applicable in another State, the agreement might provide for the court to consult with the issuing court regarding interpretation and application of the stay, including its possible modification, relief from the stay, and issues of enforcement.

92. Other agreements do not provide for the automatic recognition in relevant courts of a stay of proceedings issued by one court involved in the agreement, but permit recognition and assistance to be sought from those relevant courts, where that assistance might include giving effect to the stay or providing an equivalent remedy or relief.[82]

93. In addition to a court-ordered stay of proceedings, parties may agree to suspend any proceedings commenced by them against the debtor for a specific period, in order to allow time for the optimal approach to coordination of the different proceedings to be found. Such an agreement may be coordinated through creditor committees or involve the agreement of creditors (especially where those creditors have applied for commencement of the insolvency proceedings) and might be included in a written agreement,[83] but would also be feasible outside a written agreement. Similarly, in a case concerning main and non-main proceedings, the insolvency representative of the main proceeding agreed not to apply, for a certain period of time, for a stay in the non-main proceeding, in order to achieve the best means of recovery of the assets of the debtor, notwithstanding their right to so apply under applicable law.[84]

94. The issue of relief from the stay might also be addressed. One agreement, for example, provided a safeguard that permitted the parties to seek relief after entry into force of the agreement, in the event of an emergency. Another agreement facilitated coordination by granting the foreign insolvency representative relief from the automatic stay for a specific period of time to investigate assets allegedly belonging to the debtor's estate in the forum State. In a case where the cross-border insolvency proceedings were to be administered jointly and a workplan to be agreed upon, the court-approved agreement granted the insolvency representatives relief

---

80 UNCITRAL Model Law, articles 20-21, 28-29.

81 Not all States enacting legislation based upon the Model Law have adopted the automatic stay.

82 See, for example, Federal Mogul.

83 See, for example, Inverworld.

84 See, for example, SENDO.

from any stay or similar order so that the agreed plan could be implemented.

95. In situations involving assets or persons in a third State, an agreement may provide that each court involved could grant emergency relief upon application by the insolvency representative. In one agreement including such provisions, it also specified that since that relief could be granted by the court of one forum, the insolvency representative should attempt to obtain the ex post facto approval of the other courts as soon as possible.[85]

(c) Applicable law

96. Where insolvency proceedings involve parties or assets located in different States, complex questions may arise with respect to the law that will apply to questions of validity and effectiveness of rights in those assets or of other claims; and to the treatment of those assets and of the rights and claims of those parties not located in the State in which the insolvency proceedings have been commenced. In the case of such insolvency proceedings, the forum State will generally apply its private international law rules (or conflict-of-laws rules) to determine which law is applicable to the validity and effectiveness of a right or claim and to its treatment in the insolvency proceedings. While insolvency proceedings may typically be governed by the law of the State in which the proceedings are commenced (the *lex fori concursus*), many States have adopted exceptions to the application of that law, which vary both in number, scope and policy justification. The diversity in the number and scope of such exceptions may create uncertainty and unpredictability for parties involved in cross-border insolvency proceedings. By specifically addressing the issue of applicable law, an insolvency law can assist in providing certainty with respect to the effects of insolvency proceedings on the rights and claims or parties affected by those proceedings.

97. However, formally articulated conflict-of-laws rules specific to solving cross-border insolvency issues do not exist in most States. An example serves to illustrate the difficulties. In the *Toga Manufacturing* case, the bankruptcy court in the United States did not grant an injunction to the applying Canadian debtor, because the United States' creditor's claim, which would be given priority under United States' law, would be treated in the Canadian proceeding as an ordinary unsecured claim.[86]

98. In the absence of clear rules under applicable law, an agreement can seek to avoid the conflict arising from different conflict-of-laws rules by specifying the applicable law for specific issues. Many agreements address applicable law issues with respect to questions such as the treatment of claims; right to set-off and security; application of avoidance provisions; use and disposal of assets; distribution of proceeds from the sale of the debtor's assets; and so forth.[87] Different approaches are taken to the determining the law applicable to those issues. One approach is to apply the law of the forum, unless considerations of comity require application of another law. Other agreements indicate that issues should be decided by the forum court using an analysis based upon the conflict-of-laws rules applicable in that forum or in accordance with the law governing the underlying

---

[85] See, for example, Nakash.

[86] In re Toga Manufacturing Ltd., 28 B.R. 165 (E.D.Mich. 1983).

[87] The Concordat refers the decision on value and admissibility of claims as well as the determination of certain creditor's rights to each forum for the claims filed before it, using an analysis based upon conflicts of laws rules (Principle 8A).

obligation. In the case of avoidance provisions, for example, that agreement may specify the law of the State in whose territory the entities to which transfers of assets were made are situated or the law as determined by the rules of the jurisdiction to which the creditors are subject.[88]

99. A proviso might be that if the law governing the underlying obligation is either unclear or the law of a State not involved in the agreement, the choice of law rules of one of the relevant States should be applied to determine which of the courts should be responsible for that matter. A further approach specifies that the conflict-of-laws rules of a third country should apply if application of the laws of the jurisdictions involved leads to conflicting results.[89]

100. Parties may also agree how to approach certain issues that would be treated differently under the laws of the different jurisdictions. In one case involving the Netherlands and the United States, which was coordinated without a written cross-border arrangement, the parties agreed that one burdensome contract governed by the law of a third jurisdiction would be rejected in accordance with United States' law. The parties further agreed that the effects of such rejection would be considered in an arbitration in the Netherlands, applying the third jurisdiction's law.[90] The parties further agreed not to apply the law of one State and thus not to subordinate certain claims to the level of equity interests, because it would have been inconsistent with the law of the insolvency law of the other jurisdiction.[91]

101. As already noted (see para. 22 above), several agreements may be concluded between the parties in the course of the insolvency proceedings. Where that occurs, a preliminary agreement may record that the parties will attempt to negotiate a subsequent agreement addressing, for example, the treatment of claims that would specify the law applicable to claims submitted by each debtor and their respective creditors in the other proceedings.[92]

Sample clauses

Priority of proceedings

(19) Subject to the terms of this agreement, the State A proceeding shall be the main proceeding and the State B proceeding shall be the non-main proceeding. However, as a practical matter, given that the business activities of the company are and always have been focussed in State B, substantially all of the liquidation of the company shall be carried out in and from State B.

---

88 See, for example, AgriBioTech, Everfresh.

89 See, for example, Peregrine Investment.

90 See United Pan Europe.

91 Ibid., the law not to be applied was section 510 (b) of the United States Bankruptcy Code.

92 See, for example, Calpine, Quebecor.

Stays of proceedings

(20A) The State A court recognizes the validity of the stay of proceedings and actions applicable against the State B debtor and its property under the insolvency law of State B. In implementing the terms of this paragraph, the State A court may consult with the State B court regarding (a) the interpretation and application of the State B stay and any orders of the State B court modifying or granting relief from the State B stay and (b) the enforcement of the State B stay in State A.

Nothing in this agreement shall affect or limit the debtors' or other parties' rights to assert the applicability or non-applicability of the State A or the State B stay to any particular proceeding, property, asset, activity or other matter, wherever pending or located.

Nothing in this agreement shall affect or limit the ability of either court to direct (a) that any stay of proceedings affecting the parties before it shall not apply to any application by those parties to the other court or (b) that relief be granted to permit those parties to apply to the other court on such terms and conditions as the court considers appropriate.

(20B) To promote the orderly and efficient administration of the insolvency proceedings and the protection of the debtor's estates for the benefit of creditors and other stakeholders, the parties shall:

(a) If so requested by the State A insolvency representative, request the State B court, to the extent permitted under State B law, to recognize and/or provide judicial assistance to the State A proceeding and extend and give effect to the State A stay in State B or provide equivalent remedies and relief;

(b) [*Repeat clause (a) for the State A court*.]

Applicable law

(21) The adjudicating forum shall decide the value, admissibility and priority of claims submitted using an analysis based upon the conflict-of-laws rules applicable in that forum.

5. Allocation of responsibilities between the parties to the agreement

102. Cooperation is most needed in areas where potential conflict can be expected. Agreements on the responsibilities of each party or at least cooperation in these areas constitute one way to avoid potential conflicts. Consequently, agreements often allocate responsibility between the parties to the proceedings for a range of matters, including: supervision of the debtor; reorganization plans; treatment of assets; power to commence legal actions; treatment of claims, including claims verification and creditor notification; and post-commencement finance. However, as soon as an agreement touches upon involvement of the court, responsibility of the court or action to be taken by the court, court approval of such arrangement would be required for the agreement to be effective.

103. In some States, an insolvency representative may be able to allocate responsibility for certain actions to another insolvency representative where it is practical to do so, and satisfy its own obligation by overseeing and reviewing what the other insolvency representative does; this may even include insolvency representatives in other States. Insolvency representatives may also be able to

provide certain undertakings in order to coordinate their activities with courts or other parties. For example, in a case in which no written agreement was concluded, the insolvency representative provided to the court of the other jurisdiction a letter confirming that it would not consent to the disposition of any estate assets or funds until approved by that court, to the extent required.[93]

(a) General means of cooperation

104. Some agreements do not address the allocation of responsibilities between the various parties and the courts in detail, but include a broad statement concerning cooperation between the parties which is in the nature of a statement of good faith or intent, leaving flexibility to the parties to determine the manner in which cooperation will be achieved.[94]

105. Examples include provisions to the effect that: the parties, which may include some or all of the debtor, the creditor committee and the insolvency representatives depending upon the circumstances of the case, will take all reasonable steps to cooperate with each other in connection with actions taken in the courts of the States involved, and to coordinate the administration of the proceedings for the benefit of the respective insolvency estates and stakeholders;[95] to the extent possible, all actions taken in the different insolvency proceedings should be consistent; and the administration of the proceedings should be organized to ensure efficiency and reduce costs, focussing upon coordination of the activities of the insolvency representatives, the matters to be addressed by the courts and relevant procedural issues.

106. More detailed provisions may specify the means of achieving cooperation, such as sharing the administration of the proceedings, where the insolvency representatives reach agreement on how to coordinate their activities with each other, subject to their respective obligations and responsibilities under applicable law. These provisions might include agreement that: each representative control the administration of the subsidiaries of the debtor in its State and seek the assistance of the other where needed; an insolvency representative may act without the prior consent of the other representative and without giving prior notice on any matter that does not require notice to be given to interested parties under the law governing those insolvency proceedings; or an insolvency representatives should attempt, in good faith, to obtain the consent of the other insolvency representative prior to taking certain actions, including seeking or consenting to the substantive consolidation of the debtor with any other entity and or any other action that would have an adverse impact on the debtor or any member of the debtor.[96] The provisions may also specify the procedure to be followed to achieve this cooperation, including, for example, holding an initial meeting, at which the insolvency

---

93 See United Pan Europe.

94 See, for example, Philip, Systech.

95 See, for example, Federal Mogul, Laidlaw; the Concordat takes a similar approach, stipulating that for cases with more than one plenary forum, but no main forum, each forum should coordinate with each other, subject in appropriate cases to a governance protocol (Principle 4A). The CoCo Guidelines recommend the cooperation of the insolvency representatives and sets out details for this cooperation (Guideline 12.1-4), including the court appointment of the main insolvency representative's or its agent as a co-insolvency representative in non-main proceedings to ensure coordination between different proceedings under the court's supervision (Guideline 16.3).

96 See, for example, AIOC.

representatives should discuss all actions already taken concerning the debtor's assets and develop a workplan together, followed by meetings on a regular basis. Further details could include the particulars of those meetings, including a timetable and how they should take place (e.g. in-person, via telephone). Other elements of cooperation could include that documents prepared in one proceeding may be used for similar purposes in other proceedings or that the insolvency representatives should participate as management exercising the rights, powers and duties of a debtor in possession in the insolvency proceedings in the other forum.[97]

(b) Supervision of the debtor

107. An agreement can establish the extent to which the debtor will be responsible for supervision of its business, addressing what the management can or cannot do without prior consultation with, or the consent of, the insolvency representatives. Prior consent may be required, for example, for the use and disposal of assets, while prior consultation may be required with respect to commencing legal proceedings; recruiting or dismissing employees, other than in the ordinary course of business; and consulting with any trade unions except in the ordinary course of business.[98]

(c) Reorganization plans

108. Where reorganization proceedings are commenced against a debtor in a number of different States or against several members of an enterprise group in different States, a question arises as to whether it will be possible to reorganize the debtors in a coordinated manner, perhaps through a single plan that will deliver savings across the various insolvency proceedings, ensure a coordinated approach to the resolution of the debtors financial difficulties and maximize value for creditors. Some insolvency laws permit the development of such a plan, while under others it will only be possible where the different proceedings can be coordinated. Accordingly, this issue is commonly addressed in cross-border agreements, many of which provide that for each proceeding, a reorganization plan or similar arrangement should be submitted to each responsible court and that the plans should be substantially similar to each other.[99] The development of a similar plan of reorganization in different forums may also be achieved in the absence of a written agreement, by the parties working together to ensure that the plan and the approval and confirmation process are in accordance with both legal systems. It may also be possible pursuant to the statutory obligation of the insolvency representative to maximize the value of the estate and to act in the interests of the debtors.

109. The joint development of the plans is an appropriate means for addressing concerns of creditors and the courts, where they have a role to play in approval and implementation of the plans, and can be coordinated through a cross-border agreement. That agreement might cover: preparation of the plan or plans; classification and treatment of creditors;[100] procedures for approval, including solicitation and voting; and the role to be played by the courts (where applicable), particularly with respect to confirmation of a plan approved by creditors and its

---

97 See, for example, Manhatinv, Commodore.

98 See, for example, Federal Mogul.

99 See, for example, Solv-Ex; the CoCo Guidelines also emphasize the cooperation of the insolvency representatives in any manner consistent with the objective of reorganization or the sale of the business as a going concern wherever possible (Guideline 14.1).

100 See, for example, Everfresh.

implementation.[101] An agreement might also provide that the plans, once approved by creditors and, where required, confirmed by the respective courts, should be binding upon claimants in relevant States, regardless of whether those claimant had submitted claims in proceedings in those States or otherwise submitted to the jurisdiction of those States.[102]

110. Where the agreement does not establish those procedures, it may nevertheless provide that they should be established in accordance with applicable law, by the debtor in consultation with the insolvency representatives, or by order of the relevant courts. A cross-border agreement that provides generally for coordination but does not specifically address reorganization plans might also facilitate coordination of such plans. In the *360Networks* case, for example, the agreement itself did not address the issue of reorganization plan but in the course of reorganization, the parties agreed to draft two substantially similar plans and make each dependent on the approval of the other.

111. One particular concern with negotiating a single reorganization plan relates to the equal treatment of creditors in each jurisdiction and the need to ensure that some do not receive less favourable treatment than others. For example, in the *Felixstowe Dock and Railway Co.* case,[103] the United States' debtor sought the cooperation of the English courts to lift injunctions applying to the debtor's assets in England to prevent their realization or removal. Although the United States' court assured the English court that if the injunctions were lifted, prosecution of the English claims in the English courts would not give rise to actions for contempt in the United States' court, the English court declined to lift the injunctions. That decision was based on the English court's concern that English creditors would receive less favourable treatment under a United States' plan of reorganization.

112. Different approaches may be taken to preparation and submission of the plan. Responsibility could be given to the debtor or debtors respectively, where the insolvency law provides for the debtor to remain in possession and continue operating the business or to the insolvency representatives, possibly in cooperation with the debtor. Where the plan is to be developed together with the insolvency representative, different approaches may be adopted to coordinate the process in different States. The management of the debtor's business in one State, for example, may be best positioned to develop a reorganization plan for all of the debtor's businesses in consultation with all of the insolvency representatives; or the plan may be prepared by the debtor together with the insolvency representative of only one forum, but with the involvement of other insolvency representatives, especially if the insolvency law requires the insolvency representative to participate in the negotiation of, or to consent to, the reorganization plan.[104]

(d) Treatment of assets

113. The conduct of insolvency proceedings will often require assets of the debtor to continue to be used or disposed of (including by way of encumbrance) in order to enable the goal of the particular proceedings to be realized. Where the insolvency of the debtor involves proceedings in different States, coordination of the use and

---

101 See, for example, AgriBioTech.

102 See, for example, AgriBioTech.

103 Felixstowe Dock and Railway Co. v. U.S. Lines Inc.; [1989] Q.B. 360 (1987) (Eng.). Re T & N Ltd; [2005] B.CC. 982.

104 See, for example, AgriBioTech, Maxwell.

disposal of the debtor's assets may be required to ensure maximization of the value of assets for the benefit of all creditors. Agreements can be used to facilitate this coordination by establishing requirements for approval; allocation of responsibility between the different parties in interest; and details concerning the procedures for use or disposal. Although the extent to which responsibility can be allocated between the different courts and insolvency representatives will depend upon the requirements of applicable law, practice suggests that a number of different approaches are possible.[105]

(i) Supervision by the courts

114. Some agreements allocate responsibility for supervising use and disposal of assets to the courts, whether to the court of the State in which assets are located; to the court of the State in which the debtor is located; or jointly to the courts competent for the different insolvency proceedings.[106] In some agreements, use of the location criteria is relevant only to specific kind of assets, such as immovables.[107] Another approach, which may be appropriate in certain cases such as where there is a high level of managerial and operational interdependence among the cross-border companies, is to make sales of certain assets subject to the joint approval of the courts involved, regardless of the location of those assets,[108] although it would be desirable to ensure that such a provision did not cause unnecessary delay and reduction of value. To facilitate that joint approval and the allocation of proceeds between the different debtors, some agreements permit joint hearings to be conducted.[109] The requirement for court approval may be limited to assets that exceed a specified value or to certain types of transactions, distinguishing for example, between disposals in the ordinary course of business and disposals outside the ordinary course, with approval required only for transactions in the latter category. An agreement may also specify that approval is not required for certain types of transactions, e.g. depositing funds in bank accounts. Some agreements envisage approval being sought for each and every transaction, while others provide that a single court order might cover all disposals of assets, enabling the insolvency representatives to take action without seeking approval in each instance.[110]

(ii) Supervision by insolvency representatives

115. Another approach explicitly authorizes the insolvency representative to use or dispose of the debtor's assets without court approval where permissible by applicable law, reducing the time needed for those actions. This authorization could include requesting the debtor to dispose of certain assets. In some situations, it might be appropriate to require the insolvency representative to seek the prior

---

105 In cases with more than one plenary forum, but no main forum, the Concordat refers the assets within each jurisdiction to that forum (Principle 4B). Where proceedings involve a main and non-main proceeding, the CoCo Guidelines recommend that every insolvency representative should seek to sell the assets [in its jurisdiction] in cooperation with the other insolvency representatives so as to maximize the value of the assets as a whole [Guideline 13.1]. Further, any national court, where required to act, should approve those sales or disposals that would produce such value [Guideline 13.1].

106 See, for example, AgriBioTech, Everfresh.

107 See, for example, PSINet.

108 See, for example, Tee-Comm.

109 See, for example, Livent, PSINet.

110 See, for example, Livent, Solv-Ex.

consent of their foreign counterpart for disposal of assets, including the disposal of shares or interests. To avoid an impasse, the requirement to seek consent might be limited to making a "good faith attempt" or to consultation. Where the debtor is permitted to manage the assets, for example, as a debtor in possession, approval of the insolvency representatives may be required for sale or disposal outside the ordinary course of business, but not otherwise.[111] Even where court approval is not required for sale or disposal of assets, the courts may nevertheless oversee the use and disposal of assets by requiring the insolvency representative to provide regular reports on their work.[112]

116. Other details which an agreement may address regarding the use and disposal of assets might include: the manner of the disposition; the setting of a foreign exchange rate for transactions that require the computation of an amount in different currencies; the manner or place of payment of the proceeds; and the use of the proceeds from sales, such as to fund working capital, cover court-approved expenses, plan funding or distribute to creditors.[113]

(iii) Investigation of assets

117. Investigation of the debtor's assets is often key to the successful conduct of insolvency proceedings and a coordinated approach might avoid duplication of effort and save costs. Investigations may be coordinated by allocating responsibility for their conduct to, for example, the insolvency representative of one State or by coordinating the activities of the insolvency representatives in other ways, such as by establishing provisions for notice and reporting. Where responsibility is allocated to one insolvency representative, it will be desirable that the investigating representative informs its counterpart in the other States about the investigation[114] and periodically consults with it with respect to progress and results, as well as proposed actions, providing the counterpart with drafts of any requests proposed to be made to the courts.

(e) Allocation of responsibility for commencing proceedings

118. During insolvency proceedings, it might become necessary to commence various types of proceedings concerning the debtor or third parties, including insolvency or other similar proceedings with respect, for example, to subsidiaries of the debtor (wherever situated) not already subject to insolvency proceedings, or parallel proceedings, for example, on the basis of presence of substantial assets, substantial business or place of incorporation[115] or actions concerning third parties, such as avoidance of certain transactions or with respect to submission and verification of claims. To avoid possible conflict, an agreement may allocate responsibility for commencing such actions between the different representatives, subject to certain requirements, such as the written consent of the other insolvency representative.[116]

119. Allocation of responsibility in this manner may be important to satisfy the requirements of local law as many laws, in specifying the persons who may request

---

111 See, for example, AIOC, Manhatinv.
112 See, for example, Inverworld.
113 See, for example, AIOC, Everfresh.
114 See, for example, Maxwell, Nakash.
115 See, for example, Commodore.
116 See, for example, Manhatinv.

the commencement of insolvency proceedings, do not include foreign insolvency representatives and or address the question of their standing under those laws to make such a request, which is therefore in doubt. Article 11 of the Model Law is designed to ensure that a foreign representative, following recognition of main or non-main proceedings, has the standing to request commencement of an insolvency proceeding in the recognizing State, provided the conditions for commencement are otherwise met; the Model Law does not modify the conditions under local law for commencement of those proceedings. Similarly, article 23 provides the standing, following recognition of a foreign proceeding, for a foreign representative to initiate avoidance actions as available in the recognizing State. Where the Model Law has not been enacted however, or there is doubt as to the standing of a foreign representative to commence such proceedings, allocating that responsibility in a cross-border agreement to another insolvency representative may facilitate commencement of those proceedings. An agreement may also cover related procedural issues, such as deadlines for filing certain documents and reports and provision of notice, in accordance with applicable national law.

(f) Treatment of claims

120. Claims by creditors operate at several levels in insolvency, determining which creditors may vote in the proceedings, how they may vote and how much they would receive in a distribution. Accordingly, the procedure for submission of claims and their verification and admission is a key part of the insolvency proceedings. Where insolvency proceedings cross borders, procedural matters with respect to coordination of claims processing such as place and time (including deadlines) of submission, responsibility and procedure for verification and admission, provision of notice of claims submitted and cross-recognition of admission can be clarified and coordinated in an agreement. Such an agreement may or may not require approval by the court, depending upon the role played by the court in the claims admission and verification process. Details of the claims procedure to be followed may be negotiated at the commencement of those proceedings or the agreement negotiated at that time might provide that certain claims would be dealt with later in a claims protocol to address the timing, process, jurisdiction and law applicable to the resolution of inter-company claims.[117]

121. While agreements in writing typically address coordination of the treatment of claims, coordination may be achieved without an agreement. In one case involving the United States and the Netherlands, for example, the debtor in possession and the insolvency professionals worked together to coordinate various processes without a written agreement, ensuring that the laws of both jurisdictions involved were complied with.

122. Agreements may also address issues of priority and subordination. For example, in one case the parties agreed not to subordinate certain claims to the level of equity interests, which they could have done under the law of one of the jurisdiction involved, because it would have been inconsistent with the law of the other jurisdiction.

(i) Submission of claims

123. Agreements can establish the proceedings in which claims should be submitted, and address the issue of claims submitted in more than one proceeding to

---

[117] See, for example, Calpine, Quebecor.

establish where they should be verified and admitted. Claims submitted in one jurisdiction could be treated as if they had been properly submitted in the other jurisdiction in which they would then be considered or a claim submitted in one proceeding may be deemed to have been submitted in both proceedings, with the place of last submission being responsible for its consideration. An agreement may also clarify that submitting a claim is a prerequisite for participating in a distribution or voting upon any proposal or plan of reorganization.[118]

(ii) Claim verification and admission

124. Verification and admission of claims may be conducted in a variety of ways by different parties, involving the courts, the insolvency representatives and in some cases the debtor. As noted above, agreements may address the procedure for verification and admission of claims and the allocation of responsibility between the courts or insolvency representatives.[119] For example, the agreement may provide that the insolvency representatives should work together to agree on the procedure or that claims should be adjudicated in accordance with applicable law.

125. Where the court is involved in the process, parties may agree that the court of one forum will verify and admit all claims[120] or that each court responsible for the different insolvency proceedings will verify and admit claims properly submitted in those proceedings.[121] Where claims are to be adjudicated by one court, it may be the court of the State in which the debtor is located or the court in which the claim is submitted, unless principles of comity require otherwise or another court is a more appropriate forum in view of all the circumstances.[122]

126. Where the agreement provides for claims to be verified and admitted in one State, it might require recognition of those claims by the other courts involved in the proceedings and acceptance of that process by the debtor. Similarly, where claims are to be adjudicated in several courts, an agreement can stipulate that each court should consider the claims against the debtor submitted in its proceeding and that that court's decision on those claims should be applied and recognized by the other courts, to the extent allowed under applicable governing law. Where action is required to be taken to ensure recognition, the agreement may allocate responsibility for taking the necessary steps to, for example, the debtor or the insolvency representative.[123] Requiring insolvency representatives to periodically exchange a register of the claims submitted in each proceeding may facilitate coordination of claims processing.[124] Where creditors are required under applicable law to attend in person to verify their claims, a cross-border agreement might address the obstacle caused by the costs of travel for foreign creditors, which might prevent smaller claim-holders from pursuing their rights at all.

127. An agreement may provide that the adjudicating forum will decide the value, admissibility and priority of the claims, using an analysis based upon the conflict-

---

118 See, for example, AgriBioTech, Livent.

119 See, for example, Inverworld; the Concordat stipulates principles for the filing of claims for cases with a main forum and for cases with more than one plenary forum, but no main forum (Principle 2 D & E, 4 C-E).

120 See, for example, AgriBioTech.

121 See, for example, Commodore.

122 See, for example, PSINet.

123 See, for example, PSINet, AgriBioTech.

124 See, for example, AIOC.

of-laws rules applicable in that forum or in accordance with the law governing the underlying claim.[125] The agreement may also address the question of objections to claims, for example, by permitting objections to be made in each proceeding.[126]

128. As an alternative to adjudication by the courts, an agreement may provide for claims to be verified and admitted by the insolvency representative, and specify the details of the procedure. One agreement, for example, provided that the insolvency representatives of main and non-main proceedings in different European Union States should each verify the amount and form of the claims submitted in their proceedings and that the insolvency representative of the non-main proceedings should provide to the insolvency representative of the main proceeding a list of the claims in the non-main proceedings. The verification was to be undertaken independently in conformity with national law in accordance with the provisions of the EC Regulation.[127]

129. Responsibility for treatment of specific claims, such as unsecured claims, may in some cases be referred to specified parties, for example, the debtor in possession, subject to consultation with the insolvency representatives.[128]

130. An agreement may also address treatment of claims in reorganization proceedings, prior to approval and implementation of the plan. One agreement, for example, referred primary responsibility during that time to the insolvency representatives in consultation with the debtor for agreement on the validity or amount of claims and their payment or other settlement.[129]

131. Another issue that an agreement may address is the manner in which, and the court to which, appeals concerning rejection of claims should be made. To facilitate coordination, enhance transparency and predictability, an agreement may also include certain standard forms relating to verification and admission of claims, such as (i) the proof of claim, (ii) the notice of rejection, and (iii) a notice of election.[130]

(iii) Distribution

132. Where creditors are able to submit claims in multiple proceedings, it is desirable that the proceedings be coordinated to avoid a situation in which one creditor might be treated more favourably than other creditors of the same class by obtaining payment of the same claim in more than one proceeding. Article 32 of the Model Law includes a rule to address that situation (incorporating the so-called *hotchpot rule*).

133. Some agreements include a general provision on distribution, such as that all of the debtor's assets should be realized for the benefit of all secured, priority, and non-insider unsecured creditors, with the net proceeds of sale to be distributed in accordance with priorities established under the laws of one forum. Other agreements specifically address the issue of double payment. One approach is to include a general provision that a creditor should not be paid twice where, in parallel proceedings, it submits a claim in both proceedings. Other agreements are more specific, detailing how this should be avoided, including by the insolvency

---

125 See, for example, Everfresh, AgriBioTech.
126 See, for example, Everfresh.
127 See, for example, SENDO.
128 See, for example, Everfresh.
129 See, for example, Federal Mogul.
130 See, for example, GBFE.

representatives exchanging relevant information, such as draft distribution schedules and, if distributions have occurred, lists of the recipient creditors. It may also be avoided by providing that the creditor should receive a distribution from the debtor's assets as if it had submitted a single claim in either proceeding, but limited to a rateable recovery from the debtor's assets not greater than would be permitted under both laws.[131]

134. An agreement may also address the means of distribution, for example, the currency in which claims should be paid; who will pay the dividends, for example, each insolvency representative may be responsible for making distributions in the proceedings in which it was appointed;[132] and to which creditors they will be paid.

(g) Post-commencement finance

135. The continued operation of the debtor's business after the commencement of insolvency proceedings is critical to reorganization, and to a lesser extent, liquidation, where the business is to be sold as a going concern. To maintain its business activities, the debtor must have access to funds to enable it to continue to pay for crucial supplies of goods and services. Where the debtor has no available liquid assets to meet its immediate cash flow needs, it will have to seek finance from third parties.[133] Since many insolvency laws either restrict the provision of new money in insolvency or do not specifically address the provision of new finance or the priority for its repayment in insolvency, the uncertainty created by these different approaches in a cross-border insolvency situation makes post-commencement an issue that might be addressed in a cross-border agreement.

136. Many agreements, however, do not address the provision of post-commencement finance. Sometimes, the court order approving the agreement contains provisions on post-commencement finance. Such order might, for example, authorize the applicants to pursue all avenues of refinancing and the sale of material parts of their business or assets, subject to prior approval of the court and the lenders, as applicable and approve and recognize the finance approved in proceedings in other jurisdictions.[134] One agreement included a provision that the insolvency representative with responsibility for operation of the business on an ongoing basis required the consent of the other insolvency representatives and approval of the court of the other forum to obtain financing, regardless of whether that consent was required under the applicable law.[135] That mechanism was adopted to ensure that the parallel insolvency proceedings achieved the goal of maximizing the value of the estate and preserving the interests of each of the insolvency regimes involved. An agreement may also address issues of jurisdiction providing, for example, that any post-commencement finance lender should only be subject to the jurisdiction in which the post-commencement finance was provided.[136]

---

131 See, for example, AIOC, SENDO.

132 See, for example, Peregrine Investment, GBFE.

133 The CoCo Guidelines recommend the insolvency representatives' cooperation with regard to obtaining any necessary post-commencement financing, including through granting of priority or a security interest to reorganization lenders as might be appropriate and insofar as permitted under any applicable law (Guideline 14.2); see also UNCITRAL Legislative Guide, part two, II, paras. 94-107 and recommendations 63-68.

134 See, for example, Systech.

135 See, for example, Maxwell.

136 See, for example, Mosaic.

137. Similarly, an agreement can explicitly permit the insolvency representative to borrow funds or encumber assets and impose conditions such as the consent of the creditor committee, or permit the use of the proceeds of certain transactions other than the sale of assets to fund, for example, working capital or to invest, leaving the manner of investment to the insolvency representative's reasonable judgment.[137]

Sample clauses

General means of cooperation

(22) To assist in the efficient administration of the insolvency proceedings, the debtor, the creditor committee and the insolvency representatives shall (a) cooperate with each other in connection with actions taken in the courts of States A and B, and (b) take any other appropriate steps to coordinate the administration of the proceedings in States A and B for the benefit of the debtor's respective estates and stakeholders.

Supervision of the debtor

(23) The debtor shall not:

(a) Without the prior consent of the State A insolvency representative, take any of the following steps:

(i) Subject any asset to any new mortgage, charge or security interest;

(ii) Except as provided in any reorganization plan to which effect is given under State A law, agree to the validity or amount of, pay or settle the claims of any pre-petition creditor of the debtor out of the debtor's assets;

(iii) Undertake intragroup sales or purchases other than in the ordinary course of business and in compliance with the debtor's present transfer pricing policies;

(b) Without prior consultation with the State A insolvency representative take any of the steps:

(i) File in the State A court, or circulate to the creditors of the debtor or any class of them for approval by them, any reorganization plan;

(ii) Except in the ordinary course of business, consult with any trade unions;

(iii) Recruit or dismiss any employees other than in the ordinary course of business, and the debtor shall, in respect of any recruitment or dismissal of employees, comply at all times with applicable employment law.

Reorganization plans

(24) To the extent permitted by the laws of the respective jurisdictions and to the extent practicable, the insolvency representatives of States A and B shall submit substantially similar reorganization plans in States A and B in accordance with the

[137] See, for example, GBFE, Livent.

respective insolvency laws of States A and B. The insolvency representatives of States A and B shall, to the extent practicable, coordinate all procedures in connection with those reorganization plans, including solicitation proceedings procedures regarding voting on the reorganization plan, treatment of creditors and classification of claims. To the extent not provided for in this agreement, those procedures will be established either by applicable law or further orders of courts of States A and B.

In order to coordinate the contemporaneous submission of reorganization plans in States A and B, the insolvency representatives of States A and B shall take any action necessary to seek extension of the submission dates in both States.

Treatment of assets: supervision by the courts

(25) Transactions relating to the State A assets will be subject to the sole approval of the State A court. Transactions relating to the State B assets will be subject to the sole approval of the State B court. Any transactions involving assets located in both States A and B will be subject to the joint jurisdiction of both courts.

Supervision by the insolvency representatives

(26) The debtor shall not, without the prior consent of the insolvency representatives of States A and B, acquire, sell or dispose of any asset outside the ordinary course of business.

Investigation of assets

(27) There shall be an investigation into the debtor's assets wherever located. The State A insolvency representative has already commenced such an investigation, and in the interests of continuity, efficiency and expense, shall continue with its investigation in accordance with this agreement. Notwithstanding the foregoing, the State B insolvency representative, the debtor or any other party in interest shall have the right at any time to request either court to permit or order the State B insolvency representative to conduct an independent investigation.

In conducting the investigation, the State A insolvency representative shall, at all times, notify the State B insolvency representative of any actions that the State A insolvency representative desires to pursue and consult in good faith with the State B insolvency representative as to the reasons for and propriety of pursuing those actions. Unless not reasonably practical due in the circumstances, the State A insolvency representative shall provide the State B insolvency representative with a draft of each application that the State A insolvency representative proposes to make to either court in pursuit of those actions. The State A insolvency representative shall not be required to obtain the consent of the State B insolvency representative with respect to such actions, but to the extent the State B insolvency representative disagrees with any of the proposed actions, (a) the State A insolvency representative shall be required to inform the court in which it is seeking to pursue such actions of the State B insolvency representative's disagreement, and (b) the State B insolvency representative shall have a reasonable opportunity to appear and be heard in, and to seek relief from, the relevant court.

The State A insolvency representative shall at all times keep the State B insolvency representative informed as to the course and conduct of the investigation into the debtor's assets and periodically consult with the State B insolvency

representative as to progress. Unless otherwise requested by the State B insolvency representative or directed by either court with respect to specified information, the State A insolvency representative shall promptly share with the State B insolvency representative all documents and other information obtained in connection with the State A insolvency representative's investigation.

Allocation of responsibility for commencing proceedings

(28) The State A insolvency representative shall attempt in good faith to obtain the consent of the State B insolvency representative prior to:

(a) Commencing or consenting to insolvency proceedings (whether in States A, State B or elsewhere) with respect to the State A debtor; and

(b) Causing the State A debtor or its subsidiary to commence legal proceedings.

Submission of claims & claim verification and admission

See sample clause number 12: *Allocation of responsibility between courts: treatment of claims.*

Distribution

(29) In order to avoid the risk, arising from the plurality of insolvency proceedings, of paying a creditor an amount that is greater than should be received, each insolvency representative is required to send to the other insolvency representative:

(a) Prior to any payment, the draft distribution plan based on which the payment of dividends will be made. The insolvency representatives to whom this draft is sent shall respond to the other insolvency representative within […] days from the date of receipt of the draft. Failure to respond within this time period shall be treated as acceptance of the draft plan;

(b) After any payment of dividends, a list providing the names and addresses of the creditors who have been paid, the amount paid and nature of the claim.

Post-commencement finance

(30) The State A insolvency representative shall attempt, in good faith, to obtain prior approval of the State B insolvency representative before borrowing funds or pledging or charging any assets of the debtor.

6. Communication

138. As noted above, communication between the parties in cross-border insolvency proceedings is often viewed as an essential means of addressing the uncertainty that may be encountered in cross-border cases where the parties are not necessarily familiar with the laws of other States and their application. Accordingly, the most common goal of cross-border agreements is to establish procedures for communication between the parties. Where the provisions of chapter IV of the Model Law (articles 25-27) have been enacted into national law they will provide the legislative framework for communication between the courts, between insolvency representatives and between the courts and insolvency representatives. An agreement might provide further detail as to the types of information to be

exchanged; means of exchanging information; methods and frequency of communication; provision of notice; and confidentiality. Where the Model Law has not been adopted, an agreement might both establish the framework and provide the necessary practical detail. Formalizing the procedures for communication in an agreement will assist the overall coordination of the proceedings, promote the confidence of the parties, avoid disputes and increase transparency.[138]

139. A communication agreement might be used to address some, or all of the issues noted above, as required in each particular case and as permitted by local procedural requirements. While many such agreements have been endorsed by the court, that may only be a requirement where the communication agreement covers aspects of communication between the courts; an agreement addressing communication between, for example, the insolvency representatives and the creditors, may be implemented without such approval. Such an agreement might be one of a series of agreements entered into in the course of proceedings to address different issues and may be used as an initial step to facilitate resolution of those other issues.

(a) Communication between courts

(i) Direct communication

140. As noted above (part II.B), communication between relevant courts is very often essential because of the important supervisory role of courts in insolvency proceedings and may assist in preventing a "duelling of insolvency proceedings", undue delays and costs, unduly cumbersome and lengthy hearings, inconsistent treatment of similarly situated creditors, and the loss of valuable assets. In addition, direct communications might facilitate the resolution of problems created when different laws accord different treatment to the same types of claims. In the *Stonington Partners* case, for example, involving parallel insolvency proceedings in the United States and Belgium, an issue concerned the ranking of a securities-fraud claim that would effectively be denied any share under United States law, but could be allowed under Belgian law and would rank equally with all other unsecured claims if proven.[139] Where permitted under applicable law, the ability to communicate with each other provides a safeguard for the courts, facilitating direct knowledge of the administration of the other proceeding. In a case concerning litigation against the debtor in the United States and insolvency proceedings in the Netherland Antilles, a telephone call from the judge in the court of the Netherlands Antilles to the court in the United States led to correction of erroneous information communicated by the parties. In the same case, direct communication between the courts resulted in an order by the United States' court, with the concurrence of the court of the Netherlands Antilles, directing mediation and the appointment of a mediator with the consent of the parties.[140] In a further example, in a case

---

[138] The CoCo Guidelines recommend that courts communicate with each other for the purpose of coordinating and harmonizing the different insolvency proceedings (Guideline 2), including the communication between courts and foreign insolvency representatives (Guideline 4); and that courts should cooperate with each other directly, through insolvency representatives or through any person or body appointed to act at the direction of the court (Guideline 16.4). Other recommendations address the time (Guideline 15), method and means of communication (Guidelines 6 and 7).

[139] Unfortunately, the lower court did not follow the strong recommendations of the higher court to directly communicate with the Belgium court, see supra note 10.

[140] Supra note 21.

concerning the United States and Canada, the Canadian court needed information from the United States court on whether the criteria for independence was fulfilled by the "foreign representative", so that the Canadian court could recognize the foreign representative and order needed actions in Canada.[141]

141. In the *Cenargo* case,[142] which involved insolvency proceedings in the United States and the United Kingdom, direct communication between the judges was arranged via a telephone conference in which the various parties' counsel participated after the English judge was contacted by the United States' judge seeking direct dialogue to resolve problems caused by competing orders. In the course of the conference, the English judge mentioned that English law did not permit him to speak to another judge officially on any matter without the consent and the participation of the parties. The parties were given the opportunity to comment at the end of the conference and a transcript was circulated upon the request of the English judge. The various safeguards that might apply to direct communication are discussed in part II (see para. 8 above) and below (see paras. 185-188 below).

142. Provisions on court-to-court communication included in cross-border agreements may include different levels of detail. For example, they may provide that the courts of the different forums may communicate with one another generally or with respect to any matter relating to the insolvency proceedings or in order to coordinate their efforts and avoid potentially conflicting rulings[143] or they specify particular issues on which courts may communicate and, in some cases, seek guidance and advice from other courts, such as the application of the law of the other forum with respect to certain issues, for example the interpretation, application and enforcement of the stay ordered by that court.[144]

143. Where courts are unable to communicate directly, communication may nevertheless be facilitated through the insolvency representatives or through an intermediary or by way of letter or other written communication. As noted above, direct communication across borders is subject to the provision of national law and practice, which might not always facilitate that communication (see part II, para. 9 above). Article 31 of the EC Regulation provides for communication between insolvency representatives, but is silent on communication between courts. Some EU Member States have elaborated that provision. One law, for example, authorizes the judge or insolvency representative to provide to the foreign insolvency representative all information deemed necessary for the foreign proceeding and requires domestic courts or insolvency representatives to give the foreign insolvency representative the opportunity to make proposals with respect to the treatment of assets in the domestic proceedings.[145]

144. The *Maxwell*, *Nakash* and *Matlack* cases provide examples of the use of an intermediary through whom the judges could communicate (see part II, para. 3 above). An agreement may specify the type of information to be exchanged and the manner of its exchange (see part II, para. 6 above). Communication may also be facilitated by incorporating guidelines, such as the Court-to-Court Guidelines, into

---

141 AgriBioTech.

142 In re Cenargo Int'l, PLC, 294 B.R. 571 (Bankr. S.D.N.Y. 2003).

143 Financial Asset Management, Laidlaw, Pioneer, Systech.

144 Calpine.

145 § 239 I and II of the Austrian Bankruptcy Act (Konkursordnung).

the agreement (see part II, para. 10 above)[146] and may be made subject to general provisions of a cross-border agreement relating to dispute resolution.[147]

(ii) Joint hearings

145. One means of facilitating coordination of multiple proceedings is to hold joint hearings or conferences, where appropriate, to resolve issues that have arisen. Joint hearings or conferences have the advantage of enabling the courts to deal with the complex issues of different insolvency proceedings directly and in a timely manner. Parties involved in the various proceedings have the opportunity for direct contact and are able to ask questions and seek clarification of counsel in the other jurisdiction. Such direct communication proved to be very successful in one case involving the United States and Germany, in which the German insolvency representative appeared in a hearing, testifying by telephone.[148] Where videoconference facilities are available, the ability of the parties to "see" each other might further assist mutual understanding.

146. Some agreements leave it to the courts to determine when joint hearings or conferences should be conducted, providing, for example, that they may be conducted with respect to any matter relating to the administration, determination or disposition of any aspect of the proceedings, where the courts consider it to be necessary or advisable or to facilitate coordination with the proper and efficient conduct of the insolvency proceedings.[149] A more limited example permits joint hearings with regard to specific issues, such as disposal of assets.

147. Some agreements set out procedures to be followed for joint hearings and in some cases also for conferences. Some agreements adopt procedures similar to Guideline 9 of the *Communications Guidelines*; other agreements incorporate the *Guidelines* by reference. Those procedures may include:[150]

(a) The establishment of a telephone or video link to enable the courts to simultaneously hear or see the proceedings in the other Court;[151]

(b) Limitation of submissions or applications by any party to the court in which the party is appearing, unless specifically given leave by the other court. Some agreements add that after the scheduling of the joint hearing, courtesy copies of such submissions or applications should be provided to the other court, and that application seeking relief from both courts must be filed with both courts;[152]

(c) The judges of the different fora who will hear such applications are entitled to communicate with each other in advance of the hearing, with or without counsel being present, to establish guidelines for the orderly submission of documents and the rendering of decisions by the courts, and to deal with any related procedural, or other matters;[153] and

(d) The judges of the different fora, having heard an application, are entitled to communicate with each other after the hearing, without counsel present, for the

---

146 See, for example, Matlack.
147 See, for example, Calpine.
148 See Dornier Aviation [DANA], proper citation to be provided later.
149 See, for example, 360Networks, Quebecor.
150 See, for example, Solv-Ex, Inverworld.
151 See, for example, Livent.
152 See, for example, Mosaic, Philip.
153 See, for example, PSINet.

purpose of determining whether consistent rulings can be made by both courts, and the terms upon which such rulings shall be made, as well as to address any other procedural or non-substantive matter.

148. A different approach to joint hearings provides that the judges of the different fora might appear and sit jointly in either court as agreed between them, provided that where they do, creditors and other parties in interest may appear and be heard in person or at the courtroom of the judge who has travelled to appear in the other courtroom.[154]

149. Rather than leaving it to the judges to establish, some agreements establish the rules for submission of evidentiary materials in joint hearings and for submissions or applications by any party becoming subject to a joint hearing.[155]

150. In cases where the cross-border agreement included relevant provisions, joint hearings have been successfully arranged and have included holding a telephone conference to develop a coordinated schedule for the case and video joint hearings to discuss a proposed sale of assets in the different jurisdictions.[156]

(b) Communication between the parties

(i) Information-sharing between insolvency representatives

151. In addition to communication between courts, communication between insolvency representatives may be important to the coordination of insolvency proceedings, facilitating exchange of information and coordination of the activities to be undertaken by the insolvency representatives in pursuance of their obligations. Practice indicates that exchange of information has taken place on the basis of both written and oral agreements.[157]

152. Exchange of information may be specifically addressed in the agreement or it may be pursued under a more general obligation to cooperate.[158] An agreement may specify a procedure such as that communication should take place on a regular basis, for example, through the provision of monthly operating reports prepared by the insolvency representatives and transmitted to specified parties or consultations by quarterly meetings or conferences.[159] The agreement may specify how those meetings should be conducted, whether by phone, or in person, and the procedures to be followed.[160] A further approach may provide for joint development of a workplan to coordinate and govern the material steps to be taken by the insolvency representatives, including keeping each other regularly informed about their activities and material developments with respect to the debtor, as well as providing notice of any application to the court and, in some cases, drafts of those applications or copies of any documents filed in the proceeding or other significant documents,[161] such as expert opinions. Provision of information may be assisted by requiring the insolvency representatives to keep clear records of the administration

---

154 See, for example, Livent.
155 See, for example, Laidlaw, Loewen.
156 See, for example, Everfresh, Systech.
157 See, for example, United Pan Europe.
158 Compare 360Networks and Loewen with Manhatinv.
159 See, for example, Peregrine Investment, Commodore.
160 See, for example, Manhatinv.
161 See, for example, Peregrine Investment, Nakash.

of the estate, including of significant management decisions,[162] books and records that would account for disposal of the assets and monthly reports of the fees and expenses of the administration.

153. Insolvency representatives may agree to make themselves available for consultation with their foreign counterparts upon request or to consult each other on specific matters, such as the preparation and negotiation of reorganization plans to be submitted in the different States.[163] One agreement dealing with main and non-main proceedings in European Union Member States referred to Article 31 of the EC Regulation and required each insolvency representative, prior to any disposal of assets, to prepare and provide to the other a list of the assets located in the territory of the non-main proceeding. It also required the insolvency representative of the main proceeding to make to the insolvency representative of the non-main proceeding a proposal for the global transfer of all assets. The insolvency representative of the non-main proceeding was to provide the proposal and its response to that proposal to the court administering the non-main insolvency proceeding. The insolvency representatives were also required to share a draft distribution plan and a list of creditors who had received distributions.[164]

(ii) Sharing information with other parties

154. In addition to the sharing of information between insolvency representatives, a cross-border agreement may also address the sharing of that information with other parties, such as the courts involved and the creditors or creditor committee. Such provisions may be useful to provide a degree of certainty and avoid potential conflict. The agreement may require, for example, that information shared by the insolvency representatives, such as monthly reports on their activities, could also be provided to the creditors or the creditor committee or the courts.[165] Additional information may be exchanged on request, either by an insolvency representative or a creditor committee.

155. With a view to enhancing the transparency of the proceedings, some agreements provide that information publicly available in one forum should be made available in all forums[166] or that all claimants in the proceedings should have similar access to disclosed information, including information as to the financial condition, status and activities of the debtor, the nature and effect of any reorganization plan and the status of proceedings in each jurisdiction. Sharing of information may also be enhanced by measures such as a court holding monthly status conferences.[167]

156. An agreement may also cover communication between the management of the debtor and the insolvency representatives. It may provide, for example, that the insolvency representatives and the management of the debtor entities should regularly consult on strategic matters, specifying the kind of information that management should provide to the insolvency representatives or providing the insolvency representatives with access to all books and other records requested. Relevant information might include: minutes of board meetings of the debtor;

---

162 See, for example, Federal Mogul, Inverworld.
163 See, for example, Peregrine Investment, Maxwell.
164 See SENDO.
165 See, for example, Inverworld, Commodore.
166 See, for example, Calpine, Everfresh.
167 See, for example, Solv-Ex, Inverworld.

periodical account information; periodical reports on the status of other legal proceedings involving the debtor; and copies of all tax returns.[168]

(iii) Notice

a. When notice is required

157. Provision of notice to interested parties is an essential element of the efficient administration of global insolvency proceedings and a reliable mechanism for the dissemination of basic information. Notice may be required to be given, under applicable law, to a number of different parties and stakeholders in those insolvency proceedings. While a cross-border agreement cannot circumvent the requirements of applicable law, it can extend those requirements (e.g. by providing notice more widely or including more comprehensive information), clarify the manner in which the provisions will operate across the different proceedings and supplement them if necessary to take account of the relationship between the different proceedings. Details that might be included in such agreements may include the party to give notice; to whom notice should be given; when notice is required; and the content of that notice.

158. Notice provisions in an agreement may be very general, relying upon procedures applicable under the relevant insolvency laws. Without specifying the exact circumstances warranting the provision of notice, the approach may be limited to indicating that where notice is required, one party should provide notice to the other parties in writing, in accordance with the applicable law.[169] Another approach might be to provide that all parties should receive notice of all proceedings in accordance with the practices of the respective courts.[170]

159. Agreements may also limit the requirements for provision of notice, excluding matters of a purely formal and non-substantive nature or limit notice to cases where joint hearings are held.[171] Failure to provide notice as required may also be addressed, excusing a party from providing advance notice in a timely manner, if circumstances reasonably prevented it from doing so,[172] with the proviso that notice should be given as soon as practicable after the preventing event.

160. Matters requiring notice to be given might include: an application made by an insolvency representative to commence proceedings with respect to a member of the debtor's group,[173] any other application, request or document filed in one or all of the insolvency proceedings; related hearings or other proceedings mandated by applicable law in connection with the insolvency proceedings; an application for approval of remuneration and expenses of the insolvency representatives and professionals; issues concerning treatment of claims and reorganization plans; court orders or reasons and opinions issued in the proceedings; an action relating to investigation of assets in other forums; the seeking of emergency relief; a transaction, or an application for approval of a transaction, involving the assets of

---

168 See, for example, Maxwell, Federal Mogul; see also UNCITRAL Legislative Guide on obligations of the debtor (part two, III, paras. 22-33 and recommendation 110).

169 See, for example, AIOC.

170 See, for example, Livent, Solv-Ex.

171 See, for example, Federal Mogul, PSINet.

172 See, for example, AIOC.

173 See, for example, Commodore, including e.g. a subsidiary or an intermediate holding company situated between the debtor and its affiliate or subsidiary companies: Maxwell.

the estate, including the use, sale, lease, deposit of funds or any other disposal; and with respect to post-commencement finance.[174]

b. Parties required to give notice

161. Some agreements specify the persons required to provide notice, for example, the insolvency representatives of the different proceedings, the debtor or the party otherwise responsible for affecting notice in the State where certain documents are filed or the proceedings are to be conducted.[175]

c. Recipients of notice

162. Different approaches are taken to specifying the persons to be notified of different aspects of cross-border insolvency proceedings. Some agreements specify that notice requirements apply only to parties to the agreement, others require notice to be given generally to a number of recipients, including the debtor, creditor committee, creditors, the insolvency representatives and sometimes to other persons appointed or designated by the courts or that are entitled to receive notice according to the practice of the State where the documents are filed or the proceedings occur. Notice may be limited, with respect to creditors, to the creditor committee or to a certain number of the largest creditors, for example, the twenty largest creditors. Recipients may also be determined by reference to a list maintained in one proceeding or to all parties that are entitled to notice in accordance with any order issued in either proceeding. Some agreements specify contact details, including fax numbers or the full addresses of the parties entitled to receive notice. Others not only list the parties entitled to receive notice, but also emphasize the obligations of those parties to give notice in accordance with the practices of the respective courts.[176]

163. Another example requires the insolvency representative of the main proceeding to give notice to all creditors based in other forums by regular mail in the form of individual notices setting forth the required formalities and penalties provided by the law applicable in the main proceeding. Notice may also be required to be given to creditors whose claims are to be dealt with by a court other than the one to which the claim was submitted.[177]

164. Where the insolvency representative is required to obtain court approval in order to investigate or pursue assets of the debtor in a particular State, an agreement may require notice to be given to other courts involved in the proceedings.[178] Some agreements provide that where a request for an order contrary to the provisions of the agreement is made, all parties should be notified.[179]

d. Method of giving notice

165. Some agreements do not specify how the notice should be given, other than requiring that it should be in accordance with the practices of the respective courts

---

174 See, for example, AgriBioTech, Matlack.

175 See, for example, Inverworld, Mosaic.

176 See, for example, AIOC, Laidlaw.

177 See, for example, Solv-Ex.

178 See, for example, Nakash.

179 See, for example, Everfresh, Solv-Ex; the CoCo Guidelines provide, inter alia, that notice of any court hearing or any order should be given to the insolvency representatives where relevant to that insolvency representative (Guidelines 17.1-3).

or in writing. Other agreements list different methods, from which the parties can choose including: courier, telecopier, facsimile, email or other electronic forms of communication or overnight mail, overnight delivery service or even delivery by hand. An agreement may also regulate the publication of notice, stipulating the time and medium (e.g. the newspaper) in which the debtor should publish the notice and the language of the notice to be given, in order to ensure creditors, wherever situated and other parties in interest will be able to understand it, satisfying requirements for effectiveness and sufficiency.[180]

166. An agreement may address the effectiveness of service of notice and the impact of changes of the address for service. One example provided that notice would be effective notwithstanding a change of address, where the change of address was not notified within certain time limits determined by reference to the giving of notice. In case of personal delivery, for example, notification of the change had to be received before the time of delivery; in case of communication by facsimile, at the time of transmission (with confirmed answerback). In addition, an agreement can indicate the evidence required to prove service.

e. Notice concerning operation and implementation of the agreement

167. Some agreements include notice provisions with respect to operation or implementation of the agreement, requiring that notice be given for any supplementation, modification, termination or replacement of the agreement in accordance with the notice procedure described in it.[181] Where disputes relating to the agreement arise, the agreement might require notice to be provided to specified parties.[182]

(c) Confidentiality of communication

168. Much of the information relating to the debtor and its affairs that needs to be considered and shared in insolvency proceedings may be commercially sensitive, confidential or subject to obligations owed to third persons (such as trade secrets, research and development information and customer information). Accordingly, its use needs to be carefully considered and disclosure appropriately restricted to avoid third parties being placed in a position where they can take unfair advantage of it. Confidentiality of information, especially in a cross-border case where requirements for protection of confidentiality may vary from State to State, may be an issue that could be addressed in an agreement.[183]

169. Not all agreements provide for confidentiality of communication.[184] Those that do, adopt various approaches, including: providing generally that the information

---

180 See, for example, Federal Mogul, Olympia & York.

181 See, for example, Loewen, Mosaic, Pioneer.

182 See, for example, PSINet, Systech.

183 Principle 3D of the Concordat also addresses the issue of confidentiality; the CoCo Guidelines recommend that to the fullest extent permissible under applicable law, any relevant information not available publicly should be shared by an insolvency representative subject to appropriate confidentiality arrangements to the extent that this is commercially and practically sensible (Guideline 7.5); that the duty to provide information, within the meaning of the Guidelines, includes the duty to provide copies of documents at reasonable cost on request (Guideline 7.6). They also address communication between insolvency representatives (Guideline 6.1 and Guideline 7.1-7), including between insolvency representatives of a main and a non-main proceeding (Guideline 8).

184 See, for example, Maxwell and SENDO do not.

exchanged should be kept confidential, or that non-public information may be made available subject to appropriate protections, for example, that confidentiality arrangements are made; the insolvency representatives have entered into a written agreement with the objective of protecting and preserving all privileges; the written consent of the concerned party has been obtained; or disclosure is required by applicable law or a court order. Where information is exchanged, an agreement may provide that such exchange does not constitute a waiver of any applicable privileges, including attorney-client or work product privileges.[185]

170. In addition to the sharing of information, confidentiality requirements may also apply to the dispute resolution process concerning any conflicts under or regarding the agreement and any material produced in that process. Divulgence of information by any participants in that process may be limited or the agreement may provide that divulgence of such information cannot be compelled by, for example, the insolvency representative.[186]

171. Confidentiality agreements might also affect the creditor committee. One agreement provided that the creditor committee would be bound by the by-laws adopted in one jurisdiction, to relieve it from executing the confidentiality agreements otherwise required in the other proceeding.[187]

Sample clauses

Communication between courts

(31) The courts of States A and B may communicate with one another with respect to any matter relating to the State A and B proceedings and, in addition to joint hearings contemplated by this agreement, may conduct other joint hearings with respect to any matter relating to the conduct, administration, determination or disposition of any aspect of those proceedings, provided both courts consider such joint hearings to be necessary or advisable and, in particular, to facilitate or coordinate the proper and efficient conduct of the State A and B proceedings.

Communication between the parties: information sharing between insolvency representatives

(32) In addition to other provisions of this agreement addressing information sharing, the insolvency representatives of States A and B agree to share on an unlimited basis all information regarding the debtor, its present and former officers, directors, employees, advisors, professionals, agents and its assets, and liabilities, which each has or may have under its possession or control and which each may lawfully share with the other. The insolvency representatives may, but are not obliged to, share privileged information with each other. Each of the insolvency representatives shall keep the other fully apprised of their activities and material developments in matters concerning the debtor known to them.

The entry of an order approving this agreement shall constitute the recognition by each relevant court, each insolvency representative, the professionals retained by them, their employees, agents and representatives that they are subject to, and do not

185 See, for example, Commodore, Inverworld, Everfresh, Livent, Manhatinv, Federal Mogul.
186 See, for example, Manhatinv.
187 See, for example, Quebecor.

waive any attorney-client, work product, legal, professional or any other privileges recognized under any applicable law.

Communication between the parties: sharing information with other parties

(33) Information publicly available in either forum State shall be made publicly available in the other. To the extent permitted, non-public information shall be made available to official representatives of the debtor, including the creditor committee and any other official committee appointed in proceedings with respect to the debtor, and parties in interest, including providers of post-commencement finance, subject to appropriate confidentiality agreements.

Notice

(34) Notice of any application or documents filed in one or both of the insolvency proceedings and notice of any related hearing or other proceeding mandated by applicable law in connection with the insolvency proceedings or the agreement shall be given by appropriate means (including, where circumstances warrant, by courier, telecopier or other electronic forms of communication) to the following parties:

(a) All creditors and other parties in interest in accordance with the practice of the jurisdiction where the documents are filed or the proceedings are to occur; and

(b) To the extent the parties referred to in paragraph (a) are not entitled to receive such notice, to counsel to the creditor committee, the insolvency representatives and such other parties as may be designated by either of the courts from time to time.

Notice in accordance with this paragraph shall be given by the party otherwise responsible for affecting notice in the jurisdiction where the documents are filed or the proceedings are to occur. In addition to the foregoing, the debtor shall provide to the court of State A or B, upon request, copies of all orders, or similar papers issued by the other court in the insolvency proceeding.

Confidentiality of communication

(35) The insolvency representatives of States A and B acknowledge and agree that each shall not provide any non-public information received from the other regarding any present or former officer, director or employee of the debtor to any third party, unless the provision of that information is either:

(a) Agreed to by the other party;

(b) Required by applicable law; or

(c) Required by order of any relevant court.

7. Effectiveness, amendment, revision and termination of agreements

(a) Effectiveness and conditions precedent to effectiveness

172. Parties negotiating an agreement want the result to be effective. For this reason, some agreements set out the procedure by which they are to become effective, generally involving approval of the courts of the different forums. The approval may be that of a specific court or all courts involved in the proceedings and an additional provision may make it clear that the agreement will have no

binding or enforceable legal effect until that approval is obtained. In approving an agreement, a court may also specify that it will only be binding upon the parties when approval of the other courts has been obtained.[188] Some agreements include additional requirements, such as that the decision to approve by one court should be transmitted to all creditors that have submitted claims in the insolvency proceedings before that court or to the parties that have signed the agreement.[189]

173. Under some national laws, a creditor committee may be required to approve an agreement and copies of the agreement and approval be provided to the court in order for the agreement to become effective.[190]

174. In practice, the courts involved in approval of agreements to date have been willing to do so, on the basis that they represent the consensus reached by the relevant parties, including the insolvency representatives that are often appointed by the courts. Courts have tended to trust the professional judgment of insolvency representatives who, as experienced insolvency practitioners, have drafted the agreement as a pragmatic solution to harmonize and coordinate concurrent insolvency proceedings.[191] The English Judge in the *Maxwell* agreement, for example, said that it took him about 20 minutes to read and approve the agreement, as he only checked whether there was anything like an obvious mistake. In *Everfresh*, the courts of both jurisdictions involved approved the agreement on the day approval was sought.

175. In deciding on the approval of an agreement, courts have looked to factors such as whether a conflict with any principle of comity was at stake and whether the principle of equal treatment of creditors was observed.[192] Courts have ensured they do not approve an agreement that would authorize something contrary to the law or ultra vires. In a case concerning concurrent insolvency proceedings, the court had before it a plan of reorganization drafted by the insolvency representatives of the other jurisdiction. The court only approved the plan with modifications, on the basis that it could not approve a reorganization plan that authorized something contrary to the law or ultra vires, as the plan would have amounted to a waiver of any liability for the directors of any company in the debtor group for any breach of duty to its company.[193] To facilitate approval and avoid challenges, the process of approval may permit creditors to raise objections to the content or drafting of the agreement. Those objections would be considered by the court in deciding upon approval.

176. In addition to court approval, an agreement may authorize the parties to take such actions and execute such documents as might be necessary and appropriate for its effective implementation or the parties may expressly agree that they will do everything appropriate to give full effect to the terms of the agreement.[194]

---

188 See, for example, Solv-Ex, Systech.

189 See, for example, AIOC, Nakash.

190 Under German law, for e.g. the insolvency judge could not order that a cross-border agreement between insolvency representatives was binding, as such a decision can only be made by the creditor committee; see, for example, ISA-Daisytek.

191 See supra note 20. The English judge involved in the Maxwell case noted that "in general the attitude of the court is that if the administrator's business judgment is that doing something would be in the best interest of creditors, the court will accept that judgment".

192 Ibid.

193 See Re APB Holdings Ltd., High Court of Justice of Northern Ireland, Chancery Division, [1991] N.I. 17.

194 See, for example, Inverworld, Nakash.

(b) Amendment, revision and termination of an agreement

177. To accommodate changing circumstances, many agreements contain provisions on amendment. Typically, those agreement approved by the court stipulate that the agreement cannot be supplemented, amended or replaced in any manner except as approved by the respective courts, following notice to specified parties and a hearing. Some agreements require, in addition to the approval of the courts, the written consent of the parties. Those parties may be specified and include the debtor, the insolvency representatives, certain creditors or a creditor committee.[195]

178. Not all amendments to an agreement will require court approval and examples of some that may not would include: (a) the addition as a party of one or more members of the debtor group, wherever incorporated, and in respect of which insolvency proceeding in any State have been commenced; (b) the removal as a party of any debtor if that debtor has ceased, or is about to cease, to be a member of the debtor group, or if that debtor has ceased, or is about to cease, to be the subject of insolvency proceedings in any State; (c) the substitution, addition or removal of an individual as an insolvency representative; or (d) conforming amendments that result from the preceding examples. Some agreements include a safeguard that no amendment may adversely affect any rights to indemnification, immunity or other protection contemplated by the agreement with respect to service prior to such amendment.

179. Some agreements particularize who has the right to amend or terminate the agreement; when this could be done; and its impact. One agreement, for example, specified that any party in interest could apply to either court at any time to amend or terminate the agreement. In an agreement requiring the parties' consent for effectiveness, any amendment would generally need the consent of each party. Amendment would render the earlier version of an agreement null and void.

180. Although not all agreements include a provision on termination, those that do mention it in the context of amendment or specify when it would terminate. Those situations might include, in relation to any of the debtors of one country, (a) if the insolvency representative gives notice in writing to the other parties that it was terminated; (b) if management gives notice in writing to the parties that it was terminated; or (c) in relation to any of the debtors to which a reorganization plan relates, upon that plan becoming effective under applicable law.

Sample clauses

Effectiveness and conditions precedent to effectiveness

(36A) This agreement shall become effective only upon its approval by both the courts of States A and B.

(36B) According to the law of State A, the effectiveness of this agreement is subject to the approval of the creditors of the debtor. The State A insolvency representative will convene a creditors meeting in State A as soon as practicable and will use all reasonable endeavours to obtain the creditors' approval of this agreement.

The State A insolvency representative will report the terms of this agreement

[195] See, for example, Solv-Ex, Quebecor.

to the State A court within […] days and to the State B court within […] days of the creditors meeting referred to above.

Amendment, revision and termination

(37) This agreement may not be supplemented, modified, terminated or replaced in any manner except by the written agreement of the parties and approval of both the courts of States A and B. Notice of any legal proceeding to supplement, modify, terminate or replace this agreement shall be given in accordance with paragraph x above [*paragraph on notice*].

8. Costs and fees

181. Costs may be incurred in the course of administration of insolvency proceedings, be it the investigation of the debtor's assets, the insolvency representative's remuneration, costs of the proceedings (e.g. court fees) and so forth. To ensure efficient administration of the proceedings, many agreements address the costs and fees of proceedings, and at least some specifically address the insolvency representatives' fees [Solv-Ex]. In general, agreements follow the principle that obligations incurred by the insolvency representatives should be funded from the respective insolvency estate.[196]

182. Agreements typically address the costs and fees that are to be paid, how they are to be paid and which court has jurisdiction over the issue. Some provide, for example, that fees of professionals retained by the debtor or even by the secured lenders or the lenders providing post-commencement finance, including financial or other advisors for activities performed in one State or in connection with the insolvency proceeding in that State, should be subject to the sole and exclusive jurisdiction of the court of that State; approval of another court is not required. Typically, such a provision will apply in respect of each State involved in the cross-border agreement and may require parties in interest to request the courts to consider whether a different allocation of expenses would be more appropriate based on the facts and circumstances of the case. Similarly, the fees, costs and ordinary expenses of the insolvency representative and of professionals retained by the insolvency representative would generally be paid from the insolvency estate in the State in which they are appointed.[197] A detailed procedure for accounting, including the exchange of a monthly accounting between the insolvency representatives and its confidential nature may also be stipulated.

183. Where an agreement covers main and non-main insolvency proceedings, provisions on costs might address how the costs are to be apportioned between them.[198] In one agreement, for example, the legal costs of the non-main proceeding

---

196 See, for example, Manhatinv; see also Principles of European Insolvency Law, 2003 by the International Working Group on European Insolvency Law and common to many national insolvency laws (Principal 5.1); the CoCo Guidelines recommend that obligations incurred by the insolvency representative during proceedings and the insolvency representative's fees should be funded from the assets administered in the proceedings in which it is appointed (Guideline 11.1).

197 See, for example, Mosaic, Systech.

198 See, for example, SENDO; the CoCo Guidelines recommend that obligations and fees incurred by the insolvency representative in the main proceedings prior to the opening of any non-main proceedings, but concerning assets to be included in the estate in principle should be funded by the estate corresponding to the non-main proceedings (Guideline 11.2).

were to be met from the assets of the debtor as an expense of the administration of the main proceeding, but subject to certain limits and to applicable law as to what those costs could include, for example, verification of claims lodged, establishment of statements of wages due, and recovery of assets as a result of actions initiated or pursued by the insolvency representatives. Moreover, the agreement specified the amount that the insolvency representatives of the non-main proceeding would receive as an expense of the administration of the main proceeding and determined which judge would have jurisdiction to set the fees.

184. Some agreements include a provision concerning disclosure of costs and fees, requiring costs and remuneration received in each proceeding to be disclosed in the other proceedings, to ensure transparency and to guarantee trust and confidence between the courts of different jurisdiction regarding payment of compensation to professionals. In a case where no written agreement was concluded, one court approved the fees of the professionals retained in the foreign proceeding and, in turn, the foreign representative participated in the review of the fees of professionals retained in the local proceeding.

Sample clauses

Costs and fees

(38) The insolvency representatives of States A and B agree that their respective fees, costs and ordinary course expenses (including those of the professionals and other agents retained by each of them, as well as the cost of assisting one another) in the first instance shall be payable from the funds that each holds in State A or B, respectively. Nothing in this agreement shall preclude those insolvency representatives from transferring funds to each other to meet fees approved by the relevant court, costs and ordinary course expenses of administration or for purposes of distribution, if, to do so, would in the reasonable opinion of either insolvency representative be consistent with the objectives of this agreement.

9. Safeguards

185. The terms of an agreement should not lead to infringement of local law or the rights of parties in interest. Consequently, an agreement may include a range of safeguards provisions, i.e. provisions that safeguard a certain status, which can be related to rights, principles or facts. Typically, safeguard provisions are intended to preserve rights and jurisdiction, exclude or limit liability and warrant the parties' authority to enter into the agreement. The latter is of particular importance, as parties want to be assured that their counterpart is appropriately authorized and that applicable law will be observed. As noted above (see para. 46 above), some agreements include a sentence at the end of a provision to the effect that notwithstanding the foregoing, that provision should not be construed as having a certain effect. Other agreements include more general safeguard provisions.[199]

(a) Preservation of rights and jurisdiction

186. An agreement can stipulate that neither its terms nor any actions taken under it should prejudice or affect the powers, rights, claims and defences of the debtor and

[199] The Court to Court Guidelines provide that the Guidelines should not affect any powers, orders or substantive determination of any matter in controversy before the court or other court nor a waiver by any party of its rights or claims (Guideline 17).

its estates, the insolvency representatives, the creditors or equity holders under applicable law nor preclude or prejudice the right of any person to assert or pursue their substantive rights against any other person under applicable law.[200]

187. An agreement may include provisions on the preservation of jurisdiction, for example that nothing in the agreement is intended to affect, impair, limit, extend or enlarge the jurisdiction of the courts involved, as notwithstanding cooperation and coordination, each court should be entitled at all times to exercise its independent jurisdiction and authority with respect to matters presented to it and the conduct of the parties appearing before it.[201]

188. An agreement may also provide examples of what it should not be construed as doing, including: requiring the debtor, the creditor committee or the insolvency representative to breach any duties imposed on them by national law, including the debtor's obligations to pay certain fees to the insolvency representative under the applicable law; authorizing any action that requires specific approval of one or both courts; precluding any creditor or other party in interest from asserting its substantive rights under applicable law including, without limitation, the right to appeal from decisions taken by one or all of the involved courts; or affecting or limiting the debtor's or other parties' rights to assert the applicability or otherwise of the stays ordered in the different proceedings to any particular proceeding, asset, or activity, wherever pending or located.[202]

(b) Limitation of liability

189. An agreement may provide that, notwithstanding cooperation between the different parties, neither the insolvency representatives nor the professionals retained by them, their employees, agents or representatives should incur any liability in respect of, or resulting from the actions of their counterparts in other States. Some agreements also provide that granting relief from the automatic stay for a specific purpose, such as allow the insolvency representative to investigate the debtor's assets, should not be construed as approval of any specific actions the insolvency representative might take in pursuit of that purpose. The parties may also agree to include further persons in such a clause, including a mediator, if the process of dispute resolution foresees mediation.[203]

(c) Warrantees

190. Some agreements contain a provision in which each party represents and warrants to the other that its execution, delivery, and performance of the agreement are within its power and authority, although such a provision may not be required where the court is to approve the agreement.[204]

Sample Clauses

Preservation of rights

(39) Neither the terms of this agreement nor any actions taken under the terms of this agreement shall prejudice or affect the powers, rights, claims and defences of

---

200 See, for example, 360Networks, Loewen, Philip.
201 See, for example, Laidlaw, Commodore.
202 See, for example, Livent, Systech.
203 See, for example, Manhatinv.
204 See, for example, Everfresh, Inverworld.

the debtors and their estates, the creditor committee, the insolvency representatives or any of the debtor's creditors under applicable law, including the laws relating to insolvency of States A and B and the orders of the courts of States A and B.

Preservation of jurisdiction

(40) Nothing in this agreement shall increase, decrease or otherwise affect in any way the independence, sovereignty or jurisdiction of any of the relevant courts, or any other court in States A, B or […], including, without limitation, the ability of any of the relevant courts or other courts under applicable law to provide appropriate relief.

Limitation of liability

(41) The State A insolvency representative acknowledges (a) that the State B insolvency representative acts as insolvency representative of the debtor in accordance with the applicable law of State B and without any personal liability and any personal liability on its part under this agreement or otherwise is expressly excluded; and (b) that neither she nor the debtor has any claim whatsoever against the State B insolvency representative other than under this agreement.

[*Repeat for the State B insolvency representative.*]

Warrantees

(42) Each party represents and warrants to the other that its execution, delivery and performance of this agreement are within its power and authority and have been duly authorized by it or approved by the court as applicable.

Annex

Summaries of the cases referred to in Part III.B

1. AgriBioTech Canada Inc. (2000)[205]

In the case of AgriBioTech Canada, Inc., parallel insolvency proceedings were conducted in Canada and the United States with respect to the subsidiary of one of the largest forage and turf grass seed producers in the United States. One key point of the protocol was coordination of the sales of the debtor's assets, which were made conditional on approval by both courts. Resulting proceeds were to be kept in a segregated account under the authority of the Canadian court. Joint hearings by means of modern telecommunications were contemplated by the protocol, as well as the judges' right to discuss related matters in confidence. Creditors had the right to appear before either court and would then be subject to the respective court's jurisdiction. The debtor agreed to submit substantially similar reorganization plans in both jurisdictions, which the creditors could either jointly accept or reject. The Canadian court was appointed to process the creditor claims in accordance with Canadian law, but the validity of those claims was to be determined in accordance with the law governing the underlying obligation. The protocol also included a provision on avoidance of transactions.

2. AIOC Corporation and AIOC Resources AG (1998)[206]

In AIOC Corporation, a liquidation protocol was developed between Switzerland and the United States. The difficulties in the case arose not only because of the differences between Swiss and United States insolvency law, but also because of the inability of the Swiss and United States insolvency representatives to abstain from their statutory responsibilities to administer the respective liquidations. The parties agreed upon a protocol as a means of providing joint liquidation of resources in a manner consistent with the insolvency laws of both countries. The management of liquidations by means of the protocol is one of the key features of the case. The protocol was based upon the Concordat, but focused generally on marshalling resources, and specifically on procedures for administering the reconciliation of claims.

3. Akai Holdings Limited and Kong Wah Limited (2004)[207]

The cases of Akai Holdings Limited and Kong Wah Limited were identical, involving concurrent insolvency proceedings in the Hong Kong Special Administrative Region of China (SAR) and Bermuda. The objective of the protocol was that both liquidation proceedings would be administered simultaneously from Hong Kong, which was the principal place of business of the debtor companies, though the protocol recognized the Bermuda proceeding as the "main proceeding". The protocols were drafted to take into account the relevant provisions of the Hong

---

[205] Ontario Superior Court of Justice, Toronto, (Canada) Case No. 31-OR-371448, (16 June 2000) and the United States Bankruptcy Court for the District of Nevada, Case No. 500-10534 LBR, (28 June 2000) (Unofficial Version).

[206] United States Bankruptcy Court for the Southern District Court of New York, Case Nos. 96 B 41895 and 96 B 41896, (3 April 1998).

[207] High Court of the Hong Kong Special Administrative Region, Cases No. HCCW 49/2000 and HCCW 50/2000 (6 February 2004) and the Supreme Court of Bermuda.

Kong SAR and Bermudan insolvency laws and enable the insolvency representatives to administer both liquidations in the most economical way. Accordingly, creditor claims could be filed in either jurisdiction. The Hong Kong SAR court approved the protocols, noting that in the absence of legislation to deal with matters affecting cross-border insolvency, the proposed protocols seemed to be the best way to serve the interests of creditors. As in the protocols in the Peregrine and Greater Beijing cases, the same individuals were appointed as insolvency representative for each of the companies in the two jurisdictions.

4. Calpine Corporation (2007)[208]

Calpine Corporation, a Delaware corporation, is the ultimate parent company of a multinational enterprise that operates through various subsidiaries and affiliates in the United States, Canada and other countries. Reorganization proceedings commenced in the United States and in Canada, with the respective debtors being separate and distinct. The protocol was developed, inter alia, to coordinate and harmonize both proceedings. A Memorandum of Understanding, aimed at the resolution of intercompany claims, preceded and was subsequently incorporated into the protocol. In addition, the protocol contained a provision that required the Canadian and the United States debtors to negotiate a specific claims protocol to address claims filed by each other (and their respective creditors) in the other's case. The goals set out in the protocol were: to avoid duplication of activities; to honour the sovereignty of the courts involved and to facilitate the fair, open and efficient administration of the insolvency proceedings. For those purposes, the protocol provided for court-to-court cooperation, notably joint decisions on issues of jurisdiction and on disputes arising out of the protocol; joint hearings; notice requirements and mutual recognition of stays of proceedings. The protocol incorporated by reference the Court-to-Court Guidelines.

5. Commodore Business Machines (1994)[209]

The case of Commodore involved insolvency proceedings in the Bahamas and the United States. The protocol was entered into by the Bahamian insolvency representatives and the creditor committee. Its main purpose was to convert the involuntary Chapter 7 proceedings under the United States Bankruptcy Code, which had commenced on the application of some creditors, into Chapter 11 proceedings in the United States and to resolve contemplated litigation. The parties agreed in the protocol that the Bahamian insolvency representatives would serve the functions customarily held by a debtor in possession under Chapter 11. Other objectives of the protocol included: facilitating the liquidation of assets in both jurisdictions; and avoiding conflicting decisions by the courts involved. Consequently, the Bahamian insolvency representatives were appointed as debtors in possession in the United States proceedings. The protocol regulated the submission of claims; the retention and compensation of insolvency representatives; accountants and attorneys; the responsibility of the insolvency representatives to inform both courts and the creditor committee and to manage funds; to sell assets; to lend or to borrow monies and to initiate legal proceedings.

---

[208] United States Bankruptcy for the Southern District of New York, Case No. 05-60200 (9 April 2007) and Court of Queens Bench of Alberta, (Canada) Case No. 0501-17864 (7 April 2007).

[209] United States Bankruptcy Court for the Southern District of New York and the Supreme Court of the Commonwealth of the Bahamas (1994).

6. EMTEC (2006/2007)[210]

The case of EMTEC involved a group interlinked in a classical pyramidal structure with a holding company, incorporated in the Netherlands, and below it three French companies and a German company, which themselves held the share capital of other companies located in the European Union or Asia. Insolvency proceedings commenced in France for all companies in the group, including those whose registered offices were located abroad. Secondary insolvency proceedings were opened in Germany upon the request of the insolvency representative of the French proceedings. Both insolvency representatives then entered into an agreement for the purpose of establishing the practical terms for the distribution of the assets among the creditors and organizing the cooperation between the insolvency representatives, in particular the exchange of information regarding the verification of claims and the distribution of assets. The agreement provided that the insolvency representative of the main proceedings would transfer a certain amount of funds to the insolvency representative of the secondary proceeding, which the latter would then distribute to the creditors without discriminating between the creditors in the different proceedings. The insolvency representative in the secondary proceeding agreed to avoid double payment to creditors who had filed in both proceedings. It was further agreed that claims admitted in both proceedings would be paid in the proceedings, in which they would receive the higher amount. The insolvency representative of the secondary proceeding agreed to inform the insolvency representative of the main proceeding in writing before making any distribution. The agreement provided that it was governed exclusively by French law and that the French court would have exclusive jurisdiction over any dispute concerning the agreement.

7. Everfresh Beverages Inc. (December 1995)[211]

The first protocol developed after drafting of the Concordat was finalized (and modelled on the Concordat principles) in a case involving the United States and Canada, Everfresh Beverages Inc. A United States company with Canadian operations applied for commencement of reorganization proceedings in both countries at the same time. The protocol explicitly addressed a broad range of cross-border insolvency issues such as choice of law, choice of forum, claims resolution and avoidance proceedings. Creditors were given, for example, the express right to submit claims in either proceeding. The protocol followed many of the principles of the Concordat very closely, using as a starting point Principle 4, which addresses the situation where there is no main proceeding, but essentially two competing proceedings in different jurisdictions. The protocol was finalized approximately one month after proceedings began and used to hold the first cross-border joint hearing to coordinate the proceedings.

8. Federal-Mogul Global Inc. (2001)[212]

Federal-Mogul concerned reorganization proceedings of a major automotive

---

[210] Commercial Tribunal of Nanterre (France) and the Insolvency Court of Mannheim (Germany).

[211] Ontario Court of Justice, Toronto, (Canada) Case No. 32-077978, (20 December 1995) and the United States Bankruptcy Court for the Southern District of New York, Case No. 95 B 45405, (20 December 1995).

[212] United States Bankruptcy Court for the District of Delaware, Case No. 01-10578 (SLR), and the High Court of England and Wales, Chancery Division in London, (2001).

parts supplier in the United States and in Great Britain. The protocol, which had to take into account pending asbestos claims against the English subsidiaries; established as its goals the orderly and efficient administration of the insolvency proceedings; the coordination of activities and the implementation of a framework of general principles. The protocol gave responsibility for the development of a reorganization plan and the handling of the asbestos and insurance claims to the United States debtors in possession. The acquisition, sale and encumbrance of assets were subjected to prior approval by the insolvency representatives, as were most other activities outside the ordinary course of business. Further, the protocol dealt with communication procedures between the debtors and the insolvency representatives; confidentiality issues; rights to appear before the respective courts; the mutual recognition of stays of proceedings; and the retention and compensation of insolvency representatives and professionals.

9. Financial Asset Management Foundation (2001)[213]

In the Financial Asset Management (FAM) Foundation case, insolvency proceedings respecting a trust were opened in Canada and the United States. A protocol was entered into by the debtor, the insolvency representatives and the main creditor. Each court agreed to defer in general to the judgement of the other court, as was "appropriate and feasible". The protocol outlined the procedure for joint hearings and appearance before either court. It also confirmed the enforceability of a judgment which the main creditor had previously obtained against the debtor before a court in California. The protocol further specified the responsibility of the courts for determining certain issues, for example, the United States court to be responsible for determining whether or not FAM violated any order of the aforementioned judgment.

10. Greater Beijing First Expressways Limited (2003) (GBFE)[214]

The Greater Beijing First Expressway case involved insolvency proceedings in the British Virgin Islands (BVI) and the Hong Kong SAR, concerning the liquidation of a toll way operator. The case is very similar to Peregrine, as the proceedings in the BVI were mainly initiated to support the Hong Kong SAR proceeding and to further avoid jurisdictional conflicts and the dissipation of assets. Similarly to Peregrine, the insolvency representatives appointed in both proceedings were the same professionals, in order to coordinate activities; to facilitate the exchange of information and to identify, preserve and maximize the value of and realize the debtor's assets. Responsibilities for matters were split between both proceedings, for example, the Hong Kong SAR representatives being responsible for the conduct of day-to-day business and the adjudication of creditor claims with the BVI representatives being responsible for the realization of assets. In addition, the protocol regulated the filing of claims; currency of payments; the representatives' remuneration; and notice requirements and attached forms for the proof of debt; notice of rejection and notice of election.

---

[213] United States Bankruptcy Court for the Southern District of California, Case No. 01-03640-304, and the Supreme Court of British Columbia, (Canada) Case No. 11-213464/VA.01, (2001).

[214] High Court of the Hong Kong Special Administrative Region, HCCW No. 338/2000, and the High Court of Justice of the Eastern Caribbean Supreme Court, Suit No. 43/2000, (2003).

11. Inverworld (1999)[215]

Inverworld involved the United States, the United Kingdom and the Cayman Islands. It was a complicated case in which applications for commencement of insolvency proceedings were made for the debtor and several subsidiaries in the three States. To avoid the ensuing conflicts, various parties created protocols that were agreed by courts in each of the jurisdictions. The protocol arrangements included: dismissal of the United Kingdom proceedings, upon certain conditions regarding the treatment of United Kingdom creditors; strict division of outstanding issues between the other two courts; and each court was to take the other court's actions as binding, preventing parallel litigation and leading to a coordinated worldwide settlement.

12. ISA-Daisytek (October 2007)[216]

In the ISA-Daisytek case, parallel insolvency proceedings commenced in England and in Germany. The decision of the English court that the English proceedings were the main proceeding pursuant to the EC Regulation was challenged and not recognized for over one year in Germany. As a result, there had been uncertainty as to the respective status and powers and responsibilities of the English and German insolvency representatives. After the German courts finally recognized the English proceeding as a main proceeding, the German and English insolvency representative developed a "cooperation and compromise agreement" in order to resolve all outstanding issues between them and to deal with future steps in the insolvency proceedings. The protocol included a compromise provision, which regulated payment of proceeds in the secondary (German) proceedings and dividends from certain foreign subsidies to the main (English) proceedings, distributions to creditors, and liability of the insolvency representatives. The protocol also included a provision on its approval and provided that the protocol should be construed in accordance with English law and that the English courts would be exclusively responsible for enforcing its terms.

13. Laidlaw Inc. (2001)[217]

The case of Laidlaw involved insolvency proceedings pending in Canada and the United States of a multinational enterprise operating through various subsidiaries and affiliates in the United States, Canada and other countries. The debtors forwarded the protocol for the courts' approval in order to implement basic administrative procedures necessary to coordinate certain activities in the insolvency proceedings. The protocol closely resembles the protocol in Loewen, including provisions on comity and independence of the courts; cooperation, including joint hearings; retention and compensation of insolvency representatives; notice; recognition of stays of proceedings; procedures for resolving disputes under the protocol; effectiveness of and modification of the protocol; and preservation of rights.

---

[215] United States District Court for the Western District of Texas, Case No. SA99-C0822FB, (22 October 1999), the High Court of England and Wales, Chancery Division, (1999), and the Grand Court of the Cayman Island (1999).

[216] High Court of England and Wales, Chancery Division, Leeds and the Insolvency Court of Düsseldorf, (Germany).

[217] Ontario Superior Court of Justice, Toronto, (Canada) Case No. 01-CL-4178, (10 August 2001) and the United States Bankruptcy Court for the Western District of New York, Case No. 01-14099, (20 August 2001).

14. Livent Inc. (1999)[218]

Livent was the first case in which joint cross-border hearings were conducted via a closed circuit satellite TV/video-conferencing facility. Two hearings were held. The first hearing was conducted to approve a cross-border protocol for the settlement of creditor claims against the debtor. The second hearing was to approve the sale of all or substantially all of the debtor's assets. The protocol expressly provided for such hearings, and allowed the two judges some discretion to discuss and resolve procedural and technical issues relating to the joint hearing. The joint hearing was successfully concluded after two days and the courts granted complementary orders permitting the sale of assets in both countries to a single successful purchaser.

15. Loewen Group Inc. (1999)[219]

The debtor, a large multinational company, applied for commencement of insolvency proceedings in Canada and the United States and immediately presented both courts with a fully developed protocol establishing procedures for coordination and cooperation. The debtor had quickly identified cross-border coordination of court proceedings as vitally important to its reorganization plans, and took the initiative of constructing a draft protocol that was approved as a "first day order" in both proceedings. The protocol provided that: the two courts could communicate with each other and conduct joint hearings, and set out rules for such hearings; creditors and other interested parties could appear in either court; the jurisdiction of each court over insolvency representatives from the other jurisdiction was limited to the particular matters in which the foreign insolvency representative appeared before it; and any stay of proceedings would be coordinated between the two jurisdictions.

16. Manhattan Investment Fund (2000)[220]

The protocol in Manhattan Investment Fund, a case involving the United States and the British Virgin Islands, listed a number of objectives including: coordinating the identification, collection and distribution of the debtor's assets to maximize the value of such assets for the benefit of the debtor's creditors and activities and the sharing of information (including certain privileged communications) between the respective insolvency representatives to minimize costs and to avoid duplication of effort.

17. Matlack Inc. (2001)[221]

In the case of Matlack, a bulk transportation group operative in the United

---

[218] United States Bankruptcy Court for the Southern District of New York, Case No. 98-B-48312, and the Ontario Superior Court of Justice, Toronto, (Canada) Case No. 98-CL-3162, (11 June 1999).

[219] United States Bankruptcy Court for the District of Delaware, Case No. 99-1244, (30 June 1999), and the Ontario Superior Court of Justice, Toronto, (Canada) Case No. 99-CL-3384, (1 June 1999).

[220] United States Bankruptcy Court for the Southern District of New York, Case No. 00-10922BRL, (April 2000), the High Court of Justice of the British Virgin Islands, (19 April 2000), and the Supreme Court of Bermuda, Case No. 2000/37, (April 2000).

[221] Superior Court of Justice of Ontario, (Canada) Case No. 01-CL-4109, and the United States Bankruptcy Court for the District of Delaware, Case No. 01-01114 (MFW), (2001).

States, Mexico and Canada, a protocol was developed to coordinate insolvency proceeding pending in Canada and in the United States. The protocol incorporated the Court-to-Court Guidelines as an appendix. In the protocol, both courts agreed to recognize the respective foreign court's stay of proceedings to prevent adverse actions against the debtor's assets. The debtors, their creditors and other interested parties could appear before either court, and would therefore be subject to that court's jurisdiction. Other issues dealt with by the agreement were the retention and compensation of professionals, notice requirements and the preservation of creditors' rights.

18. Maxwell Communication Corporation plc. (1991/1992)[222]

The earliest reported cross-border insolvency protocol was developed in Maxwell Communication plc which involved two primary insolvency proceedings initiated by a single debtor, one in the United States and the other in the United Kingdom, and the appointment of two different and separate insolvency representatives in the two different jurisdictions, each charged with a similar responsibility. The United States and English judges independently raised with their respective counsel the idea that a protocol between the two administrations could resolve conflicts and facilitate the exchange of information. Under the protocol, two goals were set to guide the insolvency representatives: maximizing the value of the estate and harmonizing the proceedings to minimize expense, waste and jurisdictional conflict. The parties agreed essentially that the United States court would defer to the United Kingdom proceedings, once it was determined that certain criteria were present. Specificities included: that some existing management would be retained in the interests of maintaining the debtor's going concern value, but the United Kingdom insolvency representatives would be allowed, with the consent of their United States counterpart, to select new and independent directors; the United Kingdom insolvency representatives should only incur debt or file a reorganization plan with the consent of the United States insolvency representative or the United States court; the United Kingdom insolvency representatives should give prior notice to the United States insolvency representative before undertaking any major transaction on behalf of the debtor, but were pre-authorized to undertake "lesser" transactions. Many issues were purposely left out of the protocol to be resolved during the course of proceedings. Some of those issues, such as distribution matters, were later included in an extension of the protocol.

19. Mosaic (2002)[223]

This case involved parallel insolvency proceedings in Canada and in the United States. From the beginning, the parties understood that the insolvency of the Mosaic web of companies was going to involve a number of complicated and

---

222 In re Maxwell Communication Corporation plc, 93 F.3d 1036, 29 Bankr.Ct.Dec. 788 (2nd Cir. (N.Y.) 21 August 1996) (No. 1527, 1530, 95-5078, 1528, 1531, 95-5082, 1529, 95-5076, 95-5084) and Cross-Border Insolvency Protocol and Order Approving Protocol in Re Maxwell Communication plc between the United States United States Bankruptcy Court for the Southern District of New York, Case No. 91 B 15741 (15 January 1992), and the High Court of England and Wales, Chancery Division, Companies Court, Case No. 0014001 of 1991 (31 December 1991).

223 Ontario Court of Justice, Toronto, (Canada) Court File No. 02-CL-4816, (7 December 2002) and the United States Bankruptcy Court for the Northern District of Texas, Case No. 02-81440, (8 January 2003).

contentious hearings in both jurisdictions, and that establishing a framework within which the courts could independently, but cooperatively, deal with the various corporate entities was critical. The protocol closely resembled, in both format and contents, the protocols in Loewen and Laidlaw, including provisions on comity and independence of the courts; cooperation, including joint hearings; retention and compensation of insolvency representatives; notice; recognition of stays of proceedings; procedures for resolving disputes under the protocol; effectiveness and modification of the protocol; and preservation of rights. The protocol was instrumental to the success of cross-border sales in the proceedings.

20. Nakash (1996)[224]

The protocol in the Nakash case involved the United States and Israel. It required express statutory authorization in Israel and direct court involvement generally in its negotiation. It focused on enhanced coordination of court proceedings and cooperation between the judiciaries, as well as between the parties (previous protocols had focused on the parties). Unlike previous cases involving cross-border insolvency protocols, this case did not involve parallel insolvency proceedings for the same debtor. The relevant conflict and central issue in the case that the protocol sought to resolve was between the pursuit of a judgment against the debtor in Israel and the automatic stay arising from the debtor's insolvency proceedings (pursuant to Chapter 11) in the United States, which should have prevented pursuit of the judgment. The debtor was not a signatory to the protocol and opposed its approval and implementation.

21. 360Networks Inc.[225]

In *360Networks*, the protocol involved the United States and Canada. The 360 Group was a fiber-optics network provider with international operations, comprising more than 90 companies registered in about 33 jurisdictions with nearly 2000 employees. As the main part of its assets and employees were located in both Canada and the United States, insolvency proceedings were commenced in both jurisdictions. The initial orders included a cross-border protocol with the following goals: promoting orderly, efficient, fair and open administration; honouring the respective courts' independence and integrity; promoting international cooperation and respect for comity between the Canadian and United States court and any foreign court; and implementing a framework of general principles to address administrative issues arising from the cross-border nature of the proceedings. To achieve these goals, the protocol addressed, among other things, court-to-court coordination and cooperation, including joint hearings; notice; the retention and compensation of professionals; joint recognition of stays of proceedings; future foreign proceedings; and a procedure for resolving disputes under the protocol. However, the two restructuring processes progressed relatively independently with little reference to the protocol. Plans substantially similar to each other were filed in each jurisdiction, each being dependent on the approval of the other. Although the protocol made provision for joint hearings, none were needed.

---

[224] United States Bankruptcy Court for the Southern District of New York, Case No. 94 B 44840, (23 May 1996), and the District Court of Jerusalem, (Israel) Case No. 1595/87, (23 May 1996).

[225] British Columbia Supreme Court, Vancouver, (Canada) Case No. L011792, (28 June 2001) and United States Bankruptcy Court for the Southern District of New York, Case No. 01-13721-alg, (29 August 2001).

22. Olympia & York Developments Limited (1993)[226]

The case of Olympia & York Developments Ltd. involved a Canadian parent company and its subsidiaries that operated primarily in the United States, Canada and the United Kingdom. The protocol was drafted to harmonize the Canadian and the United States proceedings, and to achieve a consensus among the various parties regarding the corporate governance of the debtor by reconstructing the board of directors of each corporation. The protocol included provisions, among others, on the composition, authority, actions, removal and re-election of the directors, and also the modification and approval of the protocol. The Olympia & York cross-border cooperation framework resulted in the speedy and efficient reorganizations of the debtors.

23. Peregrine Investments Holdings Limited (1999)[227]

In the Peregrine case, the debtor was incorporated in Bermuda and had its principal place of business in the Hong Kong SAR, where insolvency proceedings were commenced. Shortly afterwards, insolvency proceedings were also initiated in Bermuda, primarily to avoid jurisdictional conflicts and to ensure that the insolvency representatives appointed in the Hong Kong SAR had full authority in other jurisdictions and in relation to assets located outside of Hong Kong. The insolvency representatives were the same persons in both proceedings except for one person appointed only in the Bermudan proceedings, but all were employed by the same international law firm. The protocol was developed to harmonise and coordinate the proceedings; ensure the orderly and efficient administration of the proceedings in the two jurisdictions; identify, preserve and maximize the value of the debtor's worldwide assets for the collective benefit of the debtor's creditors and other parties in interest; coordinate activities; and share information. The protocol determined that the Bermudan proceedings would be the main proceedings and the Hong Kong SAR proceedings the non-main proceedings. Nevertheless, substantially all of the liquidation of the debtor's assets was to be carried out in and from the Hong Kong SAR, as the debtor's business activities were and had always been focussed there. The protocol determined which matters should be principally dealt with in the Hong Kong SAR, for example the adjudication of claims of creditors and distribution of dividends to creditors. It also included provisions on claims and distribution; the rights and powers of the insolvency representatives with respect to the exchange of information; costs and their taxation; and applications to the courts. As annexes, the protocol contained forms for the proof of debt; notice of rejection of proof of debt and notice of election.

---

[226] Ontario Court of Justice, Toronto, (Canada) Case No. B125/92, (26 July 1993) and United States Bankruptcy Court for the Southern District of New York, Case No's 92-B-42698-42701, (15 July 1993) (Reasons for Decision of the Ontario Court of Justice: (1993), 20 C.B.R. (3d) 165).

[227] High Court of the Hong Kong Special Administrative Region, HCCW Companies (Winding-up) No. 20 of 1998, and the Supreme Court of Bermuda Companies (Winding-up) No. 15 of 1998, (1999).

24. Philip Services Corporation (1999)[228]

This case is noted as being the first "cross-border pre-pack".[229] Prior to the instigation of insolvency proceedings, the debtor negotiated a reorganization plan with its creditors over several months. It was intended that, following court approval, the plan would be implemented in both jurisdictions. As in the Loewen case, a fully developed protocol was presented to and approved by the courts as an initial order. The case has been cited as an example of a protocol providing for broad and general harmonization and coordination of cross-border proceedings, in line with the principles of the Concordat (as opposed to the very specific protocol in Tee-Comm. Electronics (see below, para. 31). The broad goals of the protocol included: promoting orderly, efficient, fair and open administration; respecting the respective courts' independence and integrity; promoting international cooperation and respect for comity; and implementing a framework of general principles to address administrative issues arising from the cross border nature of the proceedings. To achieve those goals, the protocol addressed, among other things, court-to-court coordination and cooperation; the retention and compensation of professionals; and joint recognition of stays of proceedings. Under the protocol, the courts also agreed to cooperate, wherever feasible, in the coordination of claims processes; voting procedures; and plan confirmation procedures.

25. Pioneer Companies Inc.[230]

The Pioneer case involved insolvency proceedings in the United States of a United States multinational enterprise and certain of its direct and indirect subsidiaries and affiliates and insolvency proceedings in Canada concerning one Canadian subsidiary, which was also a debtor in the United States cases. The format and provisions of the protocol resembled those in Laidlaw, Loewen, and Mosaic cases. In addition, the protocol recognized that it was in the interests of the debtors and their stakeholders that the United States court should take charge of the principal administration of the reorganization and set forth general principles for the manner in which claims made against the debtors should be adjudicated, in particular relating to proving claims against the debtors.

26. PSINet Inc. (2001)[231]

PSINet involved insolvency proceedings in Canada and the United States. The protocol was entered into to coordinate the insolvency proceedings pending in both jurisdiction and was similar in structure to the protocols in Loewen, Laidlaw and Mosaic. In addition, the protocol set out certain cross-border insolvency and restructuring matters raised by the nature of the debtors' business operations in the United States and Canada and the interconnectivity and interdependence of the lines

---

228 United States Bankruptcy Court for the District of Delaware, Case No. 99-B-02385, (28 June 1999), and the Ontario Superior Court of Justice, Toronto, Case No. 99-CL-3442, (25 June 1999).

229 A process available in some jurisdictions, where a reorganization plan is negotiated voluntarily prior to commencement of insolvency proceedings and subsequently approved by the court.

230 Quebec Superior Court, (Re PCI Chemicals Canada Inc.,) (Canada) Case No. 5000-05-066677-012, (1August, 2001) and the United States Bankruptcy Court for the Southern District of Texas, (Re Pioneer Companies Inc.) Case No. 01-38259, (1 August 2001).

231 Ontario Superior Court of Justice, Toronto, (Canada) Case No. 01-CL-4155, (10 July 2001) and the United States Bankruptcy Court for the Southern District of New York, Case No. 01-13213, (10 July 2001).

of communications in the group's global business and internet operations, which required the assistance of both courts to resolve fairly and efficiently. Those matters included: asset sale approval; allocation of proceeds; treatment of inter-company claims; and approval and implementation of any reorganization plan involving as parties the debtors of each jurisdiction. The protocol established guidelines with respect to those matters, which were to be determined and resolved by joint hearings of the courts. The protocol authorized use of the Court-to-Court Guidelines. The protocol was a key factor in the successful sale of PSINet's Canadian assets.

27. Quebecor World Inc. (2008)[232]

The Quebecor case involved parallel proceedings pending in the United States and Canada. The debtors proposed approval of a protocol at the outset of the cases as one of their "first day" orders, anticipating the need for court to court communication and joint hearings to facilitate the proceedings due to the large scale of the debtors' operations in both countries. The United States judge delayed the approval of the protocol, in order to establish a creditor committee and provide it with the opportunity to comment on the procedure. As a result, the original protocol was amended to include expanded notice provisions; a provision to further develop a joint claims protocol with respect to the timing, process, jurisdiction and the law applicable to the resolution of intercompany claims filed by the debtors' creditors in both proceedings; and a detailed provision relating to procedures to be followed when relief requested in one State was deemed to have a material impact in other States. The protocol also incorporated the Court-to-Court Guidelines. Joint hearings were held to approve the sale of the debtors' European operations and resulted in the prompt entry of separate orders approving that sale.

28. SENDO International Limited (2006)[233]

In the cases of SENDO, main insolvency proceedings were pending in the United Kingdom and secondary insolvency proceedings in France. The secondary proceedings were commenced at the request of the insolvency representative in the main proceeding because of employees of SENDO in France. Through the opening of the secondary proceedings, the employees in France were covered by French insolvency law, which was more favourable than English law, and the French insolvency representative could sell assets located on French territory and gather together statements of outstanding receivables registered by SENDO's French and foreign creditors. The insolvency representatives of both proceedings entered into an agreement to coordinate the two insolvency proceedings, noting that the EC Regulation only established very general operating principles. In the agreement, the insolvency representatives agreed to act, for the purposes of implementing such operating principles, with mutual trust and to adhere to the duty to communicate information and to cooperate as defined by Article 31 of the EC Regulation, with the main proceeding taking precedence over the secondary proceeding. The agreement included provisions on the treatment of notice and submission of claims of creditors; on practical means of verification of claims; treatment of legal costs; and on the treatment of the assets of the French branch of the debtor.

---

[232] Montreal Superior Court, Commercial Division, (Canada) No. 500-11-032338-085 and the United States Bankruptcy Court for the Southern District of New York, No. 08-10152 (JMP), (2003).

[233] Insolvency proceedings before the High Court of Justice, Chancery Division of London (United Kingdom) and before the Commercial Court of Nanterre (France), (2006).

29. Solv-Ex Canada Limited and Solv-Ex Corporation (1998)[234]

In the case of Solv-Ex Canada, involving the United States and Canada, a number of contrary rulings by the two courts had effectively deadlocked proceedings. Following negotiations between the parties, simultaneous proceedings, connected by telephone conference call, were arranged to approve the sale of the debtors' assets. The courts reached identical conclusions authorizing the sale, and encouraged the parties to negotiate a cross-border insolvency protocol to govern further proceedings in the case. Procedural matters agreed between the parties included that identical materials would be filed in both jurisdictions and the presiding judges could communicate with one another, without counsel present, to (a) agree on guidelines for the hearings, and, subsequently, (b) determine whether they could make consistent rulings. The courts subsequently approved the protocol.

30. Systech Retail Systems Corp. (2003)[235]

Systech Retail Systems involved insolvency proceedings in the United States and Canada for a large provider of retail point of sale field services, operating though various Canadian and American subsidiaries and affiliates. The debtor companies developed a protocol to establish basic administrative procedures between the proceedings in both jurisdictions. The protocol included provisions on comity and independence of the courts; cooperation; retention and compensation of insolvency representatives and professionals; notice; joint recognition of the stays of proceedings under the laws of both jurisdictions; rights to appear and be heard; and procedures on resolving disputes under the protocol. The protocol also included the Court-to-Court Guidelines. Subsequent to approval of the protocol by both courts, a joint hearing was held in accordance with the Guidelines, which resolved and coordinated a number of cross-border issues in the case.

31. Tee-Comm. Electronics Inc (1997)[236]

The protocol in Tee-Comm. Electronics Inc., a case involving the United States and Canada, may be characterized as a specific-purpose protocol with a narrow focus. It established a framework under which the administrators in the two jurisdictions would jointly market the debtors' assets, so as to maximize the value of the estate. Accordingly, it addressed the sale of those assets, which was the key issue at the outset of the case, but no other matters, such as entitlement to and distribution of proceeds.

32. United Pan-Europe Communications N.V. (2003)[237]

In this case, the debtor was a leading cable and telecommunications company based in the Netherlands with ownership interests in direct and indirect operating subsidiaries, including in the United States. Insolvency proceedings commenced in

---

[234] Alberta Court of Queen's Bench, Case No. 9701-10022, (28 January 1998), and the United States Bankruptcy Court for the District of New Mexico, Case No. 11-97-14362-MA, (28 January 1998).

[235] Ontario Court of Justice, Toronto, Court File No. 03-CL-4836, (20 January 2003) and the United States Bankruptcy Court for the Eastern District of North Carolina, Raleigh Division, Case No. 03-00142-5-ATS, (30 January 2003).

[236] In re AlphaStar Television/Tee-Comm Distribution, Inc, Ontario Court of Justice (Canada) and the United States Bankruptcy Court for the District of Delaware, (27 June 1997).

[237] Proper citation to be provided later.

the United States and the Netherlands. As the debtor's Dutch counsel was of the view that a protocol was not permissible under Dutch law and procedure, the debtor's Dutch and United States counsel worked closely together as issues arose in the proceedings to ensure that all decisions complied with both laws, Dutch and United States. Both insolvency representatives were involved in the deliberations. The coordination included: continuous provision of information to the courts and insolvency representatives; retention and compensation of counsel and insolvency representatives; the development of solicitation procedures for use in both cases; assets sales; and a reorganization plan. As a result, the United States and the Dutch proceedings closed on the same day.

D. Report of the Working Group on Insolvency Law on the work of its thirty-sixth session (New York, 18-22 May 2009)

(A/CN.9/671) [Original: English]

CONTENTS

I. Introduction

1. At its thirty-ninth session in 2006, the Commission agreed that the topic of the treatment of enterprise groups in insolvency was sufficiently developed for referral to Working Group V (Insolvency Law) for consideration 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.

2. The Working Group agreed at its thirty-first session, held in Vienna from 11 to 15 December 2006, that the UNCITRAL Legislative Guide on Insolvency Law and the UNCITRAL Model Law on Cross Border Insolvency provided a sound basis for the unification of insolvency law, and that the current work was intended to complement those texts, not to replace them (see A/CN.9/618, para. 69). A possible method of work would entail the consideration of those provisions contained in existing texts that might be relevant in the context of enterprise groups and the identification of those issues that required additional discussion and the preparation of additional recommendations. Other issues, although relevant to enterprise groups, could be treated in the same manner as in the Legislative Guide and Model Law. It was also suggested that the possible outcome of that work might be in the form of legislative recommendations supported by a discussion of the underlying policy consideration (see A/CN.9/618, para. 70).

3. The Working Group continued its consideration of the treatment of enterprise groups in insolvency at its thirty-second session in May 2007, on the basis of notes by the Secretariat covering both domestic and international treatment of corporate groups (A/CN.9/WG.V/WP.76 and Add.1). For lack of time, the Working Group did not discuss the international treatment of enterprise groups contained in document A/CN.9/WG.V/WP.76/Add.2.

4. At its thirty-third session in November 2007, its thirty-fourth session in March 2008 and its thirty-fifth session in November 2008, the Working Group continued its discussion of the treatment of enterprise groups, before referred to as corporate groups, in insolvency, on the basis of notes by the Secretariat (A/CN.9/WG.V/WP.78 and Add.1, A/CN.9/WG.V/WP.80 and Add.1 and A/CN.9/WG.V/WP.82 and Add.1-4).

II. Organization of the session

5. Working Group V (Insolvency Law), which was composed of all States members of the Commission, held its thirty-sixth session in New York from 18 to 22 May 2009. The session was attended by representatives of the following States members of the Working Group: Algeria, Australia, Belarus, Benin, Bulgaria, Canada, Chile, China, Colombia, Czech Republic, Ecuador, Egypt, Fiji, France, Germany, Greece, Guatemala, India, Iran (Islamic Republic of), Italy, Japan, Kenya, Latvia, Malaysia, Mexico, Morocco, Nigeria, Norway, Poland, Republic of Korea, Russian Federation, Senegal, South Africa, Spain, Switzerland, Thailand, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

6. The session was also attended by observers from the following States: Afghanistan, Angola, Bangladesh, Belgium, Croatia, Denmark, Ghana, Indonesia, Iraq, Ireland, Lithuania, Mauritania, Philippines, Qatar, Republic of Moldova, Slovenia and Turkey.

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

(a) *Organizations of the United Nations system*: International Monetary Fund (IMF) and The World Bank;

(b) *Intergovernmental organizations*: Economic Community of West African States (ECOWAS) and European Commission;

(c) *Invited international non-governmental organizations*: American Bar Association (ABA), American Bar Foundation (ABF), INSOL International (INSOL), Inter-Pacific Bar Association (IPBA), International Bar Association (IBA), International Credit Insurance and Surety Association (ICISA), International Insolvency Institute (III), International Women's Insolvency & Restructuring Confederation (IWIRC), International Working Group on European Insolvency Law (IWGEIL) and Union internationale des Avocats (UIA).

8. The Working Group elected the following officers:

Chairman: Mr. Wisit Wisitsora-At (Thailand)

Rapporteur: Ms. Haini Hassan (Malaysia)

9. The Working Group had before it the following documents:

(a) Annotated provisional agenda (A/CN.9/WG.V/WP.84);

(b) A Note by the Secretariat on the treatment of enterprise groups in insolvency (A/CN.9/WG.V/WP.85 and Add.1);

(c) A Note by the Secretariat on cooperation, communication and coordination in cross-border insolvency proceedings (A/CN.9/WG.V/WP.86 and Add.1-3);

(d) A Note by the Secretariat on the discussion of intellectual property in the Legislative Guide on Insolvency Law (A/CN.9/WG.V/WP.87);

(e) A proposal by the United States of America on post-application finance (A/CN.9/WG.V/WP.88); and

(f) An addendum to a Note by the Secretariat on the draft annex to the UNCITRAL Legislative Guide on Secured Transactions dealing with security rights in intellectual property and, in particular, the impact of the insolvency of a licensor or licensee of intellectual property on a security right in that party's rights under a licence agreement (A/CN.9/WG.VI/WP.37/Add.4).

10. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of cooperation, communication and coordination in cross-border insolvency proceedings, the treatment of enterprise groups in insolvency and the impact of insolvency on a security right in intellectual property.
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

11. The Working Group commenced its discussion of cooperation, communication and coordination in insolvency proceedings on the basis of document A/CN.9/WG.V/WP.86 and Add.1-3 and continued its discussion of the treatment of enterprise groups in insolvency on the basis of documents A/CN.9/WG.V/WP.85 and Add.1 and A/CN.9/WG.V/WP.88 and other documents referred therein. The Working Group also considered the impact of insolvency on a security right in intellectual property on the basis of documents A/CN.9/WG.V/WP.87 and A/CN.9/WG.VI/WP.37/Add.4 and an extract of the Report of Working Group VI on the work of its fifteenth session (A/CN.9/WG.VI/XV/CRP.1/Add.5). The deliberations and decisions of the Working Group on these topics are reflected below.

IV. Cooperation, communication and coordination in cross-border insolvency proceedings

12. The Working Group commenced its discussion of cooperation, communication and coordination in cross-border insolvency proceedings on the basis of document A/CN.9/WG.V/WP.86, the draft UNCITRAL Notes on cooperation, communication and coordination in cross-border insolvency proceedings ("the Notes").

13. The Working Group expressed its appreciation for the Notes and emphasized their usefulness for practitioners and judges, as well as creditors and other stakeholders, particularly in the context of the current financial crisis. In that regard, the Notes were viewed as very timely, having application in a number of large, complex cases and being the first document on cross-border agreements to be prepared by an international organization. The Working Group further expressed its appreciation for the incorporation of the suggestions on the previous draft of the Notes (document A/CN.9/WG.V/WP.83), which had been circulated to Governments for comment.

14. The Working Group recalled its decision at its last session (see A/CN.9/666, para. 21) to defer the question of the final title of the Notes to a later stage. Suggestions made with respect to the title included changing the reference to notes to either "guiding principles" or "recommendations" on protocols and cooperation, communication and coordination. Some support was expressed for those proposals, although it was recalled that, at its previous session, it was proposed that since the document was purely descriptive, it did not offer guidance and should not constitute a guide. After discussion, the Working Group agreed that the title of the Notes should be "Practice Guide on cooperation, communication and coordination in cross-border insolvency proceedings", as the adjective "practice" would take care of the concerns previously expressed with respect to the word "guide". The Working Group noted that the references to the title throughout the draft document would have to be changed accordingly.

15. The Working Group adopted the Notes with the view to their possible finalization and adoption by the Commission at its forty-second session in 2009. It was noted that the practical application of the Notes would be discussed at the 8th Multinational UNCITRAL/INSOL/World Bank Judicial Colloquium to be held in June 2009, prior to the forty-second session of the Commission.

V. Treatment of enterprise groups in insolvency

A. International issues

16. The Working Group continued its discussion of the treatment of enterprise groups in insolvency on the basis of documents A/CN.9/WG.V/WP.85 and Add.1 and other documents referred to therein, commencing with international issues as set forth in Add.1.

1. The coordination centre of an enterprise group

Draft recommendations 1 and 2

17. The Working Group recalled the discussion at its previous session (A/CN.9/666, para. 31) and the purposes for which it might be desirable to identify one of the enterprise group members as a coordination centre in order to achieve the objectives set forth in paragraph 5 of document A/CN.9/WG.V/WP.85/Add.1. It was recalled, in particular, that the coordination centre was to be a first among equals and not have additional powers by virtue of being the coordination centre.

18. While the achievement of the objectives set forth in paragraph 5 was generally supported, the view was expressed that identifying a coordination centre in an enterprise group brought with it a number of the difficulties associated with identifying the centre of main interests (COMI) of an individual debtor. Those included, in particular, whether the decision identifying a particular coordination centre in one State could be enforced or at least recognized in other States and which State should make the identification decision. One option suggested was the court of the State in which proceedings were first initiated with respect to a group member. A second suggestion was the court of the State in which coordination was sought. In support of the latter, it was observed that if the location of the coordination centre in the first State was not legitimate, the second State would be unlikely to cooperate.

19. Additional concerns related to: ensuring that the function of that centre was procedural and not substantive; ensuring there was sufficient flexibility to take account of individual cases; the need for speed in identifying the coordination centre, which suggested the desirability of avoiding complex criteria; the need to avoid forum shopping; the desirability of identifying the role to be played by the coordinating entity; the desirability of identifying a coordination centre only when determined to be useful or necessary to achieve global reorganization of a group; and the need to distinguish between the role of courts in coordination and cooperation and that of the coordinating group member. It was noted with respect to the latter point, that the Working Group had not considered, at its previous session, whether coordination should be initiated and led by the court responsible for conduct of the proceedings with respect to the coordinating member or the relevant insolvency representative (see para. 6, A/CN.9/WG.V/WP.85/Add.1).

20. It was widely agreed that a decision by one court identifying a coordination centre should not be binding in other States. Courts in other States could agree with such a decision, but if they did not that should not preclude coordination and cooperation between the different courts.

21. It was observed that many cross-border group insolvency cases were led from the top of the group, including with respect to coordination and cooperation. Further, it was suggested that where that occurred, little might be gained from seeking to formally identify that top group member as the coordination centre as it would gain no additional powers or broader recognition for its role than it would already have in a de facto sense as the top group member. In response, it was suggested that the key reason for seeking to identify a coordination centre was to address the problem of duelling jurisdictions. It was pointed out, however, that if the decision as to the coordination centre was not binding, a recommendation on identifying the coordination centre might add little to the other provisions on court-

to-court cooperation and coordination. It was also pointed out that in some cases it might be appropriate to have multiple coordination centres for different sub-groups or business units of a group.

22. Although there was some support for retaining a recommendation on the coordination centre, the Working Group was unable to identify a clear role for such a centre that would add to the more general recommendations on coordination and cooperation between the courts and insolvency representatives. Accordingly, the Working Group agreed to consider the other draft recommendations before deciding on the need for a recommendation on the coordination centre.

23. After further discussion, the Working Group agreed to delete draft recommendations 1 and 2, on the basis that the determination of a coordination centre did not imply any legal consequences because it was non-binding. The Working Group nevertheless recognized the value of one entity having the leading role in the cooperation and agreed to address the importance of having one entity acting as the coordinating member in the commentary.

2. Facilitating cooperation and communication

Draft recommendation 3

24. The Working Group noted that draft recommendation 3 was based on article 25 of the Model Law, appropriately extending the article to cover the situation of enterprise groups. One suggestion with respect to the draft recommendation was that the references to cooperation could be supplemented by adding a reference to coordination, which might be pursued through the coordination centre. In response, it was suggested that a general obligation for the courts and insolvency representatives to cooperate, through the use of a variety of tools, including the Notes, made it unnecessary to identify a coordination centre. After discussion, the Working Group adopted draft recommendation 3 in substance.

Draft recommendation 4

25. It was noted that the value of draft recommendation 4 was to authorize and encourage insolvency representatives to take whatever steps were required to ensure coordination of all proceedings with respect to group members, thereby avoiding a narrow interpretation of their functions. It was also noted that the reference to facilitation of coordination was sufficient and no further reference to a coordination centre was required. After discussion, the Working Group adopted draft recommendation 4 in substance.

Draft recommendation 5

26. As a matter of drafting, a question was raised as to whether the reference to “the court” in the first line of draft recommendation 5 should be to “a court”. In response, it was clarified that since the draft recommendations were intended to be enacted in domestic law, the reference would be to the domestic court and the use of “a court” would not therefore be appropriate. For similar reasons, it was noted that the references “in this State” in the draft recommendations were not required. The Working Group adopted draft recommendation 5 in substance and agreed that the drafting matters should be addressed by the Secretariat.

Draft recommendation 6

27. It was emphasized that draft recommendation 6 usefully extended article 26 of the Model Law to enterprise groups and appropriately authorized insolvency representatives, the party most commonly initiating communication, to communicate with foreign courts or representatives. The Working Group adopted draft recommendation 6 in substance.

Draft recommendation 7

28. Broad support was expressed in favour of deleting the square brackets and retaining the text to ensure a broad and flexible application, in particular in situations where the court may not play an active role in cross-border communication. The Working Group adopted draft recommendation 7 in substance with the deletion of the term "two-way" before "communication", in order to better reflect the nature of the communication between multiple parties.

Draft recommendation 8

Square brackets

29. Support was expressed in favour of retaining the text of the draft recommendation with the deletion of the square brackets, in order to align it with draft recommendation 7.

Chapeau

30. The question was raised whether the chapeau of draft recommendation 8 should also include the words "to the extent permitted by applicable law", as contained in draft recommendation 7 or whether the references in paragraphs (b) and (e) were sufficient. The Secretariat was requested to review the use of the reference to applicable law.

Paragraph (a)

31. The Working Group agreed to replace the word "agreed" with the word "determined".

Paragraph (b)

32. It was suggested that the word "should" be replaced with the word "may", so that the provision of notice would be optional, not prescriptive. A further suggestion was that the provision of notice should be determined by the court. Those proposals were not supported.

Paragraphs (d)-(e) — Confidentiality

33. Concerns were expressed that by establishing confidentiality as the default position, paragraphs (d)-(e) did not adhere to the principle of transparency, which should be the guiding principle in insolvency proceedings. Moreover, it was observed that paragraphs (c), (d) and (e) as currently drafted were not consistent. Various suggestions were made to address those concerns, including: (i) that paragraph (e) be limited to administrative matters to ensure substantive rights would not be affected; (ii) that the chapeau be rephrased to allow the courts and the various

participants to decide on the issues set forth in paragraphs (a)-(e); (iii) that parties in interest should be able to object to a decision to treat certain information as confidential; (iv) that the word "should" in paragraph (e) be replaced with "may", to clarify the exceptional character of the paragraph; (v) that since those issues were not addressed in the Model Law they should not be addressed in the draft recommendations. In response, it was stated that draft recommendation 8 was specific to supranational enterprise groups and that the Working Group should not be constrained only because it had not dealt with those issues previously; (vi) that paragraph (e) be deleted, on the basis that a provision on confidentiality of communication had the potential to be misused. That proposal was opposed on the basis that there might be situations that would warrant confidentiality and paragraph (e) thus achieved an appropriate balance.

34. After discussion, it was generally agreed draft recommendation 8 should be limited to providing that confidentiality would be an exception. To that end, the Working Group agreed to include after the words "should be" the words "only in exceptional cases".

Protection of the rights of affected parties

35. Another issue raised was ensuring that information that was confidential should not be communicated where to do so would affect the rights of certain parties. It was pointed out that that issue could be distinguished from the confidentiality of the communication as addressed in paragraph (e), which did not deal with the content of the information communicated. To protect confidential information, it was proposed that a new paragraph (f) be included along the following lines:

> "Communication should respect the mandatory rules of the jurisdictions involved in the communication as well as the substantive rights of affected parties, in particular the confidentiality of information in accordance with applicable law."

36. One response to that proposal was that the protection of substantive rights was not an issue for insolvency law, as it belonged to other kinds of law, such as contractual or constitutional law. Another response was that the inclusion of a new paragraph on protection of the rights of the affected parties was necessary, as the authorization of direct communication in the cross-border context constituted a novelty for many legal systems. The concern was expressed that the word "substantive" might not be sufficient, as the rights of the parties might be of a procedural nature. After discussion, the Working Group agreed to add a new paragraph (f) to draft recommendation 8 along the lines proposed, with the inclusion of a reference to procedural rights.

37. It was noted that recommendation 111 of the Legislative Guide covered confidentiality of information and a reference to that recommendation might be included in the commentary to accompany the draft recommendations. It was recalled that the Guide to Enactment to the Model Law explained, in paragraph 182, that the implementation of cooperation was subject to any mandatory rules applicable in the enacting State and a reference to that paragraph might also be included in any commentary.

Draft recommendation 9

38. The principle set forth in draft recommendation 9 was generally supported. Several proposals were made with respect to improvement of the drafting to more clearly reflect what was intended. One proposal was that the chapeau should be revised to read "the insolvency law should specify that, for greater certainty, communication in accordance with these recommendations should be interpreted as constituting" or, as an alternative, "as reflecting", with appropriate changes to the beginning of the subparagraphs. Another proposal was to revise draft recommendation 9 as follows:

> "The insolvency law should specify that:
>
> (a) No compromise or waiver by the court of any powers, responsibilities or authority;
>
> (b) No substantive determination of any matter in controversy before the court or the foreign court;
>
> (c) No waiver by any of the parties of any of their substantive rights and claims; and
>
> (d) No diminution of the effect of any of the orders made by the court or the foreign court,
>
> shall be implied as the result of the communication made in accordance with these recommendations."

39. The Working Group approved the substance of that proposal, subject to any revisions required to align the draft recommendation with other draft recommendations.

Draft recommendation 10

40. The Working Group supported the desirability of including a recommendation along the lines of draft recommendation 10. Concerns were expressed, however, with respect to the use of the word "joint" to describe the type of hearing contemplated. It was suggested that it must be clear from the language used that there was no intermingling of the hearings and that each court would hold its own hearing in accordance with the requirements of applicable law, but that the courts might deliberate jointly or collaborate with each other. It was proposed that the draft recommendation might provide that the court was authorized to conduct a hearing in coordination with a foreign court. That proposal was widely supported.

41. A second suggestion was that, for greater clarity, the substance of the footnote might be included in the text of the draft recommendation, with appropriate drafting revisions. That suggestion was also widely supported.

42. After discussion, the Working Group adopted the substance of draft recommendation 10 with the proposed revisions.

Draft recommendation 11

43. One proposal made with respect to draft recommendation 11 was that some of the detail, in particular, the second sentence of paragraph (a) and the examples in paragraph (e), might be included in any commentary to the recommendations in

order to avoid the interpretation that the examples given were intended to be exhaustive. That proposal was widely supported.

44. As a matter of drafting, it was noted that the opening words of paragraph (c) were not required as they were already set forth in the chapeau.

45. It was pointed out that article 26 of the Model Law provided for cooperation between insolvency representatives to be subject to the supervision of the court. It was questioned whether that approach should be followed in draft recommendation 11 or whether supervision of the court was only required with respect to substantive matters, such as those set forth in paragraph (e). In response, it was suggested that since the requirement for court supervision in article 26 was specifically limited to matters within the scope of article 1 of the Model Law, there was no requirement for that approach to be followed in draft recommendation 11 and to establish supervision as a precondition to cooperation. Moreover, it was pointed out that the words "to the extent permitted by law" would be sufficient to take account of any local requirements with respect to court supervision. The prevailing view was that greater supervision by the court was not required and the limitation provided by domestic law was sufficient. It was suggested that any commentary to the draft recommendations might discuss what was intended by the reference to applicable law and the different approaches that insolvency laws adopted.

46. After discussion, the Working Group adopted the substance of draft recommendation 11 with the revisions noted above.

Draft recommendation 12

47. It was proposed that draft recommendation 12 might be expanded to include more detail, such as a reference to the place of the agreement and the means of communication, including modern means such as videoconferencing. In response, it was proposed that the first sentence was sufficient as drafted to state the general principle and that the second sentence should be deleted. That deletion was generally supported. It was further suggested that draft recommendation 12 should appear before draft recommendation 11. The Working Group agreed on the substance of draft recommendation 12 with the deletion of the second sentence and on its placement before draft recommendation 11.

3. Use of cross-border agreements

Draft recommendation 13

48. With respect to the reference to approval by the court, it was suggested that a wider formulation might be required to include non-judicial or non-supervisory authorities, such as a government ministry, that might be required to approve certain aspects of a cross-border agreement, such as a distribution with foreign exchange implications. To include that possibility, it was suggested that the draft recommendation should refer to approval by the courts "or any other competent authority". A different view was that the reference to the court was sufficiently broad and approval by other such authorities should not be introduced. To address those concerns, it was proposed that the draft recommendation should provide that insolvency representatives and other parties in interest should be authorized to enter

into such agreements "to the extent permitted or in the manner required by law", without including a specific reference to approval by the courts.

49. The Working Group adopted the substance of the draft recommendation with that revision.

Draft recommendation 14

50. The Working Group adopted the substance of the draft recommendation with the deletion of the word "authorize" and use of a word such as "empower".

4. Facilitating coordination — the insolvency representative

Draft recommendation 15

51. The Working Group generally supported the idea that the same insolvency representative could be appointed in different insolvency proceedings as it would facilitate the coordination of those proceedings. Some concerns were expressed, however, with respect to the potential for conflicts of interest to arise, as previously discussed in the context of domestic issues (previously draft recommendation 27 as discussed in document A/CN.9/666, para. 102, now numbered draft recommendation 231), and the need to include an appropriate provision to address that eventuality. A suggestion that draft recommendation 15 be aligned with draft recommendation 231 received support.

52. It was noted that draft recommendation 230 (A/CN.9/WG.V/WP.85), which addressed the appointment of a single or the same insolvency representative in the domestic context, was limited by the words "where the court determines it to be in the best interests of the administration of the insolvency proceedings" and suggested that those words or words such as "in appropriate cases" might be included in draft recommendation 15. The adoption of such a formulation was generally supported.

53. A further concern related to the second sentence of the draft recommendation and the need to clarify that the insolvency representative would be subject to the supervision of the court in each of the States in which it was appointed. To that end, it was proposed that the final words of the second sentence be revised to provide for "supervision of each of the appointing courts". That proposal was widely supported.

54. A drafting suggestion that the word "authorize" be replaced with a word such as "empower" or "permit" to align the draft recommendation with draft recommendation 14 was widely supported.

5. Format of the work on enterprise groups in insolvency in the international context

55. The Working Group noted that, although dealing with the international treatment of enterprise groups, the draft recommendations addressed the content of domestic legislation, and they might therefore be added to part three of the Legislative Guide, together with the draft recommendations on domestic issues. It was acknowledged that, although the form of a Model Law might be desirable, it might not be realistic to pursue that type of text at this stage in view of the time that might be required for its negotiation, the current need for the provisions on enterprise groups in light of the global financial crisis and the question of whether there was the support necessary for its negotiation. The Working Group agreed that the draft recommendations on the international treatment of enterprise groups in

insolvency should be included in part three of the Legislative Guide and adopt the same format as the preceding parts of the Legislative Guide.

B. Domestic issues

56. The Working Group continued its consideration of the domestic treatment of enterprise groups on the basis of document A/CN.9/WG.V/WP.85.

Glossary

(a) Enterprise group

57. A proposal to delete the reference to "significant ownership" received some support on the basis that it would be difficult to define and that the concept of "control" was sufficient. After discussion, the prevailing view was that the reference to significant ownership should be retained.

(b) Enterprise

58. The Working Group recalled previous discussions that the term "enterprise" should not include financial and other specialized institutions on the same basis as article 1.2 of the Model Law and part two, chapter 1, paragraph 11 of the Legislative Guide. It was agreed that footnote 1 should be revised to clarify that exclusion.

(c) Control

59. A proposal was made to replace the word "and" with "or" to provide greater flexibility, on the basis that the current wording constituted an unnecessary limitation. In response, it was noted that that issue had previously been extensively discussed and that both concepts were viewed as necessary. After discussion, the prevailing view was that the word "and" should be retained.

(d) Procedural coordination

60. The Working Group approved the substance of the explanation of "procedural coordination" as set forth in paragraph (d).

(e) Substantive consolidation

61. Some preference was expressed for the formulation contained in the square brackets, as the word "pooling" better described what occurred in substantive consolidation. The prevailing view, however, was that the words "as if they were part of a single insolvency estate" were preferable to the words "to form a single insolvency estate".

1. Joint application

Purpose clause

Chapeau — "two or more enterprise group members"

62. One question raised was whether the words "two or more" with respect to enterprise group members were redundant and could be deleted, as the explanation

of the term "enterprise group" already contained the notion of two or more enterprise group members. That proposal did not find support.

Paragraph (d)

63. The concern was expressed that the current wording of paragraph (d) of the purpose clause implied that a joint application was the only mechanism for the court to assess whether procedural coordination was appropriate. To address that concern, it was proposed that paragraph (d) be deleted, that the word "additional" be inserted before the word "mechanism" or that a footnote be added to clarify that a joint application was not a pre-requisite for procedural coordination, but merely facilitated the consideration of the court. After discussion, the Working Group approved the purpose clause in substance with the inclusion of a footnote as proposed.

Draft recommendation 199

64. The concern was expressed that the words at the end of draft recommendation 199 "that satisfy the applicable commencement standard" could be wrongly interpreted as requiring the enterprise group members to collectively satisfy the commencement standard. To address that concern, the Working Group adopted draft recommendation 199 in substance with the insertion of the words "each of which satisfies the applicable commencement standard".

Draft recommendation 200

65. It was agreed that the words "the insolvency law should specify that" be added to the chapeau.

Paragraph (a)

66. The Working Group agreed that the words proposed for addition to draft recommendation 199 should also be added to paragraph (a) of draft recommendation 200 for consistency.

Paragraph (b)

67. It was observed that there might be situations in which it might be desirable for a creditor, who was not necessarily a creditor of each enterprise group member to be included in a joint application, to join together with other creditors to make a joint application. It was suggested that the words "or creditors provided that the applicant creditors included creditors of" be included to capture that possibility. Limited support was expressed in favour of that proposal. The prevailing view was that persons permitted to make a joint application should be creditors of each enterprise group member to be included in the joint application as to adopt a different standard might be contrary to the commencement provisions of many domestic laws and open the door to abuse.

68. The Working Group adopted the substance of draft recommendation 200 with the revisions noted above with respect to the chapeau and paragraph (a).

Draft recommendation 201

69. The Working Group adopted draft recommendation 201 in substance.

2. Procedural coordination

Purpose clause

70. A proposal to extend paragraph (b) to include notions of fairness and administrative efficiency was not supported. The Working Group adopted the substance of the purpose clause.

Draft recommendation 202

71. The Working Group adopted draft recommendation 202 in substance.

Draft recommendation 203

72. The question was raised whether the reference to court included in draft recommendation 203 should also include the plural ("the court and courts") to clarify that there could be more than one court involved. The Working Group's attention was drawn to draft recommendations 201 and 207, which included references in footnotes 6 and 8 to the issue of the competent court. After discussion, the Working Group adopted draft recommendation 203 in substance and agreed to reflect the discussion on courts in the commentary.

Draft recommendation 204

73. The Working Group agreed to delete the words "in accordance with the insolvency law".

74. It was proposed that the appointment of a single or the same insolvency representative be added to the list of examples contained in draft recommendation 204, on the basis that it was one of the most efficient means of facilitating procedural coordination. Different views were expressed in response. One view was that the list was illustrative, that there was no need to cover every possible example and that the appointment of a single or the same insolvency representative was already addressed in the purpose provision on the appointment of a single or the same insolvency representative in part F. Other views expressed proposed categorizing the examples by reference to courts and to the insolvency representative and deleting the latter examples, as they were already captured in draft recommendation 234 or moving all of the examples to the commentary. After discussion, the Working Group agreed to retain the examples in the draft recommendation and include a reference to the appointment of a single or the same insolvency representative.

Draft recommendation 205

75. The concern was expressed that since the words "or at any subsequent time" were too vague and might lead to abuse, it was preferable to indicate a specific time period within which an application for procedural coordination could be made. In response, it was said that the current formulation best captured the flexibility that was needed. In order to address the concern expressed, several proposals were made, including inserting after the words "at any subsequent time" the words

"provided that this was possible" or "as permitted by applicable law"; to replace "at any subsequent time" with words along the lines of "or provided that the status of proceedings would permit"; or to include a second sentence that would state "The insolvency law should specify the period of time for filing the application for procedural coordination". Another proposal was to adopt a footnote along the lines of the footnote to draft recommendation 220. After discussion, the Working Group adopted the substance of draft recommendation 205 with the addition of a footnote as proposed.

Draft recommendation 206

76. It was suggested that the court should have the ability, on its own motion, to initiate procedural coordination. The Working Group recalled that that issue had been discussed at its previous session (A/CN.9/666, para. 55) and it had been decided that since the Guide generally did not provide for courts to act on their own initiative in insolvency matters, that approach should be maintained. It was noted that the issue of the court acting on its own initiative with respect to procedural coordination was addressed in the commentary included in paragraphs 23-24 of document A/CN.9/WG.V/WP.82/Add.3.

77. In support of the proposal to include the possibility for the court to act on its own initiative in draft recommendation 206, it was noted that there might be situations in which procedural coordination would be appropriate but no application was made by the parties permitted to do so in the draft recommendation. It was also suggested that unless specifically provided with respect to insolvency proceedings in these recommendations, it might not be possible under general procedural law. After discussion, the Working Group agreed that such a provision be included and drafted along the lines of: "The insolvency law may permit the court to order procedural coordination on its own initiative."

Draft recommendation 207

78. As a matter of drafting, it was suggested that draft recommendation 207 should be aligned with draft recommendation 203 and refer to "the court", deleting the words "or the courts". To reflect the notion of coordination with other courts, it was proposed that words such as "with any other competent court" be added after the words "to coordinate" in the first sentence. That proposal was widely supported.

79. With respect to the second sentence, a proposal was made to clarify that the list was not exhaustive and to redraft it as follows: "Those steps might involve, for example, coordinated proceedings, joint hearings, sharing and disclosure of information." Recalling that it had agreed not to use the term "joint hearings" with respect to international issues, the Working Group noted that such hearings did not raise the same difficulties in the domestic context and thus might appropriately be included. The substance of draft recommendation 207 was approved with the proposed revisions.

Draft recommendation 208

80. The Working Group approved a proposal to delete the square brackets around the second sentence and to retain the text. A suggestion to change the terms "modify" and "terminate" to "vary" and "vacate" was not supported on the basis

that the terms "modify" and "terminate" were consistent with both the Model Law and the Legislative Guide.

Draft recommendations 209 and 210

81. It was noted that draft recommendation 209 should include the same footnote as draft recommendation 201. With that addition, the Working Group adopted the substance of draft recommendations 209 and 210.

3. Post-commencement finance

Purpose clause

82. A proposal to limit the scope of paragraph (d) to those group members involved in the post-commencement finance by adding the word "involved" at the end of the paragraph was widely supported.

83. The Working Group considered a number of proposals set forth in document A/CN.9/WG.V/WP.85, paragraphs 8-16 with respect to the draft recommendations on post-commencement finance.

Draft recommendation 211

84. It was widely agreed that draft recommendation 211 should state the general principle with respect to provision of post-commencement finance in the enterprise group context and include references to the granting of a security interest and a guarantee or other assurance and that the conditions attaching to the provision of such finance should be set forth in a separate recommendation.

85. To that end, it was proposed that paragraphs (a)-(c) of draft recommendation 211 might be sufficient if adopted with the deletion of the words in paragraph (c) after the first comma. A second proposal was that draft paragraph (a) might be sufficient as it was broad enough to include the substance of draft paragraphs (b) and (c). In response, it was observed that paragraphs (b) and (c) did not necessarily fall within (a) and that they gave more detail as to the possible ways in which post-commencement finance might be provided.

86. After discussion, the Working Group agreed to the first proposal to retain paragraphs (a)-(c) of draft recommendation 211, with the deletion of text as proposed.

87. As a matter of drafting, it was noted that the heading to draft recommendation 211 should be aligned with the scope of application of the recommendation to clarify that both the provider and receiver of post-commencement finance were subject to insolvency proceedings.

88. With respect to the conditions to apply to the provision of post-commencement finance, the Working Group based its discussion on the draft versions of recommendation 211 contained in paragraphs 10 and 15 of A/CN.9/WG.V/WP.85. Various proposals were made with respect to how those conditions should be formulated.

89. It was widely agreed that the insolvency representative should be required to make the determinations set forth in paragraph (a) of the paragraph 15 version of draft recommendation 211, as well as the determination as to harm set forth in

paragraph (c) of that version. Some concern was expressed as to the liability that might attach to an insolvency representative required to make such a determination. In response, it was suggested that the making of such a determination was really a question of risk allocation to be made on a case-by-case basis, but was not an issue to be addressed in the draft recommendation. It was also recalled that that language was used in recommendation 63.

90. It was also widely agreed that the court and creditors should play roles with respect to the provision of post-commencement finance, which should be stated in the alternative set forth in paragraphs (b) and (c) of the paragraph 15 version of draft recommendation 211. It was noted that the roles played by the courts and creditors under insolvency laws varied widely and, accordingly, the draft recommendation should adopt a flexible approach, allowing those States that gave a greater role to the courts to do so with respect to the approval of post-commencement finance and those that relied upon consent of creditors to adopt that approach. As currently drafted, it was noted that paragraph (c) was not specific as to the party to make the determination, but that it might be interpreted as including the court. In response to a proposal that the word "consent" with respect to creditors might be too restrictive and that the words "did not object" were preferable, the Working Group recalled that the word "consent" was used in recommendation 63. It was suggested that mechanisms for obtaining consent might be discussed in the commentary.

91. After discussion, it was proposed that the wording of the last sentence of recommendation 63 might be considered as an option to resolve some of the concerns expressed. The prevailing view was to support that proposal.

92. The Working Group agreed that it should be stated in a recommendation that the safeguards set forth in recommendations 65-67 applied to post-commencement finance provided in the enterprise group context. It was also agreed that the application of recommendation 63 to an enterprise group member receiving post-commencement finance should be clearly stated in a recommendation.

Draft recommendation 212

93. A proposal to add requirements for creditor consent or court approval with respect to priority in the draft recommendation were not widely supported on the basis that recommendation 64, upon which this draft recommendation was based, required the priority to be specified in the insolvency law and did not include those additional elements. In response to a query concerning the scope of the words "the priority", it was suggested that they could be interpreted broadly to mean the level of priority, if any, which might apply and that discussion of that issue could be included in the commentary. After discussion, the Working Group adopted draft recommendation 212 in substance.

Draft recommendations 213 and 214

94. The Working Group agreed that draft recommendations 213 and 214 could be deleted.

95. The following revision of the draft recommendations on post-commencement finance was proposed and the Working Group agreed to continue its discussion at a future session on the basis of that text.

1. Purpose of legislative provisions

The purpose of provisions on post-commencement finance for enterprise groups is:

(a) To facilitate finance to be obtained for the continued operation or survival of the business of the enterprise group members subject to insolvency proceedings or the preservation or enhancement of the value of the assets of those group members;

(b) To facilitate the provision of finance by enterprise group members, including group members subject to insolvency proceedings;

(c) To ensure appropriate protection for the providers of post-commencement finance and for those parties whose rights may be affected by the provision of that finance; and

(d) To advance the objective of fair apportionment of the benefit and detriment associated with the provision of post-commencement finance among all group members involved.

2. Contents of legislative provisions

Provision of post-commencement finance by a group member subject to insolvency proceedings to another group member subject to insolvency proceedings

211A. The insolvency law should permit an enterprise group member subject to insolvency proceedings to:

(a) Advance post-commencement finance to other enterprise group members subject to insolvency proceedings;

(b) Grant a security interest over its assets for post-commencement finance provided to another enterprise group member subject to insolvency proceedings; and

(c) Provide a guarantee or other assurance of repayment for post-commencement finance provided to another enterprise group member subject to insolvency proceedings.

211B. Post-commencement finance may be [provided] [advanced or facilitated] in accordance with recommendation 211A, where the insolvency representative of the group member advancing finance, granting a security interest or providing a guarantee or other assurance:

(a) Determines it to be necessary for the continued operation or survival of the business of that enterprise group member;

(b) Determines it to be necessary for the preservation or enhancement of the value of the estate of that enterprise group member; and

(c) Determines [in accordance with the insolvency law] that any harm to creditors is offset by the benefit to be derived from advancing finance, granting a security interest or providing a guarantee or other assurance.

211C. The insolvency law may require the court to authorize or creditors to consent to the provision of post-commencement finance in accordance with recommendations 211A and 211B.

Receipt of post-commencement finance by a group member subject to insolvency proceedings from another group member subject to insolvency proceedings

211D. In accordance with recommendation 63, post-commencement finance may be obtained by an enterprise group member subject to insolvency proceedings where the insolvency representative of that group member determines it to be necessary for the continued operation or survival of the business of that group member or the preservation or enhancement of the value of the estate. The insolvency law may require the court to authorize or creditors to consent to the obtaining of that post-commencement finance.

Priority for post-commencement finance

212. The insolvency law should specify the priority that applies to post-commencement finance provided by one enterprise group member subject to insolvency proceedings to another group member that is subject to insolvency proceedings.

Security for post-commencement finance

213. Recommendations 65, 66 and 67 apply to the granting of a security interest in accordance with recommendation 211A (b).

Post-application finance

96. The Working Group considered that topic on the basis of document A/CN.9/WG.V/WP.88. It was noted that post-application finance was a necessary form of interim measure providing relief to the enterprise group member in financial distress, because in the time period between application and commencement it was difficult to obtain the finance essential to its survival. The Working Group agreed to include the proposal in the commentary with appropriate drafting modifications and requested the Secretariat to identify the appropriate location. In addition, the Working Group agreed to clarify in the commentary the distinction between post-application and post-commencement finance, particularly with respect to safeguards, and left the possibility of formulating a draft recommendation on post-application finance for future consideration.

4. Avoidance provisions

Purpose clause

97. Some concerns were expressed with respect to the purpose clause and the need to clearly reflect the context of enterprise groups. The Working Group requested the Secretariat to examine whether any new text might be proposed for future consideration.

Draft recommendation 215

98. A proposal to delete the second sentence of draft recommendation 215 was not supported. A further suggestion made was to adopt a specific standard with respect to the avoidance of transactions in the enterprise group context, i.e. either a more lenient approach to such transactions than was currently taken with respect to transactions involving a single debtor or a stricter approach. In that regard, it was proposed that the draft recommendation should indicate whether the avoidance of

transactions should be based upon a standard of prejudice to the enterprise group as a whole or to the individual enterprise group member. After discussion, the Working Group agreed not to specify any standard in draft recommendation 215, but to maintain the list of examples of factors to be considered by the court as currently drafted. The Working Group agreed to delete both sets of square brackets and retain the text, with the deletion of the words in the second text "without prejudicing the creditors of the group member or members involved". The substance of draft recommendation 215 was approved with that modification.

Draft recommendation 216

99. The Working Group adopted draft recommendation 216 in substance with the replacement of the word "may" with the word "should", in order to enhance the predictability for creditors.

5. Substantive Consolidation

Purpose clause

100. The Working Group was reminded that paragraph (c) had been added to the purpose clause to clarify the effect of the order of substantive consolidation. The inclusion of paragraph (c) was supported.

Draft recommendation 217

101. The Working Group adopted draft recommendation 217 in substance.

Draft recommendation 218

102. A suggestion to add the words "subject to insolvency proceedings" to the chapeau was not supported on the basis that insolvency should not be a precondition to substantive consolidation as the situations outlined in paragraphs (a) and (b) might lead to the inclusion of an apparently solvent entity in the order for substantive consolidation. As an example, it was pointed out that since it was not unusual, in the context of a fraudulent scheme, to establish an entity with no creditors to hold assets and it would be difficult under usual commencement standards to apply for commencement of proceedings with respect to that entity, it was important to be able to include that entity in the order for substantive consolidation.

103. A suggestion to add words to the effect of "in very limited circumstances" to the chapeau received support.

104. It was proposed that the words "disproportionate expense or delay" were too vague and that words such as "will produce a better outcome for all concerned" should be added to paragraph (a). That proposal was not supported on the basis that it would involve making an assessment of the position before consolidation and the likely outcome after consolidation, which would be very difficult to achieve in the situation set forth in paragraph (a).

105. The Working Group adopted the substance of the draft recommendation with the addition to the chapeau as noted above.

Draft recommendation 219

106. It was widely agreed that the words in square brackets should be deleted and the substance of the draft recommendation was adopted with that deletion. It was also agreed that examples of situations in which draft recommendation 219 might be useful should be discussed in the commentary.

Draft recommendation 220

107. The substance of draft recommendation 220 was adopted, noting the need for alignment with draft recommendation 205 with respect to the meaning of the words "at any subsequent time".

Draft recommendation 221

108. A proposal to include shareholders in the parties that could apply for substantive consolidation did not receive sufficient support. The substance of the draft recommendation was adopted.

Draft recommendation 222

109. Support was expressed in favour of retaining the term "consolidated", with perhaps some of the language from the definition of substantive consolidation being included. The substance of the draft recommendation was adopted with that revision. It was agreed the effect of an order for substantive consolidation should be comprehensively discussed in the commentary to facilitate understanding of this remedy.

110. A proposal to consider adding an additional paragraph to the draft recommendation to the effect that creditors should not be able to enhance their position as the result of an order for substantive consolidation was not supported. It was acknowledged, however, that that was a very important issue, but any recommendation would need to be very carefully drafted as some creditors might indeed be better off, while others would be in a worse position. It was suggested that such a recommendation might be limited to labour and secured creditors. The Working Group decided to discuss that possibility at a future session.

Draft recommendation 223

111. It was agreed that the words "as far as possible" should be added to the chapeau as proposed in paragraph 23 of A/CN.9/WG.V/WP.85. It was also agreed that the reference to the court in paragraph (b) should be substituted with the words "If it is determined that". The Working adopted the substance of draft recommendation 223 with those changes.

Draft recommendation 224

112. The Working Group adopted the substance of the draft recommendation, noting that the words to be added to the chapeau of draft recommendation 223 should also be added to draft recommendation 224.

Draft recommendations 225 and 226

113. The substance of the draft recommendations was adopted.

Draft recommendation 227

114. A proposal to add the word "already" before the word "taken" was agreed and a suggestion to make the same addition to draft recommendation 228 approved. The substance of the draft recommendation was adopted with that addition.

Draft recommendations 228 and 229

115. The substance of the draft recommendations was adopted.

6. Insolvency representative

Purpose clause

116. The Working Group agreed that the text in square brackets in paragraph (a) should be retained.

Draft recommendations 230 and 231

117. The draft recommendations were adopted in substance.

Draft recommendation 232

118. The Working Group agreed that the text in square brackets should be retained and that some redrafting might be required to more clearly state the intention of the draft recommendation. The Secretariat was requested to take those suggestions into account in revising the text. The substance of the draft recommendation was approved on that basis.

Draft recommendation 233

119. It was agreed that the changes agreed with respect to draft recommendation 232 should also be reflected in draft recommendation 233. With those changes, the Working Group adopted the substance of the draft recommendation.

Draft recommendation 234

120. It was agreed that the draft recommendation should generally be aligned with draft recommendation 11 addressing international issues and that the text in square brackets should be retained. The substance of the draft recommendation was approved on that basis.

7. Reorganization plan

Purpose clause

121. A number of proposals were made with respect to the words "thereby preserving employment and, in appropriate cases, protecting investment", including deleting the text, and changing the order of the various elements. It was recalled that that wording had been used in the purpose clause to the recommendations of part two, chapter IV of the Legislative Guide. After discussion, it was agreed the text should be retained as drafted.

Draft recommendation 235

122. The draft recommendation was adopted in substance.

Draft recommendation 236

123. The substance of the draft recommendation was adopted with the retention of the word "voluntarily" and substitution of the word "may" in the first line with the word "should".

8. Placement of the sections on the insolvency representative and reorganization plans

124. In response to a proposal to consider the order in which sections F and G were set forth, it was noted that they followed the same order as the Legislative Guide. After some discussion, the Working Group requested the Secretariat to give some further consideration to that issue, bearing in mind the placement in the Legislative Guide.

VI. The impact of insolvency on a security right in intellectual property

125. The Working Group commenced its discussion on the issues concerning the impact of insolvency on a security right in intellectual property that had been referred to it by Working Group VI (Security interests) on the basis of documents A/CN.9/WG.V/WP.87 and A/CN.9/WG.VI/WP.37/Add.4 and an extract of the Report of Working Group VI on the work of its fifteenth session (A/CN.9/WG.VI/XV/CRP.1/Add.5).

126. The Working Group noted that the text contained in document A/CN.9/WG.VI/WP.37/Add.4 was intended to appear in the commentary included in the draft annex to the UNCITRAL Legislative Guide on Secured Transactions dealing with security in intellectual property. The Working Group expressed its appreciation for the coordination between Working Groups V and VI, viewing that coordination as particularly important to achieving consistency between the two UNCITRAL Legislative Guides.

127. The Working Group approved the contents of those parts of the commentary dealing with the impact of insolvency of a licensor or licensee of intellectual property on a security right in that party's rights under a licence agreement as set forth in document A/CN.9/WG.VI/WP.37/Add.4, paragraphs 22-40 and the conclusions and revisions of Working Group VI reached at its fifteenth session as set forth in the extract of the Report of Working Group VI on the work of its fifteenth session (A/CN.9/WG.VI/XV/CRP.1/Add.5). In particular, the Working Group agreed that the square brackets should be removed from the text in paragraph 36 of A/CN.9/WG.VI/WP.37/Add.4. It was noted that to ensure consistency with the Legislative Guide on Insolvency Law, the words "insolvency administrator" in the Appendix of A/CN.9/WG.VI/WP.37/Add.4 should be replaced with "insolvency representative".

E. Note by the Secretariat on the treatment of enterprise groups in insolvency, submitted to the Working Group on Insolvency Law at its thirty-sixth session

(A/CN.9/WG.V/WP.85 and Add.1) [Original: English]

CONTENTS

I. Introduction

1. This note revises the draft recommendations contained in documents A/CN.9/WG.V/WP.82 and Addenda 1-3 on the basis of the Report of Working Group V on the work of its thirty-fifth session (A/CN.9/666). It does not include the commentary, which is currently being revised and extended and will be available for consideration by the Working Group at its thirty-seventh session.

2. This note includes a number of explanatory notes to the Working Group. They are intended only to explain the changes that have been made to the draft recommendations, to facilitate discussion and to raise questions for consideration by the Working Group; it is not intended that they would form part of the commentary.

3. The numbering of the recommendations now follows on in sequence from the Legislative Guide. Numbers from the previous version of the recommendations (A/CN.9/WG.V/WP.82 and Addenda 1-3) have been retained in square brackets for ease of reference and comparison. Cross-references to recommendations "of the Legislative Guide" have been retained for clarity and readability, but as previously noted (A/CN.9/WG.V/WP.82, para. 2), those words could be deleted in the final text.

II. Glossary

(a) "Enterprise group": two or more enterprises that are interconnected by control or significant ownership;

(b) "Enterprise": any entity, regardless of its legal form, that is engaged in economic activities and may be governed by the insolvency law;[1]

(c) "Control": the capacity to determine, directly or indirectly, the operating and financial policies of an enterprise;

(d) "Procedural coordination": coordination of the administration of two or more insolvency proceedings in respect of enterprise group members. Each of those members, including its assets and liabilities, remains separate and distinct;[2]

(e) "Substantive consolidation": the treatment of the assets and liabilities of two or more enterprise group members as if they were part of a single insolvency estate[3] [pooling of the assets and liabilities of two or more enterprise group members to form a single insolvency estate].

Note to the Working Group

4. An alternative formulation has been included in paragraph (f) for consideration by the Working Group. That formulation uses the word "pooling" rather than "treatment" to more clearly describe the manner in which the assets and liabilities are put together following an order for substantive consolidation.

III. Recommendations

A. Joint application

1. Purpose of legislative provisions

The purpose of provisions on joint application[4] for commencement of insolvency proceedings with respect to two or more enterprise group members is:

(a) To facilitate coordinated consideration of an application for commencement of insolvency proceedings with respect to two or more enterprise group members;

(b) To enable the court to obtain information concerning the enterprise group that would facilitate determination of whether commencement with respect to group members should be ordered;

---

[1] Consistent with the approach adopted [in the *Legislative Guide*] with respect to individual debtors, the focus in this part is upon the conduct of economic activities by entities that would conform to the types of entities described as an "enterprise". It is not intended to include consumers or other entities that would not be governed by an insolvency law pursuant to recommendations 8 and 9 above.

[2] The concept of procedural coordination is explained in detail in the commentary, see above paras. …

[3] For the effects of substantive consolidation and the treatment of security interests, see recommendations 222 and 223 and the commentary at paras. ...

[4] A joint application for commencement does not affect the legal identity of each group member included in the application; each member remains separate and distinct.

(c) To facilitate efficiency and reduce the costs associated with commencement of those insolvency proceedings; and

(d) To provide a mechanism for the court to assess whether procedural coordination of those insolvency proceedings would be appropriate.

2. Contents of legislative provisions

Joint application for commencement of insolvency proceedings

199. [1] The insolvency law may specify that a joint application for commencement of insolvency proceedings may be made with respect to two or more enterprise group members that satisfy the applicable commencement standard.[5]

Persons permitted to apply

200. [1] A joint application may be made by:

(a) Enterprise group members that satisfy the applicable commencement standard in recommendation 15 [of the *Legislative Guide*]; or

(b) A creditor provided it is a creditor of each group member that is to be included in the joint application.

Competent courts

201. [2] For the purposes of recommendation 13 [of the *Legislative Guide*], the words "commencement and conduct of insolvency proceedings, including matters arising in the course of those proceedings" include a joint application for commencement of insolvency proceedings with respect to two or more enterprise group members.[6]

3. Note to the Working Group

5. The words "The insolvency law should indicate that" have been deleted from recommendation 201 on the basis that the text is intended to be an aid to interpretation of recommendation 13 rather than a recommendation for inclusion of a specific provision in the insolvency law.

B. Procedural coordination

1. Purpose of legislative provisions

The purpose of provisions on procedural coordination of insolvency proceedings with respect to two or more enterprise group members is:

(a) To facilitate coordination of the administration of those insolvency proceedings, while respecting the separate legal identity of each group member; and

(b) To promote a better return to creditors and cost efficiency.

---

[5] See above, recommendation 15, which addresses debtor applications and recommendation 16, which addresses creditor applications.

[6] The criteria that might be relevant to determining the competent court are discussed in the commentary, see above, paras. ...

2. Contents of legislative provisions

Procedural coordination of two or more insolvency proceedings

202. [3(a)] The insolvency law should specify that the administration of insolvency proceedings with respect to two or more enterprise group members may be coordinated for procedural purposes.

203. [4] The insolvency law should specify that, at the request of a person permitted to make an application under recommendation 206, the court may order procedural coordination.

204. [3(b)] Procedural coordination may involve, for example, joint provision of notice; coordination of procedures for filing of claims in accordance with the insolvency law; coordination of avoidance proceedings; cooperation between the courts, including coordination of hearings; and cooperation between insolvency representatives, including information sharing and coordination of negotiations. [3(a)] The scope and extent of the procedural coordination should be specified by the court.

Application for procedural coordination

- *Timing of application*

205. [3(c)] An application for procedural coordination may be made at the time of an application for commencement of insolvency proceedings or at any subsequent time.

- *Persons permitted to apply*

206. [4] The insolvency law should specify that an application for procedural coordination may be made by:

(a) An enterprise group member that is subject to an application for commencement of insolvency proceedings or subject to insolvency proceedings;

(b) The insolvency representative of an enterprise group member; or

(c) A creditor[7] of an enterprise group member that is subject to an application for commencement of insolvency proceedings or subject to insolvency proceedings.

- *Coordinating consideration of an application*

207. [5] The insolvency law should specify that the court or courts[8] may take appropriate steps to coordinate consideration of an application for procedural coordination of insolvency proceedings concerning two or more enterprise group members. Those steps might include: coordinated and joint hearings; and sharing and disclosure of information.

---

[7] To be eligible to make an application for procedural coordination, a creditor does not have to be a creditor of all the group members in respect of which it is seeking procedural coordination.

[8] Coordination might involve different courts competent with respect to different group members or a single court that is competent with respect to a number of different insolvency proceedings concerning members of the same group.

Modification or termination of an order for procedural coordination

208. [7] The insolvency law should specify that an order for procedural coordination may be modified or terminated, provided that any actions or decisions taken pursuant to the order should not be affected by the modification or termination. [The courts that have ordered procedural coordination may take appropriate steps to coordinate modification or termination of the procedural coordination.]

Competent courts

209. [8] For the purposes of recommendation 13 [of the *Legislative Guide*], the words "commencement and conduct of insolvency proceedings, including matters arising in the course of those proceedings" include applications and orders for procedural coordination of insolvency proceedings with respect to two or more enterprise group members.

Notice of procedural coordination

210. [9] The insolvency law should establish requirements for giving notice with respect to applications and orders for procedural coordination and modification or termination of procedural coordination, including the scope and extent of the order; to whom notice should be given; the party responsible for giving notice; and the content of the notice.

3. Note to the Working Group

6. Recommendations 202-204 have been revised to reflect the discussion in the Working Group concerning the need for the court to consider procedural coordination on the basis of an application. Draft recommendation 202 is now formulated as a general enabling provision. Draft recommendation 203 provides that the court may order procedural coordination on the basis of an application under draft recommendation 206 and draft recommendation 204 includes some explanation as to what procedural coordination might involve.

7. The Working Group may wish to consider the last sentence, which has been added to recommendation 208 to ensure coordination between the courts throughout the process.

C. Post-commencement finance

1. Purpose of legislative provisions

The purpose of provisions on post-commencement finance for enterprise groups is:

(a) To facilitate finance to be obtained for the continued operation or survival of the business of the enterprise group members subject to insolvency proceedings or the preservation or enhancement of the value of the assets of those group members;

(b) To facilitate the provision of finance by enterprise group members, including group members subject to insolvency proceedings;

(c) To ensure appropriate protection for the providers of post-commencement finance and for those parties whose rights may be affected by the provision of that finance; and

(d) To advance the objective of fair apportionment of the benefit and detriment associated with the provision of post-commencement finance among all group members.

2. Contents of legislative provisions

Provision of post-commencement finance by a group member subject to insolvency proceedings

211. [10] The insolvency law should permit an enterprise group member subject to insolvency proceedings to:

(a) Advance post-commencement finance to other enterprise group members subject to insolvency proceedings;

(b) Pledge its assets as security for post-commencement finance provided to other enterprise group members subject to insolvency proceedings; and

(c) Provide a guarantee or other assurance of repayment for post-commencement finance obtained by other enterprise group members subject to insolvency proceedings, provided the insolvency representative of the member advancing finance, pledging assets or providing a guarantee determines it to be necessary for the continued operation or survival of the business of that enterprise group member or for the preservation or enhancement of the value of the estate of that enterprise group member. The insolvency law may require the court to authorize or creditors of the lending, pledging or guaranteeing group member to consent.

Priority for post-commencement finance

212. [11] The insolvency law should specify the priority that applies to post-commencement finance provided by one enterprise group member subject to insolvency proceedings to another group member that is subject to insolvency proceedings.

Security for post-commencement finance

213. [12] The insolvency law should specify that a security interest of the type referred to in recommendation 65 [of the *Legislative Guide*] may be granted by an enterprise group member subject to insolvency proceedings for repayment of post-commencement finance provided to another group member subject to insolvency proceedings, provided creditors consent or a determination is made in accordance with the insolvency law that any harm to creditors is offset by the benefit to be derived from the granting of the security interest.[9]

---

[9] Recommendations 66-67 [of the *Legislative Guide*] set forth the safeguards to apply to the granting of a security interest to secure post-commencement finance. Those safeguards would apply to the granting of a security interest in the enterprise group context.

Guarantee or other assurance for repayment of post-commencement finance

214. [13] The insolvency law should specify that an enterprise group member subject to insolvency proceedings may guarantee or provide other assurance of repayment for post-commencement finance obtained by another group member subject to insolvency proceedings, provided creditors consent or a determination is made in accordance with the insolvency law that harm to creditors is offset by the benefit to be derived from the provision of the guarantee or other assurance of repayment.

3. Note to the Working Group

8. The Working Group may wish to consider the relationship between draft recommendations 211, 213 and 214 and the standards and provisos currently attaching to each draft recommendation as discussed in the following paragraphs.

9. As currently drafted, draft recommendations 213 and 214 repeat part of draft recommendation 211, i.e. paragraphs (b) and (c). Draft recommendation 211 was intended to state, as a general principle, that a group member subject to insolvency proceedings could advance or facilitate the provision of post-commencement finance to other group members also subject to insolvency proceedings. In addressing the provision of post-commencement finance, the draft recommendation is intended to complement recommendation 63, which addresses the obtaining of post-commencement finance.

10. If draft recommendation 211 is to be retained as a general statement of principle, paragraphs (b) and (c) could be deleted and paragraph (a) amended as follows, where the phrase "facilitating the provision of post-commencement finance" refers to the granting of a security interest or guarantee under draft recommendations 213 and 214:

211. The insolvency law should permit an enterprise group member subject to insolvency proceedings to advance or facilitate the provision of post-commencement finance to other enterprise group members subject to insolvency proceedings, provided the insolvency representative of the group member advancing or facilitating the provision of post-commencement finance determines it to be necessary for the continued operation or survival of the business of that enterprise group member or for the preservation or enhancement of the value of the estate of that enterprise group member. The insolvency law may require the court to authorize or creditors of the member advancing or facilitating the provision of post-commencement finance to consent.

11. A second issue relates to the proviso in draft recommendation 211 and the requirements included in draft recommendations 213 and 214. The proviso in draft recommendation 211 repeats the proviso in recommendation 63, requiring a determination by the insolvency representative as to the necessity of the post-commencement finance. The second sentence points to the possibility that the insolvency law might also require the court or creditors of the member advancing or facilitating post-commencement finance to approve or consent.

12. Draft recommendations 213 and 214 include requirements for creditor consent (it is not specified which creditors are required to consent — the creditors of the advancing or facilitating group member or the receiving group member or both) and

a determination as to harm (since it is not specified who should make that determination, it is not clear how it relates to the determination of necessity to be made by the insolvency representative under draft recommendation 211). The Working Group may wish to note that recommendation 65, which is the basis of draft recommendation 213, does not include requirements for creditor consent or a determination as to harm for the granting of the security interest.

13. The requirement for consent in draft recommendations 213 and 214 responds to the possibility raised in the last sentence of draft recommendation 211.

14. What is therefore required under the current drafts of the recommendations in order to provide post-commencement finance is: (a) a determination by the insolvency representative that the post-commencement is necessary (draft recommendation 211) and (b) the consent of creditors or a determination as to harm and benefit (draft recommendations 213 and 214).

15. The Working Group may wish to consider whether the requirements of draft recommendation 211 might need to be aligned with those of draft recommendations 213 and 214. Draft recommendation 211 might include, for example, the requirement for creditor consent or a determination as to harm and benefit as follows:

> 211. The insolvency law should permit an enterprise group member subject to insolvency proceedings to advance or facilitate the provision of post-commencement finance to other enterprise group members subject to insolvency proceedings, provided:
>
> (a) The insolvency representative of the group member advancing or facilitating the provision of post-commencement finance determines it to be necessary for the continued operation or survival of the business of that enterprise group member or for the preservation or enhancement of the value of the estate of that enterprise group member; and
>
> (b) Creditors of the member advancing or facilitating the provision of post-commencement finance consent; or
>
> (c) A determination is made in accordance with the insolvency law that any harm to creditors is offset by the benefit to be derived from advancing or facilitating the provision of post-commencement finance.

16. That drafting retains the standard of paragraph (a) as the first requirement, with the addition of the standard of either paragraph (b) or (c). Paragraph (c) may be interpreted as including the reference in the second sentence of the previous draft of recommendation 211 (reflecting the second sentence of recommendation 63) to approval by the court. A further alternative might be to combine the determination in paragraph (a) with that of paragraph (c).

D. Avoidance provisions

1. Purpose of legislative provisions

The purpose of avoidance provisions as among enterprise group members is:

(a) To ensure the integrity of the insolvency estates of two or more enterprise group members subject to insolvency proceedings;

(b) To ensure the equitable treatment of creditors of enterprise group members, both internal and external to the group;

(c) To establish clear rules for the circumstances in which transactions occurring between members of the same enterprise group prior to the commencement of insolvency proceedings involving the assets of enterprise group members may be considered injurious and therefore subject to avoidance; and

(d) To facilitate the recovery of money or assets from persons, including group members, involved in transactions that have been avoided.

2. Contents of legislative provisions

Avoidable transactions

215. [14] The insolvency law should specify that, in considering whether a transaction of the kind referred to in recommendation 87 (a), (b) or (c) [of the *Legislative Guide*] that took place between enterprise group members or an enterprise group member and other related persons should be avoided, the court may have regard to the circumstances in which the transaction took place. Those circumstances may include: [the relationship between the parties to the transaction within the enterprise group]; the degree of integration between enterprise group members that are parties to the transaction; the purpose of the transaction; [whether the transaction contributed to the operations of the group as a whole without prejudicing the creditors of the group member or members involved]; and whether the transaction granted advantages to the enterprise group members or other related persons that would not normally be granted between unrelated parties.

Elements of avoidance and defences

216. [15] The insolvency law may specify the manner in which the elements referred to in recommendation 97 [of the *Legislative Guide*] would apply to avoidance of transactions in the enterprise group context.[10]

3. Note to the Working Group

17. Paragraph (d) of the purpose clause has been revised in accordance with the decision of the Working Group to include a reference to both persons and enterprise group members. Draft recommendation 215 has also been revised to include the notion that transactions subject to avoidance in the enterprise group context might be between group members, but also between group members and other related persons. The later type of transaction, especially where the related persons are natural persons such as owners, or directors or other office holders, also has the potential to raise issues particular to enterprise groups. The Working Group may wish to consider whether those revisions should be maintained. A further circumstance, focusing on transactions that benefit the group without prejudice to creditors, has been added to the factors that might be taken into consideration by the court.

---

[10] That is, the elements to be proved in order to avoid a transaction, the burden of proof, specific defences to avoidance, and the application of special presumptions.

E. Substantive consolidation

1. Purpose of legislative provisions

The purpose of provisions on substantive consolidation is:

(a) To provide legislative authority for substantive consolidation, while respecting the basic principle of the separate legal identity of each enterprise group member;

(b) To specify the very limited circumstances in which the remedy of substantive consolidation may be available in order to ensure transparency and predictability; and

[(c) To specify the effect of an order for substantive consolidation, including the treatment of security interests.]

2. Contents of legislative provisions

Exceptions to the principle of separate legal identity

217. [16] The insolvency law should respect the separate legal identity of each enterprise group member. Exceptions to that general principle should be limited to the grounds set forth in recommendation 218.

Circumstances in which substantive consolidation may be available

218. [17] The insolvency law may specify that, at the request of persons permitted to make an application under recommendation 221, the court may order substantive consolidation with respect to two or more enterprise group members:

(a) Where the court is satisfied that the assets or liabilities of the enterprise group members are intermingled to such an extent that the ownership of assets and responsibility for liabilities cannot be identified without disproportionate expense or delay; or

(b) Where the enterprise group members are engaged in a fraudulent scheme or activity with no legitimate business purpose and the court is satisfied that substantive consolidation is essential to rectify that scheme or activity.

Exclusions from substantive consolidation

219. [21] The insolvency law may specify that, [in unusual circumstances], the court may exclude specified assets and claims from an order for substantive consolidation.

Application for substantive consolidation

- *Timing of application*

220. [18(b)] The insolvency law should specify that an application for substantive consolidation may be made at the time of an application for commencement of insolvency proceedings with respect to two or more

enterprise group members or at any subsequent time.[11]

- *Persons permitted to apply*

221. [18(a)] The insolvency law should specify the persons permitted to make an application for substantive consolidation, which may include an enterprise group member, the insolvency representative of an enterprise group member or a creditor of any such group member.

Effect of an order for substantive consolidation

222. [19] The insolvency law should specify that an order for substantive consolidation has the following effects:[12]

(a) A [single] [consolidated] insolvency estate is created for those enterprise group members subject to the order;

(b) Claims and debts between group members included in the order are extinguished; and

(c) Claims against group members included in the order are treated as claims against the [single] [consolidated] insolvency estate.

Treatment of security interests in substantive consolidation

223. [20] The insolvency law should respect the rights and priorities of a creditor holding a security interest over an asset of an enterprise group member that is subject to an order for substantive consolidation, unless:

(a) The secured indebtedness is owed solely between enterprise group members and is extinguished by an order for substantive consolidation;

(b) The court determines the security was obtained by fraud in which the creditor participated; or

(c) The transaction granting the security is subject to avoidance in accordance with recommendations 88 [of the *Legislative Guide*] and 215.

Recognition of priorities in substantive consolidation

224. [19(d)] The insolvency law should specify that the priorities established under insolvency law and applicable to individual enterprise group members prior to an order for substantive consolidation should be recognized in substantive consolidation.

Meetings of creditors

225. [19(d)] The insolvency law should provide that, to the extent a meeting of creditors is required by the law to be held subsequent to an order for substantive consolidation, creditors of all consolidated group members are eligible to attend.

---

[11] The impracticability of ordering substantive consolidation at an advanced stage of the insolvency proceedings is discussed in the commentary, see above, paras. ...

[12] The effect on security interests is addressed in recommendation 223.

Calculation of suspect period in substantive consolidation

226 (1) [22] The insolvency law should specify the date from which the suspect period with respect to avoidance of transactions of the type referred to in recommendation 87 [of the *Legislative Guide*] should be calculated when substantive consolidation is ordered.

(2) When substantive consolidation is ordered at the same time as commencement of insolvency proceedings, the specified date from which the suspect period is calculated retrospectively should be determined in accordance with recommendation 89 [of the *Legislative Guide*].

(3) When substantive consolidation is ordered subsequent to commencement of insolvency proceedings, the specified date from which the suspect period is calculated retrospectively may be:

(a) A different date for each enterprise group member included in the substantive consolidation, being either the date of application for or commencement of insolvency proceedings with respect to each such group member, in accordance with recommendation 89 [of the *Legislative Guide*]; or

(b) A common date for all enterprise group members included in the substantive consolidation, being the earliest of the dates of application for or commencement of insolvency proceedings with respect to those group members.

Modification of an order for substantive consolidation

227. [23] The insolvency law should specify that an order for substantive consolidation may be modified provided that any actions or decisions taken pursuant to the order are not affected by the modification.[13]

Competent court

228. [24] For the purposes of recommendation 13 [of the *Legislative Guide*], the words "commencement and conduct of insolvency proceedings, including matters arising in the course of those proceedings" include an application or order for substantive consolidation, including modification of that order.[14]

Notice

229. [25] The insolvency law should establish requirements for giving notice with respect to applications and orders for substantive consolidation and modification of substantive consolidation, including the parties to whom notice should be given; the party responsible for giving notice; and the content of the notice.

---

[13] It is not intended that use of the term "modification" would include termination of an order for substantive consolidation.

[14] The criteria that might be relevant to determining the competent court are discussed in the commentary, see above, paras. ...

3. Note to the Working Group

Purpose clause

18. The Working Group may wish to consider the following revisions to the purpose clause. Paragraph (a) of the previous version has been added to paragraph (b) on the basis that while respect for the separate legal identity of each group member is an underlying principle of these recommendations on enterprise group members, it is not, of itself, a purpose of the provisions on substantive consolidation. The previous paragraph (d), which referred to establishing the objective standards and procedures upon which substantive consolidation could be based, has been deleted on the basis that the objective standards are covered by paragraph (b). Paragraph (c) has been added on the basis that it is important to clearly specify the effect of an order for substantive consolidation.

Draft recommendation 217

19. The chapeau has been revised in response to a decision of the Working Group at its thirty-fifth session (A/CN.9/666, paras. 83-84) and to align it with the approach taken in draft recommendation 203 (procedural coordination), making it clear that substantive consolidation is available upon application to the court, where the persons permitted to apply are addressed in draft recommendation 221.

Draft recommendation 218

20. The draft recommendation currently refers to enterprise group members that are engaged in a scheme or other activity as specified. The Working Group may wish to consider whether that requires further explanation in the commentary to make it clear that the activity must be ongoing at the time of the application for substantive consolidation or whether it would also include activity that had taken place in close proximity to the commencement of insolvency proceedings.

Draft recommendation 219

21. This draft recommendation previously referred to orders for partial substantive consolidation, a concept that created some confusion and misunderstanding. The Working Group may wish to consider whether it would be clearer to permit certain assets and claims to be excluded from an order for substantive consolidation, rather than creating what appears to be a second type of substantive consolidation. Although the need for such exclusions might rarely arise, including such a possibility might enhance the flexibility of the recommendations. A discussion of relevant circumstances and examples might be included in the commentary.

Draft recommendation 222

22. Paragraph (a), specifying the creation of a single insolvency estate, has been added to the draft recommendation for greater clarity on the basis that it is a key effect of an order for substantive consolidation. This addition reflects the decision of the Working Group at its thirty-fifth session (A/CN.9/666, para. 88). Paragraph (c) of the previous draft of the recommendation, which referred to recognition of priorities, has been moved to a separate recommendation on the basis that that recognition is not an effect of substantive consolidation, but rather an underlying principle that should be observed.

Draft recommendation 223

23. This draft recommendation establishes the general principle that priorities should be recognized in substantive consolidation. The Working Group may wish to consider the extent to which the requirement to recognize might be qualified by the addition of words such as "as far as possible" (see A/CN.9/666, para. 88).

F. Insolvency representative

1. Purpose of legislative provisions

The purpose of provisions on appointment of insolvency representatives in an enterprise group context is:

(a) [To permit appointment of a single or the same insolvency representative] to facilitate coordination of insolvency proceedings commenced with respect to two or more enterprise group members; and

(b) To encourage cooperation where two or more insolvency representatives are appointed, with a view to avoiding duplication of effort; facilitating gathering of information on the financial and business affairs of the enterprise group as a whole; and reducing costs.

2. Contents of legislative provisions

Appointment of a single or the same insolvency representative

230. [26] The insolvency law should specify that, where the court determines it to be in the best interests of the administration of the insolvency proceedings of two or more enterprise group members, a single or the same insolvency representative may be appointed to administer those proceedings.

Conflict of interest

231. [27] The insolvency law should specify measures to address any conflict of interest that might arise when a single or the same insolvency representative is appointed to administer insolvency proceedings with respect to two or more enterprise group members. Such measures may include the appointment of one or more additional insolvency representatives.

Cooperation between two or more insolvency representatives in a group context

232. [28] The insolvency law may specify that where insolvency proceedings are commenced with respect to two or more enterprise group members [and different insolvency representatives are appointed to administer those proceedings], those insolvency representatives should cooperate to the maximum extent possible.[15]

---

[15] In addition to the provisions of the insolvency law with respect to cooperation and coordination, the court generally may indicate measures to be taken to that end in the course of administration of the proceedings.

Cooperation between two or more insolvency representatives in procedural coordination

233. [29] The insolvency law should specify that, when more than one insolvency representative is appointed to administer insolvency proceedings that are subject to procedural coordination, the insolvency representatives should cooperate to the maximum extent possible.

Forms of cooperation

234. [30] To the extent permitted by law, cooperation to the maximum extent possible should be implemented by any appropriate means, including:

(a) Sharing and disclosure of information;

(b) Approval or implementation of agreements with respect to division of the exercise of powers and allocation of responsibilities between insolvency representatives, including one insolvency representative taking a coordinating or leading role;

(c) Coordination with respect to proposal and negotiation of reorganization plans, [communication with creditors and meetings of creditors]; and

(d) Coordination with respect to administration and supervision of the affairs of the group members subject to insolvency proceedings, including day-to-day operations where the business is to be continued; post-commencement finance; safeguarding of assets; use and disposition of assets; use of avoidance powers; submission and admission of claims; and distributions to creditors.

G. Reorganization plan

1. Purpose of legislative provisions

The purpose of provisions relating to the reorganization plan in an enterprise group context is:

(a) To facilitate the coordinated rescue of the businesses of enterprise group members subject to the insolvency law, thereby preserving employment and, in appropriate cases, protecting investment; and

(b) To facilitate the negotiation and proposal of coordinated reorganization plans in insolvency proceedings with respect to two or more enterprise group members.

2. Contents of legislative provisions

Reorganization plan

235. [31] The insolvency law should permit coordinated reorganization plans to be proposed in insolvency proceedings with respect to two or more enterprise group members.

236. [32] The insolvency law may provide that an enterprise group member that is not subject to insolvency proceedings may [voluntarily] participate in a reorganization plan proposed for two or more enterprise group members subject to insolvency proceedings.

A/CN.9/WG.V/WP.85/Add.1 (Original: English)

Note by the Secretariat on the treatment of enterprise groups in insolvency, submitted to the Working Group on Insolvency Law at its thirty-sixth session

ADDENDUM

CONTENTS

I. Introduction

1. At its thirty-fifth session (17-21 November 2008), the Working Group considered various aspects of the international treatment of enterprise groups in insolvency and requested the Secretariat to prepare draft recommendations on a number of those issues: use of the presumption in article 16 (3) of the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law) to determine the centre of a group for purposes of coordination of cross-border proceedings; coordination and cooperation in cross-border proceedings concerning enterprise groups; use of the draft UNCITRAL Notes on cooperation, communication and coordination in cross-border insolvency proceedings (the draft Notes); and appointment of a single insolvency representative to administer proceedings in different States concerning members of the same enterprise group.

2. As requested, draft recommendations on those topics are included below to facilitate discussion by the Working Group. It is not intended that those recommendations would in any way substitute for adoption of the Model Law, since the focus of that text is upon facilitating coordination of cross-border proceedings with respect to an individual debtor rather than an enterprise group. Although noting the difference between legislative recommendations and a model law, the Working Group may nevertheless wish to adopt the same working method used with respect to the Legislative Guide and its application to enterprise groups. That might involve considering first, how the articles of the Model Law might apply to an enterprise group and if not, what additional provisions might be required to facilitate coordination of proceedings concerning enterprise groups and secondly, the form of legislative text that might be used to achieve that goal.

II. Facilitating coordination of multiple proceedings with respect to group members through the controlling member of the group

A. Background

3. There has been much discussion recently of applying the concept of centre of main interests (COMI) of an individual debtor to the enterprise group with varying levels of objectives, including commencing insolvency proceedings for all insolvent members of the group, wherever located, in the COMI jurisdiction to facilitating coordination of those proceedings through the COMI. The concept is used in individual cases to determine what might be the location of main proceedings for the purposes of the Model Law and the European Council Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings (the EC Regulation), but it does not have universal application as a concept and is only recognized by States that have adopted or are subject to either or both of those instruments. Previous working papers have noted the difficulties of determining he COMI and, in particular, some of the issues associated with determining the COMI with respect to enterprise groups (see A/CN.9/WG.V/WP.82/Add.4, paras. 3-15; A/CN.9/WG.V/WP.76/Add.2, paras. 2-17; A/CN.9/WG.V/WP.74/Add.2, paras. 6-12).

4. At its thirty-fifth session, the Working Group generally agreed that it would be difficult to reach a definition of the COMI of an enterprise group that could be used, for example, to limit the commencement of parallel proceedings or simplify the number of laws that might apply to insolvency proceedings commenced in different States with respect to members of the same group (A/CN.9/666, paras. 26-27). It would also be difficult to use the COMI of a group to apply the recognition regime of the Model Law to the enterprise group. Other chapters of the Model Law would be difficult to extend to enterprise groups as such, but may have limited application where the centre of main interests of some or all of the individual members of the same group is determined to be in the same State. There are examples of cases where the court has found this situation to exist with respect to an international enterprise group.

B. Issues for consideration

1. Objectives of determining the coordination centre

5. The Working Group proposed a different approach that would focus upon identifying the member that could be said to control the group (within the meaning of control in the definition of enterprise group — see A/CN.9/WG.V/WP.85, glossary (a)) and through which coordination of multiple insolvency proceedings with respect to members of the same group might be facilitated.[1] The term "coordination centre" is used to refer to that group member in this note, but other

---

[1] The Working Group may wish to note Principle 1 of the IBA Committee J Cross-Border Insolvency Concordat, adopted in 1996, which recommends that "If an entity or individual with cross-border connections is the subject of an insolvency proceeding, a single administrative forum should have primary responsibility for coordinating all insolvency proceedings relating to such entity or individual."

terms might also be adopted. Some of the basic objectives of identifying a coordination centre for the enterprise group might be:

(a) To facilitate coordination of multiple proceedings with respect to enterprise group members in order to streamline administration, expedite proceedings and achieve greater efficiency and cost savings;

(b) To encourage and provide authorization for cooperation between the courts and insolvency representatives involved;

(c) To facilitate exchange of information as regards claims, assets and security interests;

(d) To facilitate better realization of the assets of the group, whether through liquidation or reorganization; and

(e) To coordinate raising and provision of post-commencement finance across the group.

6. Whatever factors might be used to identify that group member, it is intended, as noted by the Working Group, that that group member would be regarded only as a first among equals that could lead the coordination and cooperation. That group member would not have additional powers with respect to conduct or management of the proceedings (A/CN.9/666, para. 31). The Working Group did not go on to consider whether that coordination would be initiated and led by the court responsible for conduct of proceedings with respect to the controlling member (where the court performs that function) or the relevant insolvency representative (see below, draft recommendation 15).

2. Factors relevant to identifying the controlling group member

7. With regard to identification of that group member, the Working Group noted that the rebuttable presumption set forth in article 16 (3) of the Model Law might provide inspiration. The general approach of such a recommendation would be to facilitate identification of a coordinating member and encourage widespread recognition of the party identified, not to suggest that that centre, once identified, should automatically be recognized in every State (A/CN.9/666, para. 31). However, broad recognition and acceptance of such an approach would facilitate coordination of cross-border proceedings. Draft recommendation 1 is based upon article 16 (3) of the Model Law.

8. The Working Group further noted that the factors set forth in paragraphs 6 and 13 of A/CN.9/WG.V/WP.82/Add.4 might be relevant to rebutting that presumption (A/CN.9/666, para. 32) and should be considered collectively. Those factors are set forth in draft recommendation 2 below. However, the Working Group may wish to reconsider the appropriateness of those factors to determining which group member might be said to “control” the group. Those factors, while generally accepted as relevant to determining the place in which an individual debtor can be said to conduct its main activities, are not all relevant to assessing issues of control in an enterprise group context. Although definitions of what constitutes control in the group context varies from State to State and depends largely upon the purpose for which the definition is used, some of the factors commonly associated with the concept are discussed in A/CN.9/WG.V/WP.74, paras. 35-38 and may include:

(a) The holding, whether directly or indirectly, of a specified percentage of capital or votes of group members;

(b) The ability to determine financial and operating policy and decision-making of group members;

(c) The ability to appoint or remove all or a majority of the directors or governing officials of group members;

(d) The ability to cast or regulate the casting of, a majority of the votes that are likely to be cast at a general meeting of a group member, irrespective of whether that capacity arises through shares or options.

9. Information that may be relevant to consideration of these factors might include: the group member's incorporation documents; details about the group member's shareholding; information relating to substantive strategic decisions of the group member; internal and external management agreements; details of bank accounts and their administration and authorized signatories; and information relating to employees.

3. Defining the extent of the enterprise group

10. A preliminary issue that might need to be considered relates to the extent of the enterprise group as such for the purposes of determining the coordination centre. It may be important to know which enterprises, both solvent and insolvent, may be considered to be group members and how different laws with different definitions with respect to what might constitute a group in different States will be applied. If a coordination centre can be identified, it will need to know which insolvency proceedings with respect to which enterprises it will be able to coordinate.

4. Responsibility for making the determination

11. Another issue might be allocating the responsibility for determining which group member is the controlling member for the purposes contemplated. It might be the court or, where the court does not play a supervising role in the insolvency proceedings, the insolvency representative or a debtor-in-possession. If it were to be the court, which court would have jurisdiction to identify the controlling member? One possibility might be the court that receives the first application for commencement of insolvency proceedings with respect to one or more enterprises that could be considered to be members of a group. A second possibility might require that decision to be made following coordination between a number of courts that have received applications with respect to group members. Where the first application is made in the jurisdiction of the parent of the enterprise group, the solution may be relatively straightforward. Where, however, the first application is made with respect to a member lower in the group structure, the court may be faced with a more difficult choice. Once identified, a related issue might be how to encourage other jurisdictions to recognize that group member as the coordination centre and facilitate it in carrying out its task.

12. An additional issue to be considered relates to the powers the court or the insolvency representative may require in order to lead the coordination. This question may, in part, be answered by provisions along the lines of Chapter IV of the Model Law, which forms the basis of the draft recommendations proposed below with respect to coordination and cooperation.

5. Multiple controlling group members

13. A further issue relates to the number of members that may be identified as controlling a group. In that regard, it may be necessary to bear in mind that in many diverse groups there may not be a single controlling enterprise, but rather a number of different sub-groups or distinct business units. What might be required to facilitate cross-border coordination in that case is an enterprise sufficiently high up the organizational structure of the group to coordinate the proceedings within the discrete unit or a discrete, but sufficiently large, number of group members that might be reorganized as a stand-alone unit. On that basis, a number of coordinating centres might be identified in large enterprise groups.

6. Recommendations

Identifying the coordination centre of an enterprise group

(1) The insolvency law may specify that, in the absence of proof to the contrary, the registered office of the group member controlling the enterprise group is presumed to be the coordination centre of the enterprise group for the purpose of leading the coordination of insolvency proceedings with respect to group members in different States.

(2) The insolvency law should specify that the following factors [may] [should] be relevant to rebut the presumption in recommendation 1:

(a) The nature or extent of any business activity conducted at the location of the registered office;

(b) The location of the employees, managers, company assets and administration of the group member, including its books, records and bank accounts;

(c) The location of the majority of the group member's creditors or of a majority of the creditors who would be affected by the case;

(d) The extent of the group member's independence with respect to financial, management and policy decision-making;

(e) The law applicable to most disputes, to financial arrangements between the group members, including capitalization and accountancy services;

(f) The division of responsibility with respect to provision of technical and legal documentation and signature of contracts; and

(g) The location where design, marketing, pricing, delivery of products and office functions are conducted.

III. Facilitating cooperation and communication

A. Background

14. Chapter IV of the Model Law focuses on coordination and cooperation between courts, between courts and insolvency representatives and between insolvency representatives, but its focus on individual debtors means that it has limited application to enterprise groups. At its thirty-fifth session, the Working Group noted, in discussing international issues, that the interpretation of those parts

of the Model Law on coordination and cooperation might be expanded to apply to enterprise groups (A/CN.9/666, para. 63).

15. The Working Group may wish to consider whether that interpretation might be achieved through a series of recommendations extending articles 25 and 26 of the Model Law to enterprise groups and expanding upon the forms of cooperation outlined in article 27. In considering that issue, the Working Group may wish to consider, as noted above in paragraph 2, whether a form of legislative text other than recommendations might be considered or whether some other form of interpretative instrument could be used.

16. Draft recommendations 3-6 below are based upon articles 25 and 26 of the Model Law, with draft recommendations 3 and 4 focusing on authorizing cooperation to the maximum extent possible, and draft recommendations 5 and 6 addressing communication. One issue the Working Group may wish to consider is whether recommendations 5 and 6 should be limited to a particular group member or apply more generally to group members subject to insolvency proceedings. For example, insolvency representative A may be appointed in State A with respect to group member A. Group member A may have assets in State B, where several other group members, B, C and D are subject to insolvency proceedings. Can insolvency representative A communicate with the court of State B and the insolvency representatives of B, C and D with respect to issues concerning group member A, as well as with respect to B, C and D in so far as they are relevant to the insolvency of A and the reorganization of the group of which they are all members? Would insolvency representative A be entitled to obtain that information and, if so, would draft recommendations 4 and 6 be sufficient for that purpose or would that issue need to be addressed more specifically?

17. Draft recommendations 7-13 expand upon cooperation to the maximum extent possible between courts, courts and insolvency representatives and insolvency representatives. They draw upon draft recommendation 234 concerning domestic enterprise groups, as well as other sources including the draft Notes, the Guidelines Applicable to Court-to-Court Communications in Cross-border Cases[2] and the European Communication and Cooperation Guidelines for Cross-Border Insolvency.[3]

B. Recommendations

Cooperation between the court and foreign courts or foreign representatives

(Model Law article 25.1)

(3) The insolvency law should authorize the court that is competent with respect to insolvency proceedings concerning an enterprise group member to cooperate to the maximum extent possible with foreign courts or foreign representatives, either directly or through the insolvency representative or other person appointed in this State, to facilitate coordination of those proceedings and proceedings commenced in other States with respect to that enterprise group.

---

[2] Published by the American Law Institute (2000) and adopted by the International Insolvency Institute.

[3] Prepared by INSOL Europe, Academic Wing (2007).

Cooperation between the insolvency representative and foreign courts or foreign representatives

(Model Law article 26.1)

(4) The insolvency law should authorize the insolvency representative appointed to administer insolvency proceedings with respect to an enterprise group member in this State, in the exercise of its functions and subject to the supervision of the court, to cooperate to the maximum extent possible with foreign courts or foreign representatives to facilitate coordination of those proceedings and proceedings commenced in other States with respect to members of that enterprise group.

Direct communication between the court and foreign courts or foreign representatives

(Model Law articles 25.2 and 26.2)

(5) The insolvency law should authorize the court that is competent with respect to insolvency proceedings concerning an enterprise group member to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives with respect to those proceedings and proceedings commenced in other States with respect to members of that enterprise group.

(6) The insolvency law should authorize an insolvency representative appointed to administer insolvency proceedings with respect to an enterprise group member in this State, in the exercise of its functions and subject to the supervision of the court, to communicate directly with foreign courts or foreign representatives with respect to those proceedings and proceedings commenced in other States with respect to that enterprise group.

Forms of cooperation and communication between courts [and between courts and foreign representatives]

(7) To the extent permitted by applicable law, cooperation to the maximum extent possible between the courts [and between courts and foreign representatives] may be implemented by any appropriate means, including:

(a) Provision to the foreign court [or the foreign representative] of copies of documents issued by the court concerning the enterprise group members subject to insolvency proceedings, including formal orders, judgements, and transcripts of proceedings;

(b) Provision to the foreign court [or foreign representative] of copies of documents that have been or are to be filed with the court concerning enterprise group members; and

(c) Participation in two-way communications with the foreign court [or foreign representative] by telephone, videoconference or other electronic means.

Safeguards

(8) The [insolvency] law should specify that communication between the courts [and between courts and foreign representatives] should be subject to the following conditions:

(a) The time, place and manner of communication should be agreed between the courts [or between the courts and foreign representatives];

(b) Notice of any proposed communication should be provided to affected parties in all relevant States in accordance with applicable law and in the manner considered appropriate by the courts;

(c) Affected parties or their representatives, as appropriate, should be entitled to participate in person during the communication, unless otherwise agreed by the courts;

(d) The communication may be recorded and a written transcript prepared as directed by the courts. That transcript may be treated as an official transcript of the communication, filed as part of the record of the proceedings and made available to both court and to representatives of parties in both courts; and

(e) Communications between the courts [and between the courts and foreign representatives] should be treated as confidential to the extent considered appropriate by the courts and in accordance with applicable law.

(9) The insolvency law should specify that communication in accordance with these recommendations should not:

(a) Constitute a compromise or waiver by the court of any powers, responsibilities or authority;

(b) Constitute a substantive determination of any matter in controversy before the court or the foreign court;

(c) Constitute a waiver by any of the parties of any of their substantive rights and claims; or

(d) Diminish the effect of any of the orders made by the court or the foreign court.

Joint hearings

(10) The insolvency law may authorize the court to conduct a joint hearing with a foreign court.[4]

Forms of cooperation and communication between insolvency representatives

(Enterprise groups, draft recommendation 234) [see A/CN.9/WG.V/WP.85]

(11) To the extent permitted by law, cooperation to the maximum extent possible between insolvency representatives should be implemented by any appropriate means, including:

(a) Sharing and disclosure of information concerning the enterprise group members subject to insolvency proceedings, provided appropriate arrangements are made to protect confidential information. Provision of information may include provision of copies of documents at reasonable cost on request;

---

[4] Where joint hearings are permitted, they may be subject to certain conditions that safeguard the rights of parties and the jurisdiction of each court. Those conditions might address the rules applicable to the conduct of the hearing; the requirements for the provision of notice; the method of communication to be used so that the courts can hear each other; the conditions applicable to the right to appear and be heard; the manner of submission of documents to the court and their availability to other courts; and limitations of the jurisdiction of each court to the parties appearing before it.

(b) Use of agreements of the kind referred to in the UNCITRAL Notes on coordination, cooperation and communication in cross-border insolvency proceedings [see draft recommendations 14 and 15 below];

(c) To the extent permitted by law, division of the exercise of powers and allocation of responsibilities between insolvency representatives, including one insolvency representative taking a coordinating or leading role;

(d) Coordination with respect to proposal and negotiation of coordinated reorganization plans, communication with creditors and meetings of creditors; and

(e) Coordination with respect to administration and supervision of the affairs of the group members subject to insolvency proceedings, including day-to-day operations where the business is to be continued; post-commencement finance; safeguarding of assets; use and disposition of assets; use of avoidance powers; submission and admission of claims; and distributions to creditors.

(12) The insolvency law should authorize insolvency representatives to communicate with each other as soon as they are appointed. Any insolvency representative may take the initiative to start or continue communication with other insolvency representatives and insolvency representatives may determine the language in which communications between them will take place.

IV. Use of cross-border agreements

A. Background

18. At its thirty-fifth session, the Working Group agreed that cross-border agreements are an important means of coordinating cross-border proceedings with respect to members of an enterprise group and that a recommendation could be included to encourage legislators and courts to draw inspiration from the draft Notes (see A/CN.9/666, para. 38) and promote the use of those agreements. Those States that have enacted article 27 of the Model Law have already recognized that such agreements are one means by which the cooperation envisaged in articles 25 and 26 might be implemented. However, not all States enacting provision based on the Model Law have included article 27 and familiarity and experience with the use and negotiation of such agreements is very limited. Moreover, the Model Law does not provide specific authorization for insolvency representatives or other parties or the court to enter into such agreements.

B. Recommendations

Authority to enter into cross-border agreements

(13) The insolvency law should authorize the insolvency representatives and other parties in interest to enter into and, to the extent permitted or required by law, seek approval [by the courts] of cross-border agreements to facilitate coordination of insolvency proceedings with respect to two or more enterprise group members in different States.

Approval or implementation of cross-border agreements

(14) The insolvency law should authorize the courts to approve or implement cross-border agreements to facilitate coordination of the insolvency proceedings with respect to two or more enterprise group members in different States.

V. Facilitating coordination — the insolvency representative

A. Background

19. The issue of promoting coordination may also be approached via the insolvency representative, by facilitating not only communication and cooperation but also, for example, the appointment of the same insolvency representative in multiple proceedings affecting members of the same group in different States where that person (whether natural or legal) meets applicable local requirements. Where such a person could be appointed, they would be subject to the local law of the States in which they were appointed. Although acknowledging potential difficulties with respect to the availability of such competence, the Working Group noted at its thirty-fifth session that such an approach might be possible (A/CN.9/666, para. 105). Draft recommendation 230 on domestic groups could be extended to that effect. The appointment could be of a natural person qualified to act in different States or legal person, where that legal person had appropriately qualified persons who could serve as insolvency representatives in a number of different States. Although the availability of appropriately qualified persons might generally be limited, there may be regions where it is more common or the globalization of trade and services may make it increasingly possible. Where such an approach was adopted, provisions to avoid potential conflicts of interest along the lines of draft recommendation 231 may need to be considered.

20. The following recommendations are proposed for consideration by the Working Group.

B. Recommendations

Appointment of the same insolvency representative

(15) The insolvency law should authorize the court to coordinate with foreign courts with respect to the appointment of the same insolvency representative to administer insolvency proceedings concerning members of the same enterprise group in different States, provided that the insolvency representative is qualified to be appointed in each of the relevant States. To the extent required by the [insolvency] law, the insolvency representative would be subject to the supervision of the appointing court.

F. Note by the Secretariat on draft UNCITRAL Notes on cooperation, communication and coordination in cross-border insolvency proceedings, submitted to the Working Group on Insolvency Law at its thirty-sixth session (A/CN.9/WG.V/WP.86 and Add.1-3) [Original: English]

1. These Notes have been prepared by the Secretariat in response to a proposal made to the thirty-eighth session of the Commission (2005) that further work should be undertaken on coordination and cooperation in cross-border insolvency cases, particularly with regard to the use and negotiation of cross-border insolvency agreements, noting that that topic was closely related and complementary to the promotion and use of the UNCITRAL Model Law on Cross-Border Insolvency (the UNCITRAL Model Law) and, in particular, implementation of article 27, paragraph (d).

2. At its thirty-ninth session (2006) the Commission agreed that initial work to compile information on practical experience with negotiating and using cross-border insolvency agreements should be facilitated informally through consultation with judges and insolvency practitioners and that a preliminary progress report on that work should be presented to the Commission for further consideration at its fortieth session, in 2007.[1]

3. At the first part of its fortieth session (2007) the Commission considered a preliminary report reflecting experience with respect to negotiating and using cross-border insolvency protocols (A/CN.9/629) and expressed its satisfaction with respect to the progress made on the work of compiling practical experience with negotiating and using cross-border insolvency agreements and reaffirmed that that work should continue to be developed informally by the Secretariat in consultation with judges, practitioners and other experts.[2]

4. At its forty-first session, the Commission had before it a note by the Secretariat reporting on further progress with respect to that work (A/CN.9/654). The Commission noted that further consultations had been held with judges and insolvency practitioners and a compilation of practical experience, organized around the outline of contents annexed to the previous report to the Commission (A/CN.9/629), had been prepared by the Secretariat. The Commission decided that the compilation should be presented as a working paper to Working Group V (Insolvency Law) at its thirty-fifth session (Vienna, 17-21 November 2008) for an initial discussion. Working Group V could then decide to continue discussing the compilation at its thirty-sixth session in April and May of 2009 and make its recommendations to the forty-second session of the Commission, in 2009, bearing in mind that coordination and cooperation based on cross-border insolvency agreements were likely to be of considerable importance in searching for solutions in the international treatment of enterprise groups in insolvency. The Commission

---

[1] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17* (A/61/17), subpara. 209 (c).

[2] Ibid., *Sixty-second Session, Supplement No. 17* (A/62/17), Part I, paras. 190 and 191.

decided to plan the work at its forty-second session, in 2009, to allow it to devote, if necessary, time to discussing recommendations of Working Group V.[3]

5. At its thirty-fifth session in November 2008, Working Group V commenced its discussion of cooperation, communication and coordination in insolvency proceedings on the basis of document A/CN.9/WG.V/WP.83, the draft UNCITRAL Notes on cooperation, communication and coordination in cross-border insolvency proceedings ("the Notes") (see A/CN.9/666, paras. 12-22). At that session, the Working Group agreed that the Notes should be circulated to Governments for comment prior to its thirty-sixth session in May 2009. A revised version should be presented to the Working Group at that session, with a view to consideration and adoption by the Commission at its forty-second session in 2009 in accordance with the Commission's mandate (see A/CN.9/666, para. 22).

6. The comments received by Governments are set forth in A/CN.9/WG.V/WP.86/Add.1-3. In revising the draft Notes, the Secretariat took those comments into consideration.

7. The revised version of the Notes is set forth below. The introduction to the Notes explains the scope of the Notes, the content of each part and the manner in which the text is organized.

UNCITRAL Notes on Cooperation, Communication and Coordination in Cross-Border Insolvency Proceedings

CONTENTS

[3] Ibid., *Sixty-third Session, Supplement No. 17* (A/63/17), para. 321.

Introduction

A. Organization and scope of the Notes

1. The purpose of these Notes is to provide guidance for practitioners and judges on practical aspects of cooperation and communication in cross-border insolvency cases, i.e. cases involving insolvency proceedings in multiple States where the insolvent debtor has assets or where some of the debtor's creditors are not from the State in which the insolvency proceedings have commenced. Such cases might involve individual debtors, but typically they involve enterprise groups with offices, business activities and assets in multiple States. The guidance is based upon a description of collected experience and practice and focuses upon the use and negotiation of cross-border agreements, providing an analysis of a number of those agreements, ranging from written agreements approved by courts to oral arrangements between parties to the insolvency proceedings that have been entered into in cross-border insolvency cases over the last decade. The Notes are not

intended to be prescriptive, but rather to illustrate how the resolution of issues and conflicts that might arise in cross-border insolvency cases could be facilitated by the use of such agreements, tailored to meet the specific needs of each case and the particular requirements of applicable law.

2. Part I of the Notes discusses the increasing importance of coordination and cooperation in cross-border insolvency cases and provides an introduction to the various international texts relating to cross-border insolvency that have been developed in recent years. These texts address various aspects of cross-border insolvency, from elaborating a legislative framework to facilitate cooperation and coordination in cross-border insolvency to providing guidance on issues that could be included in cross-border agreements or adopted by courts to guide cross-border communication.

3. Part II amplifies article 27, in particular paragraph (d), of the UNCITRAL Model Law on Cross-Border Insolvency (the UNCITRAL Model law), discussing various ways in which cooperation in cross-border cases might be achieved.

4. Part III examines in detail the use of one of the means of cooperation, referred to in article 27, paragraph (d) of the UNCITRAL Model Law, namely cross-border agreements. The analysis in this part is based on practical experience with the negotiation and use of these agreements, in particular in those cases referred to in the annex. This part also includes a number of what are termed "sample clauses", which are based to varying degrees upon provisions found in those different cross-border agreements. These clauses are included to illustrate how different issues have been addressed or might be addressed, but are not intended to serve as model provisions for direct incorporation into a cross-border agreement (see also *Sample Clauses*, paras. 16-17 below.).

5. The annex includes summaries of the cases in which the cross-border agreements that form the basis of these Notes were used. The summaries provide a basic overview of the contents of those agreements and, if available, of the reasons such agreements were negotiated. Detailed reasons for using an agreement are not generally included in the agreement.

B. Glossary

1. Notes on terminology

6. The following terms are intended to provide orientation to the reader of the Notes. Since many terms have fundamentally different meanings in different jurisdictions, an explanation of the use of the term in the Notes may assist in ensuring that the concepts discussed are clear and widely understood. These Notes use terminology common to the UNCITRAL Model Law and the UNCITRAL Legislative Guide on Insolvency Law (the UNCITRAL Legislative Guide), where relevant. For ease of reference, these terms are repeated below.

(a) References in the Notes to "court"

7. The Notes follow the Legislative Guide use of the word "court" and assume that there is reliance on court supervision throughout the insolvency proceedings, which may include the power to commence insolvency proceedings, to appoint the insolvency representative, to supervise its activities and to take decisions in the course of the proceedings. Although this reliance may be appropriate as a general

principle, alternatives may be considered where, for example, the courts are unable to handle insolvency work (whether for reasons of lack of resources or lack of requisite experience) or supervision by some other authority is preferred (see Legislative Guide, part one, chap. III, Institutional framework).

8. For purposes of simplicity, the Notes uses the word "court" in the same way as article 2, subparagraph (e), of the UNCITRAL Model Law to refer to a judicial or other authority competent to control or supervise insolvency proceedings. An authority which supports or has specified roles in insolvency proceedings, but does not have adjudicative functions with respect to those proceedings, would not be regarded as within the meaning of the term "court" as that term is used in the Notes.

(b) References in the Notes to "cross-border agreement"

9. Cross-border agreements are most commonly referred to in some States as "protocols", although a number of other titles have been used including insolvency administration contract, cooperation and compromise agreement, and memorandum of understanding. These Notes attempt to compile practice with respect to as many forms of cross-border agreement as possible and, since the use of the term "protocol" does not necessarily reflect the diverse nature of the agreements being used in practice, these Notes use the more general term "cross-border agreement".

(c) Rules of interpretation

10. Use of the singular also includes the plural; "include" and "including" are not intended to indicate an exhaustive list; "such as" and "for example" are to be interpreted in the same manner as "include" or "including".

11. "Creditors" should be interpreted as including both the creditors in the forum State and foreign creditors, unless otherwise specified.

12. References to "person" should be interpreted as including both natural and legal persons, unless otherwise specified.

2. Terms and explanations

13. The following paragraphs explain the meaning and use of certain expressions that appear frequently in the Notes. Most of those terms are defined in the UNCITRAL Legislative Guide or the UNCITRAL Model Law and their use in these Notes is consistent with their use in the other texts. They are included here for ease of reference:

(a) "Assets of the debtor": 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;

(b) "Avoidance provisions": provisions of the insolvency law that permit transactions for the transfer of assets or the undertaking of obligations prior to insolvency proceedings to be cancelled or otherwise rendered ineffective and any assets transferred, or their value, to be recovered in the collective interest of creditors;

(c) "Centre of main interests": the place where the debtor conducts the administration of its interests on a regular basis and that is therefore ascertainable by third parties;

(d) "Claim": a right to payment from the estate of the debtor, whether arising from a debt, a contract or other type of legal obligation, whether liquidated or unliquidated, matured or unmatured, disputed or undisputed, secured or unsecured, fixed or contingent;

(e) "Commencement of proceedings": the effective date of insolvency proceedings whether established by statute or a judicial decision;

(f) "Court": a judicial or other authority competent to control or supervise insolvency proceedings;[4]

(g) "Creditor": a natural or legal person that has a claim against the debtor that arose on or before the commencement of the insolvency proceedings;

(h) "Creditor committee": representative body of creditors appointed in accordance with the insolvency law, having consultative and other powers as specified in the insolvency law;

(i) "Cross-border agreement": an agreement entered into, either orally or in writing, intended to facilitate the coordination of cross-border insolvency proceedings and cooperation between the courts, between the courts and insolvency representatives and between insolvency representatives, sometimes also involving other parties in interest;

(j) "Debtor in possession": a debtor in reorganization proceedings, which retains full control over the business, with the consequence that the court does not appoint an insolvency representative;

(k) "Deferral": when one court accepts the limitation of its responsibility with respect to certain issues, including for example, the ability to hear certain matters and issue certain orders, in favour of another court;

(l) "Encumbered asset": an asset in respect of which a creditor has a security interest;

(m) "Establishment": any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services;

(n) "Insolvency": when a debtor is generally unable to pay its debts as they mature or when its liabilities exceed the value of its assets;

(o) "Insolvency estate": assets of the debtor that are subject to the insolvency proceedings;

(p) "Insolvency proceedings": collective proceedings, subject to court supervision, either for reorganization or liquidation;

(q) "Insolvency representative": a person or body, including one appointed on an interim basis, authorized in insolvency proceedings to administer the reorganization or the liquidation of the insolvency estate;

(r) "Main proceeding": an insolvency proceeding taking place in the State where the debtor has the centre of its main interests;[5]

(s) "Non-main proceeding": an insolvency proceeding, other than a main proceeding, taking place in a State where the debtor has an establishment. Non-main

---

[4] See above, paras. 7-8.

[5] See UNCITRAL Model Law, articles 2 (b) and 16.3.

proceedings conducted in European Union Member States under the EC Regulation are referred to as "secondary proceedings";[6]

(t) "Ordinary course of business": transactions consistent with both:

(i) the operation of the debtor's business prior to insolvency proceedings; and

(ii) ordinary business terms;

(u) "Party in interest": any party whose rights, obligations or interests are affected by insolvency proceedings or particular matters in the insolvency proceedings, including the debtor, the insolvency representative, a creditor, an equity holder, a creditor committee, a government authority or any other person so affected. It is not intended that persons with remote or diffuse interests affected by the insolvency proceedings would be considered to be a party in interest;

(v) "Priority": the right of a claim to rank ahead of another claim where that right arises by operation of law;

(w) "Reorganization": the process by which the financial well-being and viability of a debtor's business can be restored and the business continue to operate, using various means possibly including debt forgiveness, debt rescheduling, debt-equity conversions and sale of the business (or parts of it) as a going concern;

(x) "Reorganization plan": a plan by which the financial well-being and viability of the debtor's business can be restored;

(y) "Secondary proceedings": non-main proceedings conducted in European Union Member States under the EC Regulation;

(z) "Stay of proceedings": a measure that prevents the commencement, or suspends the continuation, of judicial, administrative or other individual actions concerning the debtor's assets, rights, obligations or liabilities, including actions to make security interests effective against third parties or to enforce a security interest; and prevents execution against the assets of the insolvency estate, the termination of a contract with the debtor, and the transfer, encumbrance or other disposition of any assets or rights of the insolvency estate.

3. Reference material

(a) References to cases

14. References to cases are included throughout the Notes and particularly in the footnotes. In general, those references are to cases cited and summarised in the annex and only a short form reference is included in the text of the Notes e.g., GBFE refers to Greater Beijing First Expressway Limited, Systech to Systech Retail Systems Corporation. References to page or paragraph numbers in association with those cases are references to the relevant page or paragraph number of the publically available English version of the cross-border agreement; many of these agreements are available in English only. Cases not included in the annex are cited only in the footnotes.

---

[6] See UNCITRAL Model Law article 2, (c) and (f).

(b) References to texts

15. These Notes include references, where relevant, to several international texts that address various aspects of coordination of cross-border insolvency cases, including:

(i) "Concordat": Cross-Border Insolvency Concordat adopted by the Council of the International Bar Association Section on Business Law (Paris, 17 September 1995) and by the Council of the International Bar Association (Madrid, 31 May 1996);

(ii) "UNCITRAL Model Law": UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment (1997);

(iii) "Court-to-Court Guidelines": Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases, published by the American Law Institute (16 May 2000) and adopted by the International Insolvency Institute (10 June 2001);

(iv) "EC Regulation": European Council Regulation (EC) No. 1346/2000 of May 2000 on insolvency proceedings;

(v) "UNCITRAL Legislative Guide": UNCITRAL Legislative Guide on Insolvency Law (2004);

(vi) "CoCo Guidelines": European Communication and Cooperation Guidelines for Cross-Border Insolvency, prepared by INSOL Europe, Academic Wing (2007).

(c) Sample clauses

16. The sample clauses included in the Notes are merely illustrative, providing examples of how the provisions of a cross-border agreement addressing the particular issues discussed in part III might be drafted, based upon actual cross-border agreements. The user is advised to read the sample clauses together with the discussion of the issue in the preceding paragraphs. It should be noted that the sample clauses are not intended to be used as model clauses and they should not be regarded as necessarily comprehensive. Moreover, they should not be considered as forming the basis of what might be regarded as a model protocol. Some provisions might only be appropriate for a particular case, whereas others of a more general nature might be more widely and commonly used. Further, some sample clauses are only effective if approved by the responsible courts, for example, when they allocate or touch upon responsibilities of the courts.

17. The Notes therefore emphasize the individual approach that has to be taken for each cross-border agreement, recognizing that a cross-border agreement has to be drafted for a specific case, taking into consideration the peculiarities of the case and the interests of the parties, as well as local conditions, including the applicable law.

I. Background

A. The legislative framework for cross-border insolvency

1. Although the number of cross-border insolvency cases has increased significantly since the 1990s, the adoption of legal regimes, either domestic or international, equipped to address cases of a cross-border nature has not kept pace. The lack of such regimes has often resulted in inadequate and uncoordinated approaches that have not only hampered the rescue of financially troubled businesses and the fair and efficient administration of cross-border insolvencies, but also impeded the protection and maximization of the value of the assets of the insolvent debtor and are unpredictable in their application. Moreover, the disparities in and, in some cases, conflicts between national laws have created unnecessary obstacles to the achievement of the basic economic and social goals of insolvency proceedings. There has often been a lack of transparency, with no clear rules on recognition of the rights and priorities of existing creditors, the treatment of foreign creditors and the law that will be applicable to cross-border issues. While many of these inadequacies are also apparent in domestic insolvency regimes, their impact is potentially much greater in cross-border cases, particularly where reorganization is involved.

2. In addition to the inadequacy of existing laws, the absence of predictability as to how they will be implemented and the potential cost and delay of implementation has added a further layer of uncertainty that can impact upon capital flows and cross-border investment. Acceptance of different types of proceedings, understanding of key concepts and the treatment accorded to parties with an interest in insolvency proceedings differs. Reorganization or rescue procedures, for example, are more prevalent in some countries than others. The involvement of, and treatment accorded to, secured creditors in insolvency proceedings varies widely. Different countries also recognize different types of proceedings with different effects. An example in the context of reorganization proceedings has been the case in which the law of one State envisages a debtor in possession continuing to exercise management functions, while under the law of another State in which contemporaneous insolvency proceedings are being conducted with respect to the same debtor, existing management will be displaced or the debtor's business liquidated. Many national insolvency laws have claimed, for their own insolvency proceedings, application of the principle of universality, with the objective of a unified proceeding where court orders would be effective with respect to assets located abroad. At the same time, those laws do not accord recognition to universality claimed by foreign insolvency proceedings. In addition to differences between key concepts and treatment of participants, some of the effects of insolvency proceedings, such as the application of a stay or suspension of actions against the debtor or its assets, regarded as a key element of many laws, cannot be applied effectively across borders.

3. In addition to the lack of national law reform efforts, there has also been a lack of multilateral treaty arrangements with global effect. A few treaties have been negotiated at a regional level, but those arrangements are generally only possible (and suitable) for countries of the particular region whose insolvency law regimes and general commercial laws are similar (see below, para. 20). Experience has shown that despite the potential of international treaties to provide a vehicle for widespread harmonization, the effort in negotiating such agreements is generally

substantial and, as one commentator has noted, the greater the degree of practical utility that is pursued by means of a treaty, the greater the difficulty in bringing it to fruition and the greater the risk of ultimate failure. The search for comity in insolvency in Europe provides a good example. From 1960 the intention was to develop a bankruptcy convention that would parallel the 1968 Convention on Jurisdiction and Enforcement of Judgements in Civil Commercial Matters. These efforts led to the 1990 European Convention on Certain International Aspects of Bankruptcy (the Istanbul Convention). Following only one ratification (Cyprus), the Convention was superseded by a draft European Union convention on insolvency proceedings. Although European member States came close to adopting such a Convention in November 1995, implementation ultimately proved impossible. The Convention was revived in the form of a regulation in May 1999, which was adopted by the Council on 29 May 2000 and came into effect on 31 May 2002 (see below, para. 21).

B. International initiatives

4. To address the lack of national law reform efforts, several international initiatives have been launched by certain non-governmental organizations over the last decade or so to provide a legal framework for harmonization of cross-border insolvency proceedings.

1. Model International Insolvency Cooperation Act

5. An early project launched by a non-governmental organization was the Model International Insolvency Cooperation Act (MIICA) developed under the auspices of Committee J of the Section on Business Law of the International Bar Association and approved by the Councils of the International Bar Association and the Section on Business Law in 1989. The MIICA was a model statute, proposed for domestic adoption that provided mechanisms by which a court could assist and act in aid of insolvency proceedings being conducted in other jurisdictions. Although failing to gain wide and active acceptance from governments and legislators, the MIICA ensured that the model law concept came to be perceived as a viable way of solving the impasse caused by persistent failure to successfully conclude a global treaty in the area of insolvency. Experience with MIICA also indicated the importance to the success of a project of involving Governments in the negotiation process (a key element of the UNCITRAL process), particularly where the text being developed required action by governments for its adoption, whether legislative or otherwise.

2. UNCITRAL Model Law on Cross-Border Insolvency

6. The UNCITRAL Model Law was adopted by UNCITRAL in 1997. It focuses on the legislative framework needed to facilitate cooperation and coordination in cross-border cases, with a view to promoting the general objectives of:

(a) Cooperation between the courts and other competent authorities of [the enacting] State and foreign States involved in cases of cross-border insolvency;

(b) Greater legal certainty for trade and investment;

(c) Fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;

(d) Protection and maximization of the value of the debtor's assets; and

(e) Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.[7]

7. These principles raise a number of issues that relate to the extent to which courts, in exercising their powers with respect to administration of the cases before them, are permitted or authorized to interact with or relate to foreign courts that might be administering a related case involving the same debtor. Are courts able, for example, to treat common stakeholders equitably, give foreign stakeholders access to their courts on the same basis as domestic stakeholders or permit another jurisdiction to take principal charge of administering reorganization? Experience has shown, for example, that some courts are often reluctant or unable to defer to a foreign court and may therefore prefer parallel insolvency proceedings or treat main and non-main proceedings, where provided for under the relevant insolvency regime, as if they were concurrent or parallel proceedings. Such a preference may be based upon applicable law or a desire to protect the interests of domestic creditors.

8. In its resolution of 1997[8] recommending that States adopt the UNCITRAL Model Law, the United Nations General Assembly provided a compelling statement of the need for the text, its timeliness and its fundamental purpose. Specifically, the General Assembly noted that increased cross-border trade and investment led to a greater incidence of cases where enterprises and individuals had assets in more than one State and there was often an urgent need for cross-border cooperation and coordination to facilitate the supervision and administration of the insolvent debtor's assets and affairs. Inadequate coordination and cooperation in those cases not only reduces the possibility of rescuing financially troubled but viable businesses, but also impedes a fair and efficient administration of cross-border insolvencies, making it more likely that the debtor's assets would be concealed or dissipated, and hinders reorganization or liquidation of debtor's assets and affairs that would be the most advantageous for the creditors and other interested persons, including the debtor and the debtor's employees.

9. The General Assembly went on to note that many States lacked a legislative framework that would make possible or facilitate effective cross-border coordination and cooperation. It made clear its conviction that fair and internationally harmonized legislation on cross-border insolvency that respected the national procedural and judicial systems and was acceptable to States with different legal, social and economic systems would not only contribute to the development of international trade and investment, but would also assist States in modernizing their legislation on cross-border insolvency.

10. An intergovernmental working group, including representatives of 72 States, seven intergovernmental organizations and ten non-governmental organizations, negotiated the UNCITRAL Model Law between 1995 and 1997. As a model law, it requires enactment into domestic law to provide a unilateral legislative framework for cross-border insolvency. The UNCITRAL Model Law focuses upon what is required to facilitate the administration of cross-border insolvency cases and provide an interface between jurisdictions. As such, it respects the differences among national procedural laws and does not attempt a substantive unification of

---

[7] Preamble of the UNCITRAL Model Law.

[8] General Assembly resolution 52/158 of 15 December 1997.

insolvency law (substantive insolvency law is addressed in the UNCITRAL Legislative Guide).

11. The text of the UNCITRAL Model Law offers solutions that help in several modest but significant ways, organized around four key elements: (a) Access to local courts for representatives of foreign insolvency proceedings and for creditors; (b) According recognition to certain orders issues by foreign courts; (c) Providing relief to assist foreign proceedings; and (d) Facilitating cooperation among the courts of States where the debtor's assets are located.

12. The solutions offered by the UNCITRAL Model Law include the following:

(a) Providing the person administering a foreign insolvency proceeding ("foreign representative") with access to the courts of the enacting State, thereby permitting the foreign representative to seek a temporary "breathing space", and allowing the courts in the enacting State to determine what coordination among the jurisdictions or other relief is warranted for optimal disposition of the insolvency;

(b) Determining when a foreign insolvency proceeding should be accorded "recognition" and what the consequences of recognition may be;

(c) Establishing simplified procedures for recognition;

(d) Providing a transparent regime for the right of foreign creditors to commence, or participate in, an insolvency proceeding in the enacting State;

(e) Permitting courts and insolvency representatives in the enacting State to cooperate more effectively with foreign courts and foreign representatives involved in an insolvency matter;

(f) Authorizing courts in the enacting State and persons administering insolvency proceedings in the enacting State to seek assistance abroad;

(g) Establishing rules for coordination where an insolvency proceeding in the enacting State is taking place concurrently with insolvency proceedings in foreign States.

13. A widespread limitation on cooperation and coordination between judges from different jurisdictions cross-border insolvency cases derives from the lack of a legislative framework, or from uncertainty regarding the scope of the existing legislative authorization, for pursuing cooperation with foreign courts. As noted above, the UNCITRAL Model Law is designed to assist States to equip their insolvency laws with that modern, harmonized legislative framework.

14. The Guide to Enactment of the UNCITRAL Model Law emphasizes the centrality of cooperation to cross-border insolvency cases, in order to achieve efficient conduct of those proceedings and optimal results. A key element is cooperation between the courts involved in the various proceedings of the case (article 25) and between those courts and the insolvency representatives appointed in the different proceedings (article 26). An essential element of cooperation may be establishing communication among the administering authorities of the States involved. While the UNCITRAL Model Law provides the authorization for cross-border cooperation and communication between judges, it does not specify how that cooperation and communication might be achieved, leaving it up to each jurisdiction to determine or apply its own rules. It does note, however, that the ability of courts, with the appropriate involvement of the parties, to communicate "directly" and to request information and assistance "directly" from foreign court or foreign

representatives, is intended to avoid the use of time-consuming procedures traditionally in use, such as letters rogatory. As insolvency proceedings are inherently chaotic and value evaporates quickly with the passage of time, this ability is critical when courts consider that they should act with urgency.[9]

15. As at March 2009, legislation based upon the UNCITRAL Model Law has been enacted in: Australia (2008); British Virgin Islands, overseas territory of the United Kingdom of Great Britain and Northern Ireland (2005); Colombia (2006); Eritrea (1998); Great Britain (2006); Japan (2000); Mexico (2000); Montenegro (2002); New Zealand (2006); Poland (2003); Republic of Korea (2006); Romania (2003); Serbia (2004); Slovenia (2008); South Africa (2000); and the United States of America (2005).[10]

3. International Bar Association Cross-Border Insolvency Concordat

16. A different initiative was that of Committee J of the International Bar Association, which in the early 1990s developed a Cross-Border Insolvency Concordat based on rules of private international law. The purpose of the Concordat was to suggest guidelines for cross-border insolvencies and reorganizations that participants or courts could adopt as practical solutions to a variety of issues. These include: designation of the administrative forum; application of that forum's priority rules; rules for cases involving more than one administrative forum; and designation of applicable rules for avoidance of certain specified pre-insolvency transactions. The initial application of the Concordat was in cases that involved Canada and the United States, by some of the judges who had been instrumental in developing the Concordat. Cross-border insolvency agreements based on the Concordat model have been entered into between the United States and Canada on a number of occasions, as well as between the United States and Israel, the Bahamas, the Cayman Islands, England, Bermuda and Switzerland.

17. This form of cooperation has emerged as a common practice, at least in certain States. The absence of formal treaties or domestic legislation to address the problems arising from international insolvencies has encouraged insolvency practitioners to develop, on a case-by-case basis, strategies and techniques for resolving the conflicts that arise when the courts of different States attempt to apply different laws and enforce different requirements upon the same set of parties. The terms and duration of agreements vary, and amendment or modification in the course of the proceedings takes account of the changing dynamics of a multinational insolvency to facilitate solutions for unique problems that arise in the course of the proceedings.

18. An early use of a cross-border agreement was in 1992 in the insolvency of the *Maxwell Communication Corporation*. *Maxwell* was placed into administration in England and contemporaneously into Chapter 11 proceedings in New York, with administrators and an examiner appointed respectively. An agreement may not be the appropriate solution for all cases, being case specific as to its content and requiring time for it to be negotiated as well as a sufficient asset base to justify the costs associated with negotiation and cooperation between the two courts and between the insolvency practitioners in each jurisdiction. Nevertheless, the cases in which cross-border agreements have been used provide examples of how

---

[9] UNCITRAL Model Law, Guide to Enactment, para. 179.

[10] This information is regularly updated on the UNCITRAL website at www.uncitral.org under Status of Conventions.

cooperation and coordination between the judges, courts and the insolvency profession can improve the international regime for insolvency in the absence of comprehensive national, regional or international law reform solutions. The agreements developed have often provided innovative solutions to cross-border issues and have enabled courts to address the specific facts of individual cases. Although there are limitations on the extent to which they can be used to achieve more widespread harmonization of international insolvency law and practice, protocols are being increasingly used and information about them more and more widely disseminated.

4. Regional arrangements

19. While a few treaties have been negotiated at a regional level, these arrangements are generally only possible (and suitable) for countries of a particular region whose insolvency law regimes and general commercial laws are similar. Of necessity, their application is limited to the regional group of contracting States.

20. Regional multilateral treaties include: in Latin America, the Montevideo Treaties of 1889 and 1940 and in the Nordic region, the Convention between Denmark, Finland, Iceland, Norway and Sweden regarding Bankruptcy (concluded in 1933, amended in 1977 and 1982). While no doubt improving the situation between those contracting States, the increasing globalization of business and investment and the consequent spread of international insolvencies is likely to include non-participating States, underlining the limitations inherent in any regional treaty regime. Nevertheless, regional arrangements may prove to be a useful starting point for broader cooperation.

21. As noted above, the EC Regulation regulates the complex problems of cross-border insolvency by creating a binding framework within which insolvency proceedings taking place in any Member State of the EU could be recognized and enforced throughout the rest of the Union. The EC Regulation recognizes that the proper functioning of its internal market requires the efficient and effective operation of cross-border insolvency proceedings. One impediment to that proper functioning, which the Regulation tries to prevent, is "forum shopping", where parties transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position.[11] The EC Regulation imposes a mandatory regime for the exercise of jurisdiction to open insolvency proceedings and choice of law rules, which determine the law that will govern each relevant aspect of insolvency proceedings to which the Regulation applies and recognizes the importance of cooperation between the proceedings. Article 31 establishes the duty of insolvency representatives of the different concurrent insolvency proceedings to cooperate and communicate information, but does not provide much guidance on the detail of that communication and cooperation. That is addressed by the CoCo Guidelines, developed under the aegis of the Academic Wing of INSOL Europe, which constitute a set of standards for communication and cooperation by insolvency representatives in cross-border insolvency cases.

5. Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases[12]

22. In 2000, the American Law Institute (ALI) developed the Court-to-Court Guidelines as part of its work on transnational insolvency in the countries of the

---

[11] Preamble of the EC Regulation, recitals (2) and (4).

[12] The Court-to-Court Guidelines are available online at www.ali.org/doc/Guidelines.pdf.

North American Free Trade Agreement (NAFTA). A team of judges, lawyers and academics from the three NAFTA countries, Canada, Mexico and the United States, worked jointly on that project. The Court-to-Court Guidelines are intended encourage and facilitate cooperation in international cases. They are not intended to alter or change the domestic rules or procedures that are applicable in any country, nor to affect or curtail the substantive rights of any party in proceedings before the courts. They have been approved by both the International Insolvency Institute (III) and the Insolvency Institute of Canada and endorsed by various courts. Further, they have been used by courts in several cross-border insolvency cases, for example *PSINet* and *Matlack* (see annex).

II. UNCITRAL Model Law on Cross-Border Insolvency: possible forms of cooperation under article 27[13]

1. A widespread limitation on cooperation and coordination between judges from different jurisdictions in cases of cross-border insolvencies derives from a lack of a legislative framework, or from uncertainty regarding the scope of the existing legislative authorization, for pursuing cooperation with foreign courts. As noted above, the UNCITRAL Model Law provides that legislative framework authorizing cross-border cooperation and communication between courts. It does not, however, specify how that cooperation and communication might be achieved. To assist those States that might have a limited tradition of direct cross-border judicial cooperation and States where judicial discretion has traditionally been constrained, article 27 of the UNCITRAL Model Law lists possible forms of cooperation, as discussed below, that might be used to coordinate cross-border insolvency cases.

A. Article 27 (a): Appointment of a person to act at the direction of the court

2. Such a person may be appointed by a court to facilitate coordination of insolvency proceedings taking place in different jurisdictions concerning the same debtor. The person may have a variety of possible functions including: acting as a go-between for the courts involved, especially where issues of language are raised; developing an agreement; and promoting consensual resolution of issues between the parties. Where the court appoints such a person, typically the court order will indicate the terms of the appointment and the powers of the appointee. The person may be required to report to the court or courts involved in the proceedings on a regular basis, as well as to the parties.

3. In the *Maxwell* case, for example, the United States court appointed an examiner with expanded powers under Chapter 11 of the United States Bankruptcy Code and directed them to work to facilitate coordination of the different proceedings. In the *Nakash* case, an examiner was also appointed by the United States court to, inter alia, attempt to develop a protocol for harmonizing and coordinating the United States Chapter 11 proceedings with certain proceedings taking place in Israel and ultimately facilitate a consensual resolution of the United States Chapter 11 case. In the *Matlack* case, cross-border agreement provided for the intermediary to periodically or upon request deliver to the court reports summarizing the status of the foreign insolvency proceedings and such other information as the court might order.

---

[13] Article 27. Forms of cooperation
Cooperation referred to in articles 25 and 26 may be implemented by any appropriate means, including:
(a) Appointment of a person or body to act at the direction of the court;
(b) Communication of information by any means considered appropriate by the court;
(c) Coordination of the administration and supervision of the debtor's assets and affairs;
(d) Approval or implementation by courts of agreements concerning the coordination of proceedings;
(e) Coordination of concurrent proceedings regarding the same debtor;
(f) [The enacting State may wish to list additional forms or examples of cooperation].

B. Article 27 (b): Communication of information as considered appropriate by the court

4. An essential element of cooperation may be establishing communication between the administering authorities of the States involved. Articles 25 and 26 of the UNCITRAL Model Law authorize direct communication between courts, between courts and insolvency representatives and between insolvency representatives. Where the UNCITRAL Model Law has been adopted, these provisions establish the necessary legislative authorization for that communication, but they do not specify in any detail how that communication should take place beyond suggesting, in article 27, that it may be implemented by, for example, communicating information by any means considered appropriate by the court. The UNCITRAL Model Law envisages that communication as authorized would be subject to any mandatory rules applicable in an enacting State, such as rules restricting the communication of information for reasons, inter alia, of protection of privacy or confidentiality.[14] The ability of courts to communicate "directly" and to request information and assistance "directly" from foreign court or foreign representatives, avoiding the use of time-consuming procedures traditionally in use, such as letters rogatory, may be critical when courts consider that they should act with urgency.[15]

5. Establishing communication in cross-border cases may assist cross-border proceedings in many ways. It may assist parties to better understand the implications or application of foreign law, particularly the differences or overlaps that may otherwise lead to litigation; facilitate resolution of issues through a negotiated result acceptable to all; provoke more reliable responses from parties, avoiding inherent bias and adversarial distortion that may be apparent where parties represent their own particular concerns in their own jurisdictions. It may also serve international interests by facilitating better understanding that will assist in encouraging international business and preserving value that would otherwise be lost through fragmented judicial action. Some of the potential benefits may be hard to identify at the outset, but may become apparent once the parties have communicated. Cross-border communication may reveal, for example, some fact or procedure that will substantially inform the best resolution of the case and may, in the longer term, serve as an impetus to law reform.

6. Communication of information may take place by exchange of documents (e.g. copies of formal orders, judgements, opinions, reasons for decisions, transcripts of proceedings, affidavits and other evidence) or orally. The means of communication may be by post, fax or e-mail, or by telephone or videoconference. Copies of written communications may also be provided to the parties in accordance with applicable notice provisions. Communication may be affected directly between judges or between or through court officials (or a court appointed intermediary, as noted above) or insolvency representatives, subject to local rules. The development of new communication technologies supports various aspects of cooperation and coordination, with the potential to reduce delays and, as appropriate, facilitate face-to-face contact. As global litigation multiplies, these methods of direct communication are increasingly being used. Videoconferences have been used in preference to telephone conferences, as they provide reasonable control of the

---

[14] UNCITRAL Model Law, Guide to Enactment, para. 182.

[15] Ibid., para. 179.

process and facilitate disciplined organization of the communication as the participants can hear and see each other.

7. Communication of information between judges or other interested parties raises a number of issues that need to be considered to ensure any communication is open, effective and credible and that proper procedures are followed. At a general level, it might be appropriate to consider whether communication should be treated as a matter of course in cross-border proceedings or resorted to only where determined to be strictly necessary; whether it should cover only issues of procedure or may also deal with substantive matters; whether a judge may advocate that a particular course of action be taken; and, with respect to safeguards, such as those mentioned below (see below, part III, paras. 30-32, 185-188), whether they should apply in all cases or whether there might be exceptions.

8. In any particular case it will be necessary to determine, as appropriate to a particular jurisdiction: the correct procedures to be followed, including the persons who are to be party to the communication and any limitations that will apply; the questions to be considered; whether the parties share the same intentions or understanding with respect to communication; any safeguards that will apply to protect the substantive and procedural rights of the parties; the language of the communication and any consequent need for translation of written documents or interpretation of oral communications; and acceptable methods of communication. Cross-border agreements generally seek to balance the interests of the different stakeholders and ensure that no one is prejudiced in any material way by the methodology to be included in the agreement. Safeguards might provide that parties are entitled to be notified of any proposed communication (e.g. all parties and their representatives or counsel), object to the proposed communication, be present when the communication takes place and to participate and that a record of the communication should be made, becoming part of the records of the proceedings and available to counsel in both courts subject to any measure the courts may deem appropriate to protect confidentiality.

9. Where the UNCITRAL Model Law has not been enacted, the legislative authorization for communication in cross-border proceedings might be lacking. The different approaches taken to communication between the courts and parties serve to illustrate some of the problems that might be encountered. In addition to the absence of specific authorization, there is very often hesitance or reluctance on the part of courts of different jurisdictions to communicate directly with each other. That hesitance or reluctance may be based upon ethical considerations; legal culture; language; or lack of familiarity with foreign laws and their implementation. Some States have a relatively liberal approach to communication between judges, while in other States judges may not communicate directly with parties or insolvency representatives or indeed with other judges. In some States, ex parte communications with the judge are considered normal and necessary, while in other States such communications would not be acceptable.[16] Within States, judges and lawyers may have quite different views about the propriety of contacts between judges without the knowledge or participation of the attorneys for the parties. Some judges, for example, accept that there is no difficulty with private contact among

---

[16] For example, in the NAFTA countries, ex parte communications with the judge are accepted in Mexico, while in Canada and the United States they are not. See The American Law Institute's Principles of Cooperation Among the NAFTA Countries, Procedural Principle 10, Topic IV.B., Comment, pp. 57-58.

themselves, while some lawyers would strongly disagree with that practice. Courts typically focus on the matters before them and may be reluctant to provide assistance to related proceedings in other States, particularly when the proceedings for which they are responsible do not appear to involve an international element in the form of a foreign debtor, foreign creditors or foreign operations.

10. Courts may adopt guidelines, such as the Court-to-Court Guidelines, to coordinate their activities, foster efficiency and ensure stakeholders in each State are treated consistently. Such guidelines typically are not intended to alter or change the domestic rules or procedures that are applicable in any country, and are not intended to affect or curtail the substantive rights of any party in proceedings before the courts. Rather, they are intended to promote transparent communication between courts, permitting courts of different jurisdictions to communicate with one another and may be adopted by court for general use or incorporated into specific cross-border agreements.

C. Article 27 (c): Coordination of administration and supervision of the debtor's assets

11. The conduct of cross-border insolvency proceedings will often require assets of the different insolvency estates to continue to be used, realized or disposed of in the course of the proceedings. Coordination of such use, realization and disposal will help to avoid disputes and ensure that the benefit of all parties in interest is the key focus, particularly in reorganization. Some of the issues to be considered in facilitating coordination will include: the location of the various assets; determination of the law governing the assets and the parties responsible for determining how they can be used or disposed of (e.g. the insolvency representative, the courts or in some cases the debtor), including the approvals required; the extent to which responsibility for those assets can be shared among or allocated to those different parties in different States; and how information can be shared to ensure coordination and cooperation. Coordination may also be relevant to investigating the debtor's assets and considering possible avoidance proceedings.

D. Article 27 (d): Approval or implementation of agreements concerning coordination of proceedings

12. As noted above, the insolvency community, faced with the daily necessity of dealing with insolvency cases and attempting to coordinate administration of cross-border insolvencies in the absence of widespread adoption of facilitating national or international laws, has developed cross-border agreements. These are designed to address the potential procedural and substantive conflicts arising in those cross-border cases, facilitating their resolution through cooperation between the courts, the debtor and other stakeholders across jurisdictional lines to work efficiently and increase realizations for stakeholders in potentially competing jurisdictions.

13. Cross-border agreements do not replace enactment of the UNCITRAL Model Law as a means of facilitating cross-border cooperation and coordination, but may be used in conjunction with enactment of the Model Law and, in fact, complement its enactment. They are discussed in detail in part III below.

E. Article 27 (e): Coordination of concurrent proceedings

14. When there are concurrent cross-border proceedings with respect to the same debtor, the UNCITRAL Model Law aims to foster decisions that would best achieve the objectives of both proceedings. Article 29 provides guidance to a court that is dealing with cases where the debtor is subject to both foreign and local proceedings, addressing ways in which those proceedings should be coordinated, particularly with respect to the provision of relief, to ensure the different proceedings can move forward without being unnecessarily suspended by the operation of a stay. For example, investigation of the debtor's assets may involve assets located in a number of different jurisdictions and such investigation may be hampered by the operation of a stay in one or more of those jurisdictions. In order to proceed with the investigation, relief from the stay might be required. Similarly, proceedings commenced in one State might be assisted by the application of a stay in another State where no insolvency proceedings have commenced with respect to the debtor, but where the debtor has assets. Recognition of the stay in that second State would assist in protecting the assets for the benefit of all creditors. In recognizing and implementing a stay ordered by another court, a court might consult with the issuing court regarding (a) the interpretation and application of the stay and possible modification of the stay or relief from the stay, and (b) the enforcement of the stay.

15. Concurrent proceedings may also be coordinated by way of joint hearings (see part III, paras. 145-150 below) and, in the case of reorganization, by coordinating reorganization plans, particularly where the same or a similar plan is required in each State involved in the insolvency. Coordination may be relevant to preparation of the plan; negotiation with creditors; procedures for approval; and the role to be played by the courts, particularly with respect to approval of the plan and its implementation.

16. Chapter V of the UNCITRAL Model Law (articles 28-32) addresses certain specific aspects of coordination of concurrent proceedings, namely commencement of local proceedings after recognition of foreign main proceedings; coordination of relief; coordination of multiple proceedings; the application of a presumption of insolvency; and rules of payment in concurrent proceedings.

F. Article 27 (f): Other forms of cooperation

17. Forms of cooperation not specifically mentioned in article 27 might include the following.

(a) Questions of jurisdiction and allocation of disputes among cooperating courts for resolution

18. Reaching an appropriate level of cooperation may require courts in the States in which insolvency proceedings have commenced to coordinate their efforts and avoid the sorts of conflict that might arise from the traditional approaches of reciprocity and the first-to-judgement rule (which permits parallel litigation involving the same parties and issues to proceed in two countries, with the result governed by the first court to reach a decision). In some countries, the anti-suit injunction, restraining a party from commencing or continuing proceedings in

another jurisdiction, may also create conflict[17] and hamper the successful conduct of parallel insolvency proceedings. Litigation associated with such injunctions tends to be prolonged. Cooperation may involve, for example, identifying different matters to be brought before respective courts (which might be agreed at the level of the parties and not involve a decision by the courts); courts deferring to the jurisdiction or to decisions of other courts; and, to the extent permitted, allocating responsibility for various matters between the courts to facilitate coordination and avoid duplication of effort. Among some States, there is a trend of some courts in multinational cases attempting to determine the optimal forum for each case rather than relying on the traditional rules. This solution has been used most frequently in insolvency cases because of the universal jurisdiction characteristic of insolvency.

19. Determining the most appropriate forum may involve one court deferring to another. This might involve dismissing a legal action commenced in one court to allow a decision in the other court in which a parallel action has been commenced.[18] It might also involve one court giving jurisdiction to another court where, for example, an action may be possible in the second court, but not in the first. In the *Maxwell* case, for example, a creditor would have been subject to an avoidance action in the United States, but not in England; the English court gave jurisdiction to the United States court, all parties agreeing that the use of the United States law in this case would be territorial. After considering the matter, however, the United States court concluded that the law of the jurisdiction having the greatest interest in the outcome of the controversy, in this case English law, should govern. The United States court acknowledged, "in an age of multinational corporations, it may be that two or more countries have equal claim to be the home country of the debtor".

20. Deferring to another court might not be possible in all cases, as courts are often obliged to exercise jurisdiction or exclusive control over certain matters. Some legal systems, in particular civil law jurisdictions, may also have procedural rules that limit their ability to defer to another court. However the insolvency representative may have discretion to simply not pursue a given action in its home court, electing to let the representative of a related proceeding in another State pursue the action there.

(b) Coordination of the filing, determination and priority of claims

21. Coordinating the procedures for verification and admission of claims may assist the administration of multiple cross-border insolvency proceedings involving large number of creditors in different States. Various measures could be adopted, for example: determining a single jurisdiction for the submission, verification and

---

[17] In a case concerning parallel insolvency proceedings in the United States and Belgium, the US appellate court adopted a restricted approach to enjoining foreign proceedings and acknowledged that the courts might enter an anti-suit injunction only on the rare occasions when needed "to protect jurisdiction or an important public policy." The court quoted as an example a case where the foreign proceeding was only initiated for the "sole purpose of terminating the United States claim and where the foreign court had enjoined parties from pursuing action in the United States," see *Stonington Partners, Inc. v. Lernout & Hauspie Speech Products N.V.*, 310 F.3d 118, 127 (3d Cir. 2002).

[18] See, for example: *Victrix Steamship Co., S.A. v. Salen Dry Cargo A.B.*, 825 F.2d 709 (2d Cir. 1987), in which a United States court approved dismissal of a claim against a debtor in a Swedish insolvency proceeding in deference to that proceeding; *Cunard Steamship Co. v. Salen Reefer Serv. A. B.*, 773 F.2d 452 (2d Cir. 1985), which involved a similar dismissal of an arbitration in favour of an insolvency proceeding.

admission of claims and allocating responsibility for that process to the court or the insolvency representative; coordinating that process where claims are to be submitted in more than one proceeding, including requiring insolvency representatives to share lists of creditors and claims admitted, and aligning submission deadlines and procedures; providing for recognition of claims verified and admitted in one State in other States; establishing priorities of claims; and so forth. Coordination of treatment of claims is one of the issues commonly addressed in cross-border agreements (see below, part III, paras. 120-131).

III. Cross-border agreements

A. Preliminary issues

1. As noted above (see above, Introduction, para. 4 and part II, para. 12), one tool for facilitating the management of multiple cross-border insolvencies is the *cross-border agreement.*

2. As also noted above, some of the international projects targeting the facilitation of cross-border insolvency proceedings touch more or less explicitly on these agreements, referring in particular to cross-border "protocols", and in some cases recommending their use. Some, for example, have developed principles to assist with the negotiation of such cross-border agreements, including in particular, the Concordat. The CoCo Guidelines recommend the use of a cross-border agreement as the best means of achieving cooperation, while the Court-to-Court Guidelines make reference to the use of a cross-border agreement in the context of joint hearings. As discussed below, some agreements incorporate the terms of these instruments by reference; others model specific provisions upon the drafting used in these texts.

3. Drawing upon practical experience, the following part examines the nature and use of cross-border agreements, outlines some of the conditions supporting the use of such agreements and identifies the range of issues addressed in existing agreements, reflecting on the manner in which they have been treated in different cases.

1. What is a cross-border agreement?

4. Cross-border agreements are generally agreements entered into for the purpose of facilitating cross-border cooperation and coordination of multiple insolvency proceedings in different States concerning the same debtor. To quote the court in *MacFadyen*, a cross-border agreement is a "proper and common-sense business arrangement to make, and one manifestly for the benefit of all parties interested." Typically, they are designed to assist in the management of those proceedings and are intended to reflect the harmonization of procedural rather than substantive issues between the jurisdictions involved (although in limited circumstances, substantive issues may be addressed). They vary in form (written versus oral) and scope (generic to specific) and may be entered into by different parties. Simple generic agreements may emphasize the need for close cooperation between the parties, without addressing specific issues, while more detailed, specific agreements establish a framework of principles to govern multiple insolvency proceedings and may be approved by the courts involved. They may reflect agreement between the parties to take certain steps or actions, as well as agreement to refrain from taking certain steps or actions.

5. Though differing in form, these agreements are nearly always intended to be binding on the parties that enter into them and to regulate a similar range of issues. They are most commonly referred to as "protocols", although a number of other titles have been used including insolvency administration contract, cooperation and compromise agreement, and memorandum of understanding. Since the use of the term "protocol" does not necessarily reflect the diverse nature of the agreements being used in practice, these Notes use the more general term "cross-border agreement".

6. Cross-border agreements have been successfully used in insolvency proceedings concerning both reorganization or liquidation and in a variety of situations, including cases involving: multiple plenary proceedings; ancillary proceedings commenced in different States affecting the same parties; main and non-main proceedings; insolvency proceedings in one State and non-insolvency proceedings with respect to the same debtor in another State; and insolvency proceedings with respect to enterprise groups. They have also been used in cases involving States with different legal traditions, that is, both common law and civil law.

7. In addition to promoting the efficient worldwide coordination and resolution of multiple proceedings against a debtor, they are also intended to protect the fundamental local rights of each of the parties involved in those proceedings. Their use has effectively reduced the cost of litigation[19] and enabled parties to focus on the conduct of the insolvency proceedings rather than upon resolving conflict of laws and other such disputes. As such, they are considered by many practitioners who have been involved with their use as the key to developing appropriate solutions for particular cases, without which a successful conclusion to the proceedings would have been very unlikely. Their increasing use suggests that in time they may become the norm in cases with a significant international element, although their use is not ubiquitous, currently being limited to a handful of States.

8. Typically, cross-border agreements are tailored to address the specific issues of a case and the needs of the parties involved. They may be designed to facilitate the development of a framework of general principles to address basic administrative issues arising out of the cross-border and international nature of the insolvency proceedings and may be used:

(a) To promote certainty and efficiency with respect to management and administration of the proceedings;

(b) To help clarify the expectations of parties;

(c) To reduce disputes and promote their effective resolution where they do occur;

(d) To assist in preventing jurisdictional conflict;[20]

(e) To facilitate restructuring;

(f) To assist in achieving cost savings by avoiding duplication of effort and competition for assets and avoiding unnecessary delay;

(g) To promote mutual respect for the independence and integrity of the courts and avoid jurisdictional conflicts;

(h) To promote international cooperation and understanding between judges presiding over the proceedings, and between the insolvency representatives of those proceedings; and

---

[19] In the *Everfresh* proceedings, for example, it has been estimated that enhancement of value through the agreement, which involved the creditors and managed to restrain unsecured creditors from taking detrimental actions, was in the order of 40 per cent.

[20] The agreement in the *Maxwell* proceedings, for example, resulted in the English and United States insolvency representatives performing in such a way that no conflict requiring judicial resolution arose.

(i) To contribute to the maximization of value of the estate.

9. Unfamiliarity with the use of such agreements has led to some misapprehension that they are used to enable a party to circumvent its legal obligations, duties or limitations or to defer or impose them on the parties in another State in a way not permitted under the domestic law of either party. However, a cross-border agreement is not a tool for circumventing legal obligations, but rather a tool for working out the best possible means of coordinating the proceedings in the States involved, within the limitations of the domestic legal regimes of those States. This principle applies to all parties, including the courts, which must abide by their domestic laws. The extent to which courts might interpret that law to facilitate cross-border cooperation is a different issue.

2. Circumstances that might support use of a cross-border agreement

10. Despite the case-specificity of cross-border agreements, the existence of certain circumstances in a particular case might be regarded as supporting the use of an agreement to facilitate cross-border cooperation and coordination. The circumstances noted below should not be regarded as an inclusive or determinative checklist, but rather as signs that an agreement might be helpful; notwithstanding the existence of a number of these factors in a particular case, it might be decided that for other reasons a cross-border agreement is not required or desirable. The circumstances supporting an agreement might include, subject to consideration of what might be permitted under the law of each State:

(a) Cross-border insolvency proceedings with a considerable number of international elements, such as significant assets located in multiple jurisdictions;

(b) A complex debtor structure (for example, an enterprise group with numerous subsidiaries);

(c) Different types of insolvency procedures in the States involved, for example, reorganization with replacement of the management by insolvency representatives in one forum and the debtor in possession in the other;

(d) Sufficiency of assets to cover the costs of drafting the agreement;

(e) The availability of time for the negotiations. Cross-border agreements may not always be an option as they require time for negotiation. This might be problematic where urgent action is required;[21]

(f) The similarity of substantive insolvency laws;

(g) Legal uncertainty regarding the resolution of choice of law or choice of forum questions;

(h) Contradictory stays have been ordered in the different proceedings;

(i) The existence of a cash management system providing for the deposit of cash into a centralized account and the sharing of cash among members of an international group of companies; and

(j) The employment of the insolvency representatives appointed to the different proceedings by the same international company. This has occurred, for

---

[21] Possible assistance for making such determination may be drawn from previous agreements, as discussed in part III B. and outlined in the summaries of cross-border agreements in the annex.

example, in cases involving the Hong Kong Special Administrative Region of China (the Hong Kong SAR) and the British Virgin Islands or the Hong Kong SAR and Bermuda.[22]

3. Timing of negotiation

11. As the court in *Calpine* observed, the negotiation of a cross-border agreement is a matter of discussion, negotiation and cooperation between parties before it is presented to the courts for review and approval. That negotiation may take place at the beginning of a case or during the case as issues arise and more than one agreement may be negotiated to cover different issues. Although there are some examples of agreements negotiated in the course of proceedings, for example, in the *Maxwell* case, most cross-border agreements considered in the Notes were negotiated prior to proceedings being commenced. This approach may assist in preventing potential disputes from the outset. The timing of negotiation depends on how much time is available prior to the commencement of the proceedings or for the resolution of disputes in proceedings already commenced. For example, in the *Federal-Mogul* case, the parties had six months to negotiate the cross-border agreement, with the commencement of formal proceedings always available as an alternative. The time available for negotiation, reflected in the level of detail evident in the agreement, enabled the parties to negotiate a number of complex and sensitive issues, such as the extent to which the insolvency representative could delegate its powers to another insolvency representative or party, including the debtor in possession in another jurisdiction. In the case of *Collins and Aikman*,[23] an agreement could not be negotiated because the parties only had a few days prior to commencement of the proceedings. In other cases, proceedings such as non-main proceedings may be commenced on the application of the insolvency representative of the main proceeding with the sole purpose of assisting that main proceeding.[24] The insolvency representative of the main proceeding may have a clear idea of what cooperation and coordination is going to be required before applying for commencement of the non-main proceeding and thus negotiation of a cross-border agreement may be relatively quick and uncontroversial.

12. The time required for negotiation of an agreement varies from case to case and depends on a number of factors such as the knowledge of the parties of the key features of the debtor and of the potential conflicts that are likely to be encountered in the course of the proceedings. In simple cases, obtaining this degree of knowledge and the ensuing negotiation may be possible within a few days, but typically, the time frame would be longer.

---

22 See, for example, GBFE and Peregrine.

23 The Collins & Aikman Group was a leading supplier of automotive components. In Europe alone, it had 24 companies spread over 10 countries with some 4,000 employees and 27 operational sites. In May 2005, voluntary petitions were filed in the United States for re-organization of the United States part of the group. In July 2005, the European sub-group of companies applied to the High Court in England for administration orders over all of the operating companies in Europe. The English insolvency representatives immediately recognized the close interrelationship between the European companies and developed a coordinated approach to the continuation of the businesses, though conclusion of a cross-border agreement was not possible due to time constraints, see *In the Matter of Collins & Aikman Europe*, SA, the High Court of England and Wales, Chancery Division in London, [2006] EWHC 1343 (Ch).

24 See, for example, SENDO, EMTEC.

4. Parties to a cross-border agreement

13. Very often the negotiation of cross-border agreements is initiated by the parties to the proceedings, including the insolvency practitioners or insolvency representatives and in some cases the debtor (including a debtor in possession), or at the suggestion or with the encouragement of the court; some courts have explicitly encouraged the parties to negotiate a cross-border agreement and seek the courts' approval.[25] The early involvement of the courts may, in some cases, be a key factor in the success of the agreement.

14. Typically, the parties that enter into a cross-border agreement vary depending upon the applicable law and what is permitted, for example, with respect to the powers of the insolvency representatives, the courts and other parties in interest. Frequently, they are entered into by the insolvency representatives, sometimes by the debtor (usually a debtor in possession), and may involve the creditor committee. (For further detail, see part B comparing the contents of different cross-border agreements). It is rarely the case that a cross-border agreement is entered into between the courts, although in some jurisdictions this might be possible. However, negotiations between parties in cross-border cases are frequently assisted by the courts and courts may provide the impetus for reaching an agreement.

15. Some written arrangements are signed by the parties who conclude them; others are not. Although the signature reflects the agreement reached between the parties, in practice many agreements in writing are rendered effective by court approval constituting a court order. Some agreements address the issue of signature of counterpart copies, each of which should be deemed an original and equally authentic and the manner in which it can be signed, including by facsimile signature, which may be deemed to constitute an original.[26] Identification of the parties required to sign an agreement or to be bound by it will be determined by the effect of the agreement, both substantively and procedurally. For that reason, creditors generally are not parties to an agreement, although there are some examples involving creditors or the creditor committee. As they are often unfamiliar with the insolvency law of other States, creditors can affect the success of global reorganization, and close cooperation with the creditor committee and creditors in general, as exemplified in the *Singer*[27] case, will be desirable. Creditor support for a cross-border agreement is often achieved through provisions for notice and an opportunity for comment or objection with respect to the agreement. Additional parties may join an agreement over time, but it is desirable that the agreement not be varied by the addition of those parties and that they do not seek to vary what has previously been agreed.

5. Capacity to enter into a cross-border agreement

16. For an agreement to be effective, the parties negotiating it should have the requisite authority or capacity to do so and to commit to what they agree. That capacity will depend on what those parties are permitted to do under applicable law, which may differ from State to State. In some States, for example, the insolvency representative's authority to negotiate and enter into an agreement will fall within

---

25 See, for example, Solv-Ex, p. 2 (recitals), Nakash.

26 See, for example, Inverworld, Federal-Mogul.

27 See In re *The Singer Company N.V.*, No. 99-10578 (Bankr. S.D.N.Y., filed 13 September 1999).

its powers under the insolvency law; in other States, the insolvency representative may require the consent of creditors or authorization by the court.[28]

17. An agreement requiring approval by a court in a civil law jurisdiction may require the court to find appropriate statutory authorization for such approval, as it may not be covered by the court's "general equitable or inherent powers". Some commentators are sceptical of the feasibility of such agreements being approved by civil law courts because of the lack, in the absence of enactment of the UNCITRAL Model Law, of available judicial discretion comparable to that under the common law. Other commentators express the view that certain types of cross-border agreements, such as those dealing only with administrative issues, could be entered into by insolvency representatives or even the courts themselves. The rationale is that these agreements would fall within the insolvency representative's statutory competence, being part of their legal responsibility to protect and maximize the value of the estate, provided these responsibilities do not constitute personal, legal obligations. Some commentators take the view that the insolvency representative's responsibility to the insolvency estate could constitute a duty to enter into such an agreement.

18. It has also been suggested that a civil law judge could enter into a cross-border agreement with a foreign court on the basis of its statutory obligation to prevent actions detrimental to the estate. As noted above with respect to insolvency representatives, one issue to take into considerations is that in some civil law jurisdictions judges perhaps might be held personally liable. Although such a finding might be unlikely when the purpose of the cross-border agreement was to enhance the value of the estate within the terms of the applicable law, the existence of such provisions might help to explain a reluctance to enter into cross-border agreements in some civil law jurisdictions. Another reason may be a lack of familiarity with cross-border agreements and of the judicial discretion required to enter into them.

19. Practice has shown that these agreements are possible between civil and common law jurisdictions. In the *Nakash* case, for example, the Israeli court found statutory authorization for such an agreement. In the *AIOC* case, an agreement was reached between the United States and the Swiss insolvency representatives, with the explicit endorsement of the responsible Swiss insolvency authority. The agreements in the *ISA-Daisytek*, *SENDO* and *Swissair* proceedings are further examples of agreements between civil and common law jurisdictions, involving France, Germany, Switzerland and the United Kingdom. There have also been agreements involving only civil law jurisdiction, for example in the *EMTEC* proceedings, involving France and Germany.

20. One factor key to the use of such agreements between civil and common law jurisdictions is the willingness of the courts and insolvency representatives to work to overcome potential jurisdictional obstacles. In the *Nakash* proceedings, for example, the Israeli court called upon the insolvency representatives to work out

---

[28] See, for example, the decision authorizing the insolvency representatives in *AKAI* Holdings Limited to enter and implement a protocol, in the Matter of *AKAI* Holdings Limited, High Court of the Hong Kong Special Administrative Region, Court of First Instance, Companies (Winding-up) No. 49 of 2000 and the *ISA-Daisytek* agreement, which specifies that according to German Law, the effectiveness of the agreement is subject to approval by the creditors (see para. 10.1). In the *Swissair* case, see para. 11.3, the protocol had to be confirmed by the English courts, but not by the Swiss courts.

such an agreement, expressing the view that "it might be desirable to reach an agreement between the interested parties and the Courts in the United States and the State of Israel".[29] Many of the impediments that appeared to result from the differences between the insolvency laws of the fora involved were resolved by focussing on the goal common to both laws, that of maximizing value for the parties. Nevertheless, in practice agreements occur more frequently between common law jurisdictions, where courts have a wider discretion than in other jurisdictions, in which statutory authorization for entering into such arrangements, such as provided by enactment of the UNCITRAL Model Law, is needed. However, commentators of civil law countries are generally of the view that cross-border agreements will become more common in the future due to their successful use in cross-border insolvency proceedings.

6. Format

21. As noted above, there is no prescribed format for these agreements. Both oral and written agreements have been used in practice, although oral agreements appear not to be the prevailing practice. This might be due to the fact that some laws include writing requirements for validity and enforceability, or because written agreements are more easily proven and enforced. Each arrangement is individual to a particular case, identifying and facilitating solutions to the issues that are or are likely to become important in that case before the courts under the laws of the jurisdictions involved. Oral agreements may limit the parties to proceeding on a step-by-step basis, rather than being able to rely on a general framework that may be provided by a written agreement. Oral agreements generally rely for their observance and implementation on the trust and confidence of the parties and it may be difficult to bind parties to an oral agreement made in a cross-border context. The enforceability of written cross-border agreements depends on their legal nature. When approved by the courts, they would generally constitute an order of the court and be enforceable as such. If they are not approved by the courts, they have been considered to be contracts between the parties and should be enforceable as such.

22. A given case may be subject to a single agreement or a series of agreements addressing different issues that arise, as noted above, as the case progresses. In the *Maxwell* case, for example, an operating protocol was agreed at the start of the case to address issues of stabilization and asset preservation, with a second at the end to address distribution to creditors and closure of the proceedings.

23. Reaching consensus on the content of a cross-border agreement may be the most important step in facilitating cooperation and coordination, as the process of negotiation often helps to manage the parties' expectations and facilitate the successful conclusion of the insolvency proceedings. Once negotiated, a cross-border agreement might simply form the backdrop to administration of the case and not be referred to again. It may also be possible to resolve matters in the agreement in such a way that the courts have minimal ongoing involvement, with the judges

---

[29] See further the case of *SunResorts Ltd*., involving a United States and a Netherlands Antilles court, in which the latter court reacted positively to concerns expressed by the United States court and tightened custodial control to an unusual degree under Netherlands-Antilles law, see *Petition of Husang and DePaus, trustees of SunResorts, Ltd. N.V*., Case No. 97-42811 (BRL) (Bankr. S.D.N.Y. 1999) and *SunResorts Ltd. N.V*., Court of First Instance, Netherlands Antilles, Seat St. Maarten, 1997. This positive reaction has been associated with the Netherlands Antilles' court's knowledge of the UNCITRAL Model Law and the Concordat.

not required to communicate with each other on a continuing basis as the case progresses.[30]

7. Provisions commonly included in cross-border agreements

24. Cross-border agreements may include only general principles on how the cooperation and coordination should be handled, or also address specific issues such as court deferral, claims resolution procedures, procedures for communication between the courts, and so forth depending upon the needs of the particular case and the issues to be resolved. The issues discussed below in section B are illustrative of the issues that can be addressed in a cross-border agreement. Since cross-border agreements are very case specific, all of the issues discussed below do not necessarily need to be addressed in every cross-border agreement.

25. A survey of the agreements entered into to date indicates that the issues typically addressed include the following: (a) allocation of responsibility for various aspects of the conduct and administration of the proceedings between the different courts involved and between insolvency representatives, including limitations on authority to act without the approval of the other courts or insolvency representatives; (b) availability and coordination of relief; (c) coordination of recovery of assets for the benefit of creditors generally; (d) submission and treatment of claims; (e) use and disposal of assets; (f) methods of communication, including language, frequency, and means; (g) provision of notice; (h) coordination and harmonization of reorganization plans; (i) issues related specifically to the agreement, including amendment and termination, interpretation, effectiveness and dispute resolution; (j) administration of proceedings, in particular with respect to stays of proceedings or agreement between the parties not to take certain legal actions; (k) choice of applicable law; (l) the allocation of responsibilities between the parties to the agreement; (m) costs and fees; and (n) safeguards. Agreements may also address issues such as the composition of the board of directors; the actions the board may take and the procedures to be followed; shareholder/management and shareholder/board relations; and management of information flows.[31]

26. The choice of issues to be addressed by the agreement may be influenced by the similarities or dissimilarities between the laws and procedures of the States involved in the particular cross-border case. Where the courts involved share the same legal tradition, for example, the agreement may focus on providing more specific detail about substantive issues. Where legal traditions are different, the agreement may focus more on process and procedure, providing a framework for communication and cooperation. An agreement may require the laws of the relevant States to be analysed in order to determine whether and how a specific result can be achieved without causing insolvency representatives or other parties to breach their duties under those laws. The issues to be addressed may also require allocation of responsibility for their resolution between different courts, depending upon which substantive law should apply to a particular issue. Such a determination of substantive law might depend upon which State has the greatest interest in the outcome of a particular issue and may involve one court deferring to the jurisdiction of another, provided such deference does not deprive local creditors of due process or other fundamental rights (see above, part II, paras. 18-20; below, part III,

---

[30] See, for example, Maxwell.

[31] See, for example, Olympia & York.

paras. 71-74), or a particular action being pursued in one court as opposed to another. Agreements approved by the courts typically include provisions emphasizing the independence of the courts and the principle of comity and detailing the allocation of responsibilities between courts, in particular the right of parties in interest to appear and be heard in the respective proceedings.

8. Legal effect of cross-border agreements

27. Cross-border agreements may include a variety of different types of provisions, some of which may be intended to have legal effect and bind the parties and some of which may be simply statements of good faith or intent. Statements of good faith or intent, for example, may include provisions on the aim of the agreement, while provisions generally intended to have legal effect may include those on the responsibilities of the insolvency representatives, on the costs or on stipulating the procedure required to render the protocol effective (e.g. through court approval).

28. To be effective, a cross-border agreement requires the consent of those parties to be covered by it. Some agreements include an express stipulation that it is binding on the parties to the agreement and their respective successors, assigns, representatives, heirs, executors and insolvency representatives.[32] Some agreements also expressly authorize the parties to take such actions and execute such documents as may be necessary and appropriate for it to be rendered effective and implemented or include a statement to the effect that the parties have agreed to take the appropriate actions to render it effective. In some jurisdictions, it may be sufficient for the insolvency representatives to enter into a cross-border agreement pursuant to their inherent powers, without the need for subsequent court approval. It should be noted that court approval for such arrangement does not always exist under applicable law. Some jurisdictions, in particular civil law jurisdictions, might require the approval of the creditors, for the agreement to be effective. The cross-border agreement in the *ISA-Daisytek* proceedings, for example, provided that its effectiveness was subject to the approval of the creditors pursuant to German law. The agreement further stipulated that the insolvency representative would report the terms of the agreement to the responsible German court after the creditors' approval.

29. The agreement may require approval of each of the courts involved in the insolvency proceedings in accordance with the local law and practice of each State concerned. It is not uncommon for an agreement to include a provision that it should not have binding or enforceable legal effect until approved by the specified courts, with notice being given in proper form to the parties involved so as to minimize the likelihood of challenges. Once approved, such arrangement would generally have the effect of a court order and bind the parties specified. One of the advantages of court approval is that it removes the possibility for dissenting creditors or parties to litigate matters in a way that might otherwise undermine the agreement.

9. Safeguards

30. The safeguards to be included in a cross-border agreement may be divided into those that should always be included and others that may be included as required.

31. Provisions that should be included might relate to ensuring that there is no derogation from court authority and public policy.

---

[32] See, for example, Everfresh, Financial Asset Management.

32. Provisions that may be included concern disclosure to interested parties; protection of rights of non-signatory third parties; and the ability to revert to the court in cases of dispute. The parties entering into a cross-border agreement want to be able to rely on the capacity of their counterparts to enter into such agreement, without undertaking costly and lengthy research of the applicable law in the other forum. Consequently, an agreement may include as a safeguard a provision warranting that the parties agreeing to it have the relevant capacity or, in cases where the insolvency representative needs court authorization to enter into the agreement, acknowledging this as a pre-condition for its obligations under the agreement.[33] Similarly, agreements often explicitly provide that certain actions or divisions of power are permitted or limited to the extent provided by applicable law or that specified parties should respect and comply with the duties imposed upon them by applicable national laws.

10. Possible problems and means of resolution

33. Insolvency proceedings are ongoing proceedings and unforeseen events may occur, changing the course of the case. Accordingly, a cross-border agreement needs to be flexible, allowing revision to accommodate changing circumstances as a case progresses. In addition to revising existing agreements, parties may recognize the need for additional agreements to cover issues not foreseen.

34. Conflicts may arise in the course of implementation of the agreement. These can be manifold, relating to the terms of the agreements and their interpretation; the realization of its provisions and so forth. It is therefore important that the agreement include appropriate procedures for the resolution of disputes, to preserve what had been achieved at the time the conflict arose and to prevent further detriment. Those provisions may include specification of the courts competent to resolve certain issues or the use of other dispute resolution mechanisms.

B. Comparison of cross-border insolvency agreements

35. The purpose of this section is to provide an overview of the content and structure of a number of agreements used in recent cross-border cases. It identifies issues included in different agreements and discusses how they were treated. As noted above, because of the case-specific nature of these agreements, there is no standard or single format for cross-border agreements that could be presented here as a template. Nevertheless, although some of the issues discussed below are included in only a few agreements, others are common to most of the agreements considered. The comparison of the contents of various agreements is intended to enhance the understanding of the use of these tools for cross-border cooperation, communication and coordination and to guide future drafters in designing agreements in specific cases, so that the negotiating time to develop an agreement might be considerably shortened. The foundation of the comparison is largely written agreements as they are the most widely and readily available, but where possible reference is made to other forms of agreement.

---

[33] See, for example, Financial Asset Management.

1. Recitals

36. Recitals generally introduce the operative part of an agreement, giving details of the events leading up to the negotiation of the agreement, the reasons for the agreement, identifying the parties and so forth. While recitals differ from agreement to agreement, they typically address some or all of the following issues.

(a) Parties

37. Most agreements introduce the parties to the proceedings with varying levels of detail, including, for example, the name and nature of their business, the place of incorporation, the place of business and, where relevant, their position in relation to other members of an enterprise group.[34] Some agreements do not refer to the parties to the agreement as such, but specify that the agreement should govern the conduct of all parties in interest in the insolvency proceeding, naming the debtor, the insolvency representatives and the creditor committee.[35]

38. Different stakeholders in the proceedings may be parties to the agreement, depending upon the issues covered by it and the parties to be bound. However, as a general rule, it can be said that the parties are those whose obligations are concerned, and whose consent is needed. Some agreements indicate the agreement of the insolvency representatives[36] while others involve a wider range of parties in interest, including the creditor committee,[37] a secured lender of the debtor[38] and the debtor itself.[39]

39. The case specificity of agreements can be seen from the *Commodore* agreement — the creditor committee applied for commencement of insolvency proceedings in the United States, in response to which the Bahamian insolvency representatives requested the court to abstain from hearing the case and to order relief ancillary to foreign proceedings. Subsequently, the Bahamian insolvency representatives and the creditor committee entered into an agreement to resolve the contemplated litigation and establish a framework for the efficient and effective administration of the insolvency proceedings in the two jurisdictions. While involvement of the creditor committee may strengthen the legitimacy of those agreements in which the creditor committee or creditors are directly involved, it will not be required in every case.

(b) Background/insolvency history

40. An introduction to the case, setting out the insolvency history of the case, might enhance the clarity and comprehensibility of the agreement. In many agreements, the introduction of the parties is followed by a summary of the different insolvency proceedings concerning the parties, either already commenced or imminent. Again varying degrees of detail are included, some agreements specifying the dates and places of filing, court orders made and so forth.

---

34 See, for example, Solv-Ex, Quebecor.

35 See, for example, Laidlaw, Matlack.

36 See, for example, AIOC, Inverworld, Maxwell, Swissair. If the insolvency representatives agree to enter into a protocol, the objection of the debtor to the protocol may not be a barrier, see for example, Nakash.

37 See, for example, Commodore.

38 See, for example, Everfresh.

39 See, for example, Federal-Mogul, 360Networks.

41. In the context of multinational enterprises, there might be two different situations in which insolvency proceedings take place in different States: in one, the debtor is the same in both proceedings; in the other the proceedings concern different enterprise group members. In the latter situation, the debtors are separate and distinct in each proceeding. However, the cooperation between these proceedings might nevertheless be important because of the linkages between the group members, even though they are legally separate and distinct entities. In particular, in reorganization cases, the resale value might be enhanced through such cooperation. The agreement might explain these different situations.

(c) Scope

42. Cross-border agreements typically address the question of scope, although different approaches are taken. Some agreements commence with a general statement to the effect that it should govern the conduct of all parties in interest in the insolvency proceedings. Others describe the scope more specifically. For example, the scope may be to establish a general framework of agreed principles to address a range of different issues that may include: the recovery and disposal or other realization of the debtor's assets, including sale to a specific person;[40] the admission, verification and classification of claims, including priority; coordination of preparation, approval, confirmation and implementation of a reorganization plan or other similar arrangement; a litigation strategy with respect to any matter which could not be resolved through good faith efforts in the first instance; distribution of the proceeds; and general administrative matters. The scope provisions may also be directed to facilitating coordination by, for example, establishing coordinated procedures for addressing the matters listed above. The scope of an agreement often overlaps with its intent or purpose; by indicating what the agreement intends to regulate, it also defines its scope.

(d) Purpose

43. A provision on the parties' intent in drafting an agreement and, in particular, the objectives to be achieved, can reflect the common understanding of the parties with respect to the agreement, and provide reassurance as to that understanding to a court from which approval might be sought.

44. Many agreements share several general goals and objectives, which may include:[41]

(a) Harmonization and coordination of activities before the courts in which the different insolvency proceedings are pending;

(b) Promotion of fair, transparent, orderly and efficient administration of the insolvency proceedings for the benefit of all the debtors, their creditors and other interested parties, wherever located, to reduce cost and avoid duplication of effort;

(c) Protection of the rights and interests of all parties;

(d) Promotion of international cooperation and respect for judicial independence and comity; and

(e) Implementation of a framework of general principles to address basic

---

[40] See, for example, Solv-Ex.

[41] The CoCo Guidelines contain similar provisions relating to overriding objectives and aims (Guidelines 1 and 2).

administrative issues arising out of the cross-border and international nature of the insolvency proceedings.

45. Other examples of goals include: (a) facilitating reorganization of the debtor's business as a global enterprise; (b) protecting the integrity of the process of administration; (c) consulting with and providing information to creditors concerning developments; (d) ensuring that appropriate matters are brought before the relevant courts and that such actions shall take place in a timely and efficient manner; (e) coordinating the activities between and among insolvency representatives, in order to minimize the costs and to avoid duplication of effort; and (f) recording various mutual agreements, including with respect to coordination of relief, to respect the obligations imposed by the laws of the respective countries or to act in conformity with certain principles, such as mutual trust, adherence to the duty to communicate information and to cooperate.[42]

46. Some agreements also clarify what the agreement is not intended to achieve, i.e. to create a binding precedent or to establish an agreement that could be considered appropriate for all of the proceedings involved in a particular case, although acknowledging that it might be regarded as indicative of good practice.[43] Such a provision is responsive to the mistrust of parties with respect to the scope and admissibility of such agreements under domestic law and might, thus, facilitate parties agreeing to such an arrangement.

(e) Language of the agreement and of communication

47. Since cross-border insolvency proceedings often involve States that do not share a common language, a provision on the language or languages to be used in the agreement and for communication between the parties could be included. Many of the agreements analysed in these Notes were drafted in English or exist in two different language versions (e.g., English and French), without making any specific choice of language as such.[44] Where documents are to be filed in multiple proceedings in States that do not share a common language, translation may be required.[45]

Sample clauses

Parties

This agreement is made and entered into between

(1) The insolvency representative of State A [name and address] in its capacity as insolvency representative in the insolvency proceeding of the debtor in State A, appointed by decision of the court of State A dated […], (the "State A Insolvency Representative"),[46]

---

42 These principles are also reflect in Article 31 of the EC Regulation, which establishes the duty of the insolvency representative of the main and the non-main proceeding to cooperate and communicate information.

43 See, for example, SENDO.

44 See, for example, SENDO; the CoCo Guidelines also address the question of language (Guidelines 10.1 and 10.2).

45 See, for example, article 15.4 of the UNCITRAL Model Law.

46 The parties may wish to further specify, if applicable by virtue of adoption of the UNCITRAL

on the one hand

AND

(2) the insolvency representative of State B [name and address], in its capacity as insolvency representative in the insolvency proceeding of the debtor in State B, appointed by decision of the court of State B dated […], (the "State B Insolvency Representative"),

on the other hand

Referred to as the "Insolvency Representatives".

Background/insolvency history

Variant A

(1) X, a company [incorporated/with registered office] in State A, is the ultimate parent company of an enterprise group that operates, through its various subsidiaries and affiliates in States A, B, C and D.

(2) X and certain of its direct and indirect subsidiaries and affiliates in State A have each commenced insolvency proceedings by applying to the State A court under the insolvency law of State A and those cases are being procedurally coordinated. The State A debtors are continuing in possession of their respective properties and are operating and managing their businesses, pursuant to the insolvency law of State A. Committees of unsecured creditors (the "creditor committee") have been appointed in the State A proceedings.

(3) Y (an indirect subsidiary of X in State B) and certain of its direct and indirect subsidiaries and affiliates in State B have commenced insolvency proceedings by applying to the State B court under the insolvency law of State B. Orders have been granted under which (a) State B debtors are entitled to relief under the insolvency law of State B, and (b) Z was appointed as insolvency representative of the State B debtors, with the rights, powers, duties and limitations upon liabilities set forth in the insolvency law of State B and in the order of the State B court.

(4) The proceedings in States A and B are separate and distinct. Neither the State A debtors nor the State B debtors have sought recognition of their proceedings in the other jurisdiction. Neither the State A debtors nor the State B debtors are debtors in the other proceedings, although they have appeared before and submitted claims as creditors in the other proceedings.

Variant B

(1) X, a State A corporation, is the parent company of a business in State B that operates, through various State A and State B subsidiaries and affiliates, in States A and B. X and certain of its subsidiaries and affiliates (collectively, the "X companies") are the largest independent provider of N services in the region,

---

Model Law or the EC Regulation, which is the main and which is the non-main proceeding and who is the "Main Insolvency Representative" and the "Non-main Insolvency Representative".

with approximately 90 per cent of the X companies' revenue being generated in State A.

(2) The X companies develop, integrate and support systems for N services. The X companies provide N services to their clients using new software from leading computer manufacturers.

(3) The X companies have commenced insolvency proceedings under the insolvency law of State A in the State A court. The X companies continue to be in possession of their respective properties and to operate and manage their businesses, pursuant to the insolvency law of State A. A committee of unsecured creditors has not been appointed, but is expected to be appointed in the State A proceedings (the "creditor committee").

(4) Certain of the X companies, including the parent company, X, have assets and carry on business in State B. X and five of its State B subsidiaries and affiliates (collectively, "the applicants") have commenced proceedings under the insolvency law of State B in the State B court. Upon request of the applicants, the State B court ordered (a) that the State A proceedings are "foreign proceedings" for the purposes of the insolvency law of State B; and (b) a stay of actions against the applicants and their property.

(5) The applicants are parties to the proceedings in States A and B.

Scope, purpose and goals

Variant A

While concurrent, parallel proceedings are pending in States A and B for the debtor, the implementation of basic administrative procedures is necessary to coordinate certain activities in the two proceedings, protect the rights of the parties and ensure the maintenance of the courts' independent jurisdiction. A framework of general principles should be agreed upon to address:

(a) Sale of the debtor's assets;

(b) The admissibility and priority of claims against the debtor;

(c) Harmonization of the submission, approval and implementation of a reorganization plan under the insolvency laws of States A and B; and

(d) General administrative matters.

Variant B

The insolvency representatives of the debtor in States A and B have mutually decided to execute this agreement, with the purpose of establishing practical terms for the distribution of the assets among the company's creditors. The objective of this agreement is to organize the cooperation between the insolvency representatives. It is intended in particular to organize the exchange of information between the insolvency representatives regarding the verification of claims and the distribution of assets.

Variant C

While the insolvency proceedings are pending in States A and B and elsewhere for the debtor, the implementation of basic administrative procedures is necessary to coordinate certain activities in the insolvency proceedings, protect the rights of parties and ensure maintenance of the court's independent jurisdiction and comity. Accordingly, this agreement has been developed to promote the following mutually desirable goals and objectives, in the proceedings in States A and B and, to the extent necessary, in other proceedings:

(a) To harmonize and coordinate activities in the insolvency proceedings;

(b) To promote the orderly and efficient administration of the insolvency proceedings to, among other things, maximize efficiency, reduce associated costs and avoid duplication of effort;

(c) To maintain the independence and integrity of the courts of States A, B and other States;

(d) To promote international cooperation and respect for comity among the courts, the debtor, the creditor committee, the insolvency representatives and parties in interest in the insolvency proceedings;

(e) To facilitate the fair, open and efficient administration of the insolvency proceedings for the benefit of all of the creditors of the debtor and other parties in interest, wherever located; and

(f) To implement a framework of general principles to address basic administrative issues arising out of the cross-border and international nature of the insolvency proceedings.

Language

This agreement has been concluded in … and … (both texts are equally authentic). The language of communication between the parties shall be [...].

–.

2. Terminology and rules of interpretation

(a) Terminology

48. Insolvency laws rely on terminology and concepts that may have fundamentally different meanings in different States. Even where parties speak the same language, a term may be interpreted differently in different legal systems. To ensure a common understanding, many agreements define certain terms used, although methods of definition vary. Some arrangements include a comprehensive definition section,[47] while others adopt an ad hoc approach to terminology, providing short explanations throughout the text as required.[48]

---

[47] See, for example, GBFE, Swissair, para. 1.

[48] See, for example, Commodore, Everfresh. The Concordat contains a glossary of terms that includes the following: administrative rules, common claim, composition, discharge, distribution, insolvency proceeding/insolvency forum, international law, limited proceeding, liquidation, main forum/proceeding, non-local creditors, official representative, plenary

49. Terms often explained include: applicable national laws; competent national courts; insolvency professionals; insolvency representatives; involuntary proceedings; stays of proceedings; types of proceedings; the debtor; and the parties.

(b) Rules of interpretation

50. General rules of interpretation are also often included, for example, that words importing the singular should be deemed to include the plural and vice versa; that headings are inserted for convenience only without any further meaning; that references to any party should, where relevant, be deemed to include, as appropriate, their respective successors or assigns; and that any use of the masculine gender should be deemed to include the feminine or neuter gender.[49]

51. Some agreements refer explicitly to the principles elaborated in the Concordat,[50] or to the Court-to-Court Guidelines,[51] incorporating them into the agreement to govern appropriate issues.

Sample clauses

Terminology

In this agreement, unless the context requires otherwise, the following expressions have the following meanings: […]

Rules of interpretation

(a) Whenever the context requires, words importing the singular shall be deemed to include the plural and vice versa. Any use of the masculine gender shall be deemed to include the feminine or neuter gender;

(b) The index to, and clause headings of, this agreement are for convenience only and do not affect the construction of this agreement;

(c) References to clauses, paragraphs and recitals are to be construed as references to clauses, paragraphs and recitals of this agreement unless otherwise stated;

(d) References to any party shall, where relevant, be deemed to refer to or include, as appropriate, their respective successors or assigns;

(e) Except as otherwise expressly provided, references to this agreement or any other document include references to this agreement, its recitals and schedules or such other documents as may be varied, supplemented and/or replaced in any manner from time to time; and

(f) In respect of any computation of periods of time from a specified date to a later specified date, the word "from" means "from and including" and each of the words "to" and "until" means "to but excluding".

---

forum/proceeding, privileged claim, ranking rules, secured claim, voiding rules. The CoCo Guidelines include a definition of an insolvency representative (Guideline 4).

[49] See, for example, GBFE.

[50] See, for example, AIOC, Everfresh.

[51] See, for example, Systech.

3. Courts

52. Judicial cooperation is increasingly viewed as essential to the efficient and effective conduct of cross-border insolvency cases, increasing the predictability of the process, because debtors and creditors do not have to anticipate judicial reactions to foreign proceedings, and enhancing the equitable treatment of all parties. Cross-border agreements have adopted a variety of approaches to facilitating coordination and cooperation between the courts of the different States to ensure the proceedings are efficiently administered and disputes avoided.

(a) Comity and independence of courts

53. "*Comity* in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, on the other, but the recognition which one State accords within its territory to the legislative, executive or judicial acts of another State, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its law."[52] Many agreements emphasize the importance of comity and the independence of the courts, specifying that this independence is not to be negatively affected or diminished by the approval and implementation of the cross-border agreement. They also emphasize that each court is entitled to exercise its independent jurisdiction and authority at all times with respect to matters presented to it and the conduct of the parties appearing before it.[53] The purpose of including such a provision is to provide an assurance that each party to the agreement is acting in accordance with (and therefore within the limits of) applicable domestic law.

54. Agreements often address specifically what, in accordance with comity, the agreement should not be construed as doing, including:

(a) Altering the independence, sovereignty or jurisdiction of the courts;

(b) Requiring the debtors, the creditor committee or the insolvency representatives to breach any duties imposed on them by the national law under which they are constituted or appointed;

(c) Authorizing any action that requires specific approval of one or both courts; or

(d) Precluding any creditor or other interested party from asserting its substantive rights under the applicable laws.[54]

---

[52] See *Hilton v. Guyot*, 159 U.S. 113 (1895), a United States court decision dealing with the recognition of a French judgment and providing an early definition of comity. In some common law jurisdictions, the term "comity" has been interpreted as providing the basis for some courts to deny cooperation, on grounds that the foreign insolvency law is not sufficiently "like" the home country's laws. See para (a) of the Preamble of the Model Law, which states as an objective of the Model law "cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency. See also Article 7 of the Model Law, which allows a State to maintain provisions on assistance that are additional to those in the Model Law.

[53] See, for example, 360Networks, Matlack.

[54] See, for example, ABTC, Pioneer; the CoCo Guidelines include a similar statement (Guideline 3).

(b) Allocation of responsibilities between courts

55. Where insolvency proceedings with respect to the same debtor are commenced in a number of different jurisdictions, there will often be questions of the issues to be addressed by the different courts. In some cases, a single court will have the responsibility for determining or resolving certain matters. In other cases, it will not be so clear and several courts may be equally responsible or they may share responsibility or be jointly responsible for making certain determinations.[55] Notwithstanding the independence and sovereignty of each court, cross-border agreements often "allocate" responsibility for different matters between the competent courts to ensure efficient coordination of the proceedings, and avoid overlap, disputes and duplication of effort. This may be achieved by the courts approving the cross-border agreement or informally, by the parties agreeing to pursue certain matters in certain courts. Responsibility may be allocated broadly, such as for use and disposal of the debtor's assets in general or more specifically, such as for the verification and admission of claims or approval of particular transactions with regard to the use and disposal of certain assets, including the pledging or charging of assets.[56]

56. Even where certain matters are to be addressed by a specific court, the cross-border agreement may request that court, in addressing those matters, to seek and take into account the views of other courts and participants. In one particular case involving both main and non-main proceedings, the cross-border agreement requested the court addressing assets in the context of non-main proceedings to take into account any proposals of the insolvency representatives in the main proceeding.[57] An agreement may also provide that the determination by only one court of any particular matter is desirable and should be achieved by cooperation between the courts.[58]

57. Some further examples illustrate how cross-border agreements may facilitate this coordination and cooperation between courts. In the *Inverworld* case, a cross-border agreement approved by the courts led to dismissal of the English insolvency proceeding, upon certain conditions relating to the treatment of claimants in those proceedings and the allocation of functions between the two remaining courts. The United States' court was to resolve the outstanding legal and factual issues relating to entitlements as among various classes of investors, while the Cayman Islands' court was to oversee the administration of the distribution of proceeds to claimants. Each court was to take the other court's actions as binding, thus avoiding parallel litigation. In the *Maxwell* case, an agreement approved by both the English and the United States' courts allocated functions between the courts and provided for cooperative administration. Inter alia, the agreement granted power to the English insolvency representative to administer all assets and operations of the debtor group's business, incur expenses, and so forth, subject to agreement by the United

---

55 The Concordat recommends that a single administrative forum should have primary responsibility for coordinating all insolvency proceedings relating to one debtor (Principle 1). Where there is one main forum, the Concordat recommends that administration and collection of assets should be coordinated by the main forum (Principle 2A), where there is no main forum, it addresses the responsibilities of each court regarding the decision on value and admissibility of claims (Principle 8) and the administration of assets (Principle 4).

56 See, for example, Maxwell, Pioneer.

57 See, for example, SENDO.

58 See, for example, Laidlaw.

States' insolvency representative as to specific questions and to approval by the United States' court.

58. Some agreements specify the factors determining the competence of each court to act on certain matters. These factors may include: the location of the debtor, its assets or creditors; the application of conflict of laws rules; agreement as to the governing law; or other connecting factors. For example, responsibility for conducting the insolvency proceedings may be exercised by the court of the State in which they are commenced;[59] responsibility for approval of transactions may be allocated to the court of the State in which the assets, the subject of the transaction, are located;[60] responsibility for distribution of the proceeds of assets and instructing the insolvency representatives regarding treatment of assets may be allocated to the court of the State in which the assets are located;[61] responsibility for dealing with claims against the debtor may be allocated to the court of the State of which the debtor is a national, in which the claimants reside, are domiciled, or carry on business and have offices or in which the claims arise from the supply of goods and/or services to the debtor,[62] or according to the type of contract and the nationality of the contractual partner.[63]

59. Some agreements provide that the courts should have joint responsibility for certain transactions, such as disposal of the debtor's assets or more specifically, the sale of the debtor's assets. An agreement may also provide that joint hearings should be held to determine and resolve particular matters, including the use and disposal of assets and allocation of the proceeds, where those assets are located in both States[64] or in a third State.[65] Because of the nature of the business of the debtor and in particular, the interconnectivity and interdependence of the lines of communications of its global business and internet operations, one agreement adopted the approach of identifying those matters to be resolved with the assistance of the different courts. The courts could conduct joint hearings to determine and resolve these issues and were able to jointly determine additional issues that should be included as the insolvency proceedings progressed.[66] In the event that the courts could not agree, a fall back position was included stipulating that certain specified matters not resolved by a joint hearing of both courts would be determined and resolved by one court only.

60. As a practical means of resolving issues raised by differences between legal systems, it may be possible for courts to make orders on a reciprocal basis, conditioned upon the issuance of appropriate orders in the other jurisdiction. This approach was taken in the *360Networks* case, in which contractors had been reluctant to renegotiate contracts without a formal decision by the debtor that such contracts would not subsequently be terminated in the United States' proceedings, permissible under United States' law, thus detrimentally affecting their rights. Such arrangements might require court approval.

---

[59] See, for example, Federal-Mogul, Financial Asset Management.
[60] See, for example, Everfresh.
[61] See, for example, Everfresh.
[62] See, for example, Solv-Ex.
[63] See, for example, ABTC, Livent.
[64] See, for example, Everfresh.
[65] See, for example, Inverworld.
[66] See, for example, PSINet.

(i) Treatment of claims

61. Treatment of claims might include the verification, admission and classification of claims and the manner in which they are to be addressed in any reorganization plan. An agreement may provide that each individual claim should be dealt with by only one of the courts concerned unless the claims have a substantial connection, under conflict of law rules, to another State, relate to a security or priority claimed pursuant to the laws of another State or it has been specifically agreed that the claim would be governed by the laws of another State.[67]

62. Where a claim is submitted in one proceeding, some agreements provide that the creditor is deemed to have elected to have the verification and admissibility of that claim determined by the court administering that proceeding. If submitted in more than one proceeding, the agreement may nominate which court should be responsible for the verification and admission of those claims.[68] Courts may also agree to develop rules on how certain aspects of the claims process, such as the proof of claims, will be treated.[69] The parties to the proceedings may also adopt the approach of deferring those issues for future consideration and development of a claim resolution procedure generally or to address only certain types of claims (e.g. inter-company claims in an enterprise group context).[70]

(ii) Avoidance proceedings

63. Some agreements include provisions on the responsibility for investigation and pursuit of assets allegedly belonging to the debtor's estate within the jurisdiction of the court.[71] Allocation of responsibility for investigation and commencement of proceedings may depend upon the relevant provisions of applicable law, including conflict of laws provisions.

(iii) Insolvency representatives

64. Agreements often refer to the powers of each court with respect to the insolvency representative appointed in proceedings before it. Those powers may relate to appointment, conduct and compensation, as well as the hearing and determination of any matters relating to those issues arising in the insolvency proceedings before that court.[72] In some cases, they may also relate to the insolvency representative appointed to other proceedings. For example, in one case involving the United States and the Netherlands where no written cross-border agreement was concluded, retention and compensation of professionals was undertaken in a coordinated manner. Retention and compensation of the Dutch counsel for both the debtor and the unsecured creditors committee was approved by the United States court, while the Dutch insolvency representative was involved in approving the compensation of the United States professionals.[73]

---

67 See, for example, Solv-Ex.
68 See, for example, Pioneer.
69 See, for example, Philip.
70 See, for example, Calpine, Quebecor.
71 See, for example, Nakash, paras. 7-12.
72 See, for example, Laidlaw, Mosaic.
73 See United Pan-Europe.

(iv) Resolution of disputes

65. In order to ensure continuing cooperation between the proceedings and uphold the framework established by the agreement, the agreement may specify how disputes arising under it are to be resolved.[74] Two different kinds of disputes may be addressed in a cross-border agreement. The first kind refers to disputes, which may arise with respect to the intent, interpretation, implementation or enforcement of the agreement. Other disputes may address certain kinds of (potential) conflict in the insolvency proceedings and provide special rules regarding the resolution. An example of the second kind of dispute resolution device is establishing a scheme for the submission of special claims (e.g. warranty claims) to a special tribunal, or an arbitration panel for handling issues that could otherwise involve difficult and uncertain questions of conflict of laws or choice of forum.

66. Cross-border agreements adopt different approaches to such dispute resolution. One approach may be to require the parties to make all reasonable attempts to reach an agreement before referring the matter to a court. If agreement cannot be reached, the dispute might be referred to the court specified in the agreement as having responsibility for enforcing the terms of the agreement[75] or for resolving certain disputes, such as any act or decision of the insolvency representative.[76] Another approach may be to provide that a dispute relating to a matter arising with respect to the proceedings commenced in one State should be referred to the responsible court of that State or where the dispute affects all proceedings covered by an agreement, the dispute should be resolved by the court best suited to do so.[77]

67. Responsibility for resolution of disputes may also be shared by the courts and, where appropriate, resolved by way of joint hearing. If, notwithstanding such a provision, the dispute were to be raised with only one of the courts, the agreement may further provide that the court could either (i) render a binding decision after consultation with the other court; (ii) defer to the other court by transferring the matter, in whole or in part, to the other court; or (iii) seek a joint hearing of both courts.[78]

68. A further approach may be to appoint a third-party to resolve disputes. The agreement can particularize the mediation procedure to be followed, addressing issues such as commencement; opting-out; timetable; choice and appointment of the mediator; compensation; immunity; as well as the confidentiality of the process.[79]

69. In addition to the details above, some agreements suggest that the courts might provide each other with advice or guidance and specify the applicable procedure. To enhance transparency, the notice procedures of the agreement would generally apply and the debtor, the creditor committee or the insolvency representatives might make submissions to the appropriate court in response to or in connection with written advice or guidance received from the other court.[80]

---

[74] See, for example, Systech; the CoCo Guidelines advise courts to operate in a cooperative manner to resolve any dispute relating to the intent or application of the terms of any cooperation agreement or protocol (Guideline 16.2).

[75] See, for example, ISA-Daisytek.

[76] See, for example, GBFE.

[77] See, for example, Federal-Mogul.

[78] See, for example, Financial Asset Management, Laidlaw.

[79] See, for example, Manhatinv.

[80] See, for example, Mosaic.

70. An agreement may also indicate the parties that may raise an issue with respect to the agreement, such as the insolvency representatives[81] or other parties in interest.

(c) Deferral

71. Deferral consists of one court accepting the limitation of its responsibility with respect to certain issues, including for example, the ability to hear certain claims and issue certain orders, in favour of another court. Deferral might also involve one court waiting for another court to make a decision and then, after hearing submissions on the matter, following that decision by making an "independent", but similar decision. Where it is available, deferral may be used to avoid conflicting rulings between the jurisdictions involved. Deferral is a sensitive issue, touching on issues of sovereignty and independence. It can only occur where the courts involved agree and may often occur on a reciprocal basis, where the court in the one jurisdiction agrees to defer on certain issues or to enforce the decision of another court involved in response to similar agreement by the other court. A factor often supporting deferral is the recognition by courts that the proceedings would otherwise not be able to move forward and there would be loss of value to the detriment of the creditors. Cross-border agreements making provision for deferral would generally only be effective where the agreement was approved by the respective courts.

72. Deferring to another court might not be possible in all cases, as courts are often obligated to exercise jurisdiction or exclusive control over some matters. Some legal systems also have procedural rules that limit the court's ability to defer to another court. Cross-border agreements often contain provisions acknowledging that courts will defer only to the extent that it is consistent with local law. In addition, the insolvency representative may have the discretion not to pursue a given action in its home court, allowing the representative of a related proceeding in another country to pursue the action.

73. Cross-border agreements may address deferral with respect to very specific issues, identifying matters on which one court should defer to the decision of another, for example, the resolution of disputes arising under the agreement, stays of proceedings or issues of foreign law.[82] They may also be general in scope, providing that one court should defer to the judgment of the other where appropriate or feasible.[83] In the *Inverworld* case noted above, a consequence of the agreement reached was that one of the three courts involved deferred to the other courts by dismissing the proceedings before it on certain conditions relating to the treatment of claimants and the allocation of functions between the two remaining courts.

74. Examples of deferral provisions include: an acknowledgment that it is in the interest of the debtors and their stakeholders for one of the courts to take charge of the principal administration of the reorganization;[84] a decision that appeals against rejection of a claim should be heard by the court of the jurisdiction whose laws governed the claim;[85] an agreement that, if an appeal was presented to a different court, the matter would be referred to the competent court; and an agreement that in

---

[81] See, for example, GBFE, Peregrine Investment.
[82] See, for example, Olympia & York.
[83] See, for example, Loewen, 360Network Group.
[84] See, for example, Pioneer.
[85] See, for example, GBFE.

certain cases the approval of the court of the forum involved would be deemed to have been granted.[86]

(d) Right to appear and be heard

(i) Who has the right

75. Article 9 of the UNCITRAL Model Law provides that a foreign representative is entitled to direct access to the courts of the recognizing State thus freeing the insolvency representative from having to meet formal requirements, such as licences or consular action. Those requirements are typically lengthy and complicated, hindering the quick action that is often required in insolvency proceedings, whether domestic or cross-border. In States that have not adopted the Model Law, that right of direct access might be limited by formal requirements or by domestic law.

76. Agreements that address the issue of direct access do so to varying degrees and with respect to different parties in interest.[87] Some agreements address the issue explicitly, establishing the right to appear and be heard in each State involved in the agreement, to the same extent as the counterparts domiciled in those States have those rights. Such access might be granted to the insolvency representatives or to other parties in interest, including the creditors, the debtor, the creditor committee and the post-commencement lenders. Where the question is one of access for creditors, many agreements confer the right to appear regardless of whether the party has submitted any claims in the particular proceedings. Another approach refers to the principles of the *Concordat* that give each party, creditor and the creditor committee the right, but not the obligation, to appear in proceedings in the different fora.[88]

77. different approach notes the agreement of the insolvency representative of one State to their foreign counterparts having standing in the local insolvency proceedings or provides that the insolvency representatives of one State will support a request by the insolvency representative of another State to appear in local proceedings.[89] The effect of agreements between the insolvency representatives on direct access to the court depends on the applicable law and might constitute no more than a good will provision or an assurance that one insolvency representative would not oppose the appearance of the other in their forum.

78. Some agreements also provide details such as where to file a notice of appearance, providing the exact address of the court.[90]

(ii) Submission to jurisdiction

79. Article 10 of the Model Law constitutes a "safe conduct" rule aimed at ensuring that the court in a State enacting the Model Law would not assume jurisdiction over all the assets of the debtor or the foreign representative on the sole ground that the foreign representative had made an application for recognition of a foreign proceeding. Where the Model Law has not been enacted, an insolvency representative or other party appearing before the courts of another jurisdiction

---

[86] See, for example, GBFE.

[87] The CoCo Guidelines recommend direct access for a foreign insolvency representative (Guideline 5).

[88] See, for example, the Concordat, Principles 3A and 3C; see also AIOC.

[89] See, for example, Manhatinv, Federal-Mogul.

[90] See, for example, Everfresh.

would be subject to the rules of that jurisdiction on this issue. An agreement that deals with the right to appear in the various States covered by it could address the question of submission to jurisdiction to the extent permitted by applicable domestic law in order to avoid potential conflict if the forum State had not enacted the Model Law. An agreement containing such a provision generally would need court approval to be effective.

80. Agreements differ in the manner in which they address this question. Some provide that an appearance before the court of a State or the making of an application in that State might subject a party in interest to the jurisdiction of that State only for the purpose of those proceedings.[91] Other agreements provide that a party would be subject to the jurisdiction of another State only when they have submitted a claim in proceedings commenced in that other State.[92] If a party has not previously appeared in, or does not wish to appear in, a foreign court, an agreement may provide that the party is entitled to file written evidentiary materials in support of a submission without being deemed to have appeared in the foreign court in which such material is filed, provided that court is not requested to order affirmative relief.

81. Some agreements provide that the insolvency representatives are exempt from submission to the foreign jurisdiction generally,[93] whereas others provide that the court will have jurisdiction over the insolvency representative, but only with respect to the particular matters in which they appear before that court.[94] Such a provision can address the reluctance of an insolvency representative to subject itself to personal jurisdiction of a foreign State. Such reluctance might arise from unfamiliarity with the law of the foreign State or from disparities between the laws. The insolvency representative will seek to avoid doing anything in a foreign jurisdiction that might render them in violation of their domestic duties or be in violation of the law of the foreign State because of an inability to take any action in the foreign State that might conflict with their domestic duties.

82. Some agreements extend the immunity from submission to jurisdiction to the creditor committee, providing that an appearance in another forum should not constitute a basis for personal jurisdiction over the individual members of the committee.[95]

83. As a safeguard, some agreements provide that no person will be subject to a forum's substantive rules unless, under the forum's conflict of laws rules, they would be subject to those laws in a lawsuit on the same transaction in a non-insolvency proceeding.[96]

(e) Future proceedings

84. Agreements may address the issues likely to arise where additional insolvency proceedings are commenced with respect to the debtor (for example, in additional jurisdictions or, in the case of an enterprise group, with respect to an additional

---

91 See, for example, Loewen, Matlack.

92 See, for example, Inverworld.

93 See, for example, Manhatinv; this approach is also adopted by the Court-to-Court Guidelines which provide that the appearance of an insolvency representative in a foreign proceeding would not subject it to the jurisdiction of the foreign court (Guideline 13).

94 See, for example, 360Networks, Livent.

95 See, for example, Pioneer, Systech; see also the Concordat, principles 3A and 3C.

96 See, for example, Solv-Ex, para. 7.

member of the group). An agreement may address the question of its relationship to potential, future insolvency proceedings that are not specifically covered by the agreement, providing that if foreign proceedings are initiated, the procedures and policies of the agreement should extend to dealings related to those foreign proceedings, provided that all creditors of the foreign proceedings are treated equally irrespective of their place of domicile. An agreement may also address the situation in which one court later approves an additional agreement with a court of a different jurisdiction, requiring the court involved in only the initial agreement to honour the additional one to the extent permitted by its laws and consistent with the principles of comity and cooperation.[97]

85. A more general provision may extend to any future proceedings the obligations applicable under insolvency law with respect to existing proceedings. One example provides that obligations with respect to sharing of information between proceedings with respect to submitted claims should extend to include sharing that information with any future proceedings.[98] The purpose of such provision is to reinforce the obligation under existing law.

Sample clauses

Comity and independence of courts

(1) The approval and implementation of this agreement shall not diminish the independent jurisdiction of the courts of States A and B. Approval and implementation of this agreement shall not be deemed to constitute an infringement of the sovereignty of States A or B.

(2) In accordance with the principles of comity and independence established in paragraph 1 above, nothing in this agreement shall be construed to:

(a) Increase, decrease or otherwise modify the independence, sovereignty or jurisdiction of the courts of States A or B or of any other court or tribunal in States A or B, including the ability of any such court to provide appropriate relief under applicable law;

(b) Require the court of State A or B to take any action that is inconsistent with its obligations under the laws of State A or State B;

(c) Require the debtor, the creditor committee, or the insolvency representatives to take any action or refrain from taking any action that would result in a breach of any duty imposed on them by any applicable law; or

(d) Authorize any action that requires the specific approval of one or both of the courts under the insolvency laws of States A or B after appropriate notice and a hearing (except to the extent that such action is specifically described in this agreement).

(3) The debtor, the creditor committee, the insolvency representatives and their respective employees, members, agents and professionals shall respect and comply with the duties imposed upon them by the laws of States A and B and other applicable laws, regulations or orders of courts of competent jurisdiction.

---

[97] See, for example, 360Networks, paras. 30-31.

[98] See, for example, SENDO, part I-2.

Allocation of responsibilities between courts

The court of State A shall have exclusive jurisdiction over the conduct and hearing of the State A proceeding. [*Repeat this clause for the State B court*.]

Allocation of responsibilities between courts: treatment of claims

To coordinate the [restructuring] [liquidation] of the debtors' business and avoid any unnecessary duplication of effort and expense or inconsistent rulings by the courts, the following principles are applicable in connection with establishing the validity, amount and treatment of any claims against the debtors:

(a) All claims against the State A debtor, including claims arising under guaranties granted by the State A debtor, shall be determined by the State A court in the State A proceeding;

(b) All claims against the State B debtor (with the exception of the claims described in paragraph (a) above) shall be determined in accordance with the following principles:

(i) Any person submitting a claim against the State B debtor in the State A proceeding shall be deemed to have elected to have the validity, amount and treatment of that claim determined by the State A court;

(ii) Any person submitting a claim against the State B debtor in the State B proceeding shall be deemed to have elected to have the validity, amount and treatment of such claim determined by the State B court;

(iii) Any person submitting a claim against the State B debtor in both proceedings shall be deemed to have elected to have the validity, amount and treatment of such claim determined by the State A court.

[*moved to Applicable law — see 4 (c) below*]

Insolvency representatives

(1) The State A insolvency representative and professionals appointed in the State A proceeding shall be subject to the exclusive jurisdiction of the State A court with respect to all matters, including:

(a) Tenure in office;

(b) Compensation;

(c) Liability, if any, to any person or entity, including the debtor and any third parties, in connection with the insolvency proceeding; and

(d) The hearing and determination of any matters relating to those matters arising in the State A proceeding.

(2) The State A insolvency representative and appointed professionals shall not be required to seek approval of their retention in the State B court. Additionally, the State A insolvency representative and professionals:

(a) Shall be compensated for their services solely in accordance with the insolvency law of State A and other applicable State A law or orders of the State A court; and

(b) Shall not be required to seek approval of their compensation in the State B court.

[*Repeat these 2 clauses for State B*.]

Resolution of disputes

Variant A

Disputes relating to the terms, intent or application of this agreement shall be addressed by the parties to either the State A court, the State B court or both courts, upon notice in accordance with paragraph […] above. Where an issue is addressed to only one court, that court, in rendering a determination in any such dispute:

(a) May consult with the other court; and

(b) May, in its discretion, either:

(i) Render a binding decision after such consultation;

(ii) Defer to the determination of the other court by transferring the matter, in whole or in part, to the other court; or

(iii) Seek a joint hearing of both courts.

In making a determination, each court shall have regard to the independence, comity or inherent jurisdiction of the other court established under existing law.

Variant B

This agreement is governed exclusively by State A law. Any dispute concerning the validity, interpretation, performance or non-performance of this agreement will be subject to the exclusive jurisdiction of the State A court.

Variant C

Disputes relating to the terms, intent or application of this agreement may be addressed by parties in interest to the courts of both States A and B upon notice.

Deferral

To harmonize and coordinate the administration of the insolvency proceedings, the courts of States A and B each shall use their best efforts to coordinate activities with, and defer to the judgment of, the other court, where appropriate and feasible. If possible, any particular matter should be determined by one court, but in all events in a manner to avoid conflict between the courts.

Right to appear and be heard

The debtor, its creditors and other parties in interest in the insolvency proceedings, including the creditor committee and the insolvency representatives, shall have the right and standing to (a) appear and be heard in insolvency proceedings before either the State A or B court to the same extent as creditors and other parties in interest domiciled in the forum country, subject to any local rules or regulations generally applicable to all parties appearing in the forum, and (b) file notices of appearance or other applications or documents with the State A or B court, provided however, that any appearance or filing may subject a creditor or a party in interest to the jurisdiction of the court in which the appearance or filing occurs. Appearance by

the creditor committee in the State B proceeding shall not form the basis for personal jurisdiction in State B over the members of the creditor committee. In accordance with the policies set forth in paragraph […] above [*on court's responsibility for retention and compensation of the insolvency representatives*], (a) the State B court shall have jurisdiction over the State A insolvency representative solely with respect to the particular matters on which the State A insolvency representative appears before the State B court; and (b) [*Repeat (a) for the State A court*.]

Future proceedings

(1) Where a foreign proceeding is initiated, all persons affected by this agreement shall, to the greatest extent possible, and provided that all creditors in such foreign proceeding are treated equally irrespective of their place of domicile, implement the procedures contemplated by this agreement in any foreign proceeding and be governed by the purpose and policies of this agreement in dealings related to the foreign proceeding.

(2) If the State A court enters an order approving an agreement with the courts of a jurisdiction other than State B, the State B court shall honour such agreement to the extent permitted by the laws of State B and consistent with the principles of comity and cooperation. [*Repeat for the State B court*.]

4. Administration of the proceedings

86. The manner in which some procedural issues that arise in cross-border insolvency proceedings, including priority of proceedings, stays of proceedings and applicable law, are handled in practice may be a determining factor for the success of cross-border insolvency proceedings. For example, if a stay concerning the insolvency proceeding in one State is not upheld and respected in other States in which, for example, the debtor has assets, it can lead to a "race to the courthouse", damaging the value of the insolvency estate and the creditors' interests. These issues therefore lend themselves to being considered and addressed in an agreement.

(a) Priority of proceedings

87. As noted above, experience has shown that courts are often reluctant or unable to defer to a foreign court and may therefore prefer to treat proceedings as if they were concurrent or parallel proceedings, irrespective of whether they may be main or non-main proceedings. Such a preference may be based upon applicable law or a desire to protect the interests of domestic creditors. To provide certainty, avoid potential conflict and simplify issues of coordination, an agreement can allocate responsibility for different matters between the courts or determine the priority between different proceedings. For example, the parties may agree which is the primary proceeding and therefore has precedence over the other proceedings.[99]

88. Sometimes, the insolvency representatives appointed in one State may request commencement of insolvency proceedings in a foreign State in order to avoid jurisdictional conflicts and any risk of the debtor's assets being dissipated to the detriment of creditors.[100] Since it may not be possible for the insolvency representative requesting commencement of those proceedings to be appointed in

---

[99] See, for example, GBFE, para. 3.1, Peregrine, para. 2.

[100] See, for example, GBFE, para. E, Peregrine, para. H, SENDO, p. 2.

the other State, it may be important for the insolvency representative to reach agreement with the locally appointed insolvency representative in order to facilitate coordination of the proceedings and avoid frustrating the purpose of the proceedings. In the *SENDO* case, for example, the insolvency representatives concluded an agreement "for the purpose of defining a practical means of functioning which would allow for the efficient coordination of the two insolvency proceedings", as they recognized that the existing legal framework, i.e. the EC Regulation, established only very general operating principles.[101]

(b) Stays of proceedings

89. The UNCITRAL Legislative Guide notes that an essential objective of an effective insolvency law is protecting the value of the insolvency estate against diminution by the actions of the various parties to insolvency proceedings and facilitating administration of those proceedings in a fair and orderly manner. A stay or suspension of proceedings is one of the means by which those objectives are achieved. Cross-border insolvencies involving multiple proceedings often raise difficult questions concerning the stay, particularly with respect to implementing or respecting stays issued by foreign courts in foreign proceedings or issuing parallel stays in support of those foreign proceedings. National legislation may impose limitations on recognizing or respecting a stay issued by a foreign court or may not permit the court to grant a stay of proceedings based on the presumed validity of the filing of insolvency proceedings abroad. Moreover, the scope of a stay ordered in foreign proceedings may not find a direct parallel in a State in which its implementation is sought. The respect accorded to a stay ordered by a foreign court may be dependent upon political and economic considerations, as well as upon familiarity with the State ordering the stay or tangible business contacts with that State. Even where domestic law provides for the universal effect of an automatic stay, a foreign court might be inclined to protect the interests of its local creditors and disregard the foreign stay, even where that worked against maximizing the potential recovery for all creditors.

90. The Model Law provides for an automatic stay on recognition of foreign proceedings and deals with a number of issues concerning coordination of relief between main and non-main proceedings.[102] In States enacting the Model Law, the position with regard to the stay should be relatively clear and transparent.[103] However, in other States, or in States where recognition of foreign proceedings will not be sought, the issue may be addressed in a cross-border agreement. Since recognition of a foreign stay of proceedings cannot be imposed on a court simply by agreement between the parties, the courts would generally need to approve an agreement including such provisions.

91. Agreements adopt different approaches to the question of the stay. Some provide for joint recognition of stays of proceedings, stipulating that the court of one State should extend and enforce the stay imposed in the other State involved in the agreement in its own territory and vice versa. A proviso might be that enforcement of the stay should take place only to the extent necessary and appropriate or to the same extent that it is applicable in the State in which it is ordered. In recognizing and implementing a stay applicable in another State, the

---

[101] See, for example, SENDO, p. 2.

[102] UNCITRAL Model Law, articles 20-21, 28-29.

[103] Not all States enacting legislation based upon the Model Law have adopted the automatic stay.

agreement might provide for the court to consult with the issuing court regarding interpretation and application of the stay, including its possible modification, relief from the stay, and issues of enforcement.

92. Other agreements do not provide for the automatic recognition in relevant courts of a stay of proceedings issued by one court involved in the agreement, but permit recognition and assistance to be sought from those relevant courts, where that assistance might include giving effect to the stay or providing an equivalent remedy or relief.[104]

93. In addition to a court-ordered stay of proceedings, parties may agree to suspend any proceedings commenced by them against the debtor for a specific period, in order to allow time for the optimal approach to coordination of the different proceedings to be found. Such an agreement may be coordinated through creditor committees or involve the agreement of creditors (especially where those creditors have applied for commencement of the insolvency proceedings) and might be included in a written agreement,[105] but would also be feasible outside a written agreement. In a case concerning main and non-main proceedings, the insolvency representative of the main proceeding agreed not to apply, for a certain period of time, for a stay in the non-main proceeding, in order to achieve the best means of recovery of the assets of the debtor, notwithstanding its right to so apply under applicable law.[106]

94. The issue of relief from the stay has also been addressed in some agreements. One agreement, for example, provided a safeguard that permitted the parties to seek relief after entry into force of the agreement, in the event of an emergency. Another agreement facilitated coordination by granting the foreign insolvency representative relief from the automatic stay for a specific period of time to investigate assets allegedly belonging to the debtor's estate in the forum State. In a case where the cross-border insolvency proceedings were to be administered jointly and a work plan to be agreed upon, the court-approved agreement granted the insolvency representatives relief from any stay or similar order so that the agreed plan could be implemented.

95. In situations involving assets or persons in a third State, an agreement may provide that each court involved could grant emergency relief upon application by the insolvency representative. In one agreement including such provisions, it also specified that since that relief could be granted by the court of one forum, the insolvency representative should attempt to obtain the *ex post facto* approval of the other courts as soon as possible.[107]

(c) Applicable law

96. Where insolvency proceedings involve parties or assets located in different States, complex questions may arise with respect to the law that will apply to questions of validity and effectiveness of rights in or claims relating to those assets; to the treatment of those assets and to the rights and claims of those parties not located in the State in which the insolvency proceedings have been commenced. In the case of such insolvency proceedings, the forum State will generally apply its

---

104 See, for example, Federal-Mogul, para. 7.

105 See, for example, Inverworld, para. 27.

106 See, for example, SENDO, part II — 1.1, p. 7.

107 See, for example, Nakash, para. 6.

private international law rules (or conflict of laws rules) to determine which law is applicable to the validity and effectiveness of a right or claim and to its treatment in the insolvency proceedings. While insolvency proceedings may typically be governed by the law of the State in which the proceedings are commenced (the *lex fori concursus*), many States have adopted exceptions to the application of that law, which vary both in number, scope and policy justification. The diversity in the number and scope of such exceptions may create uncertainty and unpredictability for parties involved in cross-border insolvency proceedings. By specifically addressing the issue of applicable law, an insolvency law can assist in providing certainty with respect to the effects of insolvency proceedings on the rights and claims or parties affected by those proceedings.

97. However, formally articulated conflict of laws rules specific to solving cross-border insolvency issues do not exist in most States. An example serves to illustrate the difficulties. In the *Toga Manufacturing* case, the court in the United States did not grant an injunction to the applying Canadian debtor, because a United States creditor's claim, which would be given priority under United States' law, would be treated in the Canadian proceeding as an ordinary unsecured claim.[108]

98. In the absence of clear rules under applicable law, an agreement can seek to avoid the conflict arising from different conflict of laws rules by specifying the applicable law for specific issues. Many agreements address applicable law issues with respect to questions such as: the treatment of claims; right to set-off and security; application of avoidance provisions; use and disposal of assets; distribution of proceeds from the sale of the debtor's assets; and so forth.[109] Different approaches are taken to determining the law applicable to those issues. One approach is to apply the law of the forum, unless considerations of comity require application of another law. Other agreements indicate that issues should be decided by the forum court using an analysis based upon the conflict of laws rules applicable in that forum or in accordance with the law governing the underlying obligation. In the case of avoidance provisions, for example, that agreement may specify the law of the State in whose territory the entities to which transfers of assets were made are situated or the law as determined by the rules of the jurisdiction to which the creditors are subject.[110]

99. A proviso might be that if the law governing the underlying obligation is either unclear or the law of a State not involved in the agreement, the conflict of laws rules of one of the relevant States should be applied to determine which of the courts should be responsible for that matter. A further approach specifies that the conflict of laws rules of a third country should apply if application of the laws of the States involved leads to conflicting results.[111]

100. Parties may also agree on how to approach certain issues that would be treated differently under the laws of the different States. In one case involving the Netherlands and the United States, which was coordinated without a written cross-border arrangement, the parties agreed that one burdensome contract governed by the law of a third State would be rejected in accordance with United States' law. The

---

[108] *In re Toga Manufacturing Ltd.*, 28 B.R. 165 (E.D.Mich. 1983).

[109] The Concordat refers the decision on value and admissibility of claims as well as the determination of certain creditor's rights to each forum for the claims filed before it, using an analysis based upon conflicts of laws rules (Principle 8A).

[110] See, for example, ABTC, art. 8/sect. 8.01, Everfresh, para. 12.

[111] See, for example, Peregrine, para. 9.

parties further agreed that the effects of such rejection would be arbitrated in the Netherlands, applying the third State's law.[112] With respect to treatment of claims, the parties further agreed not to apply the law of the United States and thus not to subordinate certain claims to the level of equity interests, because that would have resulted in inconsistency with the insolvency law of the Netherlands.[113]

101. As already noted (see above, para. 22), several agreements may be concluded between the parties in the course of the insolvency proceedings. Where that occurs, a preliminary agreement may record that the parties will attempt to negotiate a subsequent agreement addressing, for example, the treatment of claims that would specify the law applicable to claims submitted by each debtor and their respective creditors in the other proceedings.[114]

Sample clauses

Priority of proceedings

Subject to the terms of this agreement, the State A proceeding shall be the primary proceeding. However, as a practical matter, given that the business activities of the company are and always have been focussed in State B, substantially all of the liquidation of the company shall be carried out in and from State B.

Stays of proceedings

Variant A

(1) The State A court recognizes the validity of the stay of proceedings and actions applicable against the State B debtor and its property under the insolvency law of State B. In implementing the terms of this paragraph, the State A court may consult with the State B court regarding (a) the interpretation and application of the State B stay and any orders of the State B court modifying or granting relief from the State B stay, and (b) the enforcement of the State B stay in State A.

[*Repeat clauses for State B*.]

(2) Nothing in this agreement shall affect or limit the debtors' or other parties' rights to assert the applicability or non-applicability of the State A or the State B stay to any particular proceeding, property, asset, activity or other matter, wherever pending or located.

(3) Nothing in this agreement shall affect or limit the ability of either court to direct (a) that any stay of proceedings affecting the parties before it shall not apply to any application by those parties to the other court, or (b) that relief be granted to permit those parties to apply to the other court on such terms and conditions as the court considers appropriate.

Variant B

To promote the orderly and efficient administration of the insolvency proceedings and the protection of the debtor's estates for the benefit of creditors and other stakeholders, the parties shall:

---

112 See United Pan Europe.

113 Ibid., the law not to be applied was section 510 (b) of the United States Bankruptcy Code.

114 See, for example, Calpine, para. 19, Quebecor, para. 18.

(a) If so requested by the State A insolvency representative, request the State B court, to the extent permitted under State B law, to recognize and/or provide judicial assistance to the State A proceeding and extend and give effect to the State A stay in State B or provide equivalent remedies and relief;

(b) [*Repeat clause (a) for the State A court.*]

Applicable law

(1) The adjudicating forum shall decide the value, admissibility and priority of claims submitted using an analysis based upon the conflict of laws rules applicable in that forum.

(2) The insolvency law of State A shall be the substantive law governing all transfers made [to] [from] entities located in State A. [Repeat clause for State B.]

5. Allocation of responsibilities between the parties to the agreement

102. Cooperation is most needed in areas where potential conflict can be expected. Agreements on the responsibilities of each party or at least cooperation in these areas constitute one way to avoid potential conflicts. Consequently, agreements often allocate responsibility between the parties to the proceedings for a range of matters, including: supervision of the debtor; reorganization plans; treatment of assets; power to commence legal actions; treatment of claims, including claims verification and creditor notification; and post-commencement finance. However, as soon as an agreement touches upon involvement of a court, responsibility of a court or action to be taken by a court, court approval of such arrangement would be required for the agreement to be effective.

103. In some States, an insolvency representative may be able to allocate responsibility for certain actions to foreign insolvency representative where it is practical to do so, and to satisfy its own obligation by overseeing and reviewing what the other insolvency representative does. Insolvency representatives may also be able to provide certain undertakings in order to coordinate their activities with courts or other parties. For example, in a case in which no written agreement was concluded, the insolvency representative provided to the court of the other State a letter confirming that it would not consent to the disposition of any estate assets or funds until approved by that court, to the extent required.[115]

(a) General means of cooperation

104. Some agreements do not address the allocation of responsibilities between the various parties and the courts in detail, but include a broad statement concerning cooperation between the parties which is in the nature of a statement of good faith or intent, leaving flexibility to the parties to determine the manner in which cooperation will be achieved.[116]

105. Examples include provisions to the effect that: the parties, which may include some or all of the debtor, the creditor committee and the insolvency representatives depending upon the circumstances of the case, will take all reasonable steps to cooperate with each other in connection with actions taken in the courts of the States involved, and to coordinate the administration of the proceedings for the

---

[115] See United Pan Europe.

[116] See, for example, Philip, paras. 11-13, Systech, paras. 11-13.

benefit of the respective insolvency estates and parties in interest;[117] to the extent possible, all actions taken in the different insolvency proceedings should be consistent; and the administration of the proceedings should be organized to ensure efficiency and reduce costs, focussing upon coordination of the activities of the insolvency representatives, the matters to be addressed by the courts and relevant procedural issues.

106. More detailed provisions specify the means of achieving cooperation, such as sharing the administration of the proceedings, where the insolvency representatives reach agreement on how to coordinate their activities with each other, subject to their respective obligations and responsibilities under applicable law. These provisions might include agreement that: (a) Each insolvency representative control the administration of the subsidiaries of the debtor in its State and seek the assistance of the other insolvency representative where needed; (b) An insolvency representative may act without the prior consent of the other representative and without giving prior notice on any matter that does not require notice to be given to parties in interest under the law governing those insolvency proceedings; or (c) An insolvency representative should attempt, in good faith, to obtain the consent of the other insolvency representative prior to taking certain actions, including seeking or consenting to the substantive consolidation of the debtor with any other entity or any other action that would have an adverse impact on the debtor or any member of the debtor.[118] The provisions may also specify the procedure to be followed to achieve this cooperation, including, for example, holding an initial meeting, at which the insolvency representatives should discuss all actions already taken concerning the debtor's assets and develop a work plan, followed by meetings on a regular basis. Further details could include the particulars of those meetings, including a timetable and how they should take place (e.g. in-person, via telephone).[119] Other elements of cooperation could include using documents prepared in one proceeding for similar purposes in other proceedings[120] or the insolvency representatives participating as management exercising the rights, powers and duties of a debtor in possession in the insolvency proceedings in the other forum.[121]

(b) Supervision of the debtor

107. An agreement can establish the extent to which the debtor will be responsible for supervision of its business, addressing what the management can or cannot do without prior consultation with, or the consent of, the insolvency representatives. Prior consent may be required, for example, for the use and disposal of assets, while prior consultation may be required with respect to commencement of legal proceedings; recruitment or dismissal of employees, other than in the ordinary

---

117 See, for example, Loewen, para. 3.1, Laidlaw, para. 10; the Concordat takes a similar approach, stipulating that for cases with more than one plenary forum, but no main forum, each forum should coordinate with each other, subject in appropriate cases to a governance protocol (Principle 4A). The CoCo Guidelines recommend the cooperation of the insolvency representatives and sets out details for this cooperation (Guideline 12.1-4), including the court appointment of the main insolvency representative's or its agent as a co-insolvency representative in non-main proceedings to ensure coordination between different proceedings under the court's supervision (Guideline 16.3).

118 See, for example, AIOC, part III. B.

119 See, for example, Manhatinv, paras. 1-6.

120 See, for example, GBFE, paras.10.1-2.

121 See, for example, Commodore, para. F.

course of business; and consultation with any trade unions, except in the ordinary course of business.[122]

(c) Reorganization plans

108. Where reorganization proceedings are commenced against a debtor in a number of different States or against several members of an enterprise group in different States, a question arises as to whether it will be possible to reorganize the debtors in a coordinated manner, perhaps through a similar plan that will deliver savings across the various insolvency proceedings, ensure a coordinated approach to the resolution of the debtors financial difficulties and maximize value for creditors. Some insolvency laws permit the development of such a plan, while under others it will only be possible where the different proceedings can be coordinated. Accordingly, this issue is commonly addressed in cross-border agreements, many of which provide that for each proceeding, a reorganization plan or similar arrangement should be submitted to each responsible court and that the plans should be substantially similar to each other.[123] The development of a similar plan of reorganization in different fora may also be achieved, in the absence of a written agreement, by the parties working together to ensure that the plan and the approval process are in accordance with both legal systems. It may also be possible, pursuant to the statutory obligations of the insolvency representative, to maximize the value of the estate and to act in the interests of the debtor.

109. The joint development of the reorganization plans is an appropriate means for addressing concerns of creditors and the courts, where they have a role to play in approval and implementation of the plans, and can be coordinated through a cross-border agreement. That agreement might cover: preparation of the plan or plans; classification and treatment of creditors;[124] procedures for approval, including solicitation and voting; and the role to be played by the courts (where applicable), particularly with respect to confirmation (if required by the insolvency law) of a plan approved by creditors and its implementation.[125] An agreement might also provide that the plans, once approved by creditors and, where required, confirmed by the respective courts, should be binding upon claimants in relevant States, regardless of whether those claimants had submitted claims in proceedings in those States or otherwise submitted to the jurisdiction of those States.[126]

110. Where the agreement does not establish those procedures, it may nevertheless provide that they should be established in accordance with applicable law, by the debtor in consultation with the insolvency representatives, or by order of the relevant courts. A cross-border agreement that provides generally for coordination but does not specifically address reorganization plans might also facilitate coordination of such plans. In the *360Networks* case, for example, the agreement itself did not address the issue of reorganization plan, but in the course of reorganization, the parties agreed to draft two substantially similar plans and make each dependent on the approval of the other.

---

122 See, for example, Federal-Mogul, para. 3.4 (b)(ii).

123 See, for example, Solv-Ex, para. 8; the CoCo Guidelines also emphasize the cooperation of the insolvency representatives in any manner consistent with the objective of reorganization or the sale of the business as a going concern wherever possible (Guideline 14.1).

124 See, for example, Everfresh, para. 13.

125 See, for example, ABTC, art. 4/sect. 4.01.

126 See, for example, ABTC, art. 5/sect 5.04.

111. One particular concern with negotiating similar reorganization plans relates to the equal treatment of creditors in each jurisdiction and the need to ensure that some do not receive less favourable treatment than others. For example, in the *Felixstowe Dock and Railway Co.* case,[127] the United States' debtor sought the cooperation of the English courts to lift injunctions applying to the debtor's assets in England to prevent their realization or removal. Although the United States' court assured the English court that if the injunctions were lifted, prosecution of the English claims in the English courts would not give rise to actions for contempt in the United States' court, the English court declined to lift the injunctions. That decision was based on the English court's concern that English creditors would receive less favourable treatment under a United States' reorganization plan.

112. Different approaches may be taken to preparation and submission of a reorganization plan. Responsibility could be given to the debtor or debtors respectively, where the insolvency law provides for the debtor to remain in possession and continue operating the business[128] or to the insolvency representatives, possibly in cooperation with the debtor.[129] Where the plan is to be developed together with the insolvency representative, different approaches may be adopted to coordinate the process in different States. The management of the debtor's business in one State, for example, may be best positioned to develop a reorganization plan for all of the debtor's businesses in consultation with all of the insolvency representatives;[130] or the plan may be prepared by the debtor together with the insolvency representative of only one forum,[131] but with the involvement of other insolvency representatives, especially if the insolvency law requires the insolvency representative to participate in the negotiation of, or to consent to, the reorganization plan.

(d) Treatment of assets

113. The conduct of insolvency proceedings will often require assets of the debtor to continue to be used or disposed of (including by way of encumbrance) in order to enable the goal of the particular proceedings to be realized. Where the insolvency of the debtor involves proceedings in different States, coordination of the use and disposal of the debtor's assets may be required to ensure maximization of the value of assets for the benefit of all creditors. Agreements can be used to facilitate this coordination by establishing requirements for approval; allocation of responsibility between the different parties in interest;[132] and details concerning the procedures for use or disposal. Although the extent to which responsibility can be allocated between the different courts and insolvency representatives will depend upon the requirements of applicable law, practice suggests that a number of different approaches are possible.[133]

---

127 *Felixstowe Dock and Railway Co. v. U.S. Lines Inc*., 1987 Q. B. 360 (Queen's Bench Division, Commercial Court 1987) (England).

128 See, for example, ABTC, art. 5/sect. 5.01.

129 See, for example, Maxwell, para. 3 (iii).

130 See, for example, Federal-Mogul, para. 3.2 (a).

131 See, for example, Maxwell, para. 3 (iii)

132 See, for example, Swissair, paras. 4 and 5.

133 In cases with more than one plenary forum, but no main forum, the Concordat refers the assets within each jurisdiction to that forum (Principle 4B). Where proceedings involve a main and non-main proceeding, the CoCo Guidelines recommend that every insolvency representative should seek to sell the assets [in its jurisdiction] in cooperation with the other insolvency

(i) Supervision by the courts

114. Some agreements allocate responsibility for supervising use and disposal of assets between the courts, whether to the court of the State in which assets are located;[134] to the court of the State in which the debtor is located; or jointly to the courts competent for the different insolvency proceedings.[135] In some agreements, use of the location criteria is relevant only to specific kind of assets, such as immovables.[136] Another approach, which may be appropriate in certain cases such as where there is a high level of managerial and operational interdependence among the enterprise group members, is to make sales of certain assets subject to the joint approval of the courts involved, regardless of the location of those assets,[137] although it would be desirable to ensure that such a provision did not cause unnecessary delay and reduction of value. To facilitate that joint approval and the allocation of proceeds between the different debtors, some agreements permit joint hearings to be conducted.[138] The requirement for court approval may be limited to assets that exceed a specified value or to certain types of transactions, distinguishing, for example, between disposals in the ordinary course of business and disposals outside the ordinary course, with approval required only for transactions in the latter category. An agreement may also specify that approval is not required for certain types of transactions, e.g. depositing funds in bank accounts. Though some agreements envisage approval being sought for each and every transaction,[139] an agreement can also provide that the responsible courts should make general orders to cover all disposals of assets, enabling the insolvency representatives to take action without seeking approval in each instance.[140]

(ii) Supervision by insolvency representatives

115. Another approach explicitly authorizes the insolvency representatives to use or dispose of the debtor's assets without court approval where permissible by applicable law, reducing the time needed for those actions. This authorization could include requesting the debtor to dispose of certain assets. In some situations, it might be appropriate to require the insolvency representative to seek the prior consent of its foreign counterpart for disposal of assets, including the disposal of shares or interests. To avoid an impasse, any requirement to seek consent might be limited to making a "good faith attempt" or to consultation. Where the debtor is permitted to manage the assets, for example, as a debtor in possession, approval of the insolvency representatives may be required for sale or disposal outside the ordinary course of business, but not otherwise.[141] Even where court approval is not required for each sale or disposal of assets, the courts may nevertheless oversee the

---

representatives so as to maximize the value of the assets as a whole [Guideline 13.1]. Further, any national court, where required to act, should approve those sales or disposals that would produce such value [Guideline 13.2].

134 See, for example, Everfresh, para. 6

135 See, for example, ABTC, art. 2, sect. 2.01.

136 See, for example, PSINet, para. 10 (ii).

137 See, for example, Tee-Comm, para. 6.

138 See, for example, Livent, para. vi [6], PSINet, para. 13.

139 See, for example, Solv-Ex, para. 3.

140 See, for example Inverworld, para. 6.

141 See, for example, Federal-Mogul, para. 3.4 (a) (i).

use and disposal of assets by requiring the insolvency representatives to provide regular reports on their work.[142]

116. Other details which an agreement may address regarding the use and disposal of assets might include: the manner of the disposal; the setting of a foreign exchange rate for transactions that require the computation of an amount in different currencies;[143] the manner or place of payment of the proceeds;[144] and the use of the proceeds from sales, such as to fund working capital,[145] cover court-approved expenses[146] and plan funding[147] or distribute to creditors.

(iii) Investigation of assets

117. Investigation of the debtor's assets is often crucial to the successful conduct of insolvency proceedings and a coordinated approach might avoid duplication of effort and save costs. Investigations may be coordinated by allocating responsibility for their conduct to, for example, the insolvency representative of one State or by coordinating the activities of the insolvency representatives in other ways, such as by establishing provisions for notice and reporting. Where responsibility is allocated to one insolvency representative, it might be desirable for the investigating representative to inform its counterpart in the other State about the investigation[148] and periodically consult with respect to progress and results, as well as proposed actions. the insolvency representative might also provide the counterpart with drafts of any requests proposed to be made to the court. Where an investigation has commenced at the time of entering into the cross-border agreement, agreements have allocated continuing responsibility to that insolvency representative[149] Another approach requires the insolvency representatives to meet to discuss all actions taken before the meeting and to develop a work plan to coordinate and govern subsequent actions, for example identification, location, recovery, preservation and protection of the debtor's assets.[150]

(e) Allocation of responsibility for commencing proceedings

118. During insolvency proceedings, it might become necessary to commence various types of proceedings concerning the debtor or third parties. These may include insolvency or other similar proceedings with respect, for example, to subsidiaries of the debtor (wherever situated) not already subject to insolvency proceedings, or parallel proceedings, for example, on the basis of presence of substantial assets, substantial business or place of incorporation[151] or actions concerning third parties, such as avoidance of certain transactions or with respect to submission and verification of claims. To avoid possible conflict, an agreement may allocate responsibility for commencing such actions between the different

---

142 See, for example, Inverworld, paras. 6 and 11.
143 See, for example, AIOC, para. G.
144 See, for example, AOIC, para. G.
145 See, for example, Livent, para. 13.
146 See, for example, Inverworld, para. 19.
147 See, for example, Everfresh, para. 10.
148 See, for example, Maxwell, para. 4, Nakash, para. 18.
149 See, for example, GFBE, para. 4.1 (c), Nakash, para. 7.
150 See, for example, Manhatinv, para. 2.
151 See, for example, Commodore, para. L.

representatives, subject to certain requirements, such as the written consent of the other insolvency representative.[152]

119. Allocation of responsibility in this manner may be important to satisfy the requirements of local law as many laws, in specifying the persons who may request the commencement of insolvency proceedings, do not include foreign insolvency representatives or address the question of their standing under those laws to make such a request. Article 11 of the Model Law is designed to ensure that a foreign representative, following recognition of main or non-main proceedings, has the standing to request commencement of an insolvency proceeding in the recognizing State, provided the conditions for commencement are otherwise met; the Model Law does not modify the conditions under local law for commencement of those proceedings. Similarly, article 23 provides the standing, following recognition of a foreign proceeding, for a foreign representative to initiate avoidance actions as available in the recognizing State. Where the Model Law has not been enacted however, or there is doubt as to the standing of a foreign representative to commence such proceedings, allocating that responsibility in a cross-border agreement to another insolvency representative may facilitate commencement of those proceedings. An agreement may also cover related procedural issues, such as deadlines for filing of documents and reports and provision of notice, in accordance with applicable national law.

(f) Treatment of claims

120. Claims by creditors operate at several levels in insolvency, determining which creditors may vote in the proceedings, how they may vote and how much they would receive in a distribution. Accordingly, the procedure for submission of claims and their verification and admission is a key part of the insolvency proceedings. Where insolvency proceedings cross borders, procedural matters with respect to coordination of claims processing such as place and time (including deadlines) of submission, responsibility and procedure for verification and admission, provision of notice of claims submitted and cross-recognition of admission can be clarified and coordinated in an agreement. Such an agreement may or may not require approval by the court, depending upon the role played by the court in the claims admission and verification process under the applicable insolvency law. Details of the claims procedure to be followed may be negotiated at the commencement of the proceedings or any agreement concluded at that time might provide that certain claims would be addressed in a subsequent protocol to specify the timing, process, jurisdiction and law applicable to the resolution of claims.[153]

121. While agreements in writing typically address coordination of the treatment of claims, coordination may in some circumstances be achieved without such agreement. In one case involving the United States and the Netherlands, for example, the debtor in possession and the insolvency professionals worked together to coordinate various processes without a written agreement, ensuring that the laws of both States involved were complied with.

122. Agreements may also address issues of priority and subordination. For example, in one case the parties agreed not to subordinate certain claims to the level of equity interests, which they could have done under the law of one of the State involved, because it would have been inconsistent with the law of the other State.

---

[152] See, for example, Manhatinv, para. 5.

[153] See, for example, Calpine, para. 19, Quebecor, para. 18.

(i) Submission of claims

123. Agreements can establish the proceedings in which claims should be submitted, and address the issue of claims submitted in more than one proceeding to establish where they should be verified and admitted. Claims submitted in one proceeding could be treated as if they had been properly submitted in the other proceeding in which they would then be verified and admitted or rejected. A claim submitted in one proceeding may be deemed to have been submitted in both proceedings, with the place of last submission being responsible for its verification and admission or rejection. An agreement may also clarify that submitting a claim is a prerequisite for participating in a distribution or voting upon any proposal or plan of reorganization.[154]

(ii) Claim verification and admission

124. Verification and admission of claims may be conducted in a variety of ways by different parties, involving the courts, the insolvency representatives and in some cases the debtor. As noted above, agreements may address the procedure for verification and admission of claims and the allocation of responsibility between the courts or insolvency representatives.[155] For example, the agreement may provide that the parties should work together to agree on the procedure in a future agreement[156] or that claims should be adjudicated in accordance with applicable law.

125. Where the court is involved in the process, parties may agree that the court of one forum will verify and admit all claims[157] or that each court responsible for the different insolvency proceedings will verify and admit claims properly submitted in those proceedings.[158] Where claims are to be adjudicated by one court, it may be the court of the State in which the debtor is located or the court in which the claim is submitted, unless principles of comity require otherwise or another court is a more appropriate forum in view of all the circumstances.[159]

126. Where the agreement provides for claims to be verified and admitted in one State, it might require recognition of those claims by the other courts involved in the proceedings and acceptance of that process by the debtor. Similarly, where claims are to be adjudicated in several courts, an agreement can stipulate that each court should consider the claims against the debtor submitted in its proceeding and that that court's decision on those claims should be applied and recognized by the other courts, to the extent allowed under applicable law.[160] Where action is required to be taken to ensure recognition, the agreement may allocate responsibility for taking the necessary steps to, for example, the debtor or the insolvency representative.[161] Requiring insolvency representatives to periodically exchange a register of the claims submitted in each proceeding may facilitate coordination of claims processing.[162] Where creditors are required under applicable law to attend in person

---

154 See, for example, ABTC, art. 4, sec. 4.01.

155 The Concordat, for example, stipulates principles for the filing of claims for cases with a main forum and for cases with more than one plenary forum, but no main forum (Principles 2 & 4).

156 See, for example, Inverworld, para. 4.

157 See, for example, ABTC, art. 4/sect. 4.01.

158 See, for example, Commodore, para. G.

159 See, for example, PSINet, para. 10.

160 See, for example, PSINet, para. 11.

161 See, for example, ABTC, art. 4/sect. 4.02.

162 See, for example, AIOC, part II. C.

to verify their claims, a cross-border agreement might address the obstacle caused by the costs of travel for foreign creditors, which might prevent smaller claim-holders from pursuing their rights at all.

127. An agreement may provide that the adjudicating forum will decide the value, admissibility and priority of the claims, using an analysis based upon the conflict of laws rules applicable in that forum or in accordance with the law governing the underlying claim.[163] The agreement may also address the question of objections to claims, for example, by permitting objections to be made in each proceeding.[164]

128. As an alternative to adjudication by the courts, an agreement may provide for claims to be verified and admitted by the insolvency representative, and specify the details of the procedure. One agreement, for example, provided that the insolvency representatives of multiple proceedings in different European Union States should each verify the amount and form of the claims submitted in their proceedings. It further provided that the insolvency representative of the non-main proceedings should provide the insolvency representative of the main proceeding with a list of the claims in the non-main proceedings. The verification was to be undertaken independently in conformity with national law in accordance with the provisions of the EC Regulation.[165]

129. Responsibility for treatment of specific claims, such as unsecured claims, may in some cases be referred to specified parties, for example, the debtor in possession, subject to consultation with the insolvency representatives.[166]

130. An agreement may also address treatment of claims in reorganization proceedings, prior to approval and implementation of the plan. One agreement, for example, referred primary responsibility during that time to the insolvency representatives in consultation with the debtor for agreement on the validity or amount of claims and their payment or other settlement.[167]

131. Another issue that an agreement may address is the manner in which, and the court to which, appeals concerning rejection of claims should be made. To facilitate coordination and enhance transparency and predictability, an agreement may also include certain standard forms relating to verification and admission of claims, such as (i) the proof of claim, and (ii) the notice of rejection of the claim.[168]

(iii) Distribution

132. Where creditors are able to submit claims in multiple proceedings, it is desirable that the proceedings be coordinated to avoid a situation in which one creditor might be treated more favourably than other creditors of the same class by obtaining payment of the same claim in more than one proceeding. Article 32 of the Model Law includes a rule to address that situation (incorporating the so-called *hotchpot rule*).

133. Some agreements include a general provision on distribution, such as that all of the debtor's assets should be realized for the benefit of all secured, priority, and

---

163 See, for example, Everfresh, para. 8, ABTC, art. 4/sect. 4.01 (b).
164 See, for example, Everfresh, para. 8.
165 See, for example, SENDO, part I-3.1.
166 See, for example, Everfresh, para. 11.
167 See, for example, Federal-Mogul, para. 3.6 (a).
168 See, for example, GBFE, p. 25-32.

non-insider unsecured creditors, with the net proceeds of sale to be distributed in accordance with priorities established under the laws of one forum. Other agreements specifically address the issue of double payment. One approach is to include a general provision that a creditor should not be paid twice where, in parallel proceedings, it submits a claim in both proceedings. Other agreements are more specific, detailing how this should be avoided, including by the insolvency representatives exchanging relevant information, such as draft distribution schedules and, if distributions have occurred, lists of the recipient creditors.[169] It may also be avoided by providing that the creditor should receive a distribution from the debtor's assets as if it had submitted a single claim in either proceeding, but limited to a rateable recovery from the debtor's assets not greater than would be permitted under both laws.[170]

134. An agreement may also address the means of distribution, for example, the currency in which claims should be paid;[171] who will pay the dividends, for example, each insolvency representative may be responsible for making distributions in the proceedings in which it was appointed;[172] and to which creditors they will be paid.

(g) Post-commencement finance

135. The continued operation of the debtor's business after the commencement of insolvency proceedings is critical to reorganization, and to a lesser extent, liquidation, where the business is to be sold as a going concern. To maintain its business activities, the debtor must have access to funds to enable it to continue to pay for crucial supplies of goods and services. Where the debtor has no available liquid assets to meet its immediate cash flow needs, it will have to seek finance from third parties.[173] Since many insolvency laws either restrict the provision of new money in insolvency or do not specifically address the provision of new finance or the priority for its repayment in insolvency, the uncertainty created by these different approaches in a cross-border insolvency situation makes post-commencement finance an issue that might be addressed in a cross-border agreement.

136. Many agreements, however, do not address the provision of post-commencement finance. Sometimes, the court order approving the agreement contains provisions on post-commencement finance. That order might, for example, authorize the applicants to pursue all avenues of refinancing and approve and recognize the finance approved in proceedings in other jurisdictions.[174] One agreement included a provision that the insolvency representative with responsibility for operation of the business on an ongoing basis required the consent of the other insolvency representative and approval of the court of the other forum to obtain financing, regardless of whether that consent was required under the

---

169 See, for example, SENDO, part. II-2.

170 See, for example, AIOC, part II. D.

171 See, for example, Peregrine, para. 11 B, GBFE, para. 8.2.

172 See, for example, GBFE, paras. 4.2 (c) and 5.3 (e).

173 See UNCITRAL Legislative Guide, part two, II, paras. 94-107 and recommendations 63-68. The CoCo Guidelines recommend the insolvency representatives' cooperation with regard to obtaining any necessary post-commencement financing, including through granting of priority or a security interest to reorganization lenders as might be appropriate and insofar as permitted under any applicable law (Guideline 14.2).

174 See, for example, Systech, paras. 19 (f) & 22.

applicable law.[175] That mechanism was adopted to ensure that the parallel insolvency proceedings achieved the goal of maximizing the value of the estate and preserving the interests of each of the insolvency regimes involved. An agreement may also address issues of jurisdiction providing, for example, that any post-commencement finance lender should only be subject to the jurisdiction in which the post-commencement finance was provided.[176]

137. Similarly, an agreement can explicitly permit the insolvency representative to borrow funds or encumber assets and impose conditions such as the consent of the creditor committee,[177] or permit the use of the proceeds of certain transactions other than the sale of substantially all of the assets to fund, for example, working capital[178] or to invest, leaving the manner of investment to the insolvency representative's reasonable judgment.[179]

Sample clauses

General means of cooperation

To assist in the efficient administration of the insolvency proceedings, the debtor, the creditor committee and the insolvency representatives shall:

(a) cooperate with each other in connection with actions taken in the courts of States A and B, and

(b) take any other appropriate steps to coordinate the administration of the proceedings in States A and B for the benefit of the debtor's respective estates and parties in interest.

Supervision of the debtor

(1) (a) Without the prior consent of the State A insolvency representative, the debtor shall not:

(i) Subject any asset to any new mortgage, charge or security interest;

(ii) Except as provided in any reorganization plan to which effect is given under State A law, agree to the validity or amount of, pay or settle the claims of any pre-commencement creditor of the debtor out of the debtor's assets; or

(iii) Undertake intragroup sales or purchases other than in the ordinary course of business and in compliance with the debtor's present transfer pricing policies;

(b) Without prior consultation with the State A insolvency representative, the debtor shall not:

(i) File in the State A court, or circulate any reorganization plan to the creditors or any class of them for approval;

(ii) Consult with any trade unions, except in the ordinary course of business; or

---

175 See, for example, Maxwell, para. 2 (iii)-(v).
176 See, for example, Mosaic, para. 16.
177 See, for example, Commodore.
178 See, for example, Livent, para. 13.
179 See, for example, GBFE, para.6.2, 6.3 (b).

(iii) Recruit or dismiss any employees other than in the ordinary course of business, and the debtor shall, in respect of any recruitment or dismissal of employees, comply at all times with applicable employment law.

(2) The debtor shall not, without the prior consent of the insolvency representatives of States A and B, acquire, sell or dispose of any asset outside the ordinary course of business

Reorganization plans

(1) To the extent permitted by the laws of the respective States and to the extent practicable, the insolvency representatives of States A and B shall submit substantially similar reorganization plans in States A and B in accordance with the respective insolvency laws of States A and B. The insolvency representatives of States A and B shall, to the extent practicable, coordinate all procedures in connection with those reorganization plans, including solicitation procedures regarding voting on the reorganization plan, treatment of creditors and classification of claims. To the extent not provided in this agreement, those procedures will be established either by applicable law or further orders of the courts of States A and B.

(2) The insolvency representatives of States A and B shall take any action necessary to coordinate the contemporaneous submission of reorganization plans in States A and B.

Treatment of assets: supervision by the courts

(1) Transactions relating to State A assets will be subject to the approval of the State A court. Transactions relating to State B assets will be subject to the approval of the State B court. Any transactions involving assets located in both States A and B will be subject to the joint jurisdiction of the courts.

(2) The parties agree that the State A insolvency representative shall pursue all necessary causes of action in other States. The parties agree that insolvency proceedings shall be initiated by the State A insolvency representative if necessary, but only upon the agreement of both insolvency representatives.

Investigation of assets

Variant A

(1) The debtor's assets shall be investigated wherever located. The State A insolvency representative has already commenced such an investigation, and in the interests of continuity, efficiency and expense, shall continue with its investigation in accordance with this agreement. The State B insolvency representative, the debtor or any other party in interest shall have the right at any time to request either court to permit or order the State B insolvency representative to conduct an independent investigation.

(2) In conducting the investigation, the State A insolvency representative shall, at all times, notify the State B insolvency representative of any actions that it intends to pursue and consult in good faith with the State B insolvency representative as to the reasons for and propriety of pursuing those actions. Unless not reasonably practical in the circumstances, the State A insolvency representative shall provide the State B insolvency representative with a draft of each application it proposes to make to either court in pursuit of those actions. The State A insolvency

representative shall not be required to obtain the consent of the State B insolvency representative with respect to such actions, but to the extent the State B insolvency representative disagrees with any of the proposed actions,

(a) the State A insolvency representative shall be required to inform the court in which it is seeking to pursue such actions of the State B insolvency representative's disagreement, and

(b) the State B insolvency representative shall have a reasonable opportunity to appear and be heard in, and to seek relief from, the relevant court.

(3) The State A insolvency representative shall at all times keep the State B insolvency representative informed as to the course and conduct of the investigation into the debtor's assets and periodically consult as to progress. Unless otherwise requested by the State B insolvency representative or directed by either court, the State A insolvency representative shall promptly share with the State B insolvency representative all documents and other information obtained in connection with its investigation into the debtor's assets.

Variant B

Subject to this agreement and any prior orders of the appropriate courts, the insolvency representatives are authorized to coordinate with each other:

(a) The identification, preservation, collection, and realization of the assets of the debtor, including evaluation of proceedings for recovery of avoidable transfers and damages;

(b) The investigation and analysis necessary to establish the financial position of the debtor.

Variant C

Investigations with respect to the assets of the debtor situated in State A shall be conducted by the State A insolvency representative in accordance with applicable law. [*Repeat clause for State B accordingly.*]

Variant D

The State A insolvency representative may, without the prior consent of the State B insolvency representative and without giving prior notice to it, carry out investigations into the assets of the debtor situated in State A provided that the State A insolvency representative shall report on the details of such matters to the State B insolvency representative at weekly or such other intervals as may be agreed between them. [*Repeat clause for State B.*]

Allocation of responsibility for commencing proceedings

The State A insolvency representative shall attempt in good faith to obtain the consent of the State B insolvency representative prior to:

(a) Commencing or consenting to insolvency proceedings (whether in States A, B or elsewhere) with respect to the State A debtor; and

(b) Causing the State A debtor or its subsidiary to commence legal proceedings.

Submission of claims & claim verification and admission

See sample clause on *Allocation of responsibility between courts: treatment of claims*.

Distribution

Variant A

In order to avoid the risk, arising from the plurality of insolvency proceedings, of paying a creditor an amount that is greater than should be received, each insolvency representative is required to send to the other insolvency representative:

(a) A draft distribution plan specifying the payment of dividends will be made. The insolvency representatives to whom this draft is sent shall respond to the other insolvency representative within […] days from the date of receipt of the draft. Failure to respond within this time period shall be treated as acceptance of the draft plan;

(b) After any payment of dividends, a list providing the names and addresses of the creditors who have been paid, the amount paid and nature of the claim.

Variant B

(1) Without prejudice to secured claims or rights in rem, a creditor who has received part payment in respect of its claim in the State A proceeding pursuant to State A laws relating to insolvency may not receive a payment for the same claim in the State B proceeding under State B laws regarding the debtor, so long as the payment to the other creditors of the same class is proportionately less than the payment the creditor has already received.

Post-commencement finance

The State A insolvency representative shall attempt, in good faith, to obtain prior approval of the State B insolvency representative before borrowing funds or pledging or charging any assets of the debtor.

6. Communication

138. As noted above, communication between the parties in cross-border insolvency proceedings is often viewed as an essential means of addressing the uncertainty that may be encountered in cross-border cases where the parties are not necessarily familiar with the laws of other States and their application. Accordingly, the most common goal of cross-border agreements is to establish procedures for communication between the parties. Where the provisions of chapter IV of the Model Law (articles 25-27) have been enacted into national law they will provide the legislative framework for communication between the courts, between insolvency representatives and between the courts and insolvency representatives. An agreement might provide further detail as to the types of information to be exchanged; means of exchanging information; method and frequency of communication; provision of notice; and confidentiality. Where the Model Law has not been adopted, an agreement might both establish the framework and provide the necessary practical detail. Formalizing the procedures for communication in an

agreement will assist the overall coordination of the proceedings, promote the confidence of the parties, avoid disputes and increase transparency.[180]

139. A communication agreement might be used to address the issues noted above, as required in each particular case and as permitted by local procedural requirements. While many such agreements have been endorsed by courts in a number of cases, that endorsement may only be a requirement where the communication agreement covers aspects of communication between the courts; an agreement addressing communication between, for example, the insolvency representatives and the creditors, may generally be implemented without such approval. Such an agreement might be one of a series of agreements entered into in the course of proceedings to address different issues and may be used as an initial step to facilitate resolution of those other issues. Such direct communication proved to be very successful in one case involving the United States and Germany, in which the German insolvency representative appeared in a hearing, testifying by telephone.[181] Where videoconference facilities are available, the ability of the parties to "see" each other might further assist mutual understanding.

(a) Communication between courts

(i) Direct communication

140. As noted above (part II.B), communication between relevant courts is very often essential because of the important supervisory role of courts in insolvency proceedings and may assist in preventing a "duelling of insolvency proceedings", undue delays and costs, unduly cumbersome and lengthy hearings, inconsistent treatment of similarly situated creditors, and the loss of valuable assets. In addition, direct communications might facilitate the resolution of problems created when different laws accord different treatment to the same types of claim. In the *Stonington Partners* case, for example, involving parallel insolvency proceedings in the United States and Belgium, an issue concerned the ranking of a securities-fraud claim that would effectively be denied any share under United States law, but could be allowed under Belgian law and would rank equally with all other unsecured claims if proven. The United States appellate court recommended that an actual dialogue should occur or be attempted.[182] Where permitted under applicable law, the

---

[180] The CoCo Guidelines recommend that courts communicate with each other for the purpose of coordinating and harmonizing the different insolvency proceedings (Guideline 2), including the communication between courts and foreign insolvency representatives (Guideline 4); and that courts should cooperate with each other directly, through insolvency representatives or through any person or body appointed to act at the direction of the court (Guideline 16.4). Other recommendations address the time, method and means of communication (Guidelines 6 and 7); see also the Court-to-Court Guidelines.

[181] This happened in the "Dana" case, *In re Petition of Dr. Eberhard Braun, in his Capacity as Insolvency Administrator for Fairchild Dornier GmbH*, United States Bankruptcy Court Western District of Texas, San Antonio Division, Case No. 02-52351-LMC, (16 July 2004).

[182] See *Stonington Partners, Inc. v. Lernout & Hauspie Speech Products N.V.*, 310 F.3d 118, 133 (3d Cir. 2002). Such dialogue did not take place in the case, though the parties discussed coordination during several case conferences resulting in the preparation of a letter by the debtor's counsel intended for signature by the United States judge and directed to the Belgian court with the purpose of opening the lines of communication between the courts. This letter might have paved way for a cross-border agreement between the two proceedings. However, the debtor withdrew its quest to enjoin Stonington from pursuing its claims in the Belgian case, thus rendering the issue of communication moot, see *Lernout & Hauspie Speech Products, N.V.*, 301 B.R. 651, 659 (Bankr. D. Del. 2003).

ability to communicate with each other provides a safeguard for the courts, facilitating direct knowledge of the administration of the other proceeding. In a case concerning litigation against the debtor in the United States and insolvency proceedings in the Netherlands Antilles, a telephone call from the judge in the court of the Netherlands Antilles to the court in the United States led to correction of erroneous information communicated by the parties. In the same case, direct communication between the courts resulted in an order by the United States' court, with the concurrence of the court of the Netherlands Antilles, directing mediation and the appointment of a mediator with the consent of the parties.[183] In a further example, a case concerning the United States and Canada, the Canadian court needed information from the United States court on whether the criteria for independence was fulfilled by the "foreign representative", so that the Canadian court could recognize the foreign representative and make certain orders in Canada.[184]

141. In the *Cenargo* case,[185] which involved insolvency proceedings in the United States and the United Kingdom, direct communication between the judges was arranged via a telephone conference in which the various parties' counsel participated after the English judge was contacted by the United States' judge seeking direct dialogue to resolve problems caused by competing orders. In the course of the conference, the English judge mentioned that English law did not permit him to speak to another judge officially on any matter without the consent and the participation of the parties. The parties were given the opportunity to comment at the end of the conference and a transcript was circulated upon the request of the English judge. The various safeguards that might apply to direct communication are discussed in part II (see above, para. 8) and below (see paras. 185-188).

142. Provisions on court-to-court communication included in cross-border agreements may include different levels of detail. They may provide, for example, that the courts of the different fora may communicate with one another generally or with respect to any matter relating to the insolvency proceedings[186] or in order to coordinate their efforts and avoid potentially conflicting rulings.[187] They may also specify particular issues on which courts may communicate and, in some cases, seek guidance and advice from other courts, such as the application of the law of the other forum with respect to certain issues, for example the interpretation, application and enforcement of the stay ordered by that court (see above, para. 91).[188]

143. Where courts are unable to communicate directly, communication may nevertheless be facilitated through the insolvency representatives or through an intermediary or by way of letter or other written communication. As noted above, direct communication across borders is subject to the provision of national law and practice, which might not always facilitate that communication (see above, part II, para. 9). Article 31 of the EC Regulation provides for communication between insolvency representatives, but is silent on communication between courts. Some

---

183 Supra note 30.

184 See ABTC.

185 In re Cenargo Int'l, PLC, 294 B.R. 571 (Bankr. S.D.N.Y. 2003).

186 See, for example, Financial Asset Management, para. 13, Laidlaw, para. 11 (b), Pioneer, para. 12 (b), Systech, para. 12 (b).

187 See, for example, Nakash, para. 4.

188 See, for example, Calpine, paras. 28 and 29.

EU Member States have elaborated that provision. One law, for example, authorizes the judge or insolvency representative to provide to the foreign insolvency representative all information deemed necessary for the foreign proceeding and requires domestic courts or insolvency representatives to give the foreign insolvency representative the opportunity to make proposals with respect to the treatment of assets in the domestic proceedings.[189]

144. The *Maxwell*, *Nakash* and *Matlack* cases provide examples of the use of an intermediary through whom the judges could communicate (see above, part II, para. 3). An agreement may specify the type of information to be exchanged and the manner of its exchange (see above, part II, para. 6). Communication may also be facilitated by incorporating guidelines, such as the Court-to-Court Guidelines, into the agreement (see above, part II, para. 10)[190] and may be made subject to general provisions of a cross-border agreement relating to dispute resolution.[191]

(ii) Joint hearings

145. One means of facilitating coordination of multiple proceedings is to hold joint hearings or conferences, where appropriate, to resolve issues that have arisen. Joint hearings or conferences have the advantage of enabling the courts to deal with the complex issues of different insolvency proceedings directly and in a timely manner. Parties involved in the various proceedings have the opportunity for direct contact and are able to ask questions and seek clarification of counsel in the other jurisdiction.

146. Some agreements leave it to the courts to determine when joint hearings or conferences should be conducted, providing, for example, that they may be conducted with respect to any matter relating to the administration, determination or disposition of any aspect of the proceedings, where the courts consider it to be necessary or advisable or to facilitate coordination with the proper and efficient conduct of the insolvency proceedings.[192] A more limited example permits joint hearings with regard to specific issues, such as disposal of assets.

147. Some agreements set out procedures to be followed for joint hearings and in some cases also for conferences. Some agreements adopt procedures similar to Guideline 9 of the Court-to-Court Guidelines; other agreements incorporate those Guidelines by reference.

148. Those procedures may include:[193]

(a) The establishment of a telephone or video link to enable the courts to simultaneously hear or see the proceedings in the other court;[194]

(b) Limitation of submissions or applications by any party to the court in which the party is appearing, unless specifically given leave by the other court. Some agreements add that after the scheduling of the joint hearing, courtesy copies

---

189 § 239 I and II of the Austrian Bankruptcy Act (Konkursordnung).

190 See, for example, Matlack, para.11 and enclosed as Schedule 1 to the protocol; Progressive Moulded, before para. 1 and enclosed as Schedule A to the protocol.

191 See, for example, Calpine, para. 27.

192 See, for example, 360Networks, para. 12, Quebecor, para. 10 (d).

193 See, for example, Solv-Ex, para. 5, Inverworld, para. 26.

194 See, for example, Livent, para. vi [6] (a).

of such submissions or applications should be provided to the other court, and that any application seeking relief from both courts must be filed with both courts;[195]

(c) The judges of the different fora who will hear such applications are entitled to communicate with each other in advance of the hearing, with or without counsel being present, to establish guidelines for the orderly submission of documents and the rendering of decisions by the courts, and to deal with any related procedural, or other matters;[196] and

(d) The judges of the different fora, having heard an application, are entitled to communicate with each other after the hearing, without counsel present, for the purpose of determining whether consistent rulings can be made by both courts, and the terms upon which such rulings shall be made, as well as to address any other procedural or non-substantive matter.

149. A different approach to joint hearings provides that the judges of the different fora might appear and sit jointly in either court as agreed between them, provided that where they do, creditors and other parties in interest may appear and be heard in person or at the courtroom of the judge who has travelled to appear in the other courtroom.[197]

150. In cases where the cross-border agreement included relevant provisions, either on joint jurisdiction or explicitly allowing for joint hearings, joint hearings have been successfully arranged and have included holding a telephone conference to develop a coordinated schedule for the case and video joint hearings to discuss a proposed sale of assets in the different jurisdictions.[198]

(b) Communication between the parties

(i) Information-sharing between insolvency representatives

151. In addition to communication between courts, communication between insolvency representatives may be important to the coordination of insolvency proceedings, facilitating exchange of information and coordination of the activities to be undertaken by the insolvency representatives in pursuance of their obligations. Practice indicates that exchange of information has taken place on the basis of both written and oral agreements.[199]

152. Exchange of information may be specifically addressed in the agreement or it may be pursued under a more general obligation to cooperate.[200] An agreement may specify a procedure such as that communication should take place on a regular basis, for example, through the provision of monthly operating reports prepared by the insolvency representatives and transmitted to specified parties[201] or consultations by quarterly meetings or conferences.[202] The agreement may specify how those meetings should be conducted, whether by phone, or in person, and the

---

195 See, for example, Mosaic, para. 11 (c).
196 See, for example, PSINet, para. 13 (iv).
197 See, for example, Livent, para. (vi) [6] (a).
198 See Everfresh, Systech.
199 See, for example, United Pan Europe.
200 Compare 360Networks, para. 11, and Loewen, para. 10, with Manhatinv, paras. 2-12, in particular 9-12.
201 See, for example, Commodore, para. K.
202 See, for example, Peregrine, para. 17.

procedures to be followed.[203] Such specific procedures may also include: the joint development of a workplan to coordinate and govern the material steps to be taken by the insolvency representatives,[204] keeping each other regularly informed about their activities and material developments with respect to the debtor, as well as providing notice of any application to the court[205] and, in some cases, drafts of those applications or copies of any documents filed in the proceeding[206] or other significant documents or information.[207] Provision of information may be assisted by requiring the insolvency representatives to keep clear records of the administration of the estate, including of significant management decisions,[208] books and records that would account for disposal of the assets and monthly reports of the fees and expenses of the administration.[209]

153. Insolvency representatives may agree to make themselves available for consultation with their foreign counterparts upon request[210] or to consult each other on specific matters, such as the preparation and negotiation of reorganization plans to be submitted in the different States.[211] One agreement dealing with main and non-main proceedings in European Union Member States referred to Article 31 of the EC Regulation and required each insolvency representative, prior to any disposal of assets, to prepare and provide to the other a list of the assets located in the territory of the non-main proceeding.[212] It also required the insolvency representative of the main proceeding to make a proposal to the insolvency representative of the non-main proceeding for the global transfer of all assets. The insolvency representative of the non-main proceeding was to provide a copy of the proposal and its response to that proposal to the court administering the non-main insolvency proceeding. The insolvency representatives were also required to share a draft distribution plan and a list of creditors who had received distributions.[213]

(ii) Sharing information with other parties

154. In addition to the sharing of information between insolvency representatives, a cross-border agreement may address the sharing of that information with other parties, such as the courts involved and the creditors or creditor committee. Such provisions may be useful to provide a degree of certainty and avoid potential conflict. The agreement may require, for example, that information shared by the insolvency representatives, such as monthly reports on their activities, could also be provided to the creditors or the creditor committee or the courts.[214] Additional information may be exchanged on request, either by an insolvency representative or a creditor committee.

155. With a view to enhancing the transparency of the proceedings, some agreements provide that information publicly available in one forum should be

---

203 See, for example, Manhatinv, para. 2-12.
204 See, for example, Manhatinv, para. 2-12.
205 See, for example, Nakash, para. 9.
206 See, for example, Peregrine, para. 14.
207 See, for example, Swissair, para. 8.1.2.
208 See, for example, Federal-Mogul, para. 4.1.
209 See, for example, Inverworld, paras. 10 and 23.
210 See, for example, Peregrine, para. 16.
211 See, for example, Maxwell, paras. G.1 (iii), G.3 (iii) and, in particular, G.6.
212 See, for example, SENDO, part II-1.1
213 See, for example, SENDO, part II-2.
214 See, for example, Inverworld, para. 23, Commodore, para. K.

made available in all fora[215] or that all claimants in the proceedings should have similar access to disclosed information, including information as to the financial condition, status and activities of the debtor, the nature and effect of any reorganization plan and the status of proceedings in each jurisdiction.[216] Sharing of information may also be enhanced by measures such as a court holding monthly status conferences.[217]

156. An agreement may also cover communication between the management of the debtor and the insolvency representatives. It may provide, for example, that the insolvency representatives and the management of the debtor entities should regularly consult on strategic matters, specifying the kind of information that management should provide to the insolvency representatives or providing the insolvency representatives with access to all books and other records requested. Relevant information might include: minutes of board meetings of the debtor; periodical account information; periodical reports on the status of other legal proceedings involving the debtor; and copies of all tax returns.[218]

(iii) Notice

a. When notice is required

157. Provision of notice to interested parties is an essential element of the efficient administration of global insolvency proceedings and a reliable mechanism for the dissemination of basic information. Notice may be required to be given, under applicable law, to a number of different parties and stakeholders in those insolvency proceedings. While a cross-border agreement cannot circumvent the requirements of applicable law, it can extend those requirements (e.g. by providing notice more widely or including more comprehensive information), clarify the manner in which the provisions will operate across the different proceedings and supplement them if necessary to take account of the relationship between the different proceedings. Details that might be included in such agreements may include the party to give notice; to whom notice should be given; when notice is required; and the content of that notice.

158. Notice provisions in an agreement may be very general, relying upon procedures applicable under the relevant insolvency laws. Without specifying the exact circumstances warranting the provision of notice, the approach may be limited to indicating that where notice is required, it should be provided in writing, in accordance with the applicable law.[219] Another approach might be to provide that all parties should receive notice of all proceedings in accordance with the practices of the respective courts.[220]

159. Agreements may also limit the requirements for provision of notice, excluding matters of a purely formal and non-substantive nature or limit notice to cases where joint hearings are held.[221] Failure to provide notice as required may also be addressed, excusing a party from providing advance notice in a timely manner, if

---

215 See, for example, Calpine, para.16, Everfresh, para. 5.

216 See, for example, Solv-Ex, para. 13.

217 See, for example, Inverworld, para. 25.

218 See, for example, Federal-Mogul, para. 4.2-4.5; see also UNCITRAL Legislative Guide on obligations of the debtor (part two, chap. III, paras. 22-33 and recommendation 110).

219 See, for example, AIOC, para. E.

220 See, for example, Livent, para. (ii) [2], Solv-Ex, para. 2.

221 See, for example, Federal-Mogul, para. 10, PSINet, para. 28.

circumstances reasonably prevented it from doing so,[222] with the proviso that notice and an opportunity for a hearing should be given as soon as practicable after the preventing event.

160. Matters requiring notice to be given might include: (a) an application by an insolvency representative to commence proceedings with respect to a member of the debtor's group[223] or any other application, request or document filed in one or all of the insolvency proceedings; (b) related hearings or other proceedings mandated by applicable law in connection with the insolvency proceedings;[224] (c) an application for approval of remuneration and expenses of the insolvency representatives and professionals;[225] (d) issues concerning treatment of claims and reorganization plans; (e) court orders or reasons and opinions issued in the proceedings;[226] (f) an action relating to investigation of assets in other fora;[227] (g) the seeking of emergency relief;[228] (h) a transaction, or an application for approval of a transaction, involving the assets of the estate, including the use, sale, lease, deposit of funds or any other disposal;[229] and (i) with respect to post-commencement finance.[230]

b. Parties required to give notice

161. Some agreements specify the persons required to provide notice, for example, the insolvency representatives of the different proceedings, the debtor or the party otherwise responsible for affecting notice in the State where certain documents are filed or the proceedings are to be conducted.[231]

c. Recipients of notice

162. Different approaches are taken to specifying the persons to be notified of different aspects of cross-border insolvency proceedings. Some agreements specify that notice requirements apply only to parties to the agreement, others require notice to be given generally to a number of recipients, including the debtor, creditor committee, creditors, the insolvency representatives and sometimes to other persons appointed or designated by the courts or that are entitled to receive notice according to the practice of the State where the documents are filed or the proceedings occur. Notice may be limited, with respect to creditors, to the creditor committee or to a certain number of the largest creditors, for example, the twenty largest creditors. Recipients may also be determined by reference to a list maintained in one proceeding or to all parties that are entitled to notice in accordance with any order issued in either proceeding. Some agreements specify contact details, including fax numbers or the full addresses of the parties entitled to receive notice. Others not only list the parties entitled to receive notice, but also emphasize the obligations of

---

222 See, for example, AIOC, para. E.

223 See, for example, Commodore, para. L, including e.g. a subsidiary or an intermediate holding company situated between the debtor and its affiliate or subsidiary companies: Maxwell.

224 See, for example, ABTC, art. 3/sect. 3.02

225 See, for example, Federal-Mogul, paras. 8 (a) (ii), (b) (ii).

226 See, for example, Loewen, para. 21.

227 See, for example, Nakash, para. 9.

228 See, for example, Manhatinv, para. 26.

229 See, for example, Everfresh, para. 3.

230 See, for example, Commodore, para M (1)-(4).

231 See, for example, Inverworld, para. 14, Mosaic, para. 19.

those parties to give notice in accordance with the practices of the respective courts.[232]

163. Another example requires the insolvency representative of the main proceeding to give notice to all creditors based in other fora by regular mail in the form of individual notices setting forth the required formalities and penalties provided by the law applicable in the main proceeding. Notice may also be required to be given to creditors whose claims are to be dealt with by a court other than the one to which their claim was submitted.[233]

164. Where the insolvency representative is required to obtain court approval in order to investigate or pursue assets of the debtor in a particular State, an agreement may require notice to be given to other courts involved in the proceedings.[234] Some agreements provide that where a request for an order contrary to the provisions of the agreement is made, all parties should be notified.[235]

d. Method of giving notice

165. Some agreements do not specify how the notice should be given, other than requiring that it should be in accordance with the practices of the respective courts or in writing.[236] Other agreements list different methods from which the parties can choose including: courier, telecopy, facsimile, email or other electronic forms of communication[237] or overnight mail, overnight delivery service[238] or even delivery by hand.[239] An agreement may also regulate the publication of notice, stipulating the time and medium (e.g. the newspaper) in which the debtor should publish the notice and the language of the notice to be given, in order to ensure creditors, wherever situated and other parties in interest will be able to understand it, satisfying requirements for effectiveness and sufficiency. Another possible and evolving means of notice is the use of a court's website.

166. An agreement may address the effectiveness of service of notice and the impact of changes of the address for service. One example provided that notice would be effective notwithstanding a change of address, where the change of address was not notified within certain time limits determined by reference to the giving of notice. In case of personal delivery, for example, notification of the change had to be received before the time of delivery; in case of communication by facsimile, at the time of transmission (with confirmed answerback). In addition to these types of detail, an agreement can indicate the evidence required to prove service.

e. Notice concerning operation and implementation of the agreement

167. Some agreements include notice provisions with respect to operation or implementation of the agreement, requiring that notice be given for any

---

232 See, for example, AIOC, para. E, Laidlaw, para. F.

233 See, for example, Solv-Ex, para. 6 (c) and (d).

234 See, for example, Nakash, para. 5.

235 See, for example, Everfresh, para. 18, Solv-Ex, para. 15. The CoCo Guidelines provide, inter alia, that notice of any court hearing or any order should be given to the insolvency representatives where relevant to that insolvency representative (Guidelines 17.1-3).

236 See, for example, AIOC, para. E.

237 See, for example, Federal-Mogul, para. 10.1.

238 See, for example, Everfresh, para. 3.

239 See, for example, Olympia & York, para. 4 (c), Swissair, para. 10.2.

supplementation, modification, termination or replacement of the agreement in accordance with the notice procedure described in it.[240] Where disputes relating to the agreement arise, the agreement might require notice to be provided to specified parties.[241]

(c) Confidentiality of communication

168. Much of the information relating to the debtor and its affairs that needs to be considered and shared in insolvency proceedings may be commercially sensitive, confidential or subject to obligations owed to third persons (such as trade secrets, research and development information and customer information). Accordingly, its use needs to be carefully considered and disclosure appropriately restricted to avoid third parties being placed in a position where they can take unfair advantage of it. Confidentiality of information, especially in a cross-border case where requirements for protection of confidentiality may vary from State to State, may be an issue that could be addressed in an agreement.[242] Many practitioners require persons seeking access to communications to execute confidentiality agreements. Cross-border agreements might set out the details of such agreements, including how they are to be enforced.

169. Not all agreements provide for confidentiality of communication.[243] Those that do, adopt various approaches, including: providing generally that the information exchanged should be kept confidential, or that non-public information may be made available subject to appropriate protections, for example, that confidentiality arrangements are made;[244] the insolvency representatives have entered into a written agreement with the objective of protecting and preserving all privileges;[245] the (written) consent of the concerned party has been obtained; or disclosure is required by applicable law[246] or a court order.[247] Where information is exchanged, an agreement may provide that such exchange does not constitute a waiver of any applicable privileges, including attorney-client or work product privileges.[248]

170. In addition to the sharing of information, confidentiality requirements may apply to the dispute resolution process concerning any conflicts under or regarding the agreement and any material produced in that process. Divulgence of information by any participants in that process may be limited or the agreement may provide that

---

240 See, for example, Loewen, para. 26, Mosaic, para. 25.

241 See, for example, PSINet, para. 31, Systech, paras. 27 and 28.

242 Principle 3D of the Concordat also addresses the issue of confidentiality; the CoCo Guidelines recommend that to the fullest extent permissible under applicable law, any relevant information not available publicly should be shared by an insolvency representative subject to appropriate confidentiality arrangements to the extent that this is commercially and practically sensible (Guideline 7.5); that the duty to provide information, within the meaning of the Guidelines, includes the duty to provide copies of documents at reasonable cost on request (Guideline 7.6). They further address communication between insolvency representatives (Guideline 6.1 and Guideline 7.1), including between insolvency representatives of a main and a non-main proceeding (Guideline 8).

243 See, for example, Maxwell and SENDO do not.

244 See, for example, Everfresh, para. 5, Livent, para (v) [5].

245 See, for example, Manhatinv, para. 11.

246 See, for example, Federal-Mogul, paras. 4.6 (c) and 4.7 (a).

247 See, for example, Manhatinv, para. 12.

248 See, for example, Commodore, para. M (6), para. 6, Manhatinv, para. 10.

divulgence of such information cannot be compelled by, for example, the insolvency representative.[249]

171. Confidentiality agreements might also affect the creditor committee. One agreement provided that the creditor committee would be bound by the by-laws adopted in one jurisdiction, to relieve it from executing the confidentiality agreements otherwise required in the other proceeding.[250]

Sample clauses

Communication between courts

The courts of States A and B may communicate with one another with respect to any matter relating to the State A and B proceedings. In addition, the courts may conduct joint hearings with respect to any matter relating to the conduct, administration, determination or disposition of any aspect of those proceedings, provided both courts consider such joint hearings to be necessary or advisable and, in particular, to facilitate or coordinate the proper and efficient conduct of the proceedings. With respect to any such hearings, unless otherwise ordered, the following procedures will be followed:

(a) A telephone and/or video link shall be established to allow both courts to be able to simultaneously hear the proceedings in the other court;

(b) The judges may appear and sit jointly in either court as agreed between them, provided that creditors and parties in interest may appear and be heard in person or at the courtroom of the judge who has travelled to appear in the other courtroom;

(c) Any party intending to rely on any written evidentiary materials in support of a submission to either court in connection with any joint hearing shall file those materials, which shall be consistent with the procedural and evidentiary rules and requirements of each court, in advance of the hearing. If a party has not previously appeared in or does not wish to submit to the jurisdiction of either court, it shall be entitled to file such materials without, by the act of filing, being deemed to have submitted to the jurisdiction of the court in which such material is filed, provided it does not request in those materials or submissions any affirmative relief from the court to which it does not wish to submit;

(d) Submissions or applications by any party shall be made initially only to the court in which such party is appearing and seeking relief. Where a joint hearing is scheduled, the party making such applications or submissions shall file courtesy copies with the other court. Applications seeking relief from both courts must be filed with both courts.

(e) The judges who will hear any such application shall be entitled to communicate with each other, with or without counsel present, to establish guidelines for the orderly submission of documents and other materials and the rendering of decisions of the courts, and to deal with any related procedural or administrative matters; and

(f) The judges shall be entitled to communicate with each other after any

---

[249] See, for example, Manhatinv, para. 18.

[250] See, for example, Quebecor, para. 17.

joint hearing, without counsel present, for the purposes of (i) determining whether consistent rulings can be made by both courts, (ii) coordinating the terms of the courts' respective rulings, and (iii) addressing any other procedural or administrative matter.

Communication between the parties: information sharing between insolvency representatives

(1) In addition to other provisions of this agreement addressing information sharing, the insolvency representatives of States A and B agree to share all information that may lawfully be shared regarding the debtor, its present and former officers, directors, and employees its assets and liabilities, which each has or may have under its possession or control. The insolvency representatives may, but are not obliged to, share privileged information with each other. Each of the insolvency representatives shall keep the other fully apprised of their activities and material developments in matters concerning the debtor known to them.

(2) The entry of an order approving this agreement shall constitute the recognition by each relevant court, insolvency representative, the professionals retained by them, their employees and […] that they are subject to, and do not waive any attorney-client, work product, legal, professional or any other privileges recognized under any applicable law.

Communication between the parties: sharing information with other parties

Information publicly available in either forum shall be made publicly available in the other. To the extent permitted, non-public information shall be made available to official representatives of the debtor, including the creditor committee and any other official committee appointed in proceedings with respect to the debtor, and parties in interest, including providers of post-commencement finance, subject to appropriate confidentiality agreements.

Notice

Notice of any application or document filed in one or both of the insolvency proceedings and notice of any related hearing or other proceeding mandated by applicable law in connection with the insolvency proceedings or the agreement shall be given by appropriate means (including, where circumstances warrant, by courier, telecopier or other electronic forms of communication) to the following parties:

(a) All creditors and other parties in interest in accordance with the practice of the jurisdiction where the document is filed or the proceedings are to occur; and

(b) To the extent the parties referred to in paragraph (a) are not entitled to receive such notice, to counsel to the creditor committee, the insolvency representatives and such other parties as may be designated by either of the courts from time to time.

Notice in accordance with this paragraph shall be given by the party otherwise responsible for affecting notice in the jurisdiction where the document is filed or the proceedings are to occur. In addition to the foregoing, the debtor shall provide to the court of State A or B, upon request, copies of all orders, or similar papers issued by the other court in the insolvency proceeding.

Confidentiality of communication

The insolvency representatives of States A and B agree that they shall not provide any non-public information received from each other regarding any present or former officer, director or employee of the debtor to any third party, unless the provision of that information is either:

(a) Agreed to by the party to whom the information relates or the other insolvency representative, as applicable;

(b) Required by applicable law; or

(c) Required by order of any relevant court.

7. Effectiveness, amendment, revision and termination of agreements

(a) Effectiveness and conditions precedent to effectiveness

172. Parties negotiating an agreement want the result to be effective. For this reason, some agreements set out the procedure by which they are to become effective; most of the agreements analysed in these Notes involved approval of the courts of the different fora.[251] The approval may be that of a specific court or all courts involved in the proceedings and an additional provision may make it clear that the agreement will have no binding or enforceable legal effect until that approval is obtained. In approving an agreement, a court may also specify that it will only be binding upon the parties when approval of the other courts has been obtained.[252] Some agreements include additional requirements, such as that the decision to approve by one court should be transmitted to all creditors that have submitted claims in the insolvency proceedings before that court[253] or to the parties that have signed the agreement.[254]

173. An alternative approach, required under some national laws, is approval by a creditor committee, with copies of the agreement and approval to be provided to the court in order for the agreement to become effective.[255] Agreements not approved by the courts may be enforceable under contract law.

174. In practice, the courts involved in approval of agreements to date have been willing to do so, on the basis that they represent the consensus reached by the relevant parties, including the insolvency representatives that are often appointed by the courts. Courts have tended to trust the professional judgment of insolvency representatives who, as experienced insolvency practitioners, have drafted the agreement as a pragmatic solution to harmonize and coordinate concurrent insolvency proceedings.[256]

---

251 See, for example, MacFadyen, para. 9, Pope & Talbot, para. 25.

252 See, for example, Solv-Ex, para. 15, Systech, para. 25. The order approving the agreement might also provide that that approval is subject to approval of the agreement by the court of the other State, see, for example, Nortel, order of the United State Bankruptcy Court for the District of Delaware (15 January 2009).

253 See, for example, AIOC, para. I.

254 See, for example, Nakash, para. 38.

255 See, for example, ISA-Daisytek, para. 10.1-10.2.

256 The English judge involved in the Maxwell case noted that "in general the attitude of the court is that if the administrator's business judgment is that doing something would be in the best interest of creditors, the court will accept that judgment".

175. In deciding on the approval of an agreement, courts have looked to factors such as whether a conflict with any principle of comity was at stake and whether the principle of equal treatment of creditors was observed.[257] Courts have ensured they do not approve an agreement that would authorize something contrary to the law or ultra vires. In a case concerning concurrent insolvency proceedings, one court had before it a reorganization plan drafted by the insolvency representatives of the other jurisdiction. The court only approved the plan with modifications, on the basis that it could not approve a reorganization plan that authorized something contrary to the law or ultra vires, as the plan would have amounted to a waiver of any liability for the directors of any company in the debtor group for any breach of duty to its company.[258] To facilitate approval and avoid challenges, the process of approval may permit creditors to raise objections to the content or drafting of the agreement. Those objections would be considered by the court in deciding upon approval.

176. In addition to court approval, an agreement may authorize the parties to take such actions and execute such documents as might be necessary and appropriate for its effective implementation[259] or the parties may expressly agree that they will do everything appropriate to give full effect to the terms of the agreement.[260]

(b) Amendment, revision and termination of an agreement

177. To accommodate changing circumstances, many agreements contain provisions on amendment. Typically, those agreements approved by the court stipulate that the agreement cannot be supplemented, amended or replaced in any manner except as approved by the respective courts, following notice to specified parties and a hearing.[261] Some agreements require, in addition to the approval of the courts, the written consent of the parties. Those parties may be specified and include the debtor, the insolvency representatives, certain creditors or a creditor committee.

178. Not all amendments to an agreement will require court approval and examples of some that may not would include: (a) the removal as a party of any debtor if that debtor has ceased, or is about to cease, to be a member of the debtor group, or if that debtor has ceased, or is about to cease, to be the subject of insolvency proceedings in any State; (b) the substitution, addition or removal of an individual as an insolvency representative; or (c) conforming amendments that result from the preceding examples in (a) and (b). Some agreements include a safeguard that no amendment may adversely affect any rights to indemnification, immunity or other protection contemplated by the agreement with respect to service prior to such amendment.

179. Some agreements particularize who has the right to amend or terminate the agreement; when this could be done; and its impact. One agreement, for example, specified that any party in interest could apply to either court at any time to amend or terminate the agreement. In an agreement requiring the parties' consent for effectiveness, any amendment would generally need the consent of each party. Amendment would render the earlier version of an agreement null and void.

---

257 Ibid.

258 See Re APB Holdings Ltd., High Court of Justice of Northern Ireland, Chancery Division, [1991] N.I. 17.

259 See, for example, Inverworld, para. 37, Solv-Ex, para. 16.

260 See, for example, Federal-Mogul, para. 12.2.

261 See, for example, Quebecor, para. 28.

180. Although not all agreements include a provision on termination, those that do mention it in the context of amendment or specify when termination would occur. Those situations might include (a) if the insolvency representative gives notice in writing to the other parties that it is terminated; (b) if management gives notice in writing to the parties that it is terminated; or (c) in relation to any of the debtors to which a reorganization plan relates, upon that plan becoming effective under applicable law.

Sample clauses

Effectiveness and conditions precedent to effectiveness

Variant A

This agreement shall become effective only upon its approval by both the courts of State A and State B.

Variant B

(1) According to the law of State A, the effectiveness of this agreement is subject to the approval of the creditors of the debtor. The State A insolvency representative will convene a creditors meeting in State A as soon as practicable and will use all reasonable endeavours to obtain the creditors' approval of this agreement.

(2) The State A insolvency representative will report the terms of

this agreement to the State A court within […] days of the creditors meeting referred to in paragraph (1).

(3) The State B insolvency representative will report the terms of this agreement to the State B court within […] days of this agreement.

Amendment, revision and termination

This agreement may not be supplemented, modified, terminated or replaced in any manner except by the written agreement of the parties and approval of both the courts of States A and B. Notice of any legal proceeding to supplement, modify, terminate or replace this agreement shall be given in accordance with paragraph […] above [*paragraph on notice*].

8. Costs and fees

181. Costs may be incurred in the course of administration of insolvency proceedings, be it the investigation of the debtor's assets, the insolvency representative's remuneration, costs of the proceedings (e.g. court fees) and so forth. To ensure efficient administration of the proceedings, many agreements address the costs and fees of proceedings, and at least some specifically address the insolvency representatives' fees.[262] In general, agreements follow the principle that obligations incurred by the insolvency representatives should be funded from the respective insolvency estate.[263]

---

[262] Solv-Ex, para. 9.

[263] See, for example, Manhatinv, para. 14; see also Principles of European Insolvency Law, ed. McBryde, Flessner and Kortmann, Law of Business and Finance, Vol. 4, Kluwer 2003 and common to many national insolvency laws (Principle 5.1); the CoCo Guidelines recommend that

182. Agreements typically address the costs and fees that are to be paid, how they are to be paid and which court has jurisdiction over the issue. Some provide, for example, that fees of professionals retained by the debtor or even by the secured lenders or the lenders providing post-commencement finance should be subject to the jurisdiction of the court of that State; approval of another court is not required. Typically, such a provision will apply in respect of each State involved in the cross-border agreement and may require parties in interest to request the courts to consider whether a different allocation of expenses would be more appropriate based on the facts and circumstances of the case. Similarly, the fees, costs and ordinary expenses of the insolvency representative and of professionals retained by the insolvency representative would generally be paid from the insolvency estate in the State in which they are appointed.[264] A detailed procedure for accounting, including the exchange of a monthly accounting between the insolvency representatives and its confidential nature may also be stipulated.

183. Where an agreement covers parallel insolvency proceedings, provisions on costs might address how the costs are to be apportioned between them.[265] In one agreement involving both main and non-main proceedings, for example, the legal costs of the non-main proceeding were to be met from the assets of the debtor as an expense of the administration of the main proceeding, but subject to certain limits and to applicable law as to what those costs could include, for example, verification of claims lodged, including wages due, and recovery of assets as a result of actions initiated or pursued by the insolvency representatives. The agreement also specified the amount that the insolvency representatives of the non-main proceeding would receive as an expense of the administration of the main proceeding and determined which judge would have jurisdiction to set the fees.

184. Some agreements include a provision concerning disclosure of costs and fees, requiring costs and remuneration received in each proceeding to be disclosed in the other proceedings, to ensure transparency and to guarantee trust and confidence between the courts of different jurisdiction regarding payment of compensation to professionals. In a case where no written agreement was concluded, one court approved the fees of the professionals retained in the foreign proceeding and, in turn, the foreign representative participated in the review of the fees of professionals retained in the local proceeding.

Sample clauses

Costs and fees

The insolvency representatives of States A and B agree that their respective fees, costs and ordinary course expenses (including those of the professionals and other agents retained by each of them, as well as the cost of assisting one another) in the first instance shall be payable from the funds that each holds in State A or B, respectively. Nothing in this agreement shall preclude the insolvency representatives

---

obligations incurred by the insolvency representative during proceedings and the insolvency representative's fees should be funded from the assets administered in the proceedings in which it is appointed (Guideline 11.1).

264 See, for example, Manhatinv, para. 14.

265 See, for example, SENDO, part I.4; the CoCo Guidelines recommend that obligations and fees incurred by the insolvency representative in the main proceedings prior to the opening of any non-main proceedings, but concerning assets to be included in the estate in principle should be funded by the estate corresponding to the non-main proceedings (Guideline 11.2).

from transferring funds to each other to meet fees approved by the relevant court, costs and ordinary course expenses of administration or for purposes of distribution, if, to do so, would in the reasonable opinion of either insolvency representative be consistent with the objectives of this agreement.

9. Safeguards

185. The terms of an agreement should not lead to infringement of local law or the rights of parties in interest. Consequently, an agreement may include a range of safeguards provisions, i.e. provisions that safeguard a certain status, which can be related to rights, principles or facts. Typically, safeguard provisions are intended to preserve rights and jurisdiction, exclude or limit liability and warrant the parties' authority to enter into the agreement. The latter is of particular importance, as parties want to be assured that their counterpart is appropriately authorized and that applicable law will be observed. As noted above (see paragraph 46 above), some agreements include a sentence at the end of a provision to the effect that notwithstanding the foregoing, that provision should not be construed as having a certain effect. Other agreements include more general safeguard provisions.[266]

(a) Preservation of rights and jurisdiction

186. An agreement can stipulate that its terms or any actions taken under it should not prejudice or affect the powers, rights, claims and defences of the debtor and its estate, the insolvency representative, the creditors or equity holders under applicable law nor preclude or prejudice the right of any person to assert or pursue their substantive rights against any other person under applicable law.[267]

187. An agreement may include provisions on the preservation of jurisdiction, for example that nothing in the agreement is intended to affect, impair, limit, extend or enlarge the jurisdiction of the courts involved, as notwithstanding cooperation and coordination, each court should be entitled at all times to exercise its independent jurisdiction and authority with respect to matters presented to it and the conduct of the parties appearing before it.[268]

188. An agreement may also provide examples of what it should not be construed as doing, including: (a) requiring the debtor, the creditor committee or the insolvency representative to breach any duties imposed on them by national law, including the debtor's obligations to pay certain fees to the insolvency representative under the applicable law;[269] (b) authorizing any action that requires specific approval of one or both courts; (c) precluding any creditor or other party in interest from asserting its substantive rights under applicable law including, without limitation, the right to appeal from decisions taken by one or all of the involved courts; or (d) affecting or limiting the debtor's or other parties' rights to assert the applicability or otherwise of the stays ordered in the different proceedings to any particular proceeding, asset, or activity, wherever pending or located.[270]

---

266 The Court-to-Court Guidelines provide that the Guidelines should not affect any powers, orders or substantive determination of any matter in controversy before the court or other court nor a waiver by any party of its rights or claims (Guideline 17).

267 See, for example, 360Networks, para. 32, Loewen, para. 28, Philip, para. 27.

268 See, for example, Laidlaw, para. 8, Commodore, para. T.

269 See, for example, 360Networks, para. 34, Livent, para. 24.

270 See, for example, Systech, para. 23.

(b) Limitation of liability

189. An agreement may provide that, notwithstanding cooperation between the different parties, neither the insolvency representatives nor the professionals retained by them, their employees, agents or representatives should incur any liability in respect of, or resulting from the actions of their counterparts in other States. Some agreements also provide that granting relief from the automatic stay for a specific purpose, such as to allow the insolvency representative to investigate the debtor's assets, should not be construed as approval of any specific actions the insolvency representative might take in pursuit of that purpose. The parties may also agree to include further persons in such a clause, such as a mediator, if the provisions on dispute resolution include mediation.[271]

(c) Warrantees

190. Some agreements contain a provision in which each party represents and warrants to the other that its execution, delivery, and performance of the agreement are within its power and authority,[272] although such a provision may not be required where the court is to approve the agreement.

Sample clauses

Preservation of rights

Neither the terms of this agreement nor any actions taken under the terms of this agreement shall prejudice or affect the powers, rights, claims and defences of the debtors and their estates, the creditor committee, the insolvency representatives or any of the debtor's creditors under applicable law, including the laws relating to insolvency of States A and B and the orders of the courts of States A and B.

Preservation of jurisdiction

Nothing in this agreement shall increase, decrease or otherwise affect in any way the independence, sovereignty or jurisdiction of any of the relevant courts, or any other court in States A, B or […], including, without limitation, the ability of any of the relevant courts or other courts under applicable law to provide appropriate relief.

Limitation of liability

The State A insolvency representative acknowledges:

(a) that the State B insolvency representative acts as insolvency representative of the debtor in accordance with the applicable law of State B and without any personal liability; and

(b) that neither she nor the debtor has any claim whatsoever against the State B insolvency representative other than under this agreement.

[Repeat for the State B insolvency representative.]

---

271 See, for example, Manhatinv, para. 21.

272 See, for example, Everfresh, para. 19, Inverworld, para. 32.

Warrantees

Each party represents and warrants to the other that its execution, delivery and performance of this agreement are within its power and authority and have been duly authorized by it or approved by the court as applicable.

Annex

Case summaries[273]

1. AgriBioTech Canada Inc. (ABTC) (2000)[274]

In the case of *ABTC*, parallel insolvency proceedings were conducted in Canada and the United States with respect to the subsidiary of one of the largest forage and turf grass seed producers in the United States. One key point of the protocol was coordination of the sales of the debtor's assets, which were made conditional on approval by both courts. Resulting proceeds were to be kept in a segregated account under the authority of the Canadian court. Joint hearings by means of modern telecommunications were contemplated by the protocol, as well as the judges' right to discuss related matters in confidence. Creditors had the right to appear before either court and would then be subject to the respective court's jurisdiction. The debtor agreed to submit substantially similar reorganization plans in both jurisdictions, which the creditors could either jointly accept or reject. The Canadian court was appointed to process the creditor claims in accordance with Canadian law, but the validity of those claims was to be determined in accordance with the law governing the underlying obligation. The protocol also included a provision on avoidance of transactions.

2. AIOC Corporation and AIOC Resources AG (1998)[275]

In this case, a liquidation protocol was developed between Switzerland and the United States. The difficulties in the case arose not only because of the differences between Swiss and United States insolvency law, but also because of the inability of the Swiss and United States insolvency representatives to abstain from their statutory responsibilities to administer the respective liquidations. The parties agreed upon a protocol as a means of providing joint liquidation of resources in a manner consistent with the insolvency laws of both countries. The management of the liquidations by means of the protocol is one of the key features of the case. The protocol was based upon the Concordat, but focused generally on marshalling resources, and specifically on procedures for administering the reconciliation of claims.

3. Akai Holdings Limited (2004)[276]*

The case of *Akai* Holdings Limited involved concurrent insolvency proceedings in the Hong Kong Special Administrative Region of China (SAR) and Bermuda. The objective of the protocol was the simultaneous administration of both liquidation proceedings from Hong Kong, which was the principal place of business

---

[273] The majority of the protocols referred to in this annex are available on one or other of the following websites: www.globalinsolvency.com; www.iiiglobal.org; www.casselsbrock.com. Those not publicly available are marked with an asterisk.

[274] Ontario Superior Court of Justice, Toronto, (Canada) Case No. 31-OR-371448 (16 June 2000) and the United States Bankruptcy Court for the District of Nevada, Case No. 500-10534 LBR (28 June 2000) (Unofficial Version).

[275] United States Bankruptcy Court for the Southern District Court of New York, Case Nos. 96 B 41895 and 96 B 41896 (3 April 1998).

[276] High Court of the Hong Kong Special Administrative Region, Cases No. HCCW 49/2000 and HCCW 50/2000 (6 February 2004) and the Supreme Court of Bermuda.

of the debtor companies, although the protocol recognized the Bermuda proceeding as the "main proceeding". The protocols were drafted to take into account the relevant provisions of the Hong Kong SAR and Bermudan insolvency laws and enable the insolvency representatives to administer both liquidations in the most economical way. Accordingly, creditor claims could be filed in either jurisdiction. The Hong Kong SAR court approved the protocols, noting that in the absence of legislation to deal with matters affecting cross-border insolvency, the proposed protocols seemed to be the best way to serve the interests of creditors. As in the protocols in the *Peregrine* and *GBFE* cases, the same individuals were appointed as insolvency representative for each of the companies in the two States. As annexes, the protocol included several standard forms including for the proof of debt and a notice of rejection of the proof of debt.

4. Calpine Corporation (2007)[277]

Calpine Corporation, a Delaware corporation, was the ultimate parent company of a multinational enterprise that operated through various subsidiaries and affiliates in the United States, Canada and other countries. Reorganization proceedings commenced in the United States and in Canada, with the respective debtors being separate and distinct. At the outset, the proceedings were conducted in tandem with memoranda of understanding being concluded on specific issues. However, in recognition of the close relationship between the companies, for example they were each the largest creditors of the other, a protocol was developed, inter alia, to coordinate and harmonize both proceedings. The Canadian court rejected an application at the beginning of proceedings for approval of the protocol as premature, holding that the proceedings were not aimed at a global restructuring of all the applicants and that a protocol should not be used as a mechanism to relitigate issues, but to advance coordination and cooperation. Subsequently, the court approved the protocol when satisfied that it had been properly negotiated and advanced the interests of various parties in interest on both sides of the border. *Calpine* resembles in form a *standard* protocol,[278] although it did not include a specific provision on rights to appear and be heard. Further, one Memorandum of Understanding, aimed at the resolution of intercompany claims, preceded and was subsequently incorporated into the protocol. In addition, the protocol contained a provision that required the Canadian and the United States debtors to negotiate a specific claims protocol to address claims filed by each other (and their respective creditors) in the other's case. The goals set out in the protocol were: to avoid duplication of activities; to honour the sovereignty of the courts involved and to facilitate the fair, open and efficient administration of the insolvency proceedings. The protocol also contained provisions on access to information and the development of a reorganization plan. The protocol incorporated by reference the Court-to-Court Guidelines.

---

[277] United States Bankruptcy for the Southern District of New York, Case No. 05-60200 (9 April 2007) and Court of Queens Bench of Alberta, (Canada) Case No. 0501-17864 (7 April 2007).

[278] A comparison of a number of protocols entered into in recent years reveals that there are some more generic protocols which resemble each other and contain the same provisions, addressing background; purpose and goals; comity and independence of the courts; cooperation, including provisions on the procedure of communication, such as joint hearings; retention and compensation of estate representatives; notice; recognition of stays of proceedings; rights to appear and be heard; effectiveness; modification and procedure for resolving disputes under the protocol and preservation of rights. Those protocols are referred to here as "*standard*" protocols.

5. Commodore Business Machines (1994)[279]

This case involved insolvency proceedings in the Bahamas and the United States. The protocol was entered into by the Bahamian insolvency representatives and the creditor committee. Its main purpose was to convert the involuntary Chapter 7 proceedings under the United States Bankruptcy Code, which had commenced on the application of some creditors, into Chapter 11 proceedings in the United States and to resolve contemplated litigation. The parties agreed in the protocol that the Bahamian insolvency representatives would perform the functions customarily performed by a debtor in possession under Chapter 11. Other objectives of the protocol included: facilitating the liquidation of assets in both jurisdictions; and avoiding conflicting decisions by the courts involved. Consequently, the Bahamian insolvency representatives were appointed as debtors in possession in the United States proceedings. The protocol regulated the submission of claims; the retention and compensation of insolvency representatives, accountants and attorneys; and the responsibility of the insolvency representatives to inform both courts and the creditor committee, to manage funds, to sell assets, to lend or borrow monies and to initiate legal proceedings.

6. EMTEC (2006/2007)[280]*

The case of *EMTEC* involved a group interlinked in a classical pyramidal structure with a holding company, incorporated in the Netherlands, and below it three French companies and a German company, which held the share capital of other companies located in the European Union or Asia. Insolvency proceedings commenced in France for all companies in the group, including those whose registered offices were located abroad. Non-main insolvency proceedings were opened in Germany upon the request of the insolvency representative of the French proceedings. Both insolvency representatives then entered into an agreement for the purpose of establishing conditions for distribution of the assets among the creditors and organization of cooperation between the insolvency representatives, in particular the exchange of information regarding verification of claims and distribution of assets. The agreement provided that the insolvency representative of the main proceedings would transfer certain funds to the insolvency representative of the non-main proceeding, which the latter would then distribute to the creditors without discriminating between the creditors in the different proceedings. The insolvency representative in the non-main proceeding agreed to avoid double payment to creditors who had filed in both proceedings. It was further agreed that claims admitted in both proceedings would be paid in the proceedings in which they would receive the higher amount. The insolvency representative of the non-main proceeding agreed to inform the insolvency representative of the main proceeding in writing before making any distribution. The agreement provided that it was governed exclusively by French law and that the French court would have exclusive jurisdiction over any dispute concerning the agreement.

---

[279] United States Bankruptcy Court for the Southern District of New York and the Supreme Court of the Commonwealth of the Bahamas (1994).

[280] Commercial Court of Nanterre (France) and the Insolvency Court of Mannheim (Germany).

7. Everfresh Beverages Inc. (December 1995)[281]

The first protocol modelled on the Concordat principles was finalized in a case involving the United States and Canada, *Everfresh* Beverages Inc. A United States company with Canadian operations applied for commencement of reorganization proceedings in both States at the same time. The protocol explicitly addressed a broad range of cross-border insolvency issues such as choice of law; choice of forum; claims resolution, including classification and treatment of unsecured claims; asset sales; and avoidance proceedings. Creditors were given the express right to submit claims in either proceeding. The protocol followed many of the principles of the Concordat very closely, using as a starting point Principle 4, which addresses the situation where there is no main proceeding, but essentially two parallel proceedings in different States. The protocol was finalized approximately one month after proceedings began and used to hold the first cross-border joint hearing to coordinate the proceedings.

8. Federal-Mogul Global Inc. (2001)[282]

Federal-Mogul concerned reorganization proceedings of a major automotive parts supplier in the United States and in Great Britain. The protocol, which had to take into account pending asbestos claims against the English subsidiaries, established as its goals the orderly and efficient administration of the insolvency proceedings; the coordination of activities and the implementation of a framework of general principles. The protocol gave responsibility for the development of a reorganization plan and the handling of the asbestos and insurance claims to the United States debtors in possession. The acquisition, sale and encumbrance of assets were subjected to prior approval by the insolvency representatives, as were most other activities outside the ordinary course of business. Further, the protocol dealt with communication procedures between the debtors and the insolvency representatives; confidentiality issues; rights to appear before the respective courts; the mutual recognition of stays of proceedings; and the retention and compensation of insolvency representatives and professionals.

9. Financial Asset Management Foundation (2001)[283]

In the *Financial Asset Management* Foundation case, insolvency proceedings concerning a trust were opened in Canada and the United States. A protocol was entered into by the debtor, the insolvency representatives and the main creditor. Each court agreed to defer in general to the judgment of the other court, as was "appropriate and feasible". The protocol outlined the procedure for joint hearings and appearance before either court. It also confirmed the enforceability of a judgment which the main creditor had previously obtained against the debtor before a court in California. The protocol further specified the responsibility of the courts for determining certain issues, for example, the United States court was to be

---

[281] Ontario Court of Justice, Toronto, (Canada) Case No. 32-077978 (20 December 1995) and the United States Bankruptcy Court for the Southern District of New York, Case No. 95 B 45405 (20 December 1995).

[282] United States Bankruptcy Court for the District of Delaware, Case No. 01-10578 (SLR) and the High Court of England and Wales, Chancery Division in London (2001).

[283] United States Bankruptcy Court for the Southern District of California, Case No. 01-03640-304, and the Supreme Court of British Columbia, (Canada) Case No. 11-213464/VA.01 (2001).

responsible for determining whether or not the debtor violated any order of the aforementioned judgment.

10. Greater Beijing First Expressways Limited (GBFE) (2003)[284]*

The *GBFE* case involved insolvency proceedings in the British Virgin Islands (BVI) and the Hong Kong SAR, concerning the liquidation of a toll way operator. The case is very similar to Peregrine, as the proceedings in the BVI were mainly initiated to support the Hong Kong SAR proceeding and to further avoid jurisdictional conflicts and the dissipation of assets. Similarly to Peregrine, the insolvency representatives appointed in both proceedings were the same professionals, in order to coordinate activities, facilitate the exchange of information and identify, preserve and maximize the value of and realize the debtor's assets. Responsibilities for matters were split between both proceedings. The Hong Kong SAR representatives, for example, were responsible for the conduct of day-to-day business and the adjudication of creditor claims while the BVI representatives were responsible for the realization of assets. In addition, the protocol regulated the filing of claims; currency of payments; the representatives' remuneration; and notice requirements. It also included standard forms, as the *AKAI* and *Peregrine* protocols, including the proof of debt and notice of rejection of proof of debt.

11. Inverworld (1999)[285]

Inverworld involved the United States, the United Kingdom and the Cayman Islands. It was a complicated case in which applications for commencement of insolvency proceedings were made for the debtor and several subsidiaries in the three jurisdictions. To avoid the ensuing conflicts, various parties created protocols that were approved by the courts in each of the three jurisdictions. The protocol arrangements included: dismissal of the United Kingdom proceedings, upon certain conditions regarding the treatment of United Kingdom creditors; strict division of outstanding issues between the other two courts; and recognition by each court of the other court's actions as binding, in order to prevent parallel litigation and lead to a coordinated worldwide settlement.

12. ISA-Daisytek (October 2007)[286]*

In the *ISA-Daisytek* case, parallel insolvency proceedings commenced in England and in Germany. The decision of the English court that the English proceedings were the main proceeding pursuant to the EC Regulation was challenged and not recognized for over one year in Germany. As a result, there had been uncertainty as to the respective status and powers and responsibilities of the English and German insolvency representatives. After the German courts recognized the English proceeding as main proceeding, the German and English insolvency representative developed a "cooperation and compromise agreement" in order to

---

[284] High Court of the Hong Kong Special Administrative Region, HCCW No. 338/2000, and the High Court of Justice of the Eastern Caribbean Supreme Court, Suit No. 43/2000 (2003).

[285] United States District Court for the Western District of Texas, Case No. SA99-C0822FB, (22 October 1999), the High Court of England and Wales, Chancery Division, (1999) and the Grand Court of the Cayman Island (1999).

[286] High Court of England and Wales, Chancery Division, Leeds and the Insolvency Court of Düsseldorf, (Germany).

resolve all outstanding issues between them and to deal with future steps in the insolvency proceedings. The protocol included a compromise provision, which regulated payment of proceeds in the German proceedings and dividends from certain foreign subsidies to the English proceedings, distributions to creditors, and liability of the insolvency representatives. The protocol also included a provision on approval, specifying that according to German Law, the effectiveness of the protocol was subject to the approval of the creditors and that the German insolvency representative would report the terms of the protocol to the responsible German court after the creditors' meeting and that the English insolvency representatives would report the terms of the protocol to the responsible English court. The protocol further provided that it should be construed in accordance with English law and that the English courts would be exclusively responsible for enforcing its terms.

13. Laidlaw Inc. (2001)[287]

The case of *Laidlaw* involved insolvency proceedings pending in Canada and the United States of a multinational enterprise operating through various subsidiaries and affiliates in the United States, Canada and other countries. The debtors submitted the protocol for the courts' approval in order to implement basic administrative procedures necessary to coordinate certain activities in the insolvency proceedings. The protocol is a *standard* protocol (see above, note …) and closely resembles other *standard* protocols, such as *Loewen*, including provisions on comity and independence of the courts; cooperation, including joint hearings; retention and compensation of insolvency representatives; notice; recognition of stays of proceedings; procedures for resolving disputes under the protocol; effectiveness of and modification of the protocol; and preservation of rights.

14. Livent Inc. (1999)[288]

Livent, involving insolvency proceedings in the United States and Canada, was the first case in which joint cross-border hearings were conducted via a closed circuit satellite TV/video-conferencing facility. Two hearings were held. The first hearing was conducted to approve a cross-border protocol for the settlement of creditor claims against the debtor. The second hearing was to approve the sale of all or substantially all of the debtor's assets. The protocol expressly provided for such hearings, and allowed the two judges some discretion to discuss and resolve procedural and technical issues relating to the joint hearing. The joint hearing was successfully concluded after two days and the courts issued complementary orders permitting the sale of assets in both countries to a single successful purchaser. The protocol included provisions on asset sales, claims procedure, executory contracts, the allocation of sale proceeds and on the application of avoidance laws.

---

[287] Ontario Superior Court of Justice, Toronto, (Canada) Case No. 01-CL-4178 (10 August 2001) and the United States Bankruptcy Court for the Western District of New York, Case No. 01-14099 (20 August 2001).

[288] United States Bankruptcy Court for the Southern District of New York, Case No. 98-B-48312, and the Ontario Superior Court of Justice, Toronto, (Canada) Case No. 98-CL-3162 (11 June 1999).

15. Loewen Group Inc. (1999)[289]

The debtor, a large multinational company, applied for commencement of insolvency proceedings in Canada and the United States and immediately presented both courts with a fully developed protocol establishing procedures for coordination and cooperation. The debtor had quickly identified cross-border coordination of court proceedings as vitally important to its reorganization plans, and took the initiative of constructing a draft protocol that was approved as a "first day order" in both proceedings. The protocol resembled a *standard* protocol (see above, note …) and provided that: the two courts could communicate with each other and conduct joint hearings, and set out rules for such hearings; creditors and other interested parties could appear in either court; the jurisdiction of each court over insolvency representatives from the other jurisdiction was limited to the particular matters in which the foreign insolvency representative appeared before it; and any stay of proceedings would be coordinated between the two jurisdictions.

16. P. MacFadyen & Co, Ltd. (1908)[290]

In the case of *MacFadyen*, probably the earliest reported case involving a cross-border insolvency protocol, insolvency proceedings were commenced against the deceased debtor in England and in India. The debtor had carried on business through two companies, one located in England and the other in India. The English and the Indian insolvency representatives negotiated a cross-border agreement, which provided for concurrent continuation of both insolvency proceedings, treatment of both companies as one, a rateable distribution of the assets to all creditors, a regular exchange of information between the insolvency representatives on claims admitted by them and recognition of claims duly admitted in one proceeding in the other proceeding. It also set forth the responsibility of each insolvency representative for the recovery and realization of the assets in its jurisdiction. The agreement was subject to the approval of the courts in England and in India. In approving the agreement, the English court addressed the challenge brought by one creditor against the authority of the English insolvency representative to enter the agreement, holding that the agreement was a "proper and common-sense business arrangement to make, and one manifestly for the benefit of all parties interested."

17. Manhattan Investment Fund Limited (Manhatinv) (2000)[291]

The protocol in *Manhattan Investment Fund*, a case involving the United States and the British Virgin Islands, listed a number of objectives including: coordinating the identification, collection and distribution of the debtor's assets to maximize their value for the benefit of creditors and the sharing of information (including certain privileged communications) between the respective insolvency representatives to minimize costs and to avoid duplication of effort. The protocol included detailed provisions on cooperation between the insolvency representatives,

---

[289] United States Bankruptcy Court for the District of Delaware, Case No. 99-1244 (30 June 1999), and the Ontario Superior Court of Justice, Toronto, (Canada) Case No. 99-CL-3384 (1 June 1999).

[290] Re P. MacFadyen & Co, ex parte Vizianagaram Company Limited [1908] 1 K.B. 675.

[291] United States Bankruptcy Court for the Southern District of New York, Case No. 00-10922BRL (April 2000), the High Court of Justice of the British Virgin Islands, (19 April 2000), and the Supreme Court of Bermuda, Case No. 2000/37 (April 2000).

who were to develop a work plan addressing material steps to be taken. It also included a provision for mediation of disputes between the insolvency representatives arising under the protocol.

18. Matlack Inc. (2001)[292]

In the case of *Matlack*, a bulk transportation group operative in the United States, Mexico and Canada, a protocol was developed to coordinate insolvency proceeding pending in Canada and in the United States. The protocol resembles a *standard* protocol (see above, note …) and incorporates the Court-to-Court Guidelines as an appendix. Both courts agreed to recognize the respective foreign court's stay of proceedings to prevent adverse actions against the debtor's assets. The debtors, their creditors and other interested parties could appear before either court, and would therefore be subject to that court's jurisdiction. Other issues dealt with by the agreement were the retention and compensation of professionals, notice requirements and the preservation of creditors' rights.

19. Maxwell Communication Corporation plc. (1991/1992)[293]

Maxwell involved two primary insolvency proceedings initiated by a single debtor, one in the United States and the other in the United Kingdom, and the appointment of two different and separate insolvency representatives in the two States, each charged with a similar responsibility. The United States and English judges independently raised with their respective counsel the idea that a protocol between the two administrations could resolve conflicts and facilitate the exchange of information. Under the protocol, two goals were set to guide the insolvency representatives: maximizing the value of the estate and harmonizing the proceedings to minimize expense, waste and jurisdictional conflict. The parties agreed essentially that the United States court would defer to the English proceedings, once it was determined that certain criteria were present. Specificities included: that some existing management would be retained in the interests of maintaining the debtor's going concern value, but the English insolvency representatives would be allowed, with the consent of their United States counterpart, to select new and independent directors; the English insolvency representatives should only incur debt or file a reorganization plan with the consent of the United States insolvency representative or the United States court; the English insolvency representatives should give prior notice to the United States insolvency representative before undertaking any major transaction on behalf of the debtor, but were pre-authorized to undertake "lesser" transactions. Many issues were purposely left out of the protocol to be resolved during the course of proceedings. Some of those issues, such as distribution matters, were later included in an extension of the protocol.

---

[292] Superior Court of Justice of Ontario, (Canada) Case No. 01-CL-4109 and the United States Bankruptcy Court for the District of Delaware, Case No. 01-01114 (MFW) (2001).

[293] In re Maxwell Communication Corporation plc, 93 F.3d 1036, 29 Bankr.Ct.Dec. 788 (2nd Cir. (N.Y.) 21 August 1996) (No. 1527, 1530, 95-5078, 1528, 1531, 95-5082, 1529, 95-5076, 95-5084) and Cross-Border Insolvency Protocol and Order Approving Protocol in Re Maxwell Communication plc between the United States United States Bankruptcy Court for the Southern District of New York, Case No. 91 B 15741 (15 January 1992), and the High Court of England and Wales, Chancery Division, Companies Court, Case No. 0014001 of 1991 (31 December 1991).

20. Mosaic (2002)[294]

This case involved parallel insolvency proceedings in Canada and in the United States. From the beginning, the parties understood that the insolvency of the *Mosaic* web of companies was going to involve a number of complicated and contentious hearings in both jurisdictions, and that establishing a framework within which the courts could independently, but cooperatively, deal with the various corporate entities was critical. The protocol took the form of a *standard* protocol (see above, note …), closely resembling, in both format and contents, the protocols in *Loewen* and *Laidlaw*, including provisions on comity and independence of the courts; cooperation, including joint hearings; retention and compensation of insolvency representatives; notice; recognition of stays of proceedings; procedures for resolving disputes under the protocol; effectiveness and modification of the protocol; and preservation of rights. The protocol was instrumental to the success of cross-border sales in the proceedings.

21. Nakash (1996)[295]

The protocol in the *Nakash* case involved the United States and Israel. It required express statutory authorization in Israel and direct court involvement generally in its negotiation. It focused on enhanced coordination of court proceedings and cooperation between the judiciaries, as well as between the parties (previous protocols listed in the annex had focused on the parties). Unlike previous cases involving cross-border insolvency protocols, this case did not involve parallel insolvency proceedings for the same debtor. The relevant conflict and central issue in the case that the protocol sought to resolve was between the pursuit of a judgment against the debtor in Israel and the automatic stay arising from the debtor's insolvency proceedings (pursuant to Chapter 11) in the United States, which should have prevented pursuit of the judgment. The debtor was not a signatory to the protocol and opposed its approval and implementation.

22. 360Networks Inc. (2001)[296]

In *360Networks*, the protocol involved the United States and Canada. The 360 Group was a fibre-optics network provider with international operations, comprising more than 90 companies registered in about 33 jurisdictions with nearly 2000 employees. As the main part of its assets and employees were located in both Canada and the United States, insolvency proceedings were commenced in both jurisdictions. The initial orders included a *standard* cross-border protocol (see above, note …) with the following goals: promoting orderly, efficient, fair and open administration; honouring the respective courts' independence and integrity; promoting international cooperation and respect for comity between the Canadian and United States court and any foreign court; and implementing a framework of general principles to address administrative issues arising from the cross-border nature of the proceedings. To achieve these goals, the protocol addressed, among

---

294 Ontario Court of Justice, Toronto, (Canada) Court File No. 02-CL-4816 (7 December 2002) and the United States Bankruptcy Court for the Northern District of Texas, Case No. 02-81440 (8 January 2003).

295 United States Bankruptcy Court for the Southern District of New York, Case No. 94 B 44840 (23 May 1996), and the District Court of Jerusalem, (Israel) Case No. 1595/87 (23 May 1996).

296 British Columbia Supreme Court, Vancouver, (Canada) Case No. L011792, (28 June 2001) and United States Bankruptcy Court for the Southern District of New York, Case No. 01-13721-alg (29 August 2001).

other things, court-to-court coordination and cooperation, including joint hearings; notice; the retention and compensation of professionals; joint recognition of stays of proceedings; future foreign proceedings; and a procedure for resolving disputes under the protocol. However, the two restructuring processes progressed relatively independently with little reference to the protocol. Plans substantially similar to each other were filed in each jurisdiction, each being dependent on the approval of the other. Although the protocol made provision for joint hearings, none were needed.

23. Nortel Networks Corporation (2009)[297]

The case of *Nortel Networks* involved parallel insolvency proceedings in the United States and Canada for members of a large telecommunications group headquartered in Canada with subsidiaries and affiliates world wide. Though the debtors in the US and Canadian proceedings were different, a protocol was developed at the commencement of the proceedings to implement administrative procedures, coordinate activities in the insolvency proceedings and protect the rights of the parties. It was approved by both courts within one day. The protocol resembles a *standard* protocol (se above, note …), including provisions on comity and independence of courts, cooperation and appearances, effectiveness, modification, procedures on resolving disputes under the protocol and incorporated the Court-to-Court Guidelines by reference. As in *Pope & Talbot*, the protocol specified that when a question of the proper jurisdiction of the court was raised in either insolvency proceeding, the court might contact the other court to determine an appropriate process by which the issue of jurisdiction would be determined. The protocol further stipulated that the courts might also jointly determine that other cross-border matters that might arise in the insolvency proceedings should be dealt with under and in accordance with the principles of the protocol.

24. Olympia & York Developments Limited (1993)[298]

The case of *Olympia & York* Developments Ltd. involved a Canadian parent company and its subsidiaries that operated primarily in the United States, Canada and the United Kingdom. The protocol was drafted to balance the interests of parties involved, in particular the Canadian insolvency representative and the United States debtors in possession, and to achieve a consensus among the various parties regarding the corporate governance of the debtors by reconstructing the board of directors of each corporation. The protocol included provisions, among others, on the composition, authority, actions, removal and re-election of the directors, and also the modification and approval of the protocol. The *Olympia & York* protocol resulted in the speedy and efficient reorganizations of the debtors by allowing the current management of the United States debtors to remain place.

---

[297] Ontario Superior Court of Justice, Toronto, (Canada) Case No. 09-CL-7950 (14 January 2009) and the United States Bankruptcy Court for the District of Delaware, Case No. 09-10138 (KG) (15 January 2009).

[298] Ontario Court of Justice, Toronto, (Canada) Case No. B125/92 (26 July 1993) and United States Bankruptcy Court for the Southern District of New York, Case No's 92-B-42698-42701, (15 July 1993) (Reasons for Decision of the Ontario Court of Justice: (1993), 20 C.B.R. (3d) 165).

25. Peregrine Investments Holdings Limited (1999)[299]

In the *Peregrine* case, the debtor was incorporated in Bermuda and had its principal place of business in the Hong Kong SAR, where insolvency proceedings were commenced. Shortly afterwards, insolvency proceedings were also initiated in Bermuda, primarily to avoid jurisdictional conflicts and to ensure that the insolvency representatives appointed in the Hong Kong SAR had full authority in other jurisdictions and in relation to assets located outside of Hong Kong. The insolvency representatives were the same persons in both proceedings except for one person appointed only in the Bermudan proceedings, but all were employed by the same international law firm. The protocol was developed to harmonise and coordinate the proceedings; ensure the orderly and efficient administration of the proceedings in the two jurisdictions; identify, preserve and maximize the value of the debtor's worldwide assets for the collective benefit of the debtor's creditors and other parties in interest; coordinate activities; and share information. The protocol determined that the Bermudan proceedings would be the main proceedings and the Hong Kong SAR proceedings the non-main proceedings. Nevertheless, substantially all of the liquidation of the debtor's assets was to be carried out in and from the Hong Kong SAR, as the debtor's business activities were and had always been focussed there. The protocol determined which matters should be principally dealt with in the Hong Kong SAR, for example the adjudication of claims of creditors and distribution of dividends to creditors. It also included provisions on the rights and powers of the insolvency representatives with respect to the exchange of information; costs and their taxation; and applications to the courts. As in the *AKAI* and *GBFE* protocols, the protocol contained standard forms relating to the claims process.

26. Philip Services Corporation (1999)[300]

This case is noted as being the first "cross-border pre-pack".[301] Prior to the instigation of insolvency proceedings in the United States and Canada, the debtor negotiated a reorganization plan with its creditors over several months. It was intended that, following court approval, the plan would be implemented in both jurisdictions. As in the *Loewen* case, a fully developed protocol was presented to and approved by the courts as an initial order. The case has been cited as an example of a protocol providing for broad and general harmonization and coordination of cross-border proceedings, in line with the principles of the Concordat (as opposed to the very specific protocol in *Tee-Comm. Electronics* (see below, para. 36). The protocol resembles a *standard* protocol (see above, note …). The broad goals of the protocol included: promoting orderly, efficient, fair and open administration; respecting the respective courts' independence and integrity; promoting international cooperation and respect for comity; and implementing a framework of general principles to address administrative issues arising from the cross border nature of the proceedings. To achieve those goals, the protocol addressed, among

---

[299] High Court of the Hong Kong Special Administrative Region, HCCW Companies (Winding-up) No. 20 of 1998, and the Supreme Court of Bermuda Companies (Winding-up) No. 15 of 1998 (1999).

[300] United States Bankruptcy Court for the District of Delaware, Case No. 99-B-02385, (28 June 1999), and the Ontario Superior Court of Justice, Toronto, Case No. 99-CL-3442 (25 June 1999).

[301] A process available in some jurisdictions, where a reorganization plan is negotiated voluntarily prior to commencement of insolvency proceedings and subsequently approved by the court.

other things, court-to-court coordination and cooperation; the retention and compensation of professionals; and joint recognition of stays of proceedings. Under the protocol, the courts also agreed to cooperate, wherever feasible, in the coordination of claims processes; voting procedures; and plan confirmation procedures.

27. Pioneer Companies Inc.[302]

The *Pioneer* case involved insolvency proceedings in the United States of a United States multinational enterprise and certain of its direct and indirect subsidiaries and affiliates and insolvency proceedings in Canada concerning one Canadian subsidiary, which was also a debtor in the United States proceedings. The protocol recognized that it was in the interests of the debtors and their stakeholders that the United States court should take charge of the principal administration of the reorganization and set forth general principles for the manner in which claims made against the debtors should be adjudicated, in particular relating to proof of claims.

28. Pope & Talbot Inc. (2007)[303]

The case of *Pope & Talbot* involved concurrent reorganization proceedings in the United States and Canada for a parent company conducting business in pulp and wood through its various Canadian and American subsidiaries and with substantial assets located in both States. The debtor companies developed a protocol to facilitate the harmonization and coordination of activities in both jurisdictions, to provide transparency and ensure fairness to parties in interest in both States. The protocol resembled a *standard* protocol (see above, note …), such as *Laidlaw*, *Loewen* and *Mosaic*, and also incorporated the Court-to-Court Guidelines by reference. It contained provisions on cooperation; reciprocal recognition of the stays ordered by the respective courts; rights to appear; retention and compensation of representatives and professionals; notice; effectiveness and modification; dispute resolution; and preservation of rights. As in the *Nortel Networks* case, the protocol included a provision permitting the courts to jointly find an appropriate process to resolve an issue of proper jurisdiction raised in either insolvency proceeding. It further contained a provision that any transaction outside the ordinary course of business for the sale, lease or use of real property of the debtors should be subject to the approval of the court of the jurisdiction in which the property was located, but excluding the debtors' mills from that provision. The Canadian insolvency representative raised concerns with respect to that provision on the ground that it required the approval of both courts for the sale of the paper mills, viewing such requirement as unnecessary expense, delay and possible duplication of decision-making processes. In a joint hearing, the courts agreed that that requirement would only enhance their ability to make the right decision with respect to sale of the assets.

---

[302] Quebec Superior Court, (Re PCI Chemicals Canada Inc.,) (Canada) Case No. 5000-05-066677-012, (1 August, 2001) and the United States Bankruptcy Court for the Southern District of Texas (Re Pioneer Companies Inc.), Case No. 01-38259 (1 August 2001).

[303] Supreme Court of British Columbia, Vancouver, Case No. SO77839, (14 December 2007) and the United States Bankruptcy Court for the District of Delaware, Case. No. 07-11738.

29. PSINet Inc. (2001)[304]

PSINet involved insolvency proceedings in Canada and the United States. The protocol was entered into to coordinate the insolvency proceedings pending in both States. The protocol set out certain cross-border insolvency and restructuring matters raised by the nature of the debtors' business operations in the United States and Canada and the interconnectivity and interdependence of the lines of communications in the group's global business and internet operations, which required the assistance of both courts to resolve fairly and efficiently. Those matters included: asset sale approval; allocation of proceeds; treatment of inter-company claims; contract claims; and approval and implementation of any reorganization plan involving as parties the debtors of each jurisdiction. The protocol established guidelines with respect to those matters, which were to be determined and resolved by joint hearings of the courts. The protocol also provided for issues concerning third party-owned equipment, lease financing and real estate to be addressed by the court of the State in which the property or equipment was located. The protocol authorized use of the Court-to-Court Guidelines. The protocol was a key factor in the successful sale of PSINet's Canadian assets.

30. Progressive Moulded Products Limited[305]

In the case of *Progressive Moulded Products*, an automotive parts group operating in the United States and Canada, a protocol was developed to coordinate insolvency proceedings pending in Canada and the United States. The protocol belonged to the group of *standard* protocols (see above, note …), for example, *Nortel Networks* and *Pope & Talbot*. The protocol was approved soon after the commencement of the proceedings and contained provisions, for example, on cooperation, including joint hearings; mutual recognition of the stays of proceedings; rights to appear and be heard; effectiveness and modification; and procedures for resolving disputes arising under the protocol. The protocol also incorporated the Court-to-Court Guidelines by reference.

31. Quebecor World Inc. (2008)[306]

The *Quebecor* case involved parallel proceedings pending in the United States and Canada. The debtors proposed approval of a protocol at the outset of the cases as one of their "first day" orders, anticipating the need for court-to-court communication and joint hearings to facilitate the proceedings due to the large scale of the debtors' operations in both States. The United States judge delayed the approval of the protocol, in order to establish a creditor committee and provide it with the opportunity to comment on the procedure. As a result, the original protocol was amended to include expanded notice provisions; a provision to further develop a joint claims protocol with respect to the timing, process, jurisdiction and the law applicable to the resolution of intercompany claims filed by the debtors' creditors in

---

[304] Ontario Superior Court of Justice, Toronto, (Canada) Case No. 01-CL-4155 (10 July 2001) and the United States Bankruptcy Court for the Southern District of New York, Case No. 01-13213 (10 July 2001).

[305] Ontario Superior Court of Justice, Commercial List, Court File No. CV-08-7590-00CL (24 June 2008) and United States Bankruptcy Court for the District of Delaware, Case No. 08-11253 (KJC) (14 July 2008).

[306] Montreal Superior Court, Commercial Division, (Canada) No. 500-11-032338-085 and the United States Bankruptcy Court for the Southern District of New York, No. 08-10152 (JMP) (2003).

both proceedings; and a detailed provision relating to procedures to be followed when relief requested in one State was deemed to have a material impact in other States. The protocol also incorporated the Court-to-Court Guidelines. Joint hearings were held to approve the sale of the debtors' European operations and resulted in the prompt entry of separate orders approving that sale.

32. SENDO International Limited (2006)[307]

In the case of *SENDO*, main insolvency proceedings were pending in the United Kingdom and non-main insolvency proceedings in France. The non-main proceedings were commenced at the request of the insolvency representative in the main proceeding because of employees of SENDO in France. Through the opening of the non-main proceedings, the employees in France were covered by French insolvency law, which was more favourable than English law, and the French insolvency representative could sell assets located on French territory and gather together statements of outstanding receivables registered by SENDO's French and foreign creditors. The insolvency representatives of both proceedings entered into an agreement to coordinate the two insolvency proceedings, noting that the EC Regulation only established very general operating principles. In the agreement, the insolvency representatives agreed to act, for the purposes of implementing such operating principles, with mutual trust and to adhere to the duty to communicate information and to cooperate as set forth in article 31 of the EC Regulation, with the main proceeding taking precedence over the non-main proceeding. The agreement included provisions on the treatment of notice and submission of claims of creditors; on practical means of verification of claims; treatment of legal costs; and on the treatment of the assets of the French branch of the debtor.

33. Solv-Ex Canada Limited and Solv-Ex Corporation (1998)[308]

In the case of *Solv-Ex*, involving the United States and Canada, a number of contrary rulings by the two courts had effectively deadlocked proceedings. Following negotiations between the parties, simultaneous proceedings, connected by telephone conference call, were arranged to approve the sale of the debtors' assets. The courts reached identical conclusions authorizing the sale, and encouraged the parties to negotiate a cross-border insolvency protocol to govern further proceedings in the case. Procedural matters agreed between the parties included that identical materials would be filed in both jurisdictions and the presiding judges could communicate with one another, without counsel present, to (a) agree on guidelines for the hearings, and, subsequently, (b) determine whether they could make consistent rulings. The protocol included further provisions on asset sales and claims procedures. The courts subsequently approved the protocol.

34. Swissair Schweizerische Luftverkehr AG (2003)[309]*

Insolvency proceedings were commenced in Switzerland over several companies of the Swissair Group. To protect the assets of the respective companies abroad, insolvency proceedings were also initiated in other jurisdictions, including

---

[307] Insolvency proceedings before the High Court of Justice, Chancery Division of London (United Kingdom) and before the Commercial Court of Nanterre (France) (2006).

[308] Alberta Court of Queen's Bench, Case No. 9701-10022 (28 January 1998), and the United States Bankruptcy Court for the District of New Mexico, Case No. 11-97-14362-MA (28 January 1998).

in England. To facilitate coordination, the Swiss and English insolvency representatives entered into a protocol. The protocol dealt with the realisation of assets, the payment of liabilities, costs and expenses, and exchange of information, as well as the receipt and adjudication of creditor claims. It was designed to avoid duplication of work, while at the same time protecting creditor rights and respecting priorities.

35. Systech Retail Systems Corp. (2003)[310]

Systech Retail Systems involved insolvency proceedings in the United States and Canada for a large provider of retail point of sale field services, operating through various Canadian and United States subsidiaries and affiliates. The debtor companies developed a protocol to establish basic administrative procedures between the proceedings in both jurisdictions. The protocol resembled a *standard* protocol (see above, note …), including provisions on comity and independence of the courts; cooperation; retention and compensation of insolvency representatives and professionals; notice; joint recognition of the stays of proceedings under the laws of both jurisdictions; rights to appear and be heard; and procedures on resolving disputes under the protocol. The protocol also included the Court-to-Court Guidelines. Subsequent to approval of the protocol by both courts, a joint hearing was held in accordance with the Guidelines, which resolved and coordinated a number of cross-border issues in the case.

36. Tee-Comm. Electronics Inc (1997)[311]

The protocol in *Tee-Comm. Electronics* Inc., a case involving the United States and Canada, may be characterized as a specific-purpose protocol with a narrow focus. It established a framework under which the administrators in the two jurisdictions would jointly market the debtors' assets, so as to maximize the value of the estate. Accordingly, it addressed only the sale of those assets, which was the key issue at the outset of the case, but no other matters, such as entitlement to and distribution of proceeds.

37. United Pan-Europe Communications N.V. (2003)[312]

In this case, the debtor was a leading cable and telecommunications company based in the Netherlands with ownership interests in direct and indirect operating subsidiaries, including in the United States. Insolvency proceedings commenced in the United States and the Netherlands. As the debtor's Dutch counsel was of the view that a protocol was not permissible under Dutch law and procedure, the debtor's Dutch and United States counsel worked closely together, without entering into any written agreement, to resolve issues as they arose in the proceedings and to ensure that all decisions complied with both Dutch and US laws, Both insolvency

---

[309] Insolvency proceedings before the district courts of Bülach (Swissair and other members of SAirGroup), Zurich (SAirGroup) and the High Court of England and Wales, Chancery Division in London, Case No. 2344 of 2002 (18 February 2003).

[310] Ontario Court of Justice, Toronto, Court File No. 03-CL-4836 (20 January 2003) and the United States Bankruptcy Court for the Eastern District of North Carolina, Raleigh Division, Case No. 03-00142-5-ATS (30 January 2003).

[311] In re AlphaStar Television/Tee-Comm Distribution, Inc, Ontario Court of Justice (Canada) and the United States Bankruptcy Court for the District of Delaware (27 June 1997).

[312] Amsterdam Court (Rechtbank) and the United States Bankruptcy Court for the Southern District of New York (Case No. 02-16020).

representatives were involved in the deliberations. The coordination included: continuous provision of information to the courts and insolvency representatives; retention and compensation of counsel and insolvency representatives; the development of solicitation procedures for use in both cases; assets sales; and a reorganization plan. As a result, the United States and the Dutch proceedings closed on the same day.

A/CN.9/WG.V/WP.86/Add.1 (Original: English)

Note by the Secretariat on draft UNCITRAL Notes on cooperation, communication and coordination in cross-border insolvency proceedings, submitted to the Working Group on Insolvency Law at its thirty-sixth session

ADDENDUM

CONTENTS

I. Introduction

1. In preparation for the thirty-sixth session of Working Group V (Insolvency Law), the text of the draft Notes on cooperation, communication and coordination, was circulated at the request of Working Group V to all Governments for comment (see A/CN.9/666, para. 22). The substance of comments received as of 27 February 2009 that relate specifically to the content of the draft Notes are reproduced below

II. Compilation of comments by Governments

A. Australia

General Comments on the draft Notes

2. Overall, Australia is of the view that the draft Notes provide a valuable guide for practitioners and judges. The draft Notes are particularly useful with respect to matters that practitioners should consider when administering matters in respect of which there are concurrent administrations recognized under the Model Law. In

general, the draft Notes provide excellent summaries of the relevant issues and assist judges and practitioners in following the development of the law in overseas jurisdictions.

3. Australia notes that the introduction of the Model Law and the draft Notes signals a move away from the idea of a territorially confined administration. A foreign insolvency proceeding will be recognized in the local jurisdiction if it falls within a broad definition of insolvency proceedings, if proper particulars of it are filed and if the application is made to the proper local court. Once a foreign proceeding has met the criteria, it will be recognized in the local jurisdiction and this will give the local court jurisdiction to grant relief. Cooperation and coordination between jurisdictions is encouraged and facilitated by both the Model Law and the draft Notes.

4. Australia observes that the draft Notes largely appear to assume that the relevant insolvency practitioner is a representative of the Court or at least that the Court is directly involved in insolvency administration. This reflects the legal regime operating in many countries. However, it does not reflect either Australia's corporate or personal insolvency regimes. We recognize that any document of this kind (particularly one which includes sample clauses that seek to show how general principles may be applied) will contain explanations that do not always translate well into local factual and legal contexts. Nevertheless, Australia suggests that perhaps the draft Notes could explicitly refer to the fact that in some jurisdictions the Courts have no role in the day to day administration of insolvencies. Australia also suggests that the draft Notes could indicate that some of the suggested content for agreements between Courts or agreements between insolvency representatives, may need to be varied for local conditions.

5. Australia recognizes that the appropriate approaches to be adopted in respect of the issues raised by the draft Notes are largely driven by the facts in individual cases and that the document explicitly recognizes this. The inclusion of suggested approaches to real life examples provides valuable reference material for practitioners.

6. In so far as the draft Notes deal with coordination and communication between insolvency practitioners, Australia has no other suggestions for amendments to the text.

Detailed Comments on the draft Notes

Part 1

7. Part 1 of the draft Notes discusses the increased importance of coordination and cooperation in cross-border insolvency cases.

8. The risks of uncoordinated approaches to cross-border insolvency cases include lost value of assets. Differences between jurisdictions may also impact on the management of the debtor's assets. Australia views the draft Notes as a useful reference for practitioners advising on cross-border insolvency.

9. The enhancement of court-to-court communication processes and the goals of treating common stakeholders equitably and giving foreign stakeholders access to Australian courts on the same basis as domestic stakeholders are all seen as desirable outcomes.

10. In addition, the Australian Government welcomes the goals of:

- enhancing access to the courts;
- recognizing foreign insolvency proceedings;
- simplifying recognition procedures;
- enhancing the transparency of access procedures for foreign creditors;
- permitting courts and foreign representatives to cooperate effectively; and
- establishing rules for coordinating relief in respect of two or more insolvency proceedings.

Part II

Treatment of Claims

11. Creditors' interests operate at several levels in insolvency: questions about which creditors may vote in proceedings, how they may vote and their allocation of any distribution rely on the orderly submission, verification and admission of claims. There can be differences between jurisdictions in the role courts play. The Australian Government acknowledges this and supports agreements to address such difficulties.

Stays of Proceedings

12. Cross-border insolvencies involving multiple proceedings raise difficult questions concerning stays issued by foreign courts in foreign proceedings or stays issued in parallel proceedings in support of foreign proceedings. The Model Law provides for an automatic stay on recognition of foreign proceedings and coordination of relief between main and non-main proceedings. Cooperation is most required in areas where potential conflict can occur. The Australian Government supports this approach.

Communication between Courts

13. Communication between courts is important to maximise the supervisory role that courts play in insolvency. Coordination between courts can reduce delays and costs and work towards the consistent treatment of similarly placed creditors. The Australian Government acknowledges this issue and supports the role of court-to-court agreements in responding to these issues. In addition, communication between insolvency representatives may be important in facilitating proceedings.

14. If it is thought desirable to make the draft Notes more concise, some of the drafting suggestions could perhaps be deleted where they highlight general drafting principles and good practice, rather than Model Law specific issues. For example, the advice that:

- "An introduction to the case, setting out the insolvency history of the case, might enhance the clarity and comprehensibility of the agreement. In many agreements, the introduction of the parties is followed by a summary of the different insolvency proceedings concerning the parties, either already commenced or imminent. Again varying degrees of detail are included, some agreements specifying the dates and places of filing, court orders made and so forth." and

- "General rules of interpretation are also often included, for example, that words importing the singular should be deemed to include the plural and vice versa; that headings are inserted for convenience only without any further meaning; that references to any party should, where relevant, be deemed to include, as appropriate, their respective successors or assigns; and that any use of the masculine gender should be deemed to include the feminine or neuter gender."

15. The draft Notes also contain lengthy "sample clauses" for cross-border insolvency agreements (e.g. the one covering pages 35 to 37), in addition to setting out, in a general way, the issues that may or should be covered by such agreements. It is queried whether such lengthy examples should be contained in a general guide to be endorsed by UNCITRAL. Such detail could be left to be expounded upon in legal and insolvency practice texts on cross-border insolvency, rather than in the draft Notes.

Conclusion

16. Enhancing access and recognition of foreign proceedings is a necessary step in ensuring equal treatment between foreign and domestic debtors and creditors. While Australian personal and corporate insolvency law imposes obligations on Australian courts to cooperate with the courts of a range of prescribed countries, the implementation of the Model Law assisted by the draft Notes will provide greater opportunities to extend these processes to other countries.

17. Australia welcomes the draft Notes and generally finds them to be a valuable resource for practitioners confronted with cross-border insolvency issues.

B. Canada

18. WP.83 is a solid, comprehensive and useful document in understanding how different jurisdictions deal with cooperation, communication and coordination in cross-border insolvency proceedings. It should be kept separate from the Model Law on Cross-Border Insolvency and the Legislative Guide on Insolvency Law, because it has a broader utility in the insolvency context, as a valuable reference document, and is not limited to enterprise groups. It should be noted that it is important to remain flexible in the approach to the protocols, and their content but also to be aware of issues that could affect their neutrality.

C. Czech Republic

19. We discovered from received responses that most of our domestic courts and judges did not have any experiences in this matter. The majority agreed on lack of on-line trade and insolvency registers in particular EU Member States.

20. Drawing upon their practical experience, they were not acquainted with facilitating cross-border agreements. Nevertheless, they've supported the idea of the use of cross-border agreements to promote the efficient coordination of multiple proceedings against the debtor and to help to clarify the expectations of parties.

21. Beside that, …, we do not have any fundamental comments on the draft UNCITRAL Notes.

D. Federal Republic of Germany

22. …[W]hile thanking the Secretariat for making available the draft Notes on Cross-Border Insolvency Proceedings to member States, the Federal Republic of Germany has no additional comments on the draft Notes.

E. Indonesia

I. General Comments

23. The problem of cross-border insolvency occurs when a multinational company is declared insolvent in a country while the company has subsidiary(/ies) in another country, established under local law. Normally countries have provisions in their laws that Insolvency rulings taken by a court under its jurisdiction would be applicable to all assets owned by the debtor, including assets in other countries. A problem may occur if a country applies the principle of universality with regard to an insolvency decree made by its court, but reject the implementation in its country of insolvency decrees made by foreign courts. There will also be a problem if a country only limits the applicability of an insolvency decree by its court only to assets in its territory, as this results in the creditor not being able to obtain all of the assets of the debtor.

24. The Indonesian Law on Insolvency (Law No. 37 of 2004 on Insolvency and the Postponement of Debt Payment Obligation) does not specifically address cross-border insolvency. However, Article 212 of the Law stipulates that a concurrent creditor, who — after being declared insolvent — used his assets abroad to pay his debts, is obliged to reimburse the amount that he took from his insolvent assets. This implicitly means that Indonesian Insolvency rulings applies to foreign jurisdictions even though in a very limited context.

25. With regard to an insolvency decision by a foreign court which is to be executed in another country where the debtor's assets are located, most countries do not allow their courts to execute the rulings of foreign courts based on the sovereignty principle. This also applies in Indonesia, in line with Indonesian private law, whereby the rulings of foreign courts cannot be acknowledged and carried out in Indonesia.

26. To sidestep this condition, some efforts to harmonize laws in cross-border insolvency have been undertaken, so that a country can acknowledge and implement the insolvency rulings of foreign courts. These include the formulation of the UNCITRAL Model Law on Cross-Border Insolvency as well as multilateral and bilateral treaties, which allows cooperation in implementing rulings on insolvency.

27. The draft UNCITRAL Notes is one of the means to facilitate coordination and cooperation in implementing rulings of insolvency by providing practical guidelines for practitioners of insolvency processes, particularly with regard to cross-border insolvency.

II. UNCITRAL Model Law on cross-border Insolvency

28. The Indonesian Law on Insolvency has not adopted the provisions in the UNCITRAL Model Law on Cross-Border Insolvency; in fact, it contains no provision on

the issue of cross-border insolvency. The Indonesian court itself lacks experience in handling cross-border insolvency.

29. In order to enable direct contact between courts in dealing with cross-border insolvency cases, a national legal framework is needed as the basis for local courts to provide assistance to foreign courts. Normally, in the context of mutual legal assistance between countries, a court can provide assistance through diplomatic channels or through a central authority specifically tasked with facilitating international mutual legal assistance.

III. Cross-Border Agreement

30. A cross-border agreement is an agreement between or among parties involved in a cross-border insolvency case aimed at cooperating or coordinating in the insolvency process in different countries on one particular debtor. Considering that this agreement is made by individuals involved in the management of the insolvent assets and not by the States, it is questionable whether the agreement binds the State or its institutions which will be involved in the insolvency process. Such an agreement is simply a contract which binds the parties and gives no obligations to State institutions.

31. Cross-border agreements would become binding to the State only if there is an umbrella international treaty, be it bilateral or multilateral, which specifically provides for the acknowledgement and implementation of insolvency decrees by foreign courts. Therefore, in promoting the cross-border insolvency process, it is not sufficient to have only a cross-border agreement but it also has to be supported by international treaties.

F. Latvia

32. The Ministry of Justice has considered the Draft UNCITRAL Notes on cooperation, communication and coordination in cross-border insolvency proceedings A/CN.9/WG.V/WP.83 (hereinafter — Draft document) and would like to express the following opinion. The Draft document has been developed as a legislative guide in cross-border insolvency — as addition to the UNCITRAL Model Law on Cross-Border Insolvency (1997) (hereinafter — Model Law). The Draft document comprises both practical examples of insolvency cases and excerpts of other regulations, for instance, Council Regulation No. 1346/2000 on insolvency proceedings (hereinafter — Regulation 1346/2000). The document covers rather detailed description of possible cooperation on cross-border insolvency issues among administrators, courts etc.

33. One of the aims of the Draft document is to facilitate the adoption of the Model Law in Member States. The text of the Model Law has been worked out with a purpose to make it possible to transpose it directly in the national regulation or to adopt only general principles of the Model Law. The Regulation 1346/2000 is applicable in the territory of the European Union, consequently, also in Latvia. Such relations with regard to third countries are not regulated.

34. Within the 35th Session of UNCITRAL Working Group V there were wide debates on the form of the mentioned Draft document. Member States unitedly stressed that the mentioned document must not fully or in some cases, partly replace the Model Law; the Draft document is developed as the auxiliary material the

objective of which is to give insight into possible types of cooperation and not to indicate preferable action.

35. After evaluating the Draft document the Ministry of Justice comes to the consideration that the Draft document is relatively complete and comprises good practical examples. It equally treats all creditors, providing that a creditor who has received dividends on his/her own claim during the insolvency proceedings can act in the allocation of assets in other proceedings unless creditors of a similar class or category in these other proceedings have received dividends of equal value. Article 16 of the Draft document covers the reference to Articles 28 to 32 of the Model Law, including Article 32 on expenses in concurrent proceedings. According to the above-mentioned article if a creditor's claim in the insolvency proceedings taking place in one foreign State is partly realized, a creditor's claim in the second proceedings can be realized only after other creditors' claims of corresponding status. Concerning this issue the Preamble of Regulations 1346/2000 states that in order to ensure equal treatment of creditors, the allocation of assets have to be coordinated, and every creditor should be able to keep what s/he has received in the course of insolvency proceedings and should be entitled to participate in the allocation of total assets in other proceedings only if creditors with the same status have obtained the same proportion of their claims. A creditor who, after initiating the proceedings mentioned in Article 3, Paragraph 1, receives a complete or partial fulfilment, exercising any instruments (including compulsory), of his/her claim from assets that belong to a debtor and that are situated in another Member State, has to send the received dividends back to the liquidator according to Articles 5 and 7.

36. Article 47 of the Draft document states that the contract of cooperation has to contain reference about the language of cooperation. Simultaneously it is indicated that the present practice is to compose agreements and develop cooperation in English as default language, however, it does not mean that the language cannot be different. The issue of language might be topical in cases when a debtor has become insolvent in one State but his/her assets are allocated in more than one State or debtor's creditors are not from another State than a State where the insolvency proceedings are initiated. In such case one State concludes a contract (as a voluntary agreement) with involved countries, in which it can be stipulated where the primary proceedings have to be realized, differences in jurisdiction of involved countries and other issues ensuring that the insolvency proceedings are equal and just for all States involved.

37. Article 181 of the Draft document on expenses of insolvency proceedings corresponds to the Insolvency Law of the Republic of Latvia where is stated that expenses of the insolvency proceedings have to be paid off by the debtor.

G. Norway

38. First, we appreciate and are very grateful for the work laid down by the Secretariat in the development of reports and discussion papers, including the draft Notes. The draft Notes have been brought to the attention of insolvency practitioners, and the Norwegian Ministry of Justice has received some comments to the draft Notes and to cross-border issues in general.

39. Second, Norwegian law currently lacks a good and comprehensive legal framework with regard to cross-border insolvency. There is a need to develop Norwegian cross-border insolvency law; both due to a substantial increase in

foreign trade and since some cases have demonstrated the limitations in Norwegian cross-border insolvency law. Norway is party to the Nordic Bankruptcy Convention 1933. However, there is a need to look into and develop cross-border cases involving other States than the Nordic States. The Ministry of Justice is currently elaborating on these issues. Both the UNCITRAL Model Law and the EU Regulation 1346/2000 will be part of the elaborations.

40. On this background, it is difficult to evaluate cross-border agreements' current impact in Norwegian insolvency law. At the same time we find that the draft Notes may be very useful, since it provides an overview of different situations that may be of interest in the development of a Norwegian cross-border insolvency law. The discussions and the examples under chapter II and chapter III may prove useful as part of the preparatory works.

41. We recall that during the meetings held in Vienna from 17 to 21 November 2008 there were some discussions regarding the status of the Notes (when finalized). In our view, the Notes should serve mainly as an overview of examples and different approaches to the contact and cooperation between the parties to a cross-border insolvency proceeding.

H. Singapore

42. We have considered the draft Notes and we have no comments at this juncture. We will however be consulting with other Government agencies as well as the Judiciary in due course to study the various issues raised in greater depth.

I. Switzerland

43. We suggest adding the "Swissair" case to the cases cited in the Annex. The Swissair case was one of the most important insolvency cases in Switzerland in the last decades and has substantial international implications.[1] It was — as far as we know — one of the first procedures in Switzerland to apply a cross-border agreement between courts/insolvency representatives. We therefore suggest the following wording to be added to the annex of A/CN.9/WG.V/WP.83:

> Swissair Schweizerische Luftverkehr AG (2001)
>
> "Footnote: Insolvency proceedings before the district courts of Bülach (Swissair and other members of SAirGroup) and Zurich (SAirGroup).
>
> Insolvency proceedings were opened in Switzerland over several companies of the Swissair Group. In order to protect the assets of the respective companies abroad ancillary proceedings were initiated in several countries (preliminary injunction order by a US judge under section 304 of title 11 of US Bankruptcy Code; temporary stay order by a Canadian judge under section 18.6 of the Canadian Companies Creditors Arrangement ACT; ancillary proceedings in France and Israel, ancillary winding up of the English Swissair branch). To facilitate the coordination between the Swiss and English office holders a Protocol was agreed. It dealt with the realisation of assets, the payment of liabilities, costs and expenses, reporting obligations as well as the receipt and adjudication of creditor claims. It was designed to avoid duplication of work

[1] See the liquidator's homepage under www.liquidator-swissair.ch.

while at the same time protecting creditor rights and respecting priority rights."[2]

44. In addition, we suggest that the following references to the Swissair case are added in the main text:

- In Footnote 20: In the Swissair case, the protocol had to be confirmed by the English courts, but not by the Swiss courts;
- In Footnote 28: insert Swissair;
- In page 58 ad lit. d) after "allocation of responsibility between the different parties in interest" insert a Footnote with a reference to Swissair;
- In Footnote 161 a reference to Swissair;
- In Footnote 180 a reference to Swissair.

45. We avail ourselves of the opportunity to congratulate the drafters of A/CN.9/WG.V/WP.83 for the excellent quality of the document. We are convinced that this document will be of great use for legislators and practitioners worldwide.

---

[2] The Swiss delegation thanks Ms Brigitte Umbach of Wenger Plattner Attorneys, Zurich for her valuable contribution to these comments.

A/CN.9/WG.V/WP.86/Add.2 (Original: English)

Note by the Secretariat on draft UNCITRAL Notes on cooperation, communication and coordination in cross-border insolvency proceedings, submitted to the Working Group on Insolvency Law at its thirty-sixth session

ADDENDUM

CONTENTS

II. Comments received from Governments

A. El Salvador

In the paragraphs that follow, the Republic of El Salvador relays the comments and suggestions received from the Office of the Superintendent of the Financial System in regard to the document.

> "The Office of the Superintendent of the Financial System offers the following comments based on its analysis of the text:

1. The Office points out that, although the concepts and procedures contained in the text are of great interest for international business operations, in so far as legal enforcement is concerned only a minimal linkage exists between the Office of the Superintendent of the Financial System as the oversight body and the institutions that are subject to its oversight. Consequently, the laws governing the actions of those institutions include control mechanisms, and in some cases provide for an orderly exit from the marketplace utilizing highly specialized procedures with a view to minimizing the impact on the public.

2. In addition, it should be noted that El Salvador is currently working to develop a draft Business Recovery Act, which has three principal objectives:

- 1 — closing down non-viable companies, so that unused assets can be put to economically productive use once again;
- 2 — restoring the health of companies that are in difficulty, thereby saving many jobs;
- 3 — expanding the supply of credit.

This work is being actively pursued, and experiences are being gathered that can be used in drafting the new legislation, with a view to providing effective regulation in this area. Consequently, much of the information that has been gathered in regard to guiding principles and basic concepts will serve as reference material that can be drawn upon in preparing the draft Salvadorian legislation.

3. It is observed that the purpose of the Notes is to provide guidance for practitioners and judges on aspects of cooperation in cross-border insolvency cases (page 6).

4. The Office suggests that the scenarios presented in the different types of insolvency should be spelled out clearly and in detail.

5. In addition, in section 2 ("Terms and explanations") of part B ("Glossary") (page 8), the definition of the Spanish term "*crédito*" in subparagraph (d) — corresponding to the term "claim" in the English version of the document — should include an explanation that the Spanish term is not being used with its customary meaning: instead of referring to the active provision of financing, "*crédito*" is here being used to refer to a creditor's right to collect a debt. Because "*crédito*" is not being used with its usual Spanish meaning, a clear explanation needs to be provided.

6. With respect to insolvency proceedings, which the Notes are seeking to strengthen and support, it should be pointed out that under current Salvadorian business law there are only two procedures applicable: universal bankruptcy proceedings and suspension of payments. For different reasons, both procedures are currently in disuse.

7. In part I ("Background"), section A ("The legislative framework for cross-border insolvency") (page 10), it would appear to be a valid assertion that, although the number of cross-border insolvency cases has increased, the adoption of legal regimes has not kept pace.

8. Complete clarity is needed in regard to the legal relationship between cross-border agreements, the Model Law and each party's domestic legislation.

9. With respect to the drafting of cross-border insolvency agreements, mention must be made of the matter of the language in which the agreement is concluded. The sample clauses state that the agreement may be drafted in English and French, but that communication between the parties is to be in only one of those languages. In our view, this is contrary to the principle of equality, and could place one of the parties — the State which is unable to draft communications in its own language — at a disadvantage (page 37).

10. The draft Notes use the construction "shall be deemed" on various occasions (page 48). This is not appropriate because the legal effect of such a presumption may be to infringe upon the procedural rights and guarantees established in the parties' primary legislation. For this reason, these passages in the Notes should be revised and made more explicit, to establish with clarity and certainty what effects derive from a given course of action, and to avoid the presumption implied by the words "shall be deemed".

11. In the Notes, there is a contradiction between the guidelines for communication between the parties in connection with insolvency, for which no major controls or restrictions are established (page 71) and the expressly and inherently recognized confidentiality of communication with respect to information relating to the debtor, such as trade secrets related to research and development

information and customer information (page 76). Perhaps the proposed drafting should be revised in regard to the right to appear and be heard (page 49). Similarly, there is a need to define fully and clearly the concept of "all of the ... other parties in interest", and in that definition to indicate what authority or court will determine such legitimate interest, with a view to achieving the desired harmonization."

B. Spain

Draft suggestions and comments from the Government of Spain in relation to UNCITRAL document A/CN.9/WG.V/WP.83 (WP.83)

1. Introduction

12. Document A/CN.9/WG.V/WP.83 (WP.83) is a very important document in that it sets forth the current situation in regard to cross-border insolvency agreements with supranational effects.

13. No doubt this document will be studied closely and, like so many other UNCITRAL documents, will prove to be a seminal text as it brings together a number of key elements. Not only does it provide an overview of cross-border agreements as they have been applied in practice but it also provides an orderly examination and comparison of the content of such agreements, it looks at the best time to conclude such agreements and it sets out a series of sample clauses that can be used in drafting them; and finally, in an annex, it provides a summary of the 32 cases that were used as a basis for assembling the document.

14. Our aim here is simply to offer a series of suggestions and comments as to form and substance (with linguistic suggestions and comments pertaining specifically to the Spanish version of the document grouped separately). We must begin, however, by once again congratulating the Secretariat on its work.

2. Suggestions and comments

2 (a) Suggestions and comments as to form

15. In paragraph 1 of the Note by the Secretariat, WP.83 makes reference to article 27 (c) of the UNCITRAL Model Law on Cross-Border Insolvency. It would perhaps be better to focus more on article 27 (d) instead, because, although it is true that coordination of the administration and supervision of the debtor's assets achieved by cross-border agreements will increase the economic return on insolvency proceedings by a significant percentage (which clearly ties in with article 27 (c)), there is also a key role for courts in these cross-border agreements (in keeping with the Secretary-General's well-founded recommendation, in his letter requesting comments, to focus on article 27 (d)).

16. Paragraph 14 lists the States that have adopted the UNCITRAL Model Law on Cross-Border Insolvency, and Spain does not appear among them. Neither is Spain included in the list at the UNCITRAL website mentioned in footnote 6. However, Spain's Insolvency Act (Law 22/2003 of 9 July 2003) contains the following statement in its preamble: "the new regulatory provisions have also drawn on the Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law (UNCITRAL), recommended pursuant to United Nations General Assembly resolution 52/158 of 15 December 1997." Without going into detail about all the supranational aspects of the provisions contained in the

Insolvency Act, there are nevertheless certain points worth citing here: article 227 establishes obligations in regard to international cooperation, in line with articles 25, 26 and 27 of the Model Law; article 226 on precautionary measures is similar, inter alia, to article 15, paragraph 3, and article 20 of the Model Law; and articles 229 and 230 regarding the rule of payment are largely parallel to article 32 of the Model Law. Unquestionably, Spain should be included in the list of countries that have adapted the UNCITRAL Model Law.

17. The paragraph numbering sequence in the text begins anew for each part identified by a Roman numeral. Instead, the paragraphs should be numbered continuously throughout to ensure that the document is understood as a whole and to reflect the fact that every part of the document is of interest and complements the rest.

18. In paragraph 8 of part III.A, the references to specific cases included in subparagraphs (d) and (j) would probably be better placed in footnotes (with an indication of the importance or rarity in each instance). If they are kept in the body of the text, then relevant cases will also need to be cited in the other subparagraphs.

19. Also in paragraph 8 of part III.A, subparagraph (i) is probably misplaced. Although the statement may be accurate, it perhaps does not properly fit in a list of the direct effects of cross-border agreements. Put another way, this is not one of the purposes of such agreements, but rather a consequence of the result of exploring such agreements. Cross-border agreements represent a step in developing a framework of general principles in this area, but the development of such a framework is not the result of an agreement or of several agreements; rather, it is the result of a considered examination of the agreements in question. Perhaps this reasoning would be grounds for grouping together the sample clauses contained in the document within a separate section.

20. It would perhaps be appropriate to simplify the title of the annex because the cases listed in it are mentioned not only in part III.B but also elsewhere in WP.83.

2 (b) Linguistic suggestions and comments pertaining to the Spanish version

21. In keeping with the general nature of the document, it would perhaps be better in the Spanish version for the purpose and objectives of the Notes — indicated by the nouns "*cooperación*", "*comunicación*" and "*coordinación*" — to be indicated in the title without being preceded by the definite article "*la*". It would probably also be worthwhile to revise the title so that the adjective "*transfronterizo*" modifies the noun "*insolvencia*" rather than the noun "*procedimientos*". These changes would result in the following title in Spanish: "*Notas de la CNUDMI sobre cooperación, comunicación y coordinación en procedimientos de insolvencia transfronteriza*". Thus, the title would be aligned with the statement in paragraph 1 of the Introduction, which reads, "*Las presentes Notas tienen por objeto dar orientación a los profesionales de la insolvencia y a los jueces sobre los aspectos prácticos de la cooperación y la comunicación en casos de* ***insolvencia transfronteriza***" (emphasis added).

22. In paragraph 15 of part III.A, the sentence immediately following footnote 18 is not coherent. It reads, "*El acuerdo determinará, tanto en lo sustantivo como el procesal*, ..." In Spanish this ought to read, "*El acuerdo determinará, tanto en lo sustantivo como en lo procesal*, ...", although it is possible that the passage could be recast entirely.

23. In Spanish, it would perhaps be best to refer to the Court-to-Court Guidelines using this term only, as in paragraph 51 of part III.B, for example, rather than as "*Directrices europeas*", as in the Glossary in the Introduction. In any event, only one term should be used to refer to that document.

24. References to the Concordat should also be unified. In part III.B, paragraph 76 refers to "*los principios del* Cross-Border Insolvency Concordat (*en adelante el* Concordat)", even though (what is presumably) the same document is referred to earlier in the text by other names: see, for example, footnote 41 (page 44 of the Spanish version), footnote 35 (page 42 of the Spanish version), paragraph 51 (in part III.B) and footnote 21 (page 31 of the Spanish version).

25. The first sentence of paragraph 77 is not very clear, and we would ask that the translation be revised. It may be that rendering the English word "local" as "*nacional*" will improve the Spanish version; but perhaps further adjustments are needed as well.

26. In the first sentence of sample clause (10), there appears to be an error in the verb tense in the Spanish version. The verb has to be in the future, matching the verb in the second sentence; it should not be in the conditional.

27. In paragraph 120, the second half of the last sentence seems to have no subject for the subordinate clause. The missing word could be "*trato*": if so, the text that now reads "*o pactarse que el otorgable a ciertos créditos será negociado ulteriormente en un protocolo que determine los plazos*, ..." should be adjusted to read "*o pactarse que el trato otorgable a ciertos créditos será negociado ulteriormente en un protocolo que determine los plazos*, ...".

2 (c) Suggestions and comments as to substance

28. The pragmatic nature of the entire document should be emphasized: it is the product of a large number of cases (dating back to *Maxwell* in 1992) and a series of general agreements (concordats, protocols, etc.) and other ad hoc agreements, some of them universal in scope and others dealing with narrowly defined topics. No mention of this is made at the beginning of WP.83, although paragraph 5 of the Note by the Secretariat which precedes the document does point this out. Paragraph 5 of the Note by the Secretariat should be expanded somewhat (to describe the method used to prepare the Notes) and should be inserted at the beginning of WP.83 (perhaps together with the preceding paragraphs on the history and raison d'être of WP.83). For this purpose, it could be useful to move paragraph 3 of part III, section A, to that location.

29. The first part of paragraph 122 seems to express a very important point, but its scope is substantially narrowed by the example that follows. The first part could be taken to mean, for example, that a subordinate claim may gain a higher priority and be moved to a higher category. But the example given in the second part of the paragraph makes it clear that it is a case of the agreement altering the ranking of a claim within the category of subordinate claims, but without moving that claim to a higher category. This seems possible (with the justification given in the passage from WP.83, namely, the law of another country in which a related insolvency proceeding is under way), but no more. Consequently, the first sentence should be corrected. Perhaps it would suffice to change "*Los acuerdos pueden también dilucidar ciertas cuestiones de prelación o de subordinación*" to read "*Los acuerdos pueden también dilucidar ciertas cuestiones de prelación en la subordinación*" (or, in the English version, to change "Agreements may also address issues of priority

and subordination" to read "Agreements may also address issues of priority in the subordination"). Certainly, it is not appropriate to speak of agreements affecting priority in other categories of claims if there are no examples to support this.

30. In paragraph 178, example (a) perhaps says more than is intended, because everything points to the necessary consent of any new court, and even more so if that court is situated in a country which is new in so far as nationals in the pre-existing agreement are concerned.

C. Mexico

31. For purposes of cooperation and coordination procedures in cases of cross-border insolvency in Mexico, the concluding of cross-border agreements in relation to insolvency proceedings is based on two main legal texts.

32. Title XII of the Business Insolvency Act, which adopts the UNCITRAL Model Law on Cross-Border Insolvency, contains articles 304 and 305 as fundamental provisions. Those articles are transcribed below:

Chapter IV

Cooperation with foreign courts and representatives

Article 304. Cooperation with foreign courts. With respect to those matters indicated in article 278 of this law, the judge, visiting judge, conciliator or receiver shall, to the extent possible, cooperate with foreign courts and representatives in the performance of his or her duties. The judge, visiting judge, conciliator or receiver shall be empowered to engage in direct communication with foreign courts or representatives in the performance of his or her duties, without letters rogatory or other formalities being required.

Article 305. Means of international cooperation. The cooperation referred to in article 304 may be carried out by any appropriate means, and in particular the following:

(i) by naming a person or entity to act under the direction of the judge, visiting judge, conciliator or receiver;

(ii) by communicating information by any means that the judge, visiting judge, conciliator or receiver may think fit;

(iii) by coordinating the administration and supervision of the business's assets and affairs;

(iv) by having courts approve or apply agreements on the coordination of proceedings;

(v) by coordinating proceedings that are under way simultaneously with respect to a single business.

33. Article 1051 of Mexico's Commercial Code establishes as a general principle of procedural law in regard to businesses that it is preferred for the parties to reach a mutual agreement:

Article 1051. The procedure preferred above all in regard to businesses is for the parties freely to reach a mutual agreement, subject to the limitations

indicated in the present volume, with the options of a conventional proceeding before the courts or an arbitration proceeding.

Should an agreement be illegal, or should an agreement which is in conformity with the law not be complied with, an incidental claim may be made in respect thereof at any time before a ruling or judgement is made in the case without the proceeding being suspended.

A conventional proceeding before the courts shall be governed by the provisions of articles 1059 and 1053; and an arbitration proceeding shall be governed by the provisions of Title IV of the present volume.

34. In addition, creditors in litigation which are party to an insolvency proceeding are required to agree to and accept the provisions of cross-border agreements, something considered difficult to achieve in a proceeding in which there are a great many creditors.

A/CN.9/WG.V/WP.86/Add.3 (Original: English)

Note by the Secretariat on draft UNCITRAL Notes on cooperation, communication and coordination in cross-border insolvency proceedings, submitted to the Working Group on Insolvency Law at its thirty-sixth session

ADDENDUM

CONTENTS

II. Compilation of comments by Governments

Jordan

1. The national understanding of insolvency in line with the actual working mechanisms of the national committee mandated with the formulation of a draft legal framework for insolvency, bankruptcy and liquidation is the restructuring of the enterprise in order to allow the company to continue its activities after overcoming the reasons for its difficulties. This restructuring would be a task assigned to the Department of Companies Control and not to the judiciary, according to this framework. Therefore, one of our comments is that, in the case of Jordan, restructuring measures are coordinated between the Department (another competent authority) and the judiciary.

2. Further elaboration of the terminology and its interpretation, as an international guiding reference, in order to avoid any ambiguity or vagueness at any phase of litigation or proceedings.

3. Cross-border insolvency proceedings should cover a businessman (owning a commercial enterprise) provided the enterprise carries on work and activities similar to those of a company in its different forms.

4. Any agreement between the insolvency representatives should involve a role for the other relevant authority.

5. There should be prior agreement concerning coordination, organization and communication mechanisms between courts in the different relevant jurisdictions.

6. There should be agreement on legally acceptable means of communication in the relevant jurisdiction.

7. In order to safeguard the debtor's rights, and allow the possibility for the company to continue its activities, decisions must be made by the court or the

competent authority to liquidate the insolvency acquisitions to the most limited extent, for specific purposes and for a legal and practical justification.

8. Coordination of proceedings between the judiciary and the other authority is likewise essential in order to reduce insolvency proceedings costs.

9. In order to prevent the submissiveness of the authority of one jurisdiction to another in a manner that could harm the interests of the debtor, an inventory must be taken of the insolvency acquisitions in the relevant jurisdiction before the proceedings are initiated.

10. The interests of the (governmental) creditors must be taken into account when taking the inventory of the insolvency acquisitions.

11. Coordination between the insolvency representatives in all relevant jurisdictions and all creditors, secured and unsecured, and between debtors, courts and/or other relevant authorities.

12. The possibility of a supervisory and coordination role between the jurisdiction and the other competent authority (the government) when concluding primary and secondary insolvency agreements.

13. Proceedings related to insolvency phases must be bound by specific and agreed time limits leading to restructuring or to liquidation.

14. Adoption of an official international language with the agreement of the insolvency representatives, in addition to the language of the location or the jurisdiction or the judiciary. For example if the jurisdiction is in Jordan, Arabic and English will be adopted, if it is in Turkey, then Turkish and English are adopted, and so on.

15. The fees and honorarium of official agencies and the insolvency representatives and others must be specified in advance and included in the agreement.

16. Technical and financial support and training for national courts so that there will be judges capable of handling insolvency cases at an international level as attested by the United Nations and other organizations.

17. Creditors in all jurisdictions must benefit from the assets that can be distributed and be allowed the opportunity to submit their claims within specific time limits and that such information be published through legal means.

18. Distribution of the revenues generated by a sale must be made according to the agreement between the insolvency representatives, and not according to the principle of similar treatment, and the distribution of the revenues generated by the sale of assets must be made with the national interest in mind as a universal principle.

19. One of the main duties of the insolvency representative is to submit periodical reports on the insolvency proceedings according to the agreement.

20. Time limits must be specified by the judiciary or the other authorities for every proceeding, starting with the nomination of the insolvency representatives through the restructuring to the initiation of the proceedings, as well as when the proceedings are suspended or discontinued.

21. The applicable law must be the one agreed to by the insolvency representatives. When such an agreement is reached, all creditors must be subject to the national treatment.

22. We propose the establishment of coordination contact points when the cross-border insolvency involves more than two jurisdictions.

23. Insolvency representatives should attach greatest importance to reorganization schemes.

24. In addition to according creditors the national treatment, the agreement between the insolvency representatives must include a ranking of the creditor's priorities according to the jurisdiction accepted by the insolvency representatives pursuant to that agreement.

25. We propose that insolvency proceedings should not involve subsidiaries or branches in other states if their work is running well, and that protection should be provided to the debtor in these companies (the subsidiaries or branches).

26. The insolvency representative should guarantee that the company will assume no new obligations, and secure the legal approval for that.

27. Investigating the assets by a party in interest must be made through the court or the other authority and with the knowledge of the insolvency representative.

28. Working mechanisms of the judiciary must be observed in correspondence or communications with other judiciaries.

29. Means of communication and notification mechanisms must be specified in the agreement concluded between the insolvency representatives.

30. We propose that there should be, within the UNCITRAL project on cooperation, communication and coordination concerning cross-border insolvency proceedings, proposed model agreements between the insolvency representatives, notifications, fees and any other expenses and other such models, with a view to adoption of these models in form and content at the international level by the judiciary and other authorities concerned with cases of cross-border insolvency.

31. Without prejudice to insolvency proceedings and all parties, the interests of a company must be protected in all cases, including safeguarding the confidentiality of information, data and all sensitive company activities that have a impact on its rights and existence. Also, fair evaluations must also be made of intellectual property rights, authorizations and taking inventory of the assets. The level of confidentiality is to be determined by the court having jurisdiction. We should point out that Jordan is needs to develop technical expertise in this field.

32. The original agreement must be the basis for any subsequent secondary agreement in the same jurisdiction or in another one, with due regard to the legal differences between different jurisdictions.

33. Matters need to be clarified concerning jurisdiction over companies located in free zones (outside the customs domain of a certain country where insolvency procedures are taking place).

G. Note by the Secretariat on the discussion of intellectual property in the Legislative Guide on Insolvency Law, submitted to the Working Group on Insolvency Law at its thirty-sixth session

(A/CN.9/WG.V/WP.87) [Original: English]

CONTENTS

1. At its 35th session in November 2008, Working Group V considered several issues concerning the impact of insolvency on a security right in intellectual property that had been referred to it by Working Group VI. The Working Group expressed its views on the first set of issues (as outlined in the table included at the end of document A/CN.9/667).

2. With respect to the second issue (as outlined in paragraph 133 of document A/CN.9/667), concerning the possibility that a licensee to a contract rejected by the insolvency representative of the licensor might be permitted, under some laws, to continue to perform that contract notwithstanding the rejection, the Working Group agreed that it was not in a position to properly consider that question without better understanding of the scope and extent of the issues involved and the commentary being proposed by Working Group VI. To assist its deliberations, the Working Group requested the Secretariat to prepare a working paper, for consideration at its next session that would provide background information on the discussion of the treatment of contracts that had taken place in the course of the development of the Legislative Guide on Insolvency law (the Guide)[1] and the recommendations that had been adopted.

3. The Working Group reached the same conclusion with respect to the third issue (referred to in paragraphs 137-138 of document A/CN.9/667), and requested the Secretariat to include in the working paper to be prepared background information and explanatory material from the Guide that would be relevant to a consideration of those proposals.

4. This note by the Secretariat provides that background information as requested.

[1] UNCITRAL Legislative Guide on Insolvency Law, Sales No. E.05.V.10, text available at www.uncitral.org.

A. References to intellectual property in the discussions of Working Group V

5. Consideration of the discussion in the Working Group indicates that issues specific to intellectual property were raised by delegations on only two occasions in the context of the treatment of contracts following commencement of insolvency proceedings. Little discussion of those specific issues ensued. The general approach of the Working Group was to agree on recommendations that would apply to contracts generally and to specify only limited exceptions.

6. The following paragraphs indicate the extent of the discussion as it related to intellectual property.

1. Recommendations

7. For consideration at its twenty-sixth session in May 2002, draft recommendation (54) as set forth in document A/CN.9/WG.V/WP.61 provided that:

> "The insolvency law may provide special rules for the treatment of labour and […] contracts."

8. The report of the twenty-sixth session (A/CN.9/511) noted that:

> "56. As to recommendation (54), it was suggested that specific mention should be made of financial transactions (addressed in detail in section F), as well as contracts involving intellectual property where it was desirable that the contract be able to be continued."

9. Following that session, draft recommendation (54) (renumbered recommendation 67) was revised to include labour, intellectual property and financial contracts (A/CN.9/WG.V/WP.63/Add.8).

10. In the discussion at the twenty-seventh session in December 2002, several delegations questioned the need to refer to intellectual property contracts in draft recommendation (67), while many supported the inclusion of labour contracts.

11. Paragraph 155 of the report of that session (A/CN.9/529) reflects the Working Group's conclusion as follows:

> "155. Some concerns were expressed as to the intention of recommendation (67) and the contracts that should be included. There was general agreement that labour contracts should be addressed in view of the applicable international regimes. After discussion, the Working Group agreed on the need for a general provision referring to the special treatment of certain types of contracts, with the addition of some examples, such as labour contracts."

12. Following that session, draft recommendation (67) was revised to include a specific exception to the recommendation on automatic termination clauses for financial contracts and a more general reference to the application of special rules in insolvency to certain types of contracts, such as labour contracts.

13. That revision appeared as draft recommendation (57) in document A/CN.9/WG.V/WP.70 (Part II). That version of the draft recommendation

was approved and adopted by the Commission at its thirty-seventh session in 2004 and renumbered 71 in the published version of the Guide.

2. Commentary

14. In the published version of the Guide, paragraphs 134-135 of part two, chapter II adopt the approach used throughout the Guide of discussing the different approaches insolvency laws take to a particular issue, in that case rejection of a contract. No specific mention is made of intellectual property contracts and no suggestion appears to have been made by the Working Group that such a reference be included in those paragraphs.

15. The general approach suggested by the Guide and discussed in paragraph 113 of part two, chapter II is to set forth general rules that apply to all types of contracts (whether specifically mentioned or not) and identify exceptions for a limited number of special contracts. Labour contracts, financial contracts, contracts for personal services and contracts for loans and insurance are mentioned.

16. Intellectual property is specifically mentioned in:

(a) Paragraph 115 of part two, chapter II as a factor supporting the observance of automatic termination or acceleration clauses on the basis that creators of intellectual property need to be able to control the use of that property or because of the effect on a counterparty's business of termination of a contract, especially one with respect to an intangible;

(b) Paragraph 116 of part two, chapter II, as a factor supporting the override of such automatic termination or acceleration clauses where, in reorganization for example, the contract involves the use of intellectual property embedded in a key product and continued performance of the contract may enhance the earnings potential of the business, capture value and assist in locking all creditors into a reorganization;

(c) Paragraph 143 of part two, chapter II, which discusses the two types of general exception to the power to continue performance, reject or assign contracts that exist in insolvency laws. The first relates to exceptions provided for specific types of contracts and several examples are given — short-term financial contracts, insurance contracts and contracts for the making of a loan. The commentary goes on to note that "Exceptions to the power to reject may also be appropriate in the case of [inter alia] agreements where the debtor is a lessor or franchisor or a licensor of intellectual property and termination of the agreement would end or seriously affect the business of the counterparty, in particular where the advantage to the debtor may be relatively minor." The only two types of contracts discussed in further detail in that section are labour contracts and contracts for irreplaceable and personal services; and

(d) The second type of exception is discussed in paragraph 146 of part two, chapter II, that is contracts that cannot continue to be performed because they require performance of an irreplaceable personal service. One example given is a contract that involves particular intellectual property.

17. Those paragraphs of the published version of the Guide reflect the content of earlier drafts and no further detail or explanation appears to have been added to those particular paragraphs after the twenty-fifth session in December 2001.

B. The consequences of rejection of a contract

1. Recommendations

18. The only remedy for rejection of a contract that is the subject of a recommendation in the Guide is payment of damages. Recommendation 82 provides that:

> "The insolvency law should specify that any damages arising from the rejection of a pre-commencement contract would be determined in accordance with applicable law and should be treated as an ordinary unsecured claim. The insolvency law may limit claims relating to the rejection of a long-term contract."

2. Commentary

19. Paragraph 134, part two, chapter II of the Guide notes that many laws provide that the counterparty is only entitled to a remedy in damages in case of rejection of a contract, even if other remedies would have been available outside of insolvency. One reason cited for that approach is that allowing other remedies, such as delivery of goods manufactured but not delivered prior to commencement of insolvency proceedings, would amount to paying the full claim of the counterparty, a result that would not be available to other unsecured creditors and that would depart from the principle of equal treatment.

20. The possibility of including references to other remedies in the commentary appears not to have been raised or discussed in the Working Group.

C. Provisions of the Legislative Guide concerning the decision to continue a contract and protection of the value of the secured asset

21. Working Group V was requested to consider and express its views on a third set of issues raised in paragraphs 135-138 of A/CN.9/667. Those paragraphs concern, on the one hand, sale by the secured creditor of the intellectual property right that was the object of the security right and recovery of its debt from the proceeds of that sale, and on the other, continuation of the performance of the licence contract to better maximise the value of the encumbered intellectual property right, thus opposing the immediate termination of the licence contract and consequent sale.

22. It was mentioned that the law of some States enabled the secured creditor to request the insolvency representative, or the insolvency court if necessary, to:

(a) Set a legally binding deadline for the decision to continue or not the performance of the licence contract; and

(b) Schedule a special hearing before the insolvency court, to attempt mediation between the insolvency representative and the secured creditor, in order to obtain further protection for the secured obligation.

23. Paragraphs 108-146 of part two, chapter II of the Guide discuss the various interests that arise with respect to continuation and rejection of contracts, including the advantages and disadvantages of possible policy options.

24. With specific reference to paragraph 22 (a) above, the Guide recommends that, rather than leaving the matter to the insolvency representative or the court to establish, this deadline be specified in the insolvency law to ensure certainty and transparency. Recommendation 74 provides that:

> "The insolvency law should specify a time period within which the insolvency representative is required to make a decision to continue or reject a contract, which time period may be extended by the court."

25. These issues are discussed in paragraphs 128-129 of part two, chapter II of the Guide.

26. With specific reference to paragraph 22 (b) above, the Guide recommends that the secured creditor should have a right to protection of the value of the assets in which it has a security interest. It would not be a question of mediation or negotiation between the insolvency representative and the secured creditor, but rather a matter to be determined by the court, based upon the provisions of the insolvency law. Recommendation 50 provides that:

> "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."

27. These issues are discussed in the commentary in paragraphs 63-69 of part two, chapter II of the Guide.

H. Note by the Secretariat on the Treatment of enterprise groups in insolvency: Proposal by the United States of America on post-application finance, submitted to the Working Group on Insolvency Law at its thirty-sixth session

(A/CN.9/WG.V/WP.88) [Original: English]

1. In preparation for the thirty-sixth session of Working Group V (Insolvency Law), the Government of the United States of America submitted the attached proposal on post-application finance to the Secretariat.

2. The document in the attached annex is reproduced in the form in which it was received by the Secretariat.

Annex

The following text is proposed for inclusion in the commentary to Part III, Treatment of enterprise groups in insolvency, of the UNCITRAL Legislative Guide on Insolvency Law (the Legislative Guide):

1. When a company or group of companies become insolvent and make an application for insolvency proceedings to be commenced, that application often results in a breach of the respective loan covenants entitling the lender of the company or the group of companies to discontinue advancing funds under existing loan agreements. Where an insolvency law does not provide for automatic commencement of a proceeding upon application, it can take a period of several months between the making of an application and the commencement of the proceeding. Generally, during this interim period, the courts must make an independent evaluation as to whether the application being made by a company or group of companies meets the statutory criteria to commence a proceeding. In the interim, if the company or group of companies is to continue as a going concern, the company or group of companies must be able to continue to conduct its business, pay its employees, pay its suppliers and generally continue its day-to-day activities. To pay these ongoing expenses, the company or group of companies will generally require new financing during the gap period.

2. The availability of financing or the lack thereof during this interim period can determine whether a reorganization of the company or group of companies will ultimately be a viable option or whether liquidation will be required. If funds are not available for the company or group of companies to pay such expenses during that gap period, then businesses will not be able to reorganize as they will not be able to continue to employ their staff or maintain production of existing products or services and will, most likely, be forced into liquidation.

3. Conversely, the existence of a provision under the insolvency law enabling post-application finance for the period of time between the making of an application and the commencement of the proceeding can preserve the possibility of reorganization of the company or group of companies. Such a provision is often necessary to provide assurance to any existing lender to the company or group of companies to provide additional financing or to any new

lender to provide alternative financing during this relatively short period between application and commencement.

4. Although the period between application and commencement may take only several months, the debtor's source of financing may well be cut off during this period because, as mentioned above, the making of the application usually triggers an event of default under existing loan agreements. Thus, in the absence of court authorization to approve post-application financing, some debtors who do not have sufficient cash to survive this interim period will find themselves unable to reorganize before the case is even commenced.

5. Recommendation 39 of the Legislative Guide provides for the court to order provisional measures to preserve the assets of the debtor prior to the commencement of an insolvency proceeding where those measures are needed to protect the assets of the debtor and the interests of creditors. Those measures could include the provision of finance to cover the period between application and commencement.

6. The authorization for the debtor to obtain finance during the interim period should therefore be regarded as being within the purview of recommendation 39 of the Legislative Guide.

IV. SECURITY INTERESTS

A. Report of the Working Group on Security Interests on the work of its fourteenth session (Vienna, 20-24 October 2008)

(A/CN.9/667) [Original: English]

CONTENTS

I. Introduction

1. At its fourteenth session (Vienna, 20-24 October 2008), Working Group VI (Security Interests) continued its work on the preparation of an annex to the UNCITRAL Legislative Guide on Secured Transactions[1] specific to security rights

[1] To be subsequently issued as a United Nations sales publication.

in intellectual property, pursuant to a decision taken by the United Nations Commission on International Trade Law at its fortieth session, in 2007.[2] The Commission's decision to undertake work on security rights in intellectual property was taken in response to the need to supplement its work on the Guide by providing specific guidance to States as to the appropriate coordination between secured transactions and intellectual property law.[3]

2. At its thirty-ninth session, in 2006, the Commission considered its future work on secured financing law. It was noted that intellectual property rights (e.g. copyrights, patents and trademarks) were becoming an extremely important source of credit and should not be excluded from a modern secured transactions law. In addition, it was noted that the recommendations of the draft Guide generally applied to security rights in intellectual property to the extent that they were not inconsistent with intellectual property law. Moreover, it was noted that, as the recommendations of the draft Guide had not been prepared with the special intellectual property law issues in mind, enacting States should consider making any necessary adjustments to the recommendations to address those issues.[4]

3. 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 secured financing 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 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.[5] 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.[6]

4. Pursuant to those requests, the Secretariat organized, in cooperation with WIPO, a colloquium on security rights in intellectual property rights (Vienna, 18 and 19 January 2007). The colloquium was attended by experts on secured financing and intellectual property law, including representatives of Governments and national and international, governmental and non-governmental organizations. At the colloquium, several suggestions were made with respect to adjustments that would need to be made to the draft Guide to address issues specific to intellectual property financing.[7]

---

[2] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17* (A/62/17), part I, para. 162.

[3] Ibid., para. 157.

[4] Ibid., *Sixty-first Session, Supplement No. 17* (A/61/17), paras. 81 and 82.

[5] Ibid., para. 83.

[6] Ibid., para. 86.

[7] See www.uncitral.org/uncitral/en/commission/colloquia/2secint.html.

5. At the first part of its fortieth session (Vienna, 25 June-12 July 2007), the Commission considered a note by the Secretariat entitled "Possible future work on security rights in intellectual property" (A/CN.9/632). The note took into account the conclusions reached at the colloquium on security rights in intellectual property rights. In order to provide sufficient guidance to States as to the adjustments that they might need to make in their laws to avoid inconsistencies between secured financing and intellectual property law, the Commission decided to entrust Working Group VI with the preparation of an annex to the draft Guide specific to security rights in intellectual property rights.[8]

6. At the second part of its fortieth session (Vienna, 10-14 December 2007), the Commission finalized and adopted the Guide on the understanding that an annex to the Guide specific to security rights in intellectual property rights would subsequently be prepared.[9]

7. At its thirteenth session (New York, 19-23 May 2008), the Working Group considered a note by the Secretariat entitled "Security rights in intellectual property rights" (A/CN.9/WG.VI/WP.33 and Add.1). At that session, the Working Group requested the Secretariat to prepare a draft of the annex to the Guide on security rights in intellectual property reflecting the deliberations and decisions of the Working Group (see A/CN.9/649, para. 13). As the Working Group was not able to reach agreement as to whether certain matters related to the impact of insolvency on a security right in intellectual property (see A/CN.9/649, paras. 98-102) were sufficiently linked with secured transactions law so as to justify their discussion in the annex to the Guide, it decided to revisit those matters at a future meeting and to recommend that Working Group V (Insolvency Law) be requested to consider those matters (see A/CN.9/649, para. 103).

8. At its forty-first session (New York, 16 June-3 July 2008), the Commission noted with satisfaction the good progress achieved by Working Group VI. The Commission also noted the decision of the Working Group with respect to certain matters related to the impact of insolvency on a security right in intellectual property, and decided that Working Group V should be informed and should be invited to express any preliminary opinion at its next session. It was also decided that, should any remaining issue require joint consideration by the two working groups after that session, the Secretariat should have discretion to organize a joint discussion of the impact of insolvency on a security right in intellectual property when the two working groups meet back to back in early 2009.[10]

II. Organization of the session

9. The Working Group, which was composed of all States members of the Commission, held its fourteenth session in Vienna from 20 to 24 October 2008. The session was attended by representatives of the following States members of the Working Group: Algeria, Australia, Austria, Bolivia, Bulgaria, Canada, China, Colombia, Czech Republic, El Salvador, Fiji, France, Germany, Greece, Guatemala,

---

[8] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17* (A/62/17), part I, paras. 156, 157 and 162.

[9] Ibid., part II, paras. 99 and 100.

[10] Ibid., *Sixty-third Session, Supplement No. 17* (A/63/17), para. 326.

India, Iran (Islamic Republic of), Italy, Japan, Kenya, Lebanon, Malaysia, Mexico, Nigeria, Norway, Republic of Korea, Russian Federation, Senegal, Spain, Switzerland, Thailand, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

10. The session was attended by observers from the following States: Angola, Argentina, Belgium, Burundi, Côte d'Ivoire, Croatia, Democratic Republic of the Congo, Dominican Republic, Indonesia, Jordan, Mali, Peru, Philippines, Qatar, Saudi Arabia, Slovakia, Slovenia, Tunisia, Turkey and Zambia.

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

(a) *United Nations system*: World Intellectual Property Organization (WIPO);

(b) *Intergovernmental organizations*: League of Arab States;

(c) *International non-governmental organizations invited by the Working Group*: American Bar Association, Association of Commercial Television in Europe, Center for International Legal Studies, Commercial Finance Association, European Company Lawyers Association, Forum for International Conciliation and Arbitration, Independent Film & Television Alliance, International Bar Association, International Federation of Phonographic Industry, International Swaps and Derivatives Association, International Trademark Association and the Association of European Trade Mark Owners (MARQUES).

12. The Working Group elected the following officers:

Chairman: Ms. Kathryn Sabo (Canada)

Rapporteur: Ms. Jitka Václavícková (Czech Republic)

13. The Working Group had before it the following documents:

(a) Annotated provisional agenda (A/CN.9/WG.VI/WP.34);

(b) Annex to the UNCITRAL Legislative Guide on Secured Transactions dealing with security rights in intellectual property: note by the Secretariat (A/CN.9/WG.VI/WP.35 and Add.1).

14. 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. Security rights in intellectual property.
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

15. The Working Group considered the draft annex to the UNCITRAL Legislative Guide on Secured Transactions dealing with security rights in intellectual property

(A/CN.9/WG.VI/WP.35 and Add.1). The deliberations and decisions of the Working Group are set forth below in chapter IV; sections A-C refer to A/CN.9/WG.VI/WP.35, and sections D-K refer to A/CN.9/WG.VI/WP.35/Add.1. The Secretariat was requested to prepare a revised draft of the annex reflecting those deliberations and decisions.

IV. Security rights in intellectual property

A. Introduction

1. Background

16. It was widely felt that the discussion of the background of the project was appropriate and should be included in the annex to the Guide dealing with security rights in intellectual property.

2. The interaction between secured transactions and intellectual property law under the Guide

17. The Working Group noted with appreciation the sensitivity demonstrated in the draft annex with respect to the interaction of secured transactions and intellectual property law. In addition, the Working Group noted with appreciation the collaborative role of WIPO, reflecting the interest of WIPO member States in the issue. It was also noted that WIPO planned to organize an information meeting to raise awareness among its member States of the importance of intellectual property financing and the relevant work of UNCITRAL; and to distribute a questionnaire to its member States with a view to gathering information on their law on intellectual property financing and providing feedback to the Working Group.

18. While there was agreement as to the policy reflected in the discussion of the interaction between secured transactions and intellectual property law under the Guide, a number of comments and suggestions were made with regard to the exact formulation, including that:

(a) In paragraph 8, second sentence, reference should be made to the exact text of recommendation 4, subparagraph (b), of the Guide and, in the last sentence, the reference to national law should be separated from the reference to international agreements, as the exact scope of the term “intellectual property” was a matter for both national law and international treaties and the latter could not be interpreted differently by each contracting State;

(b) In paragraph 9, the point that intellectual property law might need to be reviewed where it dealt with issues relating to security rights in intellectual property differently than secured transactions law should be made more clearly and, in the last sentence, reference should be made to the need to ensure the compatibility of secured transactions and intellectual property law rather than their integration.

19. Subject to the changes mentioned above, the Working Group approved the substance of the section of the draft annex dealing with the interaction between secured transactions and intellectual property law under the Guide.

3. Terminology

20. While there was agreement that some terms needed to be explained in the commentary of the draft annex, a number of comments and suggestions were made as to the exact formulation of that commentary, including that:

(a) With respect to paragraph 13, the term "law relating to intellectual property" could be defined along the following lines:

> "As used in this Annex, 'law relating to intellectual property' means any law, regulation or common law rule that governs any aspect of a State's intellectual property regime, including but not limited to laws and regulations that govern the creation, registration, maintenance, renewal, assignment, sale, transfer or licensing of any intellectual property rights, as well as all laws and regulations governing the granting and recording of security interests, liens, mortgages or other security devices involving intellectual property rights";

(b) In paragraph 15, the second sentence should be revised to state that a licence created a right in property, the example should be clarified by reference to the treatment of an exclusive licensee as a rights holder in some legal systems and the last sentence should refer to the term "security right" as used in the Guide;

(c) In paragraph 18, reference should be made to the different types of asset that could be used as an encumbered asset (i.e. the rights of a rights holder, the rights of a licensor that was not a rights holder and the rights of a licensee);

(d) In paragraph 19, reference should be made to the term "competing claimant" as used in the Guide and the reference to infringers should be qualified, since only "alleged" infringers would argue that they had a valid claim and were thus true competing claimants;

(e) In paragraph 20, it should be clarified that the Guide provided that a secured creditor acquired a security right in, but not ownership of, an encumbered asset, primarily because of the need to protect the rights of the grantor/owner, and that treatment did not affect the rights of a secured creditor for purposes of intellectual property law.

21. In support of the proposed term "law relating to intellectual property", it was stated that it would be useful to summarize for the reader the meaning of that term, which was essential to understanding the relationship between secured transactions law and intellectual property law under the Guide. However, it was also stated that the Guide already clarified that the term "law" included both statutory and non-statutory law and that the term "law relating to intellectual property" meant a body of law that was broader than intellectual property law, strictly speaking, but narrower than general contract or property law. It was observed that recommendation 4, subparagraph (b), of the Guide, followed by extensive commentary, should be sufficient, including a discussion of intellectual property law unaffected by the Guide, general property law affected by the Guide and intellectual-property-specific law accorded preference under recommendation 4, subparagraph (b). In addition, it was pointed out that, in its current formulation, the term was excessively broad and would inadvertently cover general contract and property law. It was widely felt that the principle of deference to law relating to intellectual property law would apply only to situations where that law dealt with security rights in intellectual property. After discussion, the Working Group requested the Secretariat to narrow the scope of the term to law that governed

specifically intellectual property rights and security rights in intellectual property rights.

22. In the light of the fact that the concept of "competing claimant" was discussed in the chapter on the third-party effectiveness of a security right, the Working Group deferred to a later point during the session its decision with respect to the suggestion concerning the reference to infringers mentioned above in paragraph 20 (d). Subject to the other changes mentioned above, the Working Group approved the substance of the section of the draft annex dealing with terminology.

4. Examples of intellectual property financing practices

23. While the examples of intellectual property financing practices mentioned in the draft annex were generally considered to be useful, a number of comments and suggestions were made, including that:

(a) In paragraph 22, the last sentence of paragraph 39 (a) should be included with an additional reference to applicable law;

(b) In paragraph 23, the different types of encumbered asset (i.e. rights of a rights holder, rights of a licensor that was not a rights holder and rights of a licensee) should be clarified and discussed in the relevant examples;

(c) Paragraph 25 should be deleted and, in line with the terminology used in the Guide, reference should be made to a security right in all assets of an enterprise rather than to an enterprise mortgage, while that type of transaction should not be presented as a third category, as it simply involved security rights in tangible and intangible assets, that is, reflected practices listed in the first or the second category discussed in paragraphs 23 and 24 respectively;

(d) The example in paragraph 27 should be revised to clarify that the issue was whether a person could grant a security right in rights under a licence agreement in the course of its business and whether, as a result, that security right extended to the royalties payable under that licence agreement;

(e) In paragraph 38, reference should be made to a "secured creditor" or a "prospective lender or other credit provider" rather than to the narrower term "prospective lender";

(f) In paragraph 39 (a), the last sentence should be moved to paragraph 22, amended as mentioned in subparagraph (a) above, and the insolvency discussion in paragraphs 39 (b) and (c) should be expanded to reflect in some detail four rather than two scenarios (see para. 129 below);

(g) Paragraph 40 should be revised to clarify that a security right in all assets of a grantor was useful despite any limitations introduced by intellectual property law, since a security right might extend to the proceeds of an originally encumbered intellectual property right and, in any case, such a security right might be effective against the insolvency representative in case of the insolvency of the grantor;

(h) Paragraph 41 should be revised to clarify that an accurate appraisal of encumbered intellectual property did not necessarily maximize the value of credit available and that, as in the case of any other type of encumbered asset, where intellectual property was encumbered the secured creditor would normally engage in due diligence to ascertain the value of the encumbered intellectual property.

24. The suggestion to delete paragraph 25 was objected to. It was widely felt that it reflected a different practice and should be retained. At the same time, it was agreed that the examples falling under the first category could be recast as falling under different subcategories depending on the type of encumbered asset involved in each case. Subject to the other changes mentioned above, the Working Group approved the substance of the section of the draft annex dealing with examples of intellectual property financing practices.

5. Key objectives and fundamental policies

25. With regard to the section of the draft annex dealing with key objectives and fundamental policies, a number of comments and suggestions were made, including that:

(a) In paragraph 43, reference should be made to the overall objective of the Guide not interfering with, rather than being aimed at achieving, the objectives of intellectual property law;

(b) In paragraph 44, last sentence, the point about the Guide not interfering with the objectives of intellectual property law should be strengthened;

(c) In paragraph 45, the first sentence should be deleted as the Guide did not address issues relating to diminished value or abandonment of intellectual property rights by the rights holder or the secured creditor and, in the last sentence, reference should be made to a licence in general rather than to a "personal licence".

26. More specifically, it was suggested that paragraph 45 should be revised to read along the following lines:

> "Similarly, this key objective of promoting secured credit, while not interfering with the objectives of intellectual property law, means that neither the existence of the secured credit regime nor the creation of a security right in intellectual property should diminish the value of intellectual property. Thus, for example, it is important to note that the creation of a security right in intellectual property should not be misinterpreted as constituting an inadvertent abandonment of intellectual property (e.g. failure to use a trademark properly, to use it on all goods or services or to maintain adequate quality control may result in loss of value to, or even abandonment of, the intellectual property) by the rights holder or the secured creditor. In addition, in the case of goods or services associated with marks, secured transactions law should avoid causing consumer confusion as to the source of goods or services (e.g. where a secured creditor replaces the manufacturer's name and address on the goods with a sticker bearing the creditor's name and address or retains the trademark and sells the goods in a jurisdiction where the trademark is owned by a different person). Finally, secured transactions law should not provide that the purported creation of a security right in the rights of a licensee that are, as a matter of intellectual property law, not transferable except with the consent of the licensor results in the transfer of such rights without the consent of the rights holder."

27. It was stated that the reason for the proposed changes was to clarify the important goal of preventing harm to intellectual property interests as a result of the existence of a secured credit regime and to emphasize that the recommendations of the Guide would not bring about such harm. It was suggested that the reference to

the secured creditor in the second sentence should be deleted, as an intellectual property right could be abandoned only by the rights holder. In addition, it was suggested that, in the last sentence, reference should be made to "applicable" intellectual property law. In that connection, with respect to paragraph 44, it was suggested that the first sentence should be recast in order to avoid creating the impression that the encouragement of innovation was the only objective of intellectual property law.

28. Subject to the other changes mentioned above, the Working Group approved the substance of that section of the draft annex.

B. Scope of application and party autonomy

1. Broad scope of application

29. With regard to the section of the draft annex dealing with the broad scope of application, a number of comments and suggestions were made, including that:

(a) Paragraph 47 should be revised to provide that, in some circumstances (depending on the relevant rules), a security right could be created even in an asset that was non-transferable, even though that security right would not be enforceable;

(b) Paragraph 50 should be revised to clarify that a general security rights regime would render fictional assignments unnecessary, and a recommendation should be introduced to provide that, unless otherwise provided in intellectual property law, a secured creditor could agree as to who was entitled to take the necessary steps to protect the encumbered intellectual property right;

(c) Paragraph 51 should be revised to provide that States enacting the law recommended in the Guide might wish to review their intellectual property legislation with a view to replacing all the devices by way of which a security right was created in intellectual property (including fictional assignments) with a general security right;

(d) Paragraph 54 should emphasize further the point that the list of issues following paragraph 54 was a non-exclusive list;

(e) In paragraph 54, the list of issues under the heading "copyright" should be revised along the following lines:

"(i) The determination of who is the author or joint author;

"(ii) The duration of copyright protection;

"(iii) The economic rights granted under the law and limitations and exceptions to protection;

"(iv) The nature of the protected subject matter (expression embodied in the work, as opposed to the idea behind it, and the dividing line between them);

"(v) The transferability of economic rights, the possibilities for terminating transfers and licences and other provisions regulating transfers or licences of rights;

"(vi) The scope and transferability of moral rights;

"(vii) Presumptions relating to the exercise and transfer of rights and

limitations relating to who may exercise rights;

"(viii) Attribution of original ownership in the case of commissioned works and works created by an employee within the scope of employment;"

(f) The reference to the protection of a trademark on the basis of a first-to-use or first-to-register rule should be reviewed;

(g) Paragraph 63 should be revised to provide that ownership with respect to intellectual property was a matter of intellectual property law, that the legal nature of a transfer for security purposes as a security device was a matter of general property and secured transactions law and that the legal nature of a licence was a matter of intellectual property and contract law;

(h) Paragraph 64 should be revised to clarify that any rules of secured transactions law on enforcement would not apply to the extent that they were inconsistent with rules of law relating to intellectual property that dealt with the enforcement of security rights in intellectual property.

30. The suggestion mentioned in paragraph 29 (a) above was objected to. It was widely felt that a non-transferable asset could not be encumbered. The suggestion to introduce a recommendation as to who would be entitled to take the steps necessary to protect the encumbered intellectual property right if intellectual property law did not deal with the matter was also objected to. It was widely felt that that was a matter of intellectual property law. Subject to the other changes mentioned above, the Working Group approved the substance of that section of the draft annex.

2. Application of the principle of party autonomy to security rights in intellectual property

31. The Working Group approved the substance of the section of the draft annex dealing with the application of the principle of party autonomy to security rights in intellectual property.

C. Creation of a security right in intellectual property

1. The concepts of creation and third-party effectiveness

32. The Working Group approved the substance of the section of the draft annex dealing with the concepts of creation and third-party effectiveness of a security right.

2. Unitary concept of a security right

33. The Working Group approved the substance of the section of the draft annex dealing with the unitary concept of a security right.

3. Requirements for the creation of a security right in intellectual property

34. With respect to paragraph 73, the suggestion was made that the text should refer to the registration of a security right in an intellectual property registry and that the last sentence should be deleted as it dealt with third-party effectiveness rather than creation issues. Subject to those changes, the Working Group approved

the substance of the section of the draft annex dealing with requirements for the creation of a security right in intellectual property.

4. Rights of a grantor in the intellectual property to be encumbered

35. With respect to paragraph 75, it was suggested that the last sentence should be deleted as it dealt with matters that were not particularly relevant in that context. It was also suggested that the heading should be changed to refer to rights "relating to intellectual property" as the term "rights in intellectual property" might be misunderstood as meaning only the rights of a rights holder. Subject to those changes, the Working Group approved the substance of the section of the draft annex dealing with rights of a grantor in the intellectual property to be encumbered.

5. Distinction between a secured creditor and a rights holder with respect to intellectual property

36. With respect to paragraph 76, the suggestion was made that the text should be revised to clarify that the term "rights holder", as used in the draft annex, was generally intended to denote an owner and that a secured creditor was not an owner for the purposes of secured transactions law, which would not affect there being a different treatment of a secured creditor for the purposes of intellectual property law. In that connection, it was agreed that the meaning given to the term "rights holder" in the draft annex did not affect its exact meaning under intellectual property law.

37. With respect to paragraph 77, the suggestion was made that it should be revised to read along the following lines:

> "Under the enforcement chapter of the Guide, upon default of the grantor the secured party may dispose of the encumbered asset or may propose to retain it in satisfaction of the secured obligation (see recommendations 156 and 157). Under proper circumstances, the secured creditor may be the buyer at a disposition that it conducts (see recommendations 141 and 148). Thus, while the creation of a security right in intellectual property does not work a change in ownership of the intellectual property and nothing in the Guide provides that it changes the rights holder of the intellectual property, enforcement of the security right will often result in the grantor's rights in the intellectual property being transferred (and, thus, the identity of the rights holder, as determined by intellectual property law, might change). In situations in which the enforcement of the security right in the intellectual property results in a disposition to the secured creditor or retention of the intellectual property in satisfaction of the secured obligation, ownership may, at that time, be transferred to the secured creditor."

38. Subject to the changes mentioned above, the Working Group approved the substance of the section of the draft annex dealing with the distinction between a secured creditor and a rights holder with respect to intellectual property.

6. Types of rights in intellectual property that may be subject to a security right

39. It was suggested that the heading should be revised to read along the following lines: "Categories of encumbered assets in an intellectual property context".

40. With respect to paragraph 80, it was suggested that the text should clarify whether the right to sue infringers, which was incidental to the rights of the rights holder, could be used as security for credit separately from the other rights of the rights holder.

41. It was also suggested that examples of evaluation systems should be set out since, while evaluation of the rights of a rights holder was not a legal issue, it was an important prerequisite for the use of intellectual property rights as security for credit. In that connection, reference was made to work by WIPO and the International Organization for Standardization.

42. With respect to paragraph 82, it was suggested that the text should clarify that inalienability could flow from (a) a contract that was enforceable by law, (b) a legal rule independent of any contract or (c) situations in which a security right in an asset that was non-transferable extended to the proceeds of that asset.

43. With respect to paragraph 83, it was suggested that the value of the licensor's contractual rights other than the right to claim royalties should also be discussed.

44. With respect to paragraph 84, it was suggested that the text should make it clear that (a) while, for the purposes of secured transactions law, royalties would be treated in the same way as any other receivables, their possible treatment for other purposes as part of the intellectual property right from which they flowed would not be affected; (b) the recommendations of the Guide with regard to a security right in an asset extending into proceeds, its third-party effectiveness and priority would apply to royalties as proceeds of intellectual property; and (c) reference should be made to paragraph 85 to clarify that a licensee could raise against an assignee of the royalties most of the defences or rights of set-off that the licensee could raise against the licensor (see recommendation 120 of the Guide).

45. With respect to paragraph 87, last sentence, it was suggested that reference should be made to recommendation 24 of the Guide rather than to the Guide in general in order to avoid inadvertently giving the impression, for example, that the licensor controlled the flow of royalties even in situations where the licensee had created a security right in its inbound royalty payments or that the licensor would be treated in the case of the insolvency of the licensee as a privileged rather than as an unsecured creditor.

46. With respect to paragraph 90, it was suggested that there was no need to refer to a licensee's right to claim royalties as, if the licensee had a right to claim royalties, it would do so as a sub-licensor and the discussion of the licensor's rights in previous paragraphs would be sufficient.

47. With respect to paragraph 94, while some doubt was expressed as to whether the second part of the recommendation contained therein should be retained, it was agreed that the recommendation was useful and should be retained subject to (a) clarifying the context with language along the following lines: "in the case of a security right in a tangible asset with respect to which intellectual property is used"; and (b) expanding the commentary to explain in particular the second part of the recommendation, but also the meaning of the words "to deal with the tangible assets".

48. Subject to the changes mentioned above, the Working Group approved the substance of the section of the draft annex dealing with types of rights in intellectual property that may be subject to a security right.

7. Security rights in future intellectual property

49. With respect to paragraph 95, it was suggested that the text should clarify that recommendation 17 of the Guide applied to intellectual property except as provided in recommendation 4, subparagraph (b), of the Guide.

50. With respect to paragraph 96, it was suggested that the reference to statutory prohibitions resulting from the application of the *nemo dat* principle (i.e. that one cannot give more rights than oneself has) was unnecessary because it applied to all types of asset by virtue of the application of general property law principles.

51. With respect to paragraph 98, first sentence, it was suggested that the text should be aligned more closely with recommendation 4, subparagraph (b), of the Guide.

52. Subject to the changes mentioned above, the Working Group approved the substance of the section of the draft annex dealing with security rights in future intellectual property.

8. Legislative or contractual limitations on the transferability of intellectual property

53. With respect to paragraph 100, it was suggested that the text should include reference to article 8 of the United Nations Convention on the Assignment of Receivables in International Trade[11] dealing with the effectiveness of an assignment of receivables. Subject to that change, the Working Group approved the substance of the section of the draft annex dealing with legislative or contractual limitations on the transferability of intellectual property.

9. Acquisition financing and licence agreements

54. With respect to paragraphs 101 and 102, it was agreed that the only point that should be retained was that a licence agreement was not a secured transaction. The Secretariat was requested to include that point in the appropriate place in the draft annex.

D. Effectiveness of a security right in intellectual property against third parties

1. The concept of third-party effectiveness

55. With respect to paragraphs 1 and 2, it was suggested that the text should be recast to deal with the concept of third-party effectiveness rather than with the question of how third-party effectiveness could be achieved, as that matter was dealt with in paragraphs 5 and 6. With respect to paragraph 2, it was suggested that the text should distinguish between situations in which a security right could be made effective against third parties through registration in the general security rights

---

[11] United Nations publication, Sales No. E.04.V.14.

registry or in the relevant intellectual property registry and situations in which registration of a security right in the relevant intellectual property registry was exclusive. It was stated that in the latter situation, recommendation 4, subparagraph (b), would apply and would result in registration in the relevant intellectual property registry becoming the exclusive method of achieving third-party effectiveness of security rights in intellectual property.

56. With respect to paragraph 4, it was suggested that the text should be recast to discuss the notion of "third parties" and "third-party effectiveness" rather than the notions of "competing claimant" and "priority". It was widely felt that, while infringers were third parties against whom a security right would be effective, they were not competing claimants, unless they had a legitimate claim and that claim was appropriately acknowledged. In that connection, it was stated that if an "alleged infringer" had a legitimate claim, the issue would be the rights of the grantor of the security right and the *nemo dat* principle, as, if the alleged infringer was a legitimate claimant, the grantor might not have had rights to encumber at the time of the creation of the security right.

57. Subject to the changes mentioned above, the Working Group approved the substance of the section of the draft annex dealing with the concept of third-party effectiveness.

2. Third-party effectiveness of security rights in intellectual property that are registrable in an intellectual property registry

58. With respect to paragraph 5, it was suggested that the text should clarify that, if registration in a specialized registry did not have third-party effects, such a registry would not qualify as a specialized registry with respect to which the relevant recommendations of the Guide could apply. In that connection, it was observed that, even if registration of a security right in the relevant intellectual property registry had constitutive effects, the registry would still qualify as a specialized registry under the Guide at least to the extent that the security right registered therein would become effective against all parties.

59. With respect to paragraph 6, it was suggested that the text should clarify that the situations described therein were situations to which, under recommendation 4, subparagraph (b), of the Guide, law relating to intellectual property would apply.

60. With respect to paragraphs 8-11, it was suggested that the text should be recast to focus on third-party effectiveness rather than on priority issues.

61. With respect to paragraph 9, it was suggested that the text should clarify that the searchers would potentially be competing claimants with respect to encumbered intellectual property. It was also suggested that the reference to difficulties associated with dual searching should be toned down as dual searching was done in several jurisdictions without much difficulty.

62. Subject to the changes mentioned above, the Working Group approved the substance of the section of the draft annex dealing with third-party effectiveness of security rights in intellectual property that are registrable in an intellectual property registry.

3. Third-party effectiveness of security rights in intellectual property that are not registrable in an intellectual property registry

63. It was suggested that reference should be made to registration of a notice with respect to a security right in a trade secret. It was stated that, for confidentiality reasons, security rights in trade secrets could not be registered in an intellectual property registry. It was also observed that, to the contrary, registration of a notice with respect to a security right in a trade secret was possible because of the limited amount of data disclosed in that notice. In that connection, the suggestion was also made that the draft annex should discuss the so-called "technology escrow arrangements", under which, for example, a licensee could be given access to copyrighted software or trade secrets in the event the licensor discontinued support, maintenance or development of the licensed product. Subject to those changes, the Working Group approved the substance of the section of the draft annex dealing with third-party effectiveness of security rights in intellectual property that are not registrable in an intellectual property registry.

E. The registry system

1. The general security rights registry

64. The Working Group approved the substance of the section of the draft annex dealing with the general security rights registry.

2. Asset-specific intellectual property registries

65. With respect to paragraph 18, it was suggested that reference should be added to other international registration regimes, such as the regimes under the Patent Law Treaty (Geneva, 2000) and European Council regulation No. 40/941 of 20 December 1993 on the Community trademark. It was stated that examples of international registry systems in which registration of security rights in intellectual property was possible would be useful for the completeness of the discussion on registration and coordination of registries. Subject to those changes, the Working Group approved the substance of the section of the draft annex dealing with asset-specific intellectual property registries.

3. Coordination of registries

66. It was agreed that legislators should be invited to review their general security rights and intellectual property registration systems to ensure that they were compatible. It was also agreed that the text should cross-reference examples 2-5 set out in chapter I, section D, of the draft annex, since those examples dealt with the effects of registration in intellectual property registries and general security rights registries, as well as with the relationship between the two. Subject to those changes, the Working Group approved the substance of that section of the draft annex.

4. Registration of notices about security rights in future intellectual property

67. With respect to paragraph 21, it was suggested that the first sentence should refer to the registration of a "notice" about a security right in intellectual property.

68. With respect to paragraph 22, it was suggested that the text should discuss the possibility of recording security rights in intellectual property while the application for registration of intellectual property in the intellectual property registry was pending.

69. Subject to the changes mentioned above, the Working Group approved the substance of the section of the draft annex dealing with the registration of notices about security rights in future intellectual property.

5. Dual registration or search

70. With respect to paragraph 24, it was suggested that the text should include in the list of cases referring to exclusive registration in the general security rights registry for secured transactions purposes a fourth case dealing with situations in which registration of a security right in an intellectual property registry did not have third-party effects.

71. With respect to paragraph 25, it was suggested that the reference to the due diligence requirements applying "equally" to all types of movable assets should be toned down, since, while due diligence was in principle the same, its exact nature might to some extent depend on the exact type of asset involved in each case.

72. Subject to the changes mentioned above, the Working Group approved the substance of the section of the draft annex dealing with dual registration or search.

6. Time of effectiveness of registration

73. It was suggested that the section of the draft annex dealing with the time of effectiveness of registration should either be recast to deal only with third-party effectiveness issues, rather than with priority issues, or be moved to the section dealing with priority. It was stated that a question relating to the time of third-party effectiveness might arise because of a difference in the time of effectiveness of a registration in the general security rights registry and in the relevant intellectual property registry.

74. Subject to the recasting of the section to deal with the time of effectiveness of registration in the general security rights registry and in the relevant intellectual property registry rather than with priority issues, the Working Group approved the substance of that section of the draft annex.

7. Impact of a transfer of encumbered intellectual property on the effectiveness of registration

75. With respect to paragraph 28, it was suggested that the third option should be further explained by reference to the fact that the secured creditor would not need to register an amendment identifying the new transferee and that the transferee would acquire the encumbered asset subject to the security right.

76. With respect to paragraph 30, it was suggested that the text should be recast to avoid inadvertently giving the impression that, with regard to security rights in

intellectual property, the draft annex recommended that a State should take with respect to encumbered intellectual property a different decision from the decision made with respect to other types of encumbered asset as to the issues identified in recommendation 62 of the Guide.

77. However, the concern was expressed that, if the third option mentioned in paragraph 28 did not become the recommended approach with respect to security rights in intellectual property, a secured creditor would have to register amendments each time the encumbered intellectual property became the subject of an unauthorized transfer, licence or sub-licence, at the risk of losing its security right if it were not informed and had not acted promptly. In particular, with respect to licences and sub-licences, it was stated that, if the secured creditor had not authorized a licence and enforced its security right, enforcement would result in termination of the licence and any sub-licence, which would make all the "licensees" infringers. In that connection, it was observed that, as the Working Group had agreed, the third-party effectiveness of a security right in intellectual property against infringers should be left to intellectual property law.

78. In response, it was stated that, at least in the case of intellectual property with respect to which there was a specialized registry, the transferee would have to register the transfer and the secured creditor could be informed. It was also observed that recommendation 62 of the Guide applied only to transfers and that licences did not constitute transfers under the Guide. However, as the characterization of a licence was a matter of intellectual property law, it was pointed out that if a certain type of licence (e.g. an exclusive licence) was treated as a transfer under intellectual property law, that treatment under intellectual property law would result in the treatment of that licence as a transfer under the Guide as well. In that connection, it was mentioned that the general recommendations should apply to protect ordinary-course-of-business transfers or licences, and thus it would be up to each enacting State to choose one of the three alternatives discussed in paragraph 28 (see paras. 97-100 below).

79. Subject to the changes mentioned in paragraphs 75 and 76 above, the Working Group approved the substance of the section of the draft annex dealing with the impact of a transfer of encumbered intellectual property on the effectiveness of registration.

8. Registration of security rights in trademarks

80. The Working Group engaged in a discussion of the recommendations made by the International Trademark Association concerning the registration of security rights in marks (i.e. trademarks and service marks) with a view to determining their compatibility with the Guide.

81. It was stated that the recommendations made in paragraphs 32 (a), (b), (f) and (g), dealing with third-party effectiveness of a security right in a mark, were compatible with the Guide in that they promoted the objectives of transparency and registration in a specialized registry or a general security rights or other commercial registry. In response to a question, it was noted that the recommendations did not deal with priority, but left that matter to national law. It was agreed that that approach would be compatible with the Guide, the provisions of which, when enacted, would be national law.

82. It was also observed that the recommendation in paragraph 32 (c), providing that the creation of a security right in a mark did not result in a transfer of the mark or confer upon the secured creditor the right to use the mark, was also compatible with the Guide. In that connection, it was said that, in the case of enforcement, the secured creditor could sell, but not use, the mark. It was also pointed out, with respect to the recommendation in paragraph 32 (l), that if the secured creditor could not use the mark and the insolvency representative did not use it either, the mark could be lost. In response, it was stated that the secured creditor had a right, but no obligation, to maintain the mark, and the concept of the "excusable non-use" of a mark could result in the preservation of the mark in the case of non-use because of insolvency of the rights holder.

83. In addition, it was observed that the recommendation in paragraph 32 (d) was compatible with the Guide in that it set forth a default rule for the rights of the parties within the limits of the applicable law. As to the recommendation in paragraph 32 (e), it was said that the recommendation was compatible with the Guide to the extent it emphasized the importance of valuation of marks without suggesting any particular system of valuation. With respect to the recommendation in paragraph 32 (h), it was stated that the recommendation was compatible with the Guide in that it recommended the filing of a notice even in relation to mark registries. In response to a question, it was noted that the recommendations did not apply to marks that were not registrable. In response to another question, it was noted that the reference to "the date of the security right" was a reference to the effectiveness of the security right between the parties and not against third parties.

84. As to the recommendations in paragraphs 32 (i), (j) and (k), it was observed that the recommendations were compatible with the Guide in the sense that they provided for efficient enforcement mechanisms and registration of court judgements or administrative enforcement decisions. As to the recommendation in paragraph 32 (m), subject to approval by the appropriate Government authorities, it was stated that it was compatible with the recommendations of the Guide with respect to efficient registration procedures.

85. After discussion, the Working Group agreed that the recommendations on the registration of security rights in marks should be retained. As to the presentation of the recommendations, the Working Group agreed that, while paragraph 31 should be retained in the section of the draft annex dealing with registration of security rights in trademarks, the recommendations in paragraph 32 should be placed in the relevant sections of the draft annex.

F. Priority of a security right in intellectual property

1. The concept of priority

86. With respect to paragraph 33, it was suggested that the statement about a second transferee obtaining a transfer from a rights holder that had already transferred its rights should be toned down as, in some States, a second transferee might be protected as a good-faith purchaser. Subject to that change, the Working Group approved the substance of the section of the draft annex dealing with the concept of priority.

2. Identification of competing claimants

87. With respect to paragraph 34, it was suggested, that in the light of the previous discussion of the Working Group (see para. 20 (d) above), the reference to "infringers" should be deleted from the discussion of competing claimants. It was also suggested that, in the third sentence, the reference to the principle of deference to intellectual property law should be expressed in a separate sentence together with the idea that it would apply only where there was a different rule that applied "specifically" to security rights in intellectual property. It was also suggested that duplication should be avoided with the terminology section. Subject to those changes, the Working Group approved the substance of the section of the draft annex dealing with identification of competing claimants.

3. Relevance of knowledge of prior transfers or security rights

88. With respect to paragraph 36, it was suggested that the word "generally" should be added before the word "irrelevant". It was also suggested that, in the second sentence, the words "notice of it" should be replaced by the words "notice of the later-created security right". In addition, it was suggested that the statement about deference to law relating to intellectual property should be deleted as knowledge-based priority rules did not apply specifically to intellectual property but to all assets in general. That suggestion was objected to on the grounds that that matter should be left to intellectual property law. After discussion, it was agreed that language should be added that qualified the application of the principle of deference to intellectual property law by reference to the existence of knowledge-based priority rules that were specific to intellectual property. Subject to those changes, the Working Group approved the substance of the section of the draft annex dealing with the relevance of knowledge of prior transfers or security rights.

4. Priority of a security right registered in an intellectual property registry

89. With respect to paragraph 37, it was suggested that the text should clarify that the Guide referred to specialized registration systems only to the extent that they permitted registration of security rights and that such registration had third-party effects. With respect to paragraph 39, it was suggested that the paragraph might not be necessary, since, if no registration took place, a security right would not be effective against third parties and paragraph 40 would be sufficient. Subject to those changes, the Working Group approved the substance of the section of the draft annex dealing with the priority of a security right registered in an intellectual property registry.

5. Priority of a security right that is not registrable in an intellectual property registry

90. With respect to paragraph 42, it was suggested that the text should refer to recommendation 13 of the Guide, pursuant to which the grantor ought to have rights in the asset to be encumbered or the power to encumber it for the secured creditor to acquire a security right. It was also suggested that reference should be made to intellectual property law in some States that allowed the acquisition of a security right by a person that had no knowledge that the grantor did not have rights in the asset to be encumbered. Subject to those changes, the Working Group approved the substance of the section of the draft annex dealing with the priority of a security right that is not registrable in an intellectual property registry.

6. Rights of transferees of encumbered intellectual property

91. The Working Group approved the substance of the section of the draft annex dealing with the rights of transferees of encumbered intellectual property.

7. Rights of licensees in general

92. Differing views were expressed as to whether a licensee of encumbered intellectual property could take a licence free of a security right that was created by a rights holder and was made effective against third parties before the granting of the licence. One view was that the licence needed to be authorized to do so by the secured creditor in the security agreement. Otherwise, the secured creditor could consider the granting of a licence an event of default and enforce its security right by collecting the royalties or selling the licence. Another view was that the secured creditor could be protected in two ways: it could register its security right in the encumbered intellectual property or it could agree with the grantor that the secured creditor would become the rights holder (i.e. become a transferee), if permitted under intellectual property law. In the former case, a subsequent licensee would take the licence subject to the security right with the result that, in the event of default, the secured creditor could enforce its security right and either collect the royalties owed under the licence agreement or sell the licence. In the latter case, any licence given by the grantor of the security right would be unauthorized and constitute an event of both default and infringement.

93. There was general agreement as to the principle that a licensee should take a licence in encumbered intellectual property subject to a security right that was created by the licensor and was effective against third parties at the time the licence was granted. In addition, there was general agreement that a licensee should take the licence free of the security right if the secured creditor had authorized the licence free of the security right. Differing views were expressed, however, as to whether an ordinary-course-of-business non-exclusive licensee should also take the licence free of the security right (see paras. 97-100 below).

94. With respect to paragraphs 45 and 46, it was suggested that the text should clarify that enforcement of a security right in licensed intellectual property that was effective against third parties could result in the transfer of the licensed intellectual property and thus in the termination of the licence, rather than in the secured creditor being able to terminate a licence agreement to which it was not a party.

95. With respect to paragraph 46, it was suggested that the text should clarify that the mere fact that a rights holder created a security right in its intellectual property did not preclude the rights holder from granting licences. In addition, it was stated that, in order for a clause of the security agreement precluding the rights holder from granting any licences to have effects on third-party licensees, it would need to be registered. In response, it was noted that many intellectual property registries did not provide for registration of security rights, and the general security rights registry under the Guide was not set up in such a way as to accommodate registration of security agreements or various clauses of security agreements. It was also observed that whether or not a licence was authorized was a matter of intellectual property law.

96. Subject to the changes mentioned above and the discussion of the rights of ordinary-course-of-business non-exclusive licensees (see paras. 97-100 below), the

Working Group approved the substance of the section of the draft annex dealing with the rights of licences in general.

8. Rights of ordinary-course-of-business non-exclusive licensees

97. Differing views were expressed as to whether an ordinary-course-of-business non-exclusive licensee would take the licence free of or subject to a security right that was created by the licensor and was effective against third parties at the time the licence was granted.

98. One view was that such a licensee should take the licence subject to the security right (meaning that, in case of default and enforcement, the licence would terminate unless other arrangements had been made with the secured creditor). It was stated that, in a number of jurisdictions, the concept of an "ordinary-course-of-business" transaction was unknown and difficult to apply. In addition, it was observed that the concept of an ordinary-course-of-business licence had no precedent in intellectual property law, making it difficult to distinguish an ordinary-course-of-business licence from a non-ordinary-course-of-business licence. The example was given of trademark licences, in respect of which that concept would be extremely problematic. Moreover, it was said that the ordinary-course-of-business concept did not give unauthorized licensees a valid defence. It was also pointed out that often licences were mixed, in that they included both exclusive and non-exclusive rights. It was also mentioned that use of those concepts was not necessary as current intellectual property law already addressed that issue in an appropriate manner by leaving it to the parties to the security agreement. In that connection, it was stated that if the secured creditor wanted the grantor to grant licences, it would authorize all licences or at least those that met certain criteria. In any case, licensees would conduct appropriate due diligence to determine whether a licence had been acquired free of a prior security right.

99. Another view was that an ordinary-course-of-business non-exclusive licensee should take the licence free of the security right (meaning that, in the event of default and enforcement, the licence could nonetheless continue). It was stated that the ordinary-course-of-business concept was a simple and practical concept that was widely known and used. In addition, it was observed that the main purpose for the use of that concept was to protect everyday, legitimate transactions, such as the off-the-shelf purchase of copyrighted software. It was pointed out that, in such transactions, purchasers should not have to do a search in a registry or acquire the software subject to security rights created by the software developer or its distributors. In addition, it was observed that the ordinary-course-of-business concept had nothing to do with the relationship between the licensor and the licensee, and was in no way meant to suggest that the licensee would get a licence free of the terms and conditions of the licence agreement and the law applicable to it. Moreover, it was said that if the secured creditor wanted to discourage non-exclusive licences, it could, in its security agreement (or elsewhere), require the borrower (the licensor) to place in all of the non-exclusive licences a provision that the licence would terminate if the licensor's secured creditor enforced its security right. Similarly, if the licensor did not want its licensee to grant any sub-licences, it could include in the licence agreement a provision whereby the granting of a sub-licence by the licensee would be an event of default under the licence agreement that would entitle the licensor to terminate the licence. It was stated that

nothing in the Guide would interfere with the enforcement of such provisions as between the secured creditor and its borrower, or as between the licensor and its licensee. It was observed that normally the secured creditor would have no interest in doing so, since the licensor would be in the business of granting non-exclusive licences, and the secured creditor would expect the borrower to use the fees paid under those licence agreements to pay the secured obligation.

100. After discussion, it was agreed that, in some cases (e.g. in the case of an off-the-shelf sale or licence of software), licensees should take the licence free of a security right created by the licensor. While willingness was expressed to formulate a recommendation that would bring about that result, possibly on the basis of concepts such as authorization or implied authorization, it was generally found to be difficult to formulate such a recommendation in the abstract without referring to specific examples. The Working Group thus requested the Secretariat to include in the next version of the draft annex examples indicating how intellectual property law addressed the relevant issue, and proposals for a possible recommendation to be included in the draft annex and for commentary referring the matter, in line with recommendation 4, subparagraph (b), of the Guide, to law that applied specifically to intellectual property.

9. Priority of a security right granted by a licensor as against a security right granted by a licensee

101. After discussion, the Working Group approved the substance of the section of the draft annex dealing with the priority of a security right granted by a licensor as against a security right granted by a licensee.

10. Priority of a security right in intellectual property as against the right of a judgement creditor

102. After discussion, the Working Group approved the substance of the section of the draft annex dealing with the priority of a security right in intellectual property as against the right of a judgement creditor.

11. Subordination

103. After discussion, the Working Group approved the substance of the section of the draft annex dealing with subordination.

G. Rights and obligations of the parties to a security agreement relating to intellectual property

1. Application of the principle of party autonomy

104. After discussion, the Working Group approved the substance of the section of the draft annex dealing with the application of the principle of party autonomy.

2. Right of the secured creditor to pursue infringers or renew registrations

105. Some doubt was expressed as to whether the section of the draft annex dealing with the right of the secured creditor to pursue infringers or renew registrations should be retained. In response, it was noted that, like the relevant chapter in the

Guide, the section was intended to list some issues that the parties might wish to address in the security agreement and to provide some rules that would be applicable in the absence of contrary agreement of the parties and would reflect the normal expectations of the parties.

106. As to the content of that section, the view was expressed that the content should be broadened to deal in general with the management of the encumbered intellectual property. In that connection, it was stated that the section contained an indicative list of issues that the parties might wish to address without excluding other issues within the limits of party autonomy set by intellectual property law.

107. With respect to the recommendations contained in the note to paragraph 63, it was agreed that the first was appropriate in that it referred to the agreement of the parties and should thus be retained. As to the second recommendation, both support and criticism were expressed. In support, it was stated that the recommendation reflected the normal expectations of the parties. In opposition, it was observed that, in the absence of an agreement of the parties permitting the secured creditor to pursue infringers or renew registrations, such a recommendation was not appropriate. The Working Group thus decided that the second recommendation should be retained, but within square brackets, for further consideration at a future meeting.

108. Subject to the changes mentioned above, the Working Group approved the substance of that section of the draft annex.

H. Rights and obligations of third-party obligors in intellectual property financing transactions

109. With respect to paragraph 64, it was suggested that the text should clarify that a licensee as the debtor of the royalties owed under the licence agreement had the rights and obligations of a third-party obligor. Subject to that change, the Working Group approved the substance of the section of the draft annex dealing with the rights and obligations of third-party obligors in intellectual property financing transactions.

I. Enforcement of a security right in intellectual property

1. Intersection of secured transactions law and intellectual property law

110. With respect to paragraph 66, it was suggested that the text should clarify that the United Nations Assignment Convention and the Guide dealt with the assignment of receivables rather than receivables in general.

111. With respect to paragraph 67, it was suggested that the last sentence should clarify that the application of intellectual-property-specific enforcement rules in the general law of civil procedure would be preserved.

112. Subject to the changes mentioned above, the Working Group approved the substance of the section of the draft annex dealing with the intersection of secured transactions law and intellectual property law.

2. Enforcement of a security right in different types of intellectual property

113. After discussion, the Working Group approved the substance of the section of the draft annex dealing with the enforcement of a security right in different types of intellectual property.

3. Taking "possession" of encumbered intellectual property

114. With respect to paragraph 71, it was suggested that the text should include a cross reference to the definition of the term "possession" to clarify that actual possession was meant.

115. With respect to paragraph 72, it was suggested that, for consistency in terminology, reference should be made to a "transfer" rather than to a "sale" of encumbered intellectual property.

116. Subject to the changes mentioned above, the Working Group approved the substance of the section of the draft annex dealing with taking "possession" of encumbered intellectual property.

4. Disposition of encumbered intellectual property

117. With respect to paragraph 73, it was suggested that, to clarify that the assignment of the encumbered intellectual property was the result of the enforcement process rather than of a right of the secured creditor as a rights holder, the words "to assign" should be replaced by the words "to effectuate the assignment". Subject to that change, the Working Group approved the substance of the section of the draft annex dealing with the disposition of encumbered intellectual property.

5. Rights acquired through disposition of encumbered intellectual property

118. With respect to paragraph 75, it was suggested that the statement in the last sentence that the secured creditor did not become a rights holder as a result of the enforcement process should be toned down, as the secured creditor could acquire the encumbered intellectual property in the context of enforcement. Subject to that change, the Working Group approved the substance of the section of the draft annex dealing with the rights acquired through disposition of encumbered intellectual property.

6. Proposal by the grantor to accept the encumbered intellectual property

119. With respect to paragraph 78, fifth sentence, it was suggested that, to avoid giving the impression that registration was a mandatory requirement, the text should be revised to clarify that the secured creditor should register in order to enjoy the benefits resulting from registration. Subject to that change, the Working Group approved the substance of the section of the draft annex dealing with the proposal by the grantor to accept the encumbered intellectual property.

7. Collection of royalties and licence fees

120. With respect to paragraph 79, it was suggested that the text should clarify that the Guide incorporated the principles of the United Nations Assignment Convention with regard to assignments of receivables. Subject to that change, the Working

Group approved the substance of the section of the draft annex dealing with the collection of royalties and licence fees.

8. Licensor's other contractual rights

121. After discussion, the Working Group approved the substance of the section of the draft annex dealing with a licensor's other contractual rights.

9. Enforcement of security rights in tangible assets related to intellectual property

122. With respect to paragraph 81, it was suggested that the text should clarify the exhaustion doctrine by referring to an "intellectual property right" rather than to "intellectual property", as it is the right that would be exhausted and not the property, and by a more specific reference to "first marketing or sale" rather than the general reference to "first use". Subject to those changes, the Working Group approved the substance of the section of the draft annex dealing with the enforcement of security rights in tangible assets related to intellectual property.

10. Enforcement of a security right in a licensee's rights

123. Subject to the making of the same change in paragraph 86 as in paragraph 78 (see para. 119 above), the Working Group approved the substance of the section of the draft annex dealing with the enforcement of a security right in a licensee's rights.

J. Law applicable to a security right in intellectual property

1. Law applicable to proprietary matters

124. It was agreed that alternative C in paragraph 97 should be deleted. It was widely felt that, by referring to the law of the State under whose authority the registry was maintained, alternative C would introduce uncertainty as to the law applicable or, at least, increase the time and cost of a transaction, since a secured creditor would need to undertake a search to identify the relevant registry in which the intellectual property to be encumbered was registered.

125. It was widely felt that both alternative A and alternative B had advantages and disadvantages. In favour of alternative A, it was stated that the law of the State in which protection of the intellectual property was sought (*lex protectionis*) was the law applicable to ownership rights under intellectual property law. It was also stated that, by referring to the *lex protectionis*, alternative A would result in the application to a priority conflict between a transferee and a secured creditor of the same law that would apply to a priority conflict between two secured creditors. At the same time, it was observed that alternative A presented the disadvantage that a secured creditor would have to register in multiple jurisdictions, a result that was likely to increase the transaction cost. It was also observed that alternative A did not make reference to regional organizations that provided regional registration systems.

126. In favour of alternative B, it was observed that, by referring to the law of the grantor's location, the approach would result in the application of a single law to the creation, third-party effectiveness, priority and enforcement of a security right. It was stated that, to avoid referring a priority conflict between a transferee and a

secured creditor to two different laws (i.e. to the *lex protectionis* and to the law of the grantor's location), alternative B referred that priority conflict to the *lex protectionis*. It was also observed that alternative B was useful in that other priority conflicts, including a priority conflict with the insolvency representative, would be referred to the law of the grantor's location, that is, the law of the assignor's centre of main interests (i.e. the real, rather than the statutory, seat). To avoid introducing to alternative B the problems of alternative C referred to above (see para. 124), the Working Group agreed that the bracketed text in alternative B should be deleted.

127. While the view was expressed that both alternatives might be retained in the final text of the annex, the Working Group agreed that every effort should be made to reach agreement on one recommendation, with the advantages and disadvantages of each alternative being discussed in the commentary. In order to facilitate future discussions, the Secretariat was requested to set out practical examples against which the alternatives could be tested, and to further develop in the commentary the comparative advantages and disadvantages of the two alternatives. The Working Group also agreed that cooperation with the Hague Conference on Private International Law and the European Commission would be particularly welcome and requested the Secretariat to continue its efforts to ensure such cooperation and coordination.

2. Law applicable to contractual matters

128. After discussion, the Working Group approved the substance of the section of the draft annex dealing with the law applicable to contractual matters.

K. The impact of insolvency on a security right in intellectual property

129. During the session, it was stated that the issues to be referred to Working Group V pursuant to the decision of the Commission[12] presented four possible scenarios (see para. 23 (f) above), depending on whether (a) it was the licensor or licensee that had granted a security right in its rights under the licence; and (b) it was the licensor or licensee with respect to whom insolvency proceedings had been instituted. The questions that might be raised with respect to the effects of an insolvency proceeding on the rights of the secured creditor in each of those scenarios were considered, together with possible answers (see annex to the present report). The questions were felt to address as well the effects of a continuation or rejection of the licence contract in the case of an insolvency proceeding of a party to the licence contract. Moreover, the questions assumed that the circumstances were such that, pursuant to recommendations 69-86 of the *UNCITRAL Legislative Guide on Insolvency Law*,[13] the insolvent debtor might choose to continue or to reject the licence contract. It was mentioned that the questions did not address other issues that might arise, such as the effect of a stay on proceeding, possible legal limitations on the ability of the licensee to assign its rights under the licence, the effect of anti-assignment provisions in the licence contract, ipso facto clauses, unsecured claims for damages upon rejection of the licence contract, or whether the licensee had

---

[12] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17* (A/63/17), para. 326.

[13] United Nations publication, Sales No. E.05.V.10.

"vested rights" that it retained following a rejection of the licence contract. It was observed that those issues were generally addressed in the *UNCITRAL Legislative Guide on Insolvency Law*.

130. It was suggested that Working Group VI should ask Working Group V to consider an additional issue concerning the rights of a licensee of intellectual property when insolvency proceedings were instituted with respect to the licensor.

131. In that connection, it was stated that when insolvency proceedings were instituted with respect to a licensor of intellectual property, the licensor or its insolvency representative was entitled to decide to reject the licence contract (see recommendations 69-86 of the *UNCITRAL Legislative Guide on Insolvency Law*). It was observed that, very often, rejection would deprive the licensee of the benefits of a favourable licence contract and, thus, not only adversely affect the licensee but also, if the licensee had granted a security right in its rights under the licence, adversely affect the rights of the licensee's secured creditor. In addition, it was said that while, pursuant to recommendation 82 of the *UNCITRAL Legislative Guide on Insolvency Law*, the licensee might have an unsecured claim to damages as a result of the rejection, it was unlikely that such damages would be recovered in full; thus, the claim to damages might mitigate the adverse effect but would not eliminate it.

132. It was pointed out that one way in which the insolvency laws of some States addressed that issue was to allow the licensee of certain kinds of intellectual property to elect to continue using the intellectual property under the licence contract, even if the licensor or its insolvency representative rejected the licence contract. In such a case, the licensee was obliged to comply with all terms of the licence contract, including the payment of royalties due under the licence contract. However, it was mentioned that the licensor's insolvency estate would be relieved from ongoing obligations with respect to the licence contract, such as providing improvements. As a result, it was argued, the only obligation imposed upon the licensor was the obligation to continue honouring the intellectual property licence, an obligation that did not impose upon the resources of the licensor. It was noted that that approach had the effect of balancing the interest of the insolvent licensor to escape a burdensome contract and the interest of the licensee to protect its investment in the licence. In providing some protection for the licensee's interest, that approach was also said to provide some protection for the secured creditor of the licensee.

133. It was suggested that the annex to the UNCITRAL Legislative Guide on Secured Transactions should point out that a State might wish to consider including in its law a provision such as the one discussed above that would permit the licensee to continue to enjoy its rights under the licence contract in the event that the licensor was in insolvency proceedings and rejected the licence.

134. It was observed that the provisions of the *UNCITRAL Legislative Guide on Insolvency Law* should be carefully reviewed to ensure that the matters not addressed in the questions considered at the session were sufficiently addressed in that Guide. It was widely felt that the matters addressed in those questions and in the preceding paragraphs required careful consideration, in particular because the efficiency of security rights depended on whether those rights could withstand the test of insolvency and because several States were currently considering revising their laws to address those matters.

135. It was also suggested that the draft annex should address additional issues. In support of that suggestion, it was stated that there were two sets of conflicting interests that might arise in the event of the insolvency of a licensor that had granted a security right over a licensed intellectual property right. It was observed that, on the one hand, the secured creditor might seek to sell as rapidly as possible the intellectual property right that was the object of the security right, and recover the amount owed to it from the proceeds of the sale of that right, especially when the stream of royalties was not certain or guaranteed (e.g. by means of an insurance policy).

136. On the other hand, the insolvency representative might oppose the immediate termination of the licence contract and consequent sale in the belief that the continuation of the performance of the licence contract could produce better results in maximizing the value of the encumbered intellectual property right.

137. In that context, it was mentioned that the law of some States established that the secured creditor had a right to request the insolvency representative or the insolvency court, if necessary, to set a legally binding deadline for the decision to continue or not the performance of the licence contract; and to schedule a special hearing before the insolvency court, to attempt mediation between the insolvency representative and the secured creditor in order to obtain further protection for the secured obligation.

138. It was pointed out that the result mentioned in paragraph 137 (b) above might be achieved in various different ways, including through the provision of insurance for the future royalties arising from the licence contract or through the upfront payment of part of the secured obligation.

139. There was support in the Working Group for all the suggestions mentioned in paragraphs 129-138 above. It was widely felt that the suggestions should be referred to Working Group V and, subject to further consideration by both working groups, the result should be reflected in the next version of the draft annex.

140. The Working Group decided that the matters mentioned in paragraphs 129-138 above (which include those raised in the questions contained in the annex) should be referred to Working Group V and that, subject to further consideration by both working groups, the result should be reflected in the next version of the draft annex.

V. Future work

141. Before concluding its session, the Working Group engaged in a discussion of its future work. In that connection, the Working Group discussed a suggestion that guidance should be given to secured creditors accepting intellectual property as security for credit, in particular in relation to licensing practices. It was widely felt that while some discussion could be usefully included in the draft annex, the matter was sufficiently important and broad to be considered as a new project. It was stated that such a project could be aimed at a guide that would provide guidance to parties to secured transactions and guidance on the impact of licensing practices. Examples of similar work mentioned included the current work of the Commission on the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services, which could include guidance for users other than legislators and

regulators (see A/CN.9/615, para. 14), as well as past work of the Commission on the *UNCITRAL Legal Guide on Drawing Up Contracts for the Construction of Industrial Works*.[14] The Working Group agreed that some brief discussion of the matter should be included in the next version of the draft annex. The Working Group also agreed that the matter should be considered in due course as part of a discussion of its future work.

142. As to its future work on the draft annex, the Working Group noted that its fifteenth session was scheduled to be held in New York from 27 April to 1 May 2009. As the thirty-sixth session of Working Group V was scheduled to be held in New York from 18 to 22 May 2009, it was noted that it would probably not be possible to hold in early 2009 a joint session of the two working groups to consider the impact of insolvency on a security right in intellectual property, as originally envisaged by the Commission at its forty-first session.[15] It was also noted that the sixteenth session of Working Group VI was tentatively scheduled to be held in Vienna from 7 to 11 December 2009, those dates being subject to confirmation by the Commission at its forty-second session (Vienna, 29 June-17 July 2009), while the thirty-seventh session of Working Group V was tentatively scheduled to be held in Vienna from 5 to 9 October 2009, those dates also being subject to confirmation by the Commission.

143. In that connection, the Working Group agreed that the sessions of the two working groups to be held in the second half of 2009 should be scheduled in a way that would make it possible to hold a joint session, should such a joint session prove to be necessary. It was widely felt that every effort should be made to conclude discussion on the impact of insolvency on a security right in intellectual property as soon as possible, so that the result of that discussion could be reflected in the draft annex by late 2009 or early 2010. In that connection, the Working Group felt that it should be able to complete its work on the draft annex at its sixteenth session (late 2009) or at its seventeenth session (early 2010) in order to submit the draft annex to the Commission for final approval and adoption at its forty-third session, in 2010.

---

[14] United Nations publication, Sales No. E.87.V.10.

[15] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17* (A/63/17), para. 326.

Annex

Effects of an insolvency proceeding on the rights of a secured creditor in four different scenarios

	Licensor is insolvent	*Licensee is insolvent*
Licensor grants a security right in its rights under a licence contract (primarily the right to receive royalties)	Question: What happens if the licensor or its insolvency administrator decides to continue the performance of the licence contract under the insolvency law (see recommendations 69-86 of the *UNCITRAL Legislative Guide on Insolvency Law*)?[a] Answer: The licensee continues to owe royalties under the licence contract and the secured creditor of the licensor continues to have a security right both in the licensor's right to royalties under the licence contract and in the proceeds of that right, in other words, any royalty payments that are paid.	Question: What happens if the licensee or its insolvency representative decides to continue the performance of the licence contract under the insolvency law (see recommendations 69-86 of the *UNCITRAL Legislative Guide on Insolvency Law*)? Answer: The licensor continues to have a right to receive royalties under the licence contract and thus the secured creditor of the licensor continues to have a security right both in the licensor's right to royalties under the licence contract and in the proceeds of that right, in other words, any royalty payments that are made.
	Question: What happens if the licensor or its insolvency administrator rejects the licence contract under the insolvency law (see recommendations 69-86 of the *UNCITRAL Legislative Guide on Insolvency Law*)? Answer: The licensee does not owe royalties under the licence contract with respect to periods after rejection, but still owes any unpaid royalties for periods before rejection; the secured creditor of the licensor thus has a security right in the right to collect such royalties for periods prior to the rejection and in the royalties paid for those periods, but has no security right in rights to any future royalties because there will be no future royalties under the rejected contract.	Question: What happens if the licensee or its insolvency administrator rejects the licence contract under the insolvency law (see recommendations 69-86 of the *UNCITRAL Legislative Guide on Insolvency Law*)? Answer: The licensee does not continue to owe royalties under the licence contract with respect to periods after rejection, but still owes any unpaid royalties for periods before rejection; the secured creditor of the licensor thus has a security right in the right to collect such royalties for periods prior to the rejection and in the royalties paid for those periods, but has no security right in rights to any future royalties because there will be no future royalties under the rejected contract.
Licensee grants a security right in its rights under a licence contract (primarily the right to use the intellectual property)	Question: What happens if the licensor decides to continue the performance of the licence contract under the insolvency law (see recommendations 69-86 of the *UNCITRAL Legislative Guide on Insolvency Law*)? Answer: The licensee continues to have rights under the licence contract and the secured creditor of the licensee continues to have a security right in those rights under the licence contract.	Question: What happens if the licensee decides to continue the performance of the licence contract under the insolvency law (see recommendations 69-86 of the *UNCITRAL Legislative Guide on Insolvency Law*)? Answer: The licensee continues to have rights under the licence contract and the secured creditor of the licensee continues to have a security right in those rights under the licence contract.
	Question: What happens if the licensor or its insolvency administrator rejects the licence contract under the insolvency law (see recommendations 69-86 of the *UNCITRAL Legislative Guide on Insolvency Law*)? Answer: The licensee does not have rights under the licence contract with respect to periods after rejection, but retains any rights it may still have with respect to periods before rejection; the secured creditor of the licensee continues to have a security right in those rights of the licensee with respect to periods before rejection.	Question: What happens if the licensee or its insolvency administrator rejects the licence contract under the insolvency law (see recommendations 69-86 of the *UNCITRAL Legislative Guide on Insolvency Law*)? Answer: The licensee does not have rights under the licence contract with respect to periods after rejection, but retains rights it may still have with respect to periods before rejection; the secured creditor of the licensee continues to have a security right in those rights of the licensee with respect to periods before rejection.

[a] United Nations publication, Sales No. E.05.V.10.

B. Note by the Secretariat on the Annex to the UNCITRAL Legislative Guide on Secured Transactions dealing with security rights in intellectual property, submitted to the Working Group on Security Interests at its fourteenth session (A/CN.9/WG.VI/WP.35 and Add.1) [Original: English]

CONTENTS

I. Introduction

A. Background

[*Note to the Working Group: For paras. 1-7, see A/CN.9/WG.VI/WP.33, paras. 1-5, A/CN.9/WG.VI/WP.34, paras. 10-11 and A/63/17, para. 326.*]

1. At its thirty-ninth session, in 2006, the Commission considered its future work on secured financing law. It was noted that intellectual property rights (e.g. copyrights, patents and trademarks) were increasingly becoming an extremely important source of credit and should not be excluded from a modern secured transactions law. In addition, it was noted that the recommendations of the draft Legislative Guide on Secured Transactions ("the draft Guide") generally applied to security rights in intellectual property to the extent that they were not inconsistent with intellectual property law. Moreover, it was noted that, as the recommendations had not been prepared with the special intellectual property law issues in mind, the draft Guide suggested that enacting States might consider making any necessary adjustments to the recommendations to address those issues.[1]

2. 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 secured financing 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.[2] 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.[3]

3. Pursuant to that decision of the Commission, the Secretariat organized in cooperation with WIPO a colloquium on security rights in intellectual property rights (Vienna, 18 and 19 January 2007). The colloquium was attended by experts on secured financing and intellectual property law, including representatives of Governments and national and international, governmental and non-governmental organizations. At the colloquium, several suggestions were made with respect to adjustments that would need to be made to the draft Guide to address issues specific to intellectual property financing.[4]

4. At the first part of its fortieth session (Vienna, 25 June-12 July 2007), the Commission considered a note by the Secretariat entitled "Possible future work on

---

[1] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17* (A/61/17), paras. 81 and 82.

[2] Ibid., para. 83.

[3] Ibid., para. 86.

[4] See www.uncitral.org/uncitral/en/commission/colloquia/2secint.html.

security rights in intellectual property" (A/CN.9/632). The note took into account the conclusions reached at the colloquium. In order to provide sufficient guidance to States as to the adjustments that they might need to make in their laws to avoid inconsistencies between secured financing and intellectual property law, the Commission decided to entrust Working Group VI (Security Interests) with the preparation of an annex to the draft Guide specific to security rights in intellectual property rights.[5]

5. At its resumed fortieth session (Vienna, 10-14 December 2007), the Commission finalized and adopted the UNCITRAL Legislative Guide on Secured Transactions ("the Guide") on the understanding that an annex to the Guide specific to security rights in intellectual property rights would subsequently be prepared.[6]

6. At its thirteenth session (New York, 19-23 May 2008), Working Group VI considered a note by the Secretariat entitled "Security rights in intellectual property rights" (A/CN.9/WG.VI/WP.33 and Add.1). At that session, the Working Group requested the Secretariat to prepare a draft of the annex to the Guide on security rights in intellectual property ("the Annex") reflecting the deliberations and decisions of the Working Group (see A/CN.9/649, para. 13). At the same session, the Working Group felt that, while due deference should be expressed to intellectual property law, the point of reference for the Annex should be the Guide and not national secured transactions law (see A/CN.9/649, para. 14). As the Working Group was not able to reach agreement as to whether certain matters related to the impact of insolvency on a security right in intellectual property (see A/CN.9/649, paras. 98-102) were sufficiently linked with secured transactions law so as to justify their discussion in the Annex, it decided to revisit those matters at a future meeting and to recommend that Working Group V (Insolvency Law) be requested to consider those matters (see A/CN.9/649, para. 103).

7. At its forty-first session (New York, 16 June-3 July 2008), the Commission noted with satisfaction the good progress achieved by the Working Group. The Commission also noted the above-mentioned discussion and decision of Working Group VI with respect to certain insolvency-related matters and decided that Working Group V should be informed and invited to express any preliminary opinion at its next session. It was also decided that, should any remaining issue require joint consideration by the two Working Groups after that session, the Secretariat should have the discretion to organize, after consulting with the chairpersons of the two Working Groups, a joint discussion of the impact of insolvency on a security right in intellectual property when the two Working Groups meet back to back in the Spring of 2009.[7]

B. The interaction between secured transactions and intellectual property law under the Guide

8. With only limited exceptions, the recommendations of the Guide apply to security rights in all types of movable asset, including intellectual property (see

---

[5] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17* (A/62/17 (Part I)), paras. 156, 157 and 162.

[6] Ibid., *Sixty-second Session, Supplement No. 17* (A/62/17 (Part II)), paras. 99-100.

[7] Ibid., *Sixty-third Session, Supplement No. 17* (A/63/17), para. 326.

recommendations 2 and 4-7). With respect to intellectual property, the recommendations of the Guide do not apply to the extent that they are inconsistent with national law or international agreements relating to intellectual property (see recommendation 4, subparagraph (b)). Recommendation 4, subparagraph (b) sets out the basic principle with respect to the interaction of secured transactions and intellectual property law (dealing, for example, with patents, trademarks or copyrights) under the Guide. The meaning given to the term "intellectual property" is intended to ensure consistency of the Guide with intellectual property laws and treaties (see para. 12 below). The term "law relating to intellectual property" includes both statutory and case law and is broader than the term "intellectual property law", but narrower than general contract or property law.[8] The scope of recommendation 4, subparagraph (b), will, consequently, be broader or narrower, depending on how a State defines the scope of intellectual property in compliance with its international obligations flowing from intellectual property law treaties (such as the Agreement on Trade Related Aspects of Intellectual Property Rights — generally referred to as "the TRIPS Agreement").

9. The purpose of recommendation 4, subparagraph (b), is to ensure that, when States adopt the recommendations of the Guide, they do not inadvertently change basic rules of intellectual property law. As issues relating to the existence, validity and content of a grantor's intellectual property rights are matters to which the Guide does not speak (see section II.A.4 below), the occasions for possible conflict in regimes on these issues are limited. Nevertheless, in matters relating to the creation, third-party effectiveness, priority and enforcement of a security right in intellectual property, it is possible that in some States the two regimes will provide for different rules. Where this is the case, recommendation 4, subparagraph (b), preserves the precedence of the intellectual property-specific rule. It bears noting, however, that intellectual property law rules in some States relate only to forms of secured transactions that are not unique to intellectual property law and that will no longer be available once a State adopts the recommendations of the Guide (e.g. pledges, mortgages and transfers or trusts of intellectual property for security purposes). For this reason, States that adopt the Guide may also wish to review their intellectual property laws to achieve a better integration of the two regimes, reflecting in particular the integrated and functional approach recommended in the Guide, without modifying the basic policies and objectives of their intellectual property laws.

10. The Annex is intended to provide guidance to States with respect to such an integrated secured transactions and intellectual property law system. Building on the commentary and the recommendations of the Guide, the Annex discusses how the principles of the Guide apply where the encumbered asset consists of an intellectual property right and, where necessary, adds new commentary and recommendations. As is the case with the other asset-specific commentary and recommendations, the intellectual-property-specific commentary and recommendations modify or supplement the general commentary and recommendations of the Guide. Accordingly, subject to contrary provisions of law relating to intellectual property and any asset-specific commentary and recommendations of the Annex, a security right in intellectual property may be created, be made effective against third parties,

---

[8] In spite of the difference between the terms "law relating to intellectual property" and "intellectual property law", for convenience, they are used interchangeably in this Annex.

have priority and be enforced as provided in the general recommendations of the Guide.

11. While it is not the purpose of the Annex to make any recommendations for changes to a State's law relating to intellectual property, as mentioned above, it may have an impact on that law. The Annex discusses this impact and, occasionally, includes in the commentary modest suggestions for the consideration of enacting States (the expression used is "States might" or "States may wish to consider …", rather than "States should"). These suggestions are based on the premise that, by enacting secured transactions laws of the type recommended by the Guide, States have made a policy decision to modernize their secured transactions law. The suggestions seek, therefore, to point out where this modernization might lead States to consider how best to integrate their secured transactions and intellectual property law regimes.

C. Terminology

[*Note to the Working Group: For paras. 12-21, see A/CN.9/WG.VI/WP.33, paras. 39-60, and A/CN.9/649, paras. 104-107.*]

12. As already mentioned, the Guide uses the term "intellectual property" (Introduction, section E). The commentary explains that the meaning given to the term in the Guide is intended to ensure consistency of the Guide with intellectual property laws and treaties, while at the same time respecting the right of the legislature in a State enacting the recommendations of the Guide to align the definition with its own law (national law and treaties). That is, the Guide treats as "intellectual property", for the purposes of the Guide, whatever an enacting State considers to be intellectual property.

13. As also already mentioned, the commentary also clarifies that references to "law" throughout the Guide include both statutory and non-statutory law. In addition, the Guide clarifies that the expression "law relating to intellectual property" (see recommendation 4, subparagraph (b)) is broader than intellectual property law (dealing, for example, with patents, trademarks or copyrights) but narrower than general contract or property law.

14. While the Guide relies on the law of an enacting State for the meaning of the terms used to denote the particular types of intellectual property (e.g. patent, trademark or copyright) or transaction (e.g. transfer or licence of intellectual property), it has its own terminology for matters of secured transactions law. For example, it uses the term "security right" to refer to all types of right that secure an obligation, irrespective of how they are denominated. Thus, the term "security right" would cover the right of a transferee in a transfer for security purposes.

15. The Guide also uses the term "licence" and, in intellectual-property-specific contexts, draws a distinction, first, between the licence agreement and the licence (i.e. the authorization to use the licensed intellectual property) and, second, between exclusive licences and non-exclusive ones. However, the exact meaning of these terms is left to intellectual property, contract and other law that may be applicable (such as the Joint Recommendation Concerning Trademark Licences, adopted by the

Paris Union Assembly and the WIPO General Assembly (2000)[9] and the Singapore Treaty on the Law of Trademarks (2006)).[10] In particular, the Guide does not interfere with the limits or terms of a licence agreement that may refer to the description of the specific intellectual property, the authorized or restricted uses, geographic area of use, and the duration of use. For example, an exclusive licence to exercise the "theatrical rights" in Film A in Country X for "10 years starting 1 Jan. 2008" may be given and it will be different from an exclusive licence to exercise the "video rights" in Film A in Country Y for "10 years starting 1 Jan. 2008". In addition, the Guide does not affect in any way the particular characterization of rights under a licence agreement given by intellectual property law (e.g., in some systems, an exclusive licence agreement creates rights in rem or amounts even to a transfer of various exclusive rights flowing from the intellectual property). However, under the Guide, the term "security right" is not used to denote an exclusive or non-exclusive licence. Rather, a security right in intellectual property, as in any other movable asset, is often defined by reference to the right of the secured creditor, in the case of the grantor's default, to obtain payment or other performance of the secured obligation from the economic value of the intellectual property (i.e. the exploitation rights, licensing rights and rights to claim royalties derived from exploitation and licensing rights).

16. Furthermore, the Guide uses various terms to denote the particular type of intellectual property that may be given as security for credit (i.e. rights of a rights holder, rights of a licensor or of a licensee) without interfering with the nature, the content or the legal consequences of such terms for purposes of intellectual property, contract or property law.

17. The term "receivable" is used in the Guide to reflect a right to payment of a monetary obligation and thus, for the purposes of the Guide, includes the right of the licensor to obtain payment of licence royalties. The term "assignment" is used in the Guide with respect to receivables to denote pure outright transfers, transfers for security purposes (treated under the Guide as security devices) and transactions creating a security right in a receivable. To avoid creating the impression that the recommendations of the Guide relating to assignments of receivables apply also to "assignments" of intellectual property, the term "transfer" (rather than the term "assignment") is used in the Annex to denote the transfer of the rights of a rights holder with respect to intellectual property.

18. In a secured transaction relating to intellectual property, the encumbered asset may be the intellectual property rights of the rights holder. In this case, the Guide's term "grantor" will denote a rights holder. However, the encumbered asset may be a lesser right, such as a licensee's authorization to use the licensed intellectual property in accordance with the terms of the licence agreement, including the right to enter into sub-licence agreements and to obtain payment of sub-royalties (provided that they are transferable under the terms of the licence agreement and the relevant law). In this case, the term "grantor" will refer to a "licensee". Finally, as is the case with any secured transactions relating to other types of movable asset, the term "grantor" may reflect a third party granting a security right in intellectual property to secure the obligation owed by a debtor to a secured creditor.

---

[9] www.wipo.int/export/sites/www/about-ip/en/development_iplaw/pdf/pub835.pdf.

[10] www.wipo.int/treaties/en/ip/singapore.

19. In secured transactions law, the concept of a "competing claimant" is used to identify parties other than the secured creditor in a specific security agreement that might claim a right in the encumbered assets or the proceeds from its disposition. Thus, the Guide uses the term "competing claimant" (e.g. another secured creditor or a transferee, lessee or licensee of an encumbered asset) in the sense of a claimant that competes with a secured creditor. In intellectual property law, however, the notion of a "competing claimant" is not used, and priority conflicts typically refer to conflicts among transferees, licensees and infringers, even if no conflict with a secured creditor is involved. Secured transactions law does not interfere with the resolution of such conflicts that do not involve a secured creditor.

20. The Guide recognizes that a security agreement creates a limited property right (a security right) in an encumbered asset (provided, of course, that the grantor has the right to create a security right in the asset) and does not amount to a transfer of ownership. Thus, in the Guide, the term "secured creditor" (which includes a transferee by way of security) is not used to denote a transferee or an owner. In other words, a secured creditor that acquires a security right under the Guide is not presumed to acquire ownership thereby. This is because normally secured creditors do not wish to accept the responsibilities and costs of ownership, and the Guide does not require that the secured creditor do so. This means, for example, that, even after the creation of a security right, the owner of the encumbered asset may exercise all its rights as an owner (subject, of course, to any limitations it may have agreed to with the secured creditor). Accordingly, when the secured creditor disposes of the encumbered asset enforcing its security right after default, the secured creditor does not thereby become an owner. In this case, the secured creditor merely exercises the owner's rights with the consent of the owner given when the owner granted the security right. Only where, after default, the secured creditor becomes the owner after exercising the remedy of proposing to acquire the grantor's ownership rights in the encumbered asset in total or partial satisfaction of the secured obligation (in the absence of any objection by the debtor and the debtor's other creditors), or acquires the grantor's ownership rights by purchasing the asset at a public sale, may the secured creditor become an owner.

21. This characterization of a security agreement and the rights of a secured creditor applies equally to situations where the encumbered asset is intellectual property. However, the Guide does not affect different characterizations under intellectual property law as long as they are dealing with intellectual property law matters. Under intellectual property law, a security agreement may be characterized as a transfer of the intellectual property rights of a rights holder and the secured creditor may have the rights of a rights holder (e.g. to deal with State authorities, grant a licence or sue infringers). So, for example, nothing in secured transactions law prevents a creditor from agreeing with a rights holder to become a rights holder, as long as the agreement does not relate to securing the performance of an obligation. If the agreement does or is intended to secure the performance of an obligation and intellectual property law permits a secured creditor to become a rights holder, then the term "secured creditor" may denote a rights holder to the extent provided by intellectual property law and the rights of the secured creditor with respect to the encumbered intellectual property will be determined in accordance with secured transactions and intellectual property law as provided in the Guide.

D. Examples of intellectual property financing practices

[*Note to the Working Group: For paras. 22-41, see A/CN.9/WG.VI/WP.33, paras. 8-21, and A/CN.9/649, para. 108.*]

22. To provide a backdrop for the analysis in the Annex, this section sets forth a number of hypothetical fact patterns involving secured transactions in which intellectual property rights are used as encumbered assets.

23. Secured transactions involving intellectual property rights can usefully be divided into three broad categories. The first category consists of transactions in which the intellectual property rights themselves serve as security for the credit. In these transactions, the provider of credit is granted a security right in patents, trademarks, copyrights or other intellectual property rights of the borrower. Examples 1 though 5 below each involve such a situation. Thus, Example 1 presents a situation in which a pharmaceutical company wishes to obtain credit secured by its portfolio of patents and patent applications. Example 2 involves a manufacturer of photocopy machines that wishes to uses its trademark, patents and trade secrets as security for a loan. In Example 3, the borrower is a publisher of comic books that licenses the likenesses of its comic book characters to clothing manufacturers for imprinting on T-shirts and other items of clothing, and the proposed security consists of the anticipated stream of royalty payments under the licence agreements. In Example 4, the encumbered assets are rights in a motion picture of the producer of the film. Finally, Example 5 involves a loan to a software developer whose products incorporate software that it licenses from third parties. Although these five examples differ greatly in terms of the nature of the businesses and types of intellectual property rights involved, they share one common characteristic: in each example, the collateral for the credit consists of the borrower's intellectual property rights, either its own rights or those licensed from third parties.

24. The second category of transactions involves situations in which assets other than intellectual property rights, such as inventory or equipment, serve as security for the credit, but where the value of these assets is based to some extent upon intellectual property rights with which they are associated. This category of transactions is illustrated by Examples 6 though 9. Example 6 involves a situation in which the borrower is a clothing manufacturer, and the assets to be encumbered consist of the grantor's inventory of high-fashion clothing bearing valuable trademarks licensed by the manufacturer from the third-party owners of the trademarks. In Example 7, the grantor is a distributor (rather than the manufacturer) of the inventory described in Example 6. Example 8 involves a retail book store that wishes to secure a credit facility with its stock of books copyrighted in the name of third-party authors and publishers. Finally, in Example 9, the grantor is a manufacturer of equipment that incorporates patented technology licensed to the manufacturer by the owner of the patent.

25. The third category of transaction involves financing transactions that combine the elements of the first two categories. An illustration of this type of transaction is found in Example 10, which involves a credit facility to a manufacturer, secured by an "enterprise mortgage" covering substantially all of the manufacturer's assets, including its intellectual property rights.

26. Each of these categories of transaction involves not only different types (or combinations) of encumbered asset, but also presents different legal issues for a prospective lender or other credit provider.

Category 1

Example 1 (portfolio of patents and patent applications)

27. Company A, a pharmaceutical company that is constantly developing new drugs, wishes to obtain a revolving line of credit from Bank A secured in part by Company A's portfolio of existing and future drug patents and patent applications. Company A provides Bank A with a list of all of its existing patents and patent applications, as well as their chain of title, valuation and royalty receivables. Bank A evaluates which patents, patent applications and royalty receivables it will include in the "borrowing base" (that is, the pool of patents and patent applications to which Bank A will agree to assign value for borrowing purposes), and at what value they will be included. In connection therewith, Bank A obtains an appraisal of the patents and patent applications from an independent appraiser of intellectual property. Bank A then obtains a security right in the portfolio of patents and patent applications and registers a notice of its security right in the appropriate national patent registries (assuming that the applicable law provides for registration of security rights in the patents registry). When Company A obtains a new patent, it provides its chain of title, valuation and potential royalty stream to Bank A for inclusion in the borrowing base. Bank A evaluates the information, determines how much additional credit it will extend based on the new patent, and adjusts the borrowing base. Bank A then makes appropriate registrations in the patent offices reflecting its security right in the new patent.

Example 2 (trademark, patents and trade secrets of a manufacturer)

28. Company B, a well-known manufacturer of photocopy machines, wishes to borrow money from Bank B secured in part by its trademark, its patents used in connection with the photocopy machines and the trade secrets used in its manufacturing process (all of which has been appraised at €100 million by an independent appraiser). Company B is engaged in ongoing sales of its photocopy machines and licensing of its trademark and patents to generate cash flow that is used, in part, to repay the loan. Company B provides Bank B with a list of all countries in which the trademark and patents have been registered or used, along with a list of all approved licensees of the marks and patents. As part the loan documentation, Bank B registers its security right in the appropriate national trademark and patent registries (assuming that the applicable law provides for registration of security rights in these registries).

Example 3 (royalty financing)

29. Company C, a publisher of comic books, licenses its copyrighted characters to a wide array of manufacturers of clothing, toys, interactive software and accessories. The licensor's standard form of licence agreement requires licensees to report sales, and pay royalties on such sales, on a quarterly basis. Company C wishes to borrow money from Bank C secured by the anticipated stream of royalty payments arising under these licence agreements. Company C provides Bank C with a list of the licences, the credit profile of the licensees, and the status of each licence

agreement. Bank C then requires Company C to obtain an "estoppel certificate" from each licensee verifying the existence of the licence, the absence of default and the amount due, and confirming the licensee's agreement to pay future royalties to Bank C until further notice.

Example 4 (motion picture financing)

30. Company D, a motion picture company, wishes to produce a motion picture. Company D sets up a separate company to undertake the production and hire the individual writers, producers, directors and actors. The production company obtains a loan from Bank D secured by the copyright, service contracts and all revenues to be earned from the exploitation of the motion picture in the future. The production company then enters into licence agreements with distributors in multiple countries who agree to pay "advance guarantees" against royalties upon completion and delivery of the picture. For each licence, the production Company D, Bank D and the distributor/licensee enter into an "acknowledgement and assignment" agreement under which the licensee acknowledges the prior security right of Bank D and the assignment of its royalty payments to Bank D, while Bank D agrees that, in case of enforcement of its security right in the licence, it will not terminate the licence so long as the licensee makes payments and otherwise abides by the terms of the licence agreement.

Example 5 (software development financing)

31. Company E is a developer of sophisticated software used in various architectural applications. In addition to certain software components created by the company's in-house software engineers (which the company licenses to its customers), Company E also incorporates into its products software components that it licenses from third parties (and then sub-licences to its customers). Company E wishes to borrow money from Bank E secured by a security right in all of its intellectual property rights, including: (a) its rights in the software components that it develops in-house; (b) its rights as licensee of intellectual property from third parties; and (c) all royalties received by Company E from licensing (and sub-licensing) its programs to its customers.

Category 2

Example 6 (trademarked inventory owned by manufacturer)

32. Company F, a manufacturer of designer jeans and other high-fashion clothing, wishes to borrow money from Bank F secured in part by Company F's inventory of finished goods. Many of the items manufactured by Company F bear well-known trademarks licensed from third parties under licence agreements that give Company F the right to manufacture and sell the goods. Company F provides Bank F with its trademark licence agreements evidencing its right to use the trademarks.

Example 7 (trademarked inventory owned by distributor)

33. Company G, one of Company F's distributors, wishes to borrow money from Bank G secured in part by its inventory of designer jeans and other clothing that it purchases from Company F, a significant portion of which bears well-known

trademarks licensed by Company F from third parties. Company G provides Bank G with invoices from Company F evidencing that it acquired the jeans in an authorized sale, or copies of the agreements with Company F evidencing that the jeans distributed by Company G are genuine.

Example 8 (retail book store financing)

34. Company H, a retail book store, seeks a loan from Bank H secured by Company H's inventory of hardcover and paperback books. The copyrights in all of the books are owned by the authors and publishers of the books. Company H acquires its books in two ways. First, it buys individual copies from publishers. Second, recently, Company H has been taking some books "on consignment" and agreeing to provide shelf space and advertising. Company H only pays for the books when they are sold; it has the right to return the books after several months if they remain unsold.

Example 9 (financing the manufacturing of equipment under a licence agreement)

35. Company I is the licensee of a patent under a licence agreement that gives Company I the right to manufacture and sell equipment that includes technology covered by the patent. Company I wishes to obtain financing for its business secured by the equipment it manufactures and the receivables arising from sales of the equipment to Company I's customers.

Category 3

Example 10 (enterprise mortgage)

36. Company J, a manufacturer and distributor of cosmetics, wishes to obtain a €200 million credit facility to provide ongoing working capital for its business. Bank J is considering extending this facility, provided that the facility is secured by an "enterprise mortgage" granting to the bank a security right in substantially all of Company J's existing and future assets, including all existing and future intellectual property rights that it owns or licenses from third parties.

37. Each of the above examples illustrates how owners or licensees of intellectual property rights, or owners of assets that rely for their value on intellectual property rights, can use these assets as security for credit. In each case, a prudent prospective lender will engage in due diligence to ascertain the nature and extent of the rights of the owners and licensees of the intellectual property involved, and to evaluate the extent to which the proposed financing would or would not interfere with such rights. The ability of a lender to address these issues in a satisfactory manner, obtaining consents and other agreements where necessary from the rights holders of the intellectual property, will affect the lender's willingness to extend the requested credit and the cost of such credit.

38. Each of the examples presents different legal issues for a prospective lender. Some of the issues presented by Examples 1 through 5 (transactions in which the security consists of intellectual property rights) are as follows:

(a) Is there an efficient and straightforward method for creating a security right in the relevant categories of intellectual property rights and making it effective against third parties? Are the procedures for creating a security right costly in terms

of notarial fees or other formal requirements, or registration fees, which will increase the cost of the credit to the borrower? Are these costs justified because of the increased benefits the lender receives through protection of the intellectual property rights that comprise its collateral, which can reduce the cost and increase the amount of the credit that the lender is willing to make available to the borrower because of this increased protection? Is there a way for the lender to easily and inexpensively search the record to establish the priority of its security right in the intellectual property right before it extends credit? Will the security right be effective against an insolvency trustee for the grantor of the security right?

(b) In the case of intellectual property rights that are registered in multiple jurisdictions, will the lender be entitled according to the laws of each of those jurisdictions to register its security rights in such jurisdictions? What benefits or detriments arise from such registrations, and what is the cost of the registrations?

(c) Are there certain categories of intellectual property rights referred to in the examples in which a security right cannot be created under applicable law in one or another jurisdiction?

(d) Can the security right be created in a way that covers not only existing intellectual property rights, but also future intellectual property rights that the grantor develops or acquires? For example, in Example 1, can the security right granted to Bank A automatically extend to new drug patents obtained by Company A and new patent applications filed by Company A?

(e) Where the proposed encumbered asset includes royalty producing licences or sub-licences (as in Examples 3, 4 and 5), is there a straightforward procedure for the borrower to grant a security right in the revenue streams under these licences or sub-licences? Do any of the licences or sub-licences, by their terms, prohibit or otherwise restrict the ability of the licensor or sub-licensor to grant a security right in the licence or sub-licence? If so, what is the effect of such a prohibition or restriction under applicable law (e.g. is such a prohibition or other restriction recognized or deemed to be unenforceable)?

(f) In each of Examples 1 though 5, is there an efficient way for the lender to enforce its security rights in the relevant intellectual property rights if the grantor defaults under the financing arrangement?

39. Examples 6 through 9 present a somewhat different series of issues for a lender:

(a) Using Example 6 for purposes of illustration, if Bank F wishes to realize on its security consisting of trademarked goods if it enforces its security right, would it be required to obtain the consent of the licensors of the trademarks, or to pay royalties to such licensors or otherwise comply with other obligations of Company F under the licence agreements? Alternatively, does Bank F have a right to dispose of the trademarked goods without the consent of the trademark owners? These issues will, of course, require the lender to examine the relevant licence agreements;

(b) What would happen if, while the financing to Company F is outstanding, one of the licensors of the trademarks becomes insolvent? Would the insolvency administrator for that licensor be able to terminate the licence to Company F? If, on the other hand, the licensor is not insolvent, but is nevertheless in default to its own lender, and that lender transfers the trademark to a third party in connection with the

enforcement of its security right, would that transfer terminate the licence to Company F? Would the result depend on whether Company F's licence was made before or after the grant of the security right to the licensor's lender? What effect would that termination have on the ability of Bank F, upon a default by Company F under its credit facility with Bank F, to dispose of existing goods that were manufactured under the licence while the licence agreement was in effect?

(c) If Company F becomes insolvent, would it nevertheless be able to continue to operate under the licences if Company F reorganizes under applicable insolvency law, or, at a minimum, have the right under the licence agreements to complete existing work-in-process? Under what circumstances, if any, would Company F have the right under applicable insolvency law in connection with a sale of its business to a third party, with the approval of the insolvency court, to assign the licences to that third party?

(d) Do the licence agreements in favour of Company F impose any limitations on Company F's ability to disclose confidential information to Bank F that Bank F might require in order to evaluate the trademarks as collateral? In other words, does Bank F have a right to obtain confidential information of the licensor that is subject to non-disclosure? And can Bank F then use the confidential information without restriction?

(e) In Examples 7 and 8, the banks are faced with similar due diligence issues as the bank in Example 6. Are the answers in Example 7 any different because Company G is a distributor of the goods in question rather than a manufacturer? Are the answers in Example 8 any different because the intellectual property rights in question consist of copyrights rather than trademarks? What difference does it make that some copies are sold (and may trigger exhaustion; see para. 93 below and A/CN.9/WG.VI/WP.35/Add.1, paras. 81-84), while other copies are consigned?

(f) Are the answers in Example 9 any different because the intellectual property rights in question consist of patents rather than trademarks?

40. Finally, Example 10 presents the increasingly common situation of a credit facility secured by an enterprise mortgage. This efficient and cost-effective security device, which creates a security right in all or substantially of a grantor's existing and future assets, is recognized in an increasing number of States (subject, in some States, to carve-outs for unsecured creditors and other limitations) (for a more detailed discussion of enterprise mortgages, see section II, A, 7 (d), paras. 64-70 of the Guide). Often, a grantor's intellectual property rights are included in the broad security grant of an enterprise mortgage. Consistent with the approach consistently taken by this Annex, however, that grant is subject to the specific provisions and requirements of intellectual property law concerning creation, third-party effectiveness, priority and enforcement of security rights. Nevertheless, the enterprise mortgage may still have significant value for a secured creditor. For example, in the grantor's insolvency proceedings, the security right in the intellectual property created by the enterprise mortgage may well be effective against the grantor's insolvency administrator. Also, if the grantor's business is sold in the insolvency proceedings, such security right may enable the creditor to argue successfully that it is entitled to a larger percentage of the proceeds of the sale,

especially in situations where the sale price for the business is based to a significant extent of the grantor's intellectual property.[11]

41. A practical question applicable to all ten examples is how the borrower can ensure that it receives an accurate appraisal of the value of its intellectual property, thereby maximizing the amount of credit available to it based on the intellectual property. Secured transactions law cannot answer this question. However, insofar as it affects the use of intellectual property as security for credit, some of the complexities involved in valuing intellectual property need to be understood and addressed. For example, although the appraisal must take into account the value of the intellectual property itself and the expected cash flow, there are no universally accepted formulae for so doing. Because of the increasing importance of intellectual property as security for credit, in some States, lenders and borrowers are often able to seek guidance from independent appraisers of intellectual property.

E. Key objectives and fundamental policies

[*Note to the Working Group: For paras. 42-45, see A/CN.9/WG.VI/WP.33, paras. 61-75, and A/CN.9/649, paras. 88-97.*]

42. The overall objective of the Guide is to promote secured credit. In order to achieve this general objective, the Guide elaborates and discusses several additional objectives, including the objectives of predictability and transparency (see Introduction, section C, 2, of the Guide). The Guide also rests on and reflects several fundamental policies. These include providing for comprehensiveness in the scope of secured transactions laws, the integrated and functional approach to secured transactions (under which all transactions performing security functions, however denominated, are considered to be security devices) and the possibility of granting a security right in future assets (see Introduction, section C, 3, of the Guide).

43. These key objectives and fundamental policies are equally relevant to secured transactions relating to intellectual property. Accordingly, the overall objective of the Guide with respect to intellectual property is to promote secured credit for businesses that own or have the right to use intellectual property, by permitting them to use rights pertaining to intellectual property as encumbered assets, while also protecting the legitimate rights of the rights holders, licensors and licensees of intellectual property. Similarly, all the objectives and fundamental policies mentioned above apply to secured transactions in which the encumbered asset is or includes intellectual property. For example, the Guide is designed to:

(a) Allow persons with rights in intellectual property to use intellectual property as security for credit (see Key objective 1, subparagraph (a));

(b) Allow persons with rights in intellectual property to use the full value of their assets to obtain credit (see Key objective 1, subparagraph (b));

---

[11] Some of these questions might be addressed in asset-specific intellectual property legislation. For example, article 19 of the Council Regulation (EC) No. 40/94 on the Community Trademark provides that a security right may be created in a community trademark and, on request of one of the parties, such a right may be registered in the community trademark registry.

(c) Enable persons with rights in intellectual property to create a security right in such rights in a simple and efficient manner (see Key objective 1, subparagraph (c));

(d) Allow parties to secured transactions relating to intellectual property maximum flexibility to negotiate the terms of their security agreement (see Key objective 1, subparagraph (i));

(e) Enable interested parties to determine the existence of security rights in intellectual property in a clear and predictable way (see Key objective 1, subparagraph (f));

(f) Enable secured creditors to determine the priority of their security rights in intellectual property in a clear and predictable way (see Key objective 1, subparagraph (g)); and

(g) Facilitate efficient enforcement of security rights in intellectual property (see Key objective 1, subparagraph (h)).

44. The general policy of intellectual property law is to encourage the creation and dissemination of new ideas or discoveries. To accomplish this general policy, intellectual property law accords certain exclusive rights to rights holders. To ensure that the key objectives of secured transactions law will be achieved in a way that does not interfere with the objectives of intellectual property law and thus provide mechanisms to fund the development and dissemination of new works, the Guide states a general principle for dealing with the interaction of secured transactions law and intellectual property law. The principle is set out in recommendation 4, subparagraph (b) (see section II, A, 4 below). At this stage, it is sufficient to note that the regime elaborated in the Guide does not, in itself, in any way define the content of any intellectual property right, describe the scope of the rights that a holder, licensor or licensee may exercise or impede the rights of the rights holder to preserve the value of its rights by preventing the unauthorized use of intellectual property. In this regard, the key objective of promoting secured credit with respect to intellectual property should be achieved in a way that does not interfere with the objectives of intellectual property law to prevent unauthorized use of intellectual property or to protect the value of intellectual property and thus to encourage further innovation and creativity.

45. Similarly, this key objective should be understood in an intellectual property context as referring to the need to neither diminish the value of intellectual property nor result in the inadvertent abandonment of intellectual property (e.g. failure to use a trademark properly, to use it on all goods or services or to maintain adequate quality control may result in loss of value to, or even abandonment of, the intellectual property). In addition, in the case of goods or services associated with marks, secured transactions law should avoid causing consumer confusion as to the source of goods or services (e.g. where a secured creditor replaces the manufacturer's name and address on the goods with a sticker bearing the creditor's name and address or retains the trademark and sells the goods in a jurisdiction where the trademark is owned by a different person). Finally, secured transactions law should not provide that the granting of a security right in the rights of a licensee under a personal licence could result in the transfer of such rights without the consent of the rights holder.

II. Scope of application and party autonomy

[*Note to the Working Group: For paras. 46-67, see A/CN.9/WG.VI/WP.33, paras. 82-108, and A/CN.9/649, paras. 81-87.*]

A. Broad scope of application

46. The Guide applies to security rights in all types of movable asset, including intellectual property, created or acquired by a legal or natural person, to secure all types of obligation, and to all transactions serving security purposes, regardless of how they are denominated by the parties or characterized by prior law (see recommendations 2 and 8). The Annex has an equally broad scope with respect to security rights in intellectual property.

1. Encumbered assets covered

47. The question of characterization of types of intellectual property and the question of whether each type of intellectual property is transferable (and may thus be encumbered) are matters of intellectual property law. However, the Guide and the Annex are based on the general assumption that a security right may be created in a patent, a trademark and the economic rights under a copyright (but not in the moral rights of an author, if not permitted under intellectual property law). The Guide and the Annex are also based on the assumption that the encumbered asset may be various exclusive rights of a rights holder, the rights of a licensor or the rights of a licensee. However, there is an important qualification to the scope of the Guide and the Annex as just set out. In line with general rules of property law, the right to be encumbered has to be transferable under general property and intellectual property law.

2. Transactions covered

48. As mentioned, the Guide applies to all transactions serving security purposes, regardless how they are denominated by the parties or by intellectual property law. In other words, whether intellectual property law characterizes the transfer of an intellectual property right to a creditor for security purposes as a conditional transfer or even as an "outright" transfer of the right, the Guide characterizes this transaction as giving rise only to a security right and thus applies to it.

3. Outright transfers of intellectual property

49. The Guide applies to the outright transfer (i.e. pure transfer of ownership) of receivables (recommendation 3). As the Guide treats royalties payable by the licensee of intellectual property as receivables, it applies to the outright transfer of the right to receive royalties. The inclusion of outright transfers of receivables in the scope of the Guide reflects the fact that such transfers are usually seen as financing transactions and are often difficult in practice to distinguish from loans against the receivables.

50. The Guide also applies to transfers of all movable assets for security purposes, which it treats as security devices (see recommendation 2, subparagraph (d)). However, the Guide does not apply to outright transfers of any other movable asset,

including intellectual property, except to the extent that there is a priority conflict between an outright transferee of the asset and a secured creditor with a security right in the asset. The reason for the exclusion of outright transfers of any other movable asset, including intellectual property, is that they are sufficiently covered by other law, including intellectual property law and, in the case of some types of intellectual property, made subject to specialized registration.

4. Limitations on scope

51. The Guide assumes that, in order to facilitate access to financing based on intellectual property, States enacting the recommendations of the Guide will include rules on security rights in intellectual property in their modern secured transactions regime. However, the Guide also recognizes that this must be done in a manner that is consistent with the policies and infrastructure of the intellectual property laws of the enacting State (see recommendation 4, subparagraph (b)).

52. The potential points of intersection between secured transactions and intellectual property law are dealt with in detail in the various chapters of this Annex. To provide a context for this more detailed discussion of the implications of recommendation 4, subparagraph (b), it is helpful at this point to delineate: (a) issues that are clearly the province of intellectual property law and are not intended to be affected in any way by the Guide; and (b) issues on which the rules set out in the Guide may be pre-empted or supplemented by a rule of the law relating to intellectual property that regulates the same issue in a different manner from the Guide.

(a) Distinction between intellectual property rights and security rights in intellectual property

53. The Guide addresses only legal issues unique to secured transactions law as opposed to issues relating to the nature and legal attributes of the asset that is the object of the security right. The latter are the exclusive province of the body of property law that applies to the particular asset (with the partial unique exception of receivables to the extent outright transfers of receivables are also covered in the Guide).

54. In the context of intellectual property financing, it follows that the Guide does not affect, and does not purport to affect, issues relating to the existence, validity, and content of a grantor's intellectual property. These issues are determined solely by the applicable intellectual property law. Of course, the secured creditor will need to pay attention to those rules in order to assess the existence and quality of the assets to be encumbered, but this would apply to any other asset. What follows is an illustrative list of issues addressed by intellectual property law relevant to that assessment:

Copyright:

(a) The determination of who is the author or joint author;

(b) The duration of copyright protection;

(c) The limitations on and exceptions to protection;

(d) The nature of protection (expression embodied in the work, as opposed to the idea behind it, and the dividing line between these);

(e) The scope and transferability of moral rights;

(f) The relationship between the transferees of the author of a pre-existing work and the holders of the copyright in a derivative work;

(g) Attribution of original ownership in the case of commissioned works and works created by an employee within the scope of employment.

Patents:

(a) The determination of who is the inventor or joint inventor;

(b) Legal consequences of registration (e.g. validity) of a patent and where to register;

(c) Scope and duration of protection;

(d) The grounds for invalidity challenges (obviousness or lack of novelty);

(e) Whether prior publication precludes patentability;

(f) Whether protection is granted on a first-to-file basis or to the first person to conceive of the invention or reduce it to practice.

Trademarks:

(a) The determination of who is the first user or the rights holder of the trademark;

(b) Whether protection of the trademark is granted on a first-to-use or a first-to-register rule;

(c) Whether ex ante use is a pre-requisite to registration in a trademark registry or whether the right is secured by initial registration and maintained by later use;

(d) The basis of protection of the right (distinctiveness);

(e) The basis for losing protection (holder's failure to ensure that mark retains its association with the owner's goods in the marketplace), as in the case of:

(i) Licensing without the licensor directly or indirectly controlling the quality or character of the goods or services associated with the trademark (so-called "naked licensing"); and

(ii) Altering the trademark so its appearance does not match the trademark as registered;

(f) Whether the trademark may be transferred with or without goodwill.

(b) Areas of potential overlap between secured transactions and intellectual property law

55. The issues just addressed do not create any necessity for deference to intellectual property law since the Guide does not purport to address these issues in the first instance. In other words, they are not issues where the principle of recommendation 4, subparagraph (b), has any application. The deference issue

arises when the law relating to intellectual property of the enacting State provides an intellectual property-specific rule on an issue falling within the scope of the Guide, namely, an issue relating to the creation, third-party effectiveness, priority, enforcement of or law applicable to a security right in intellectual property.

56. The precise scope and implications of deference cannot be stated in the abstract since there is great variation among States on the extent to which intellectual-property-specific rules have been established, and indeed even within the same State depending on which category of intellectual property is at issue. The following examples are, however, illustrative of some typically encountered patterns.

Example 1

57. Some States, in which security rights are created by a transfer of title to the encumbered asset, do not permit security rights to be created in a trademark, owing to concerns that the secured creditor's title would impair the quality control required of the trademark holder. Adoption of the recommendations of the Guide by such a State would eliminate the rationale for this prohibition, since the grantor retains ownership of encumbered assets under the Guide's concept of security right. Nonetheless, adoption of the recommendations of the Guide would not automatically eliminate the prohibition. The requirement for deference means that a specific amendment to relevant intellectual-property-specific legislation would be needed.

Example 2

58. In a few States, as a matter of intellectual property law, registration in a specialized intellectual property registry is a mandatory pre-requisite to either the creation or the third-party effectiveness either of outright transfers only or both of outright transfers and security rights in the category of intellectual property subject to that registry. In view of the principle of deference to intellectual property law embodied in recommendation 4, subparagraph (b), adoption of the Guide's recommendations would not affect the operation of such a rule and such specialized registration will continue to be required. However, deference to intellectual property law may have the effect of compromising the Guide's goal of facilitating secured transactions. Unlike the case with the general security rights registry recommended by the Guide, it is often not possible to register in existing intellectual property registries a notice of security right against the name of the grantor or to cover future intellectual property. Rather, security rights may be registered only in existing intellectual property and new notices must be registered for a security right to extend to each new intellectual property acquired by the grantor in the future.

Example 3

59. In some States, intellectual property law provides for registration of both outright transfers and security rights in their intellectual property registries, but registration is not mandatory in the sense of being an absolute precondition to creation or third-party effectiveness. However, registration has priority consequences in that an unregistered transaction can be defeated by a registered transaction. In the case of such a State, recommendation 4, subparagraph (b), would preserve that intellectual property law rule of the State and, accordingly, a secured

creditor desiring optimal protection may need to register in both the general security rights registry and in the intellectual property registry. This is because: (a) registration in the general security rights registry is a necessary pre-requisite to third-party effectiveness under secured transactions law; and (b) registration in the intellectual property registry will be necessary to protect the secured creditor against the risk of finding its security right defeated by the registration of a competing outright transfer or security right in the intellectual property registry under the intellectual-property-specific priority rules.

60. In some States, registration of transfers and security rights in the intellectual property registry only provides protection against a prior unregistered transfer or security right only if the person with the registered right took without notice of the unregistered right (e.g. if the person is a bona fide purchaser). In States, in which this rule is a rule of intellectual property law to which the Guide defers pursuant to recommendation 4, subparagraph (b) (as opposed to a general rule of secured transactions law present throughout the State's legal system), adoption of the Guide's recommendation will raise the further question as to whether registration of a security right in intellectual property in the general security rights registry constitutes constructive notice to a subsequent secured creditor that registers its security right in the intellectual property registry. If so, under the law of a State that has such a bona fide purchaser rule, it would be unnecessary for a secured creditor that has registered in the general security rights registry to also register in the intellectual property registry in order to prevail as against subsequent transferees and secured creditors.

Example 4

61. As a matter of intellectual property law, some States provide for registration in their intellectual property registries of transfers of, but not of security rights in, intellectual property. In such situations, registration has priority consequences only as between transferees, and not as between a transferee and a secured creditor. In States that adopt this approach, a secured creditor will need to ensure that all transfers of intellectual property to its grantor are duly registered in the intellectual property registry so as to avoid the risk of the grantor's title being defeated by a subsequent registered transfer. Otherwise, however, the secured creditor's rights will be determined by the secured transactions regime. Likewise, the secured creditor will need to ensure that a transfer for security purposes made to it by the grantor is duly registered in the intellectual property registry in order to avoid the risk that a subsequent transferee of the grantor will defeat the security transfer to the secured creditor.

Example 5

62. As a matter of intellectual property law, in some States, registration of transfers and security rights in an intellectual property registry is purely permissive and intended only to facilitate identification of the current rights holder. Failure to register neither invalidates the transaction nor affects its priority (although it might create evidentiary presumptions). In States that adopt this approach, the position is essentially the same as when no specialized registry exists at all, as is often the case for copyright. Where these issues are dealt with by intellectual property law, the Guide defers to it. Where, however, these issues are left to be determined by general

property law, no issue of deference arises since the pre-Guide rules were not derived from the law relating to intellectual property but rather from property law generally. Thus, adoption of the Guide will replace the existing rules on creation, third-party effectiveness, priority and so forth for security rights in intellectual property. Of course, the old rules on these issues will continue to apply to outright transfers of intellectual property since the Guide only covers security rights in intellectual property. Consequently, the secured creditor will need to verify the quality of any outright transfers of intellectual property to its grantor. But this type of risk management is no different from that necessary for any other type of encumbered asset for which a specialized registry does not exist.

Example 6

63. The question of who has title to intellectual property in a chain of transferees is a matter of intellectual property law. At the same time, the question of whether a transfer is an outright transfer or a transfer for security purposes is a matter of general property and secured transactions law.

Example 7

64. Again, intellectual property law may provide for specialized rules governing the manner in which a creditor may seize and sell intellectual property in satisfaction of a judgement against the rights holder. In this case, the Guide's enforcement regime would defer to intellectual property law. However, if there is no specific rule of intellectual property law on the matter and the enforcement of judgements is a matter left to the Code of Civil Procedure or an Executions Act, then the enforcement regime for security rights elaborated in the Guide would take precedence over general national rules relating to the compulsory enforcement of obligations and judgements. Similarly, if there is no specific rule of intellectual property law on extrajudicial enforcement, the relevant regime of the Guide on extrajudicial enforcement of security rights in intellectual property would apply (see A/CN.9/WG.VI/WP.35/Add.1, chapter on enforcement).

B. Application of the principle of party autonomy to security rights in intellectual property

65. The Guide generally recognizes the principle of party autonomy, although it does elaborate a number of exceptions (see recommendations 10 and 111-112). This principle applies equally to security rights in intellectual property to the extent that intellectual property law does not limit party autonomy (see A/CN.9/WG.VI/WP.35/Add.1, paras. 62-63). It should be noted that recommendations 111-113 apply only to tangible assets, as they refer to the possession of encumbered assets and intangible assets are by definition not subject to possession.

66. A special expression of the principle of party autonomy in secured transactions relating to intellectual property would be the following: a grantor and a secured creditor may agree that the secured creditor may acquire certain of the rights of a rights holder under intellectual property law and thus be entitled to register or renew registrations, as well as to sue infringers. This agreement could take the form of a

special clause in the security agreement or a separate agreement between the grantor and the secured creditor, since the secured creditor does not, by the mere fact of obtaining a security right, become a rights holder (unless intellectual property law characterizes the rights of a secured creditor under the Guide as rights of a rights holder or permits the rights holder and the secured creditor to agree that the secured creditor will be the rights holder).

67. It should also be noted that damages received as a result of infringement of intellectual property rights would fall under the definition of "proceeds" ("whatever is received in respect of encumbered assets"), to which the security right in the original encumbered intellectual property would be extended. However, the right to pursue infringement claims (as opposed to the right to receive payment of damages for infringement) is a different matter. This right would not constitute proceeds as they would not fall under the words "whatever is received in respect of encumbered assets" in the definition that qualify the indicative (i.e. non-exhaustive) list of items contained in the definition ("including … and claims arising from defects in, damage or loss of an encumbered asset").

III. Creation of a security right in intellectual property

[*Note to the Working Group: For paras. 68-102, see A/CN.9/WG.VI/WP.33, paras. 112-133, and A/CN.9/649, paras. 16-28.*]

68. The general remarks and recommendations of the Guide with respect to the creation of a security right apply to security rights in intellectual property (see recommendations 13-19), as supplemented by the asset-specific remarks in the following paragraphs.

A. The concepts of creation and third-party effectiveness

69. With respect to all types of encumbered asset (including intellectual property), the Guide draws a distinction between the creation of a security right (its effectiveness as between the parties) and its effectiveness against third parties, providing different requirements to achieve each of these outcomes. In many States, intellectual property law may not draw such a distinction (see A/CN.9/WG.VI/WP.35/Add.1, paras. 1-3).

70. If, in a particular State, law relating to intellectual property law addresses the matter and draws no distinction between creation and third-party effectiveness of a security right in intellectual property, the recommendations of the Guide concerning the requirements for creation and third-party effectiveness do not apply to the extent they are inconsistent with that law. Thus, these matters are determined by reference to the relevant rules of intellectual property law. If law relating to intellectual property does not address these matters, however, the recommendations of the Guide apply to them. States enacting the recommendations of the Guide may wish to consider reviewing their laws relating to intellectual property to determine whether different concepts and requirements on matters relating to the creation and third-party effectiveness of security rights in intellectual property serve specific policy objectives of intellectual property law (rather than other law, such as general property law, contract law or secured transactions law) and should be retained or

whether they should be harmonized with the relevant concepts and requirements of the law recommended in the Guide.

B. Unitary concept of a security right

71. To the extent law relating to intellectual property permits the creation of a security right in intellectual property, it may do so by referring to outright or conditional transfers of intellectual property, mortgages, pledges, trusts or similar terms. The Guide uses the term "security right" to refer to all transactions that serve security purposes. This is referred to as the "unitary approach" to secured transactions. Although the Guide contemplates, by exception, that States taking the non-unitary approach in the limited context of acquisition financing may retain transactions denominated as retention of title or financial lease, this exception only applies to tangible assets, and would, consequently, not be relevant in an intellectual property context. States enacting the recommendations of the Guide may wish to review their law relating to intellectual property with a view to: (a) replacing all terms used to refer to the right of a secured creditor with the term "security right"; or (b) providing that, whatever the term used, rights performing security functions are treated in the same way and that such a way is not inconsistent with the treatment of security rights in the Guide.

C. Requirements for the creation of a security right in intellectual property

72. Under the Guide, the creation of a security right in an intangible asset requires a written agreement. In addition, the grantor must have rights in the asset to be encumbered or the power to encumber it. The agreement must reflect the intent of the parties to create a security right, identify the secured creditor and the grantor, and describe the secured obligation and the encumbered assets (see recommendations 13-15). As already mentioned, no additional step is required for the creation of a security right in an intangible asset. Any additional step (e.g. registration of a notice in a general security rights registry) is aimed at ensuring the third-party effectiveness of such a security right.

73. However, intellectual property laws in many States impose different requirements for the creation of a security right in such property. For example, registration of a security right in intellectual property (e.g. a transfer for security purposes, a mortgage or pledge of intellectual property) may be required for the creation of a security right. In addition, under law relating to intellectual property, the intellectual property to be encumbered may need to be described specifically in a security agreement. Thus, a sufficient description under the Guide (e.g. one that embraces "all intellectual property") may not be sufficient under intellectual property law. All depends on the particular provisions of the relevant intellectual property law regime. Similarly, as intellectual property registries index registered documents by the intellectual property, and not the grantor's name or other identifier, a document that merely states "all intellectual property of the grantor" would not be sufficient for registration in that registry. It would instead be necessary to identify each intellectual property right in the security agreement and in any registered document.

74. In all these situations, under the principle embodied in recommendation 4, subparagraph (b), the law recommended in the Guide would apply only in so far as it is not inconsistent with law relating to intellectual property. Of course, States enacting the Guide may wish to consider reviewing their laws relating to intellectual property to determine whether the different concepts and requirements with respect to the creation of security rights in intellectual property serve specific policy objectives of intellectual property law and should be retained or whether they should be harmonized with the relevant concepts and requirements of the law recommended in the Guide.

D. Rights of a grantor in the intellectual property to be encumbered

75. As mentioned, a grantor must have rights in the asset to be encumbered or the power to encumber it (see recommendation 13). This is a principle of secured transactions law that applies equally to intellectual property. In addition, as a matter of general property law, a grantor may encumber its assets only to the extent that the assets are transferable under general property law. This principle too applies to secured transactions relating to intellectual property. So, a rights holder may only encumber its rights to the extent these rights are transferable under intellectual property law. In particular, a licensee of intellectual property may encumber its licence only to the extent the licence is transferable under intellectual property law and the terms of the licence agreement.

E. Distinction between a secured creditor and a rights holder with respect to intellectual property

76. The question of who has title and whether the parties may determine it for themselves is a matter of intellectual property law. In any case, for the purposes of secured transactions law under the Guide, the creation of a security right does not change the rights holder of the encumbered intellectual property and the secured creditor does not become a rights holder on the sole ground that it acquired a security right (unless intellectual property law characterizes the rights of a secured creditor under the Guide as the rights of a rights holder or simply permits the rights holder and the secured creditor to agree that the secured creditor will be the rights holder).

77. Under the Guide, the secured creditor may become a rights holder, if, after default, it acquires the encumbered intellectual property in satisfaction of the secured obligation, which requires the consent of the grantor and its other creditors (see recommendations 156-157), or purchases the encumbered intellectual property at a public sale (see recommendations 141 and 148). Secured creditors, of course, have an interest in knowing how their rights and obligations will be characterized under intellectual property law, but this will not be determinative of how their rights will be characterized under secured transactions law. Nor will it determine the manner by which those rights will be enforced under secured transactions law (see A/CN.9/WG.VI/WP.35/Add.1, chapter on enforcement).

F. Types of rights in intellectual property that may be subject to a security right

78. Under the Guide, a security right may be created in the rights of a rights holder or the rights of a licensor or a licensee under a licence agreement. In addition, a security right may be created in intellectual property used with respect to a tangible asset (e.g. designer watches or clothes bearing a trademark). The intellectual property needs to be transferable under intellectual property law and covered in the security agreement.

1. Rights of a rights holder

79. The Guide applies to secured transactions in which the encumbered assets are the rights of a rights holder. Accordingly, an effective and enforceable security right may be created to the extent these rights are transferable under intellectual property law. These rights include the following rights of a rights holder: the right to prevent unauthorized use of intellectual property and to sue infringers, the right to register intellectual property and the right to authorize others to use the intellectual property.

80. Typically, the essence of the rights of a rights holder lies in its ability to prevent unauthorized use and to sue infringers of intellectual property. If, under intellectual property law, these rights are transferable, they may be encumbered with a security right and the Guide will apply to such security right. If these rights are inalienable, under intellectual property law, they may not be encumbered by a security right, since the Guide does not affect legislative prohibitions to the transferability of assets other than certain prohibitions with respect to future receivables and receivables assigned in bulk (see recommendation 18).

81. With respect to the right of the rights holder to sue infringers, it should be noted that, if, at the time a security right is created, an infringement has been committed, the rights holder has sued infringers and infringers have paid compensation, the amount paid prior to the creation of a security right would not be part of the encumbered intellectual property and the secured creditor could not claim it in the case of default as part of the originally encumbered asset. However, if the compensation is paid after the creation of the security right (for an infringement that occurred before or after the creation of the security right), the secured creditor may claim it as proceeds of the originally encumbered asset. If the compensation has not been paid, the receivable could be part of the originally encumbered intellectual property and, in the case of default, the secured creditor could claim it. If the lawsuit is still pending at the time of creation of the security right, the secured creditor should be able to give the buyer of the intellectual property in the case of default standing to continue the lawsuit (if permitted under intellectual property law).

82. Similar considerations apply to the question of whether the right to register intellectual property or renew a registration may be transferred and thus be part of encumbered intellectual property. Whether the right to register or renew registration of intellectual property is an inalienable right of the rights holder is a matter of intellectual property law. Whether it is part of the encumbered intellectual property is a matter of the description of the encumbered asset in the security agreement.

2. Rights of a licensor

83. As mentioned above, a licence agreement is not a secured transaction and it does not create a security right. However, under the Guide, a security right may be created in a licensor's rights. If a licensor is a rights holder, it can create a security right in its rights as mentioned above. In addition, such a licensor may create a security right in its right to claim royalties and possibly other contractual rights of value. These other contractual rights might include, for example, the licensor's right to compel the licensee to advertise the licensed intellectual property or product with respect to which the intellectual property is used, or the right to compel the licensee to market the licensed intellectual property only in a particular manner. If the licensor is not a rights holder (but a licensee that grants a sub-licence), it may create a security right in its right to claim royalties or other contractual rights of value.

84. Following the approach taken in most legal systems and reflected in the United Nations Assignment Convention, the Guide treats rights to receive payment of royalties as receivables, that is, as an asset that is separate from the intellectual property from which they flow, just as rents are separate assets from the movable or immovable property from which they flow. This means that the general discussion and recommendations dealing with receivables, as modified by the receivables-specific discussion and recommendations, apply to rights to receive the payment of royalties. Thus, under the Guide, statutory prohibitions that relate to the assignment of future receivables or receivables assigned in bulk or partial assignments are rendered unenforceable (see recommendation 23). However, other statutory prohibitions or limitations are not affected (see recommendation 18). Of course, this treatment would be subject to laws relating to intellectual property that may either expand or contract the capacity of parties to override any statutory prohibitions. Such laws would include, in particular, international accounting rules as to how or when royalties are earned (e.g. International Accounting Standard No. 38 of the International Accounting Standards Board). Such rules provide that royalties that have not been earned under applicable accounting rules at the time they are assigned are subject to particular accounting treatments. Thus, the parties to a licence agreement and to a security agreement creating a security right in the licensor's right to receive such royalties should take this into account in their transactions.

85. Under the Guide, if a licence (or a sub-licence) agreement, under which royalties are payable, includes a contractual provision that restricts the ability of the licensor (or a sub-licensor) to assign the royalties to a third party ("assignee"), an assignment of the royalties by the licensor (or sub-licensor) is nonetheless effective and the licensee (or sub-licensee) cannot terminate the licence agreement (or sub-licence agreement) on the sole ground of the assignment of the royalties (see recommendation 24). However, under the Guide, the rights of a licensee (as a debtor of the assigned receivables) are not affected except as otherwise provided in the secured transactions law recommended in the Guide (see recommendation 117, subparagraph (a)). Specifically, the licensee is entitled to raise against the assignee all defences or rights of set-off arising from the licence agreement or any other agreement that was part of the same transaction (see recommendation 120, subparagraph (a)). In addition, the Guide does not affect any liability that the licensor may have under other law for breach of the anti-assignment agreement (see recommendation 24).

86. It is important to note that recommendation 24 applies only to receivables, and not to intellectual property rights. This means that it does not apply to an agreement between a licensor and a licensee according to which the licensee does not have the right to grant sub-licences.

87. It is equally important to note that recommendation 24 applies only to an agreement between a creditor of a receivable and the debtor of the receivable that the receivable owed to the creditor by the debtor may not be assigned. It does not apply to an agreement between a creditor of a receivable and the debtor of the receivable that the debtor may not assign receivables that the debtor may have against third parties. Thus, recommendation 24 does not apply to an agreement between a licensor and a licensee that the licensee will not assign its right to receive payment of sub-licence royalties from third-party sub-licensees. Such an agreement may exist, for example, where the licensor and the licensee agree that sub-licence royalties will be used by the licensee to further develop the licensed intellectual property. Thus, the Guide does not affect the right of the licensor to negotiate the licence agreement with the licensee so as to control who can use the intellectual property or the flow of royalties from the licensee and sub-licensees.

88. In addition, recommendation 24 does not apply to an agreement between a licensor and a licensee that the licensor will terminate the licence agreement if the licensee violates the agreement not to assign royalties payable to the licensee by sub-licensees. In this context, it should be noted that the right of the licensor to terminate the licence agreement if the licensee breaches this agreement gives the sub-licensees a strong incentive to make sure that the licensor gets paid. Moreover, recommendation 24 does not affect the right of the licensor to: (a) agree with the licensee that part of the licensee's royalties (representing a source for the payment of the royalties the licensee owes to the licensor) be paid by sub-licensees to an account in the name of the licensor; or (b) obtain a security right in the licensee's future royalties to be paid by sub-licensees, register a notice in that regard in the general security rights registry and thus obtain a security right with priority over the licensee's other creditors (subject to the rules of the Guide for obtaining third-party effectiveness and priority of security rights).

89. Finally, it should be noted that the Guide's provisions with respect to limitations to the assignment of receivables apply only to contractual (not legislative) limitations. Many countries have "author-protective" or similar legislation that designates a certain portion of income earned from exploitation of the intellectual property rights as "equitable remuneration" or the like which must be paid to authors or other entitled parties or their collecting societies. These laws often make such payment rights expressly non-assignable. The Guide's recommendations with respect to limitations to the assignment of receivables do not apply to these or other legislative limitations (see also paras. 99-100 below).

3. "Rights"[12] of a licensee

90. A licensee is authorized to use the licensed intellectual property in line with the terms of the licence agreement. In addition, if a licensee has, under the terms of the licence agreement, the authority to grant sub-licences and the sub-licence agreement provides for the payment of royalties, the licensee has a right to claim such royalties from sub-licensees. Some intellectual property laws provide that the licensee may not create a security right in its authorization to use the licensed intellectual property or in its right to receive royalties from sub-licensees without the licensor's consent (an exception may arise where the licensee sells its business as a going concern). The reason is that it is important that the licensor has control over the licensed intellectual property, determining who can use it. Otherwise, the confidentiality and the value of the information associated with the intellectual property right may be jeopardized. If the licence is assignable and the licensee assigns it, the assignee will take the licence subject to the terms and conditions of the licence agreement. The Guide does not affect these licensing practices.

4. Rights in intellectual property used with respect to a tangible asset

91. Intellectual property may be used with respect to a tangible asset. For example: a tangible asset may be manufactured according to a patented process or through the exercise of patented rights; jeans may bear a trademark or cars may contain a chip which includes a copy of copyrighted software; or a CD may contain a software programme or a heat pump may contain a patented product.

92. Where intellectual property is used in connection with a tangible asset, two different types of asset are involved. One is the intellectual property; another is the tangible asset. These assets are separate. Intellectual property law allows a rights holder the ability to control many but not all uses of the tangible asset. For example, intellectual property law allows a rights holder to prevent unauthorized duplication of a book, but not to prevent an authorized bookstore that bought the book to sell it or the end-buyer to make notes in the margin while reading. As such, a security right in intellectual property does not extend to the tangible asset with respect to which intellectual property is used, and a security right in a tangible asset does not extend to the intellectual property used with respect to the tangible asset, unless the security agreement otherwise, explicitly or implicitly, provides. In other words, the extent of the security right depends on the description of the encumbered asset in the security agreement. In this regard, the question arises as to whether the description should be specific (e.g. "all my inventory with all associated intellectual property rights and other rights") or whether a general description ("all my inventory") would suffice. It would seem that a general description would be in line with the principles of the Guide and the reasonable expectations of the parties, with the realization that separate assets are involved. At the same time, key principles of intellectual property law should be respected. To the extent law relating to intellectual property requires a specific description of the encumbered intellectual property, enacting States may wish to review their laws relating to intellectual

---

[12] The term "rights of the licensee" is a generic term intended to cover the authorization granted to the licensee to use the licensed intellectual property and, possibly, grant other licences, and the right to receive payment of licence royalties from sub-licensees. It is not intended to address the question of the legal nature of the licence or its contents, which is a matter for intellectual property law.

property to consider, for example, whether the requirement for a specific description should apply to intellectual property used with respect to tangible assets.

93. As already mentioned, a security right in a tangible asset, in connection with which an intellectual property right is used, does not extend to the intellectual property used with respect to the tangible asset, but does apply to the tangible asset itself, including those characteristics of the asset that use the intellectual property (e.g. the security right applies to a television set as a functioning television set). Thus, a security right in such an asset does not give the secured creditor the right to manufacture additional assets using the intellectual property. Upon default, however, the secured creditor could exercise the remedies recognized under secured transactions law, provided that such exercise of remedies did not interfere with rights existing under intellectual property law. It may be that, under applicable intellectual property law, the concept of "exhaustion" (or similar concepts) might apply to the enforcement of the security right (see A/CN.9/WG.VI/WP.35/Add.1, paras. 81-84).

94. The above-mentioned remarks may be summarized with the following recommendation:

> "The law should provide that, unless otherwise specified in the security agreement, a security right in intellectual property does not extend to the tangible assets with respect to which it is used, and a security right in such tangible assets does not extend to the intellectual property. However, nothing in this recommendation limits the ability of a secured creditor with a security right in such intellectual property to deal with the tangible assets to the extent permitted by intellectual property law, nor does it limit the ability of a secured creditor with a security right in the tangible assets to deal with the tangible assets to the extent permitted by intellectual property law."

G. Security rights in future intellectual property

95. The Guide provides that grantors may grant security rights in future assets, namely assets created or acquired by the grantor after the creation of a security right (see recommendation 17). In principle, this recommendation applies to intellectual property. Accordingly, under the Guide, a security right could be created in future intellectual property (as to legislative limitations in that regard, see recommendation 18 and paras. 96-99 below). This approach is justified by the commercial utility in allowing a security right to extend to future intellectual property. Many intellectual property laws follow the same approach, allowing rights holders to obtain financing useful in the development of new works, provided of course that their value can be reasonably estimated in advance. For example, in some States it is possible to create a security right in a patent application before the patent is issued. Similarly, it is common practice to fund the production of motion pictures or software to be produced in the future.

96. However, in certain cases, intellectual property law may limit the transferability of various types of future intellectual property to achieve specific policy goals. For example, in some cases, a transfer of rights in new media or technological uses that are unknown at the time of the transfer may not be effective in view of the need to protect authors. In other cases, transfers of future rights may

be subject to a statutory right of cancellation after a certain period. In other cases, the notion of "future intellectual property" may include registrable rights created but not yet registered. Statutory prohibitions may also take the form of a requirement for a specific description of intellectual property. They may also be the result of the *nemo dat* principle, in accordance with which a creditor obtaining a security right does not obtain any rights greater than the rights of the grantor. In particular, if the grantor were a licensee, the licensee could not give anything more than the right granted to the licensee from the licensor.

97. Other limitations on the use of future intellectual property as security for credit may be the result of the meaning of the concepts of "improvements" or "adaptations" under intellectual property law. The secured creditor should understand how these concepts are interpreted under intellectual property law and how they may affect the concept of "ownership", which is essential in the creation of a security right in intellectual property. This determination is of particular relevance in the case of software, for example. In this case, a lender's security on a version of a software which exists at the time of the financing may not extend to modifications made to that version following the financing if it is determined that, under intellectual property laws, the modifications to such version are considered to be new works (adaptations) for which a new transfer is required. Similar considerations may apply if software incorporates patents that are subject to "improvements". As is the case with other statutory prohibitions, the Guide does not affect these prohibitions (see recommendation 18).

98. If law relating to intellectual property limits the transferability of future intellectual property, the Guide does not apply to this matter. Otherwise, the Guide applies and permits the creation of a security right in future assets (see recommendation 17). Where intellectual property law includes limitations to the transferability of future intellectual property, these limitations are often intended to protect the rights holder. Again, States enacting the Guide may wish to review their intellectual property law with a view to establishing whether the benefits from these limitations outweigh the benefits from the use of such assets as security for credit.

H. Legislative or contractual limitations on the transferability of intellectual property

99. Specific rules of intellectual property law may limit the ability to create an effective security right in certain types of intellectual property. In many States, only the economic rights of an author are transferable; the moral rights are not transferable. In addition, legislation in many States provides that an author's right to receive equitable remuneration may not be transferable, at least prior to actual receipt of payment by the author. Moreover, in many States, trademarks are not transferable without their associated goodwill. The Guide respects all these on the transferability of intellectual property (see recommendation 18).

100. The only limitations on the transferability of certain assets that the Guide may affect are the legislative limitations on the transferability of future receivables, receivables assigned in bulk and parts or undivided interests in receivables, as well as to contractual limitations on the assignment of receivables arising for the sale or licence of intellectual property rights (see recommendations 23-25). In addition, the

Guide may affect contractual limitations, but only with respect to receivables (not intellectual property) and only in a certain context, that is, in an agreement between the creditor of a receivable and the debtor of that receivable. (see paras. 84-86 above).

I. Acquisition financing and licence agreements

101. The Guide provides that acquisition-financing arrangements with respect to tangible assets (i.e. retention-of-title sales, financial leases and purchase-money lending transactions) should be treated as secured transactions and provides two approaches to such transactions (a unitary approach and a non-unitary approach) from which a State may choose to implement this treatment (see recommendations 9 and 187-202).

102. A licence agreement might be seen as having some of the characteristics of a secured transaction, since it involves: (a) financing of the licensee by the licensor to the extent that royalties are payable in future periodical instalments; (b) the grant of permission to the licensee by the licensor for the licensee to use the intellectual property rights under the conditions set out in the licence agreement; and (c) the retention of title in the intellectual property rights by the licensor. However, a licence agreement is not a secured transaction. In a licence agreement, the licensor remains the owner and does not become a secured creditor, and the licensee does not acquire title, nor does it automatically have the right to give a security right in the licence or give a sub-licence to a third party, if this is not permitted under the licence and intellectual property law. Thus the Guide does not apply to a licence agreement, although it deals with the question whether a licensee takes a licence free or subject to a security right (see A/CN.9/WG.VI/WP.35/Add.1, chapter on priority).

A/CN.9/WG.VI/WP.35/Add.1 (Original: English)

Note by the Secretariat on the Annex to the UNCITRAL Legislative Guide on Secured Transactions dealing with security rights in intellectual property, submitted to the Working Group on Security Interests at its fourteenth session

ADDENDUM

CONTENTS

IV. Effectiveness of a security right in intellectual property against third parties

[*Note to the Working Group: For paras. 1-14, see A/CN.9/WG.VI/WP.33, paras. 137-145, and A/CN.9/649, paras. 29-31.*]

A. The concept of third-party effectiveness

1. As already noted, the Guide distinguishes between creation of a security right (effectiveness of the security right as between the parties) and effectiveness of the security right against third parties of a security right. A security right becomes effective against third parties only if a notice of the security right is registered either in the general security rights registry or in the specialized registry, assuming that one exists and security rights may be registered therein (see recommendation 38). The notice may be registered before or after the creation of the security right or the conclusion of the security agreement (see recommendation 67). However, the security right cannot become effective against third parties before it is created (see recommendation 29).

2. These recommendations apply equally to security rights in intellectual property. As required by recommendation 4, subparagraph (b), however, if the intellectual property law of a State provides that registration in an existing intellectual property registry is the only method by which a security right in a particular type of intellectual property may be made effective against third parties, the recommendations of the Guide defer to that intellectual property law. Similarly, if a document, rather than a notice, has to be registered, with constitutive or declaratory rather than third-party effects, the Guide does not affect this outcome. Consequently, should registration in an intellectual property registry not produce third-party effects under intellectual property law, that registry would not be a specialized registry under the Guide and recommendations of the Guide relating to specialized registries would not apply. On the other hand, where other law relating to intellectual property does not deal with these matters, the Guide applies. States enacting the law recommended in the Guide may wish to review their law relating to intellectual property with a view to considering whether that law should provide that, to the extent a right in intellectual property may be registered in an intellectual property registry, a security right may also be registered in that registry (as to the requirements and legal consequences of registration, see chapter on the registry system below).

3. In some States, the creation and enforcement of security rights in intellectual property are governed by the same rules that govern those issues for other types of intangible property. In other States, as a matter of intellectual property law, these matters are addressed differently when the encumbered asset is intellectual property. It is very common, however, for intellectual property law to provide for particular methods in which a security right in some types of intellectual property may be made effective against third parties. The practices differ for rights in intellectual property that are subject to a specialized registration system (such as patents, trademarks and, in some countries, copyrights), and rights in intellectual property that are not subject to such registration (such as copyrights, in some countries, and trade secrets). These matters are addressed in sections B and C below.

4. In the Guide, the term “effective against third parties” refers to whether a security right in an encumbered asset will be effective as against parties other than the grantor and the secured creditor that have (or may have in the future) a claim against that encumbered asset. Such third parties include creditors of the grantor, as well as transferees, lessees and licensees of the encumbered asset. In intellectual property law, by contrast, third-party effectiveness often refers not only to the

effectiveness of a security right in intellectual property but also to the effectiveness of ownership or other rights in intellectual property itself (or a transfer or licence thereof). Thus, in an intellectual property context, the term "third parties" may include not only claimants competing with a secured creditor but also transferees and licensees competing among themselves, as well as infringers of intellectual property (who are not, of course, competing claimants — a term not used in intellectual property law — or competing transferees). These two sorts of references should not be confused. While effectiveness of a security right as against claimants competing with a secured creditor is a matter of secured transactions law, effectiveness of rights in intellectual property against transferees, licensees or infringers (where no security right is involved) is only a matter of intellectual property law. The Guide does not affect the meaning of the term "third parties" under intellectual property law.

[*Note to the Working Group: The Working Group may wish to consider whether it is appropriate to refer to infringers in this context. Both the term "competing claimant" under secured transactions law and the term "competing transferee" under intellectual property law presuppose a legitimate transaction. Infringers are, by definition, illegitimate, unauthorized third parties. In line with their objectives, the Guide and Annex do not effect any change on that matter.*]

B. Third-party effectiveness of security rights in intellectual property that are registrable in an intellectual property registry

5. Under the Guide, security rights or other rights in intellectual property that, under intellectual property law, are registrable in an intellectual property registry that provides for third-party effects of registration may be made effective against third parties by registration in the intellectual property registry or in the general security rights registry (see recommendation 38).

6. Under intellectual property law, the situation may be different. In some States, a security right is not effective against third parties or even as between the parties (i.e. is not created), unless and until it is registered in the relevant intellectual property registry. In some of these States, a security right is not even effective between the parties until such registration. In other States, intellectual property law provides that a security right is created and becomes effective against third parties when the security agreement is entered into, even without registration. Registration in the relevant intellectual property registry allows certain third parties, typically bona fide transferees without notice, to invoke a priority rule to take precedence over unregistered prior security right, but the unregistered security right still remains effective against other third parties. In still other States, a security right is created when the security agreement is entered into, but registration in the relevant intellectual property registry is necessary to make the security right effective against any third parties, for example, by way of an evidentiary rule that prohibits evidence of unregistered security rights. In still other States, the registration system does not readily accommodate registration of security rights, and third-party effectiveness must be achieved outside the intellectual property registration system. Finally, in some States, it is possible to achieve third-party effectiveness of a security right by using either the intellectual property registry or an available general security rights registry.

7. In any case, the Guide does not recommend a rule that requires registration of a security right in both the relevant intellectual property registry and in the general security rights registry. Under the Guide's recommendations, registration in either the general registry or, assuming security rights may be registered in an intellectual property registry, in the intellectual property registry is sufficient. The Guide deals with the issue of the differing effects of registration in the two registries by way of priority rules that give priority to a security or other right registered in an intellectual property registry (see recommendations 77 and 78). The Guide is thus based on the assumption that, if a secured creditor expects that there will be competing claimants (as this term is understood in the Guide) and needs to have priority, that secured creditor will register in the intellectual property registry. If such registry does not exist or does not permit registration of security rights in intellectual property or the secured creditor is not concerned with priority, the Guide is based on the assumption that that secured creditor will register in the general security rights registry.

8. For example, under the Guide, if A creates a security right in a patent in favour of B who registers in the general security rights registry, and then A transfers title to the patent to C who registers in the patent registry (if so provided under patent law), C would take the patent free of the security right, because the security right was not registered in the patent registry (see recommendation 78). Similarly, if A, instead of making a transfer of the patent, creates a second security right in favour of C and only C registers in the patent registry (if so provided under patent law), under the Guide, C would prevail (see recommendation 77, subparagraph (a)). In either case, as registration of a security right in the patent registry gives superior rights, third-party searchers that intend to acquire a right that is registrable in the specialized registry could rely on a search in that registry and would not need to search in the general security rights registry.

9. If, in order to fully assess their rights, third-party searchers would need to search in both registries, in view of the different structures of the two registries, they would need to search under the name of A in the general security rights registry and under the identifying number of the patent in the patent registry (unless a registry had two indexes, one organized by grantor name and another organized by asset description). Absent dual indexing, these difficulties could only be resolved if the registration rules in the different systems were reconciled in a way that would allow a registration in the relevant intellectual property registry to be transmitted electronically to the security rights registry in the grantor's location and to be indexed under the grantor's name or other identifier. Such transmission would require that either the registrant or the staff of the intellectual property rights registry register a notice that would also be registrable in the general security rights registry.

10. The fact that priority is accorded to a security right registered in the specialized intellectual property registry does not mean that registration in the general security rights registry is of no value, as it could still give a security right priority as against other creditors (e.g. the insolvency administrator in the insolvency of the grantor and other secured creditors that registered only in the general security rights registry). Moreover, security rights in some types of intellectual property may not be registrable in an intellectual property registry, and,

in these situations, registration in the general security rights registry is the only alternative.

11. The discussion in the preceding paragraphs is based on the assumption that the registries are in the same State. If the registries are in different States, different applicable law issues arise, which are discussed below (see chapter X below).

C. Third-party effectiveness of security rights in intellectual property that are not registrable in an intellectual property registry

12. Under the Guide, a security right in intellectual property rights that are not registrable in an intellectual property registry may become effective against third parties by registration of a notice in the general security rights registry. The same rule would apply in cases where a security right in intellectual property is registrable in an intellectual property registry but it is not actually registered and in cases where registration in an intellectual property registry produces no third-party effects. In all these cases, registration of a notice in the general security rights registry is sufficient and the effect of registration is to make the security right effective against third parties (see recommendations 29, 32-33 and 38). The Guide does not recommend that States that currently do not have a specialized registry for certain types of intellectual property create such registries in order to permit the registration of security rights in intellectual property. Nor does it recommend that States that currently do not permit the registration of security rights in an intellectual property registry amend their laws to permit such registrations. Of course, States enacting the recommendations of the Guide may wish to consider permitting registration of security rights in existing intellectual property registries.

13. States take many different approaches to the question of registration under intellectual property law. In some States, often those whose secured transactions law derives from non-possessory pledge concepts, the lack of a general registration system means that a security right cannot be made effective against third parties under the secured transactions law, and since a pledge is not a transfer, it also cannot be registered in an intellectual property registry. In other States, often those whose secured transactions law utilizes mortgage concepts, a security right is treated as another type of "title" transfer and is therefore effective against third parties to the same extent as any other title transfer registrable in an intellectual property registry. Consequently, in those States, any non-title-based security right cannot be registered in an intellectual property registry. Finally, in a few States, there are additional requirements. These commonly include payment of a stamp duty or other transaction tax, or a requirement to give notice to an administrative body, such as a national authors association or collecting society.

14. Where, under intellectual property law, a security right in intellectual property may not be registered in an intellectual property registry, under the Guide, a secured creditor may register a notice of its security right in the general security rights registry (see recommendation 38). However, if under intellectual property law, a transfer of intellectual property for security purposes or a mortgage or pledge in intellectual property may be registered in an intellectual property registry and such registration would give priority, a secured creditor will have to take such a different "security right" and register it in the intellectual property registry. Once again,

States enacting the recommendations of the Guide might wish to consider integrating their secured transactions and intellectual property laws, replacing all existing security devices with a unitary notion of a security right.

V. The registry system

[*Note to the Working Group: For paras. 15-31, see A/CN.9/WG.VI/WP.33, paras. 149-161, and A/CN.9/649, paras. 32-40*.]

A. The general security rights registry

15. As already noted, the Guide recommends that States establish a general security rights registry (see recommendations 54-75). In general, the purpose of the registry system in the Guide is to provide an efficient method for making a security right in existing or future assets effective against third parties, to establish an effective point of reference for priority rules based on the time of registration and to provide an objective source of information for third parties dealing with a grantor's assets as to whether the assets are encumbered by a security right. Under this approach, registration is accomplished by registering a notice as opposed to the security agreement or other document (see recommendation 54, subparagraph (b)). The notice need only provide basic information concerning the security right (see recommendation 57).

16. The Guide provides precise rules for identifying the grantor of the security right, whether an individual or a legal person. This is because notices are indexed and can be retrieved by searchers according to the name or some other reliable identifier of the grantor (see recommendations 54, subparagraph (h), and 58-63). The Guide contains other recommendations to simplify the operation and use of the registry.

B. Asset-specific intellectual property registries

17. As discussed above, many States maintain registries for recording transfers of intellectual property. In some of those registries, security rights may also be registered. For example, patent and trademark registries exist in most States, but not all provide for the registration of a security right. Moreover, in some States, the registration of a notice (whether of a security right or some other right) does not produce third-party effects. Finally, a number of States have similar registries for copyrights, but the practice is not universal.

18. While some States have notice-based intellectual property registries, they mostly use recording act structures or "document registration" systems. In those systems, it is necessary to record the entire instrument of transfer, or, in some cases, a memorandum describing essential terms of the transfer. In addition to national registries, there are a number of international intellectual property registries and registration in these registries is subject to relatively modern treaties that simplify the registration process. For example, the registration requirements for trademarks are simplified by articles 10 and 11 of the Trademark Law Treaty (1994) and the Singapore Treaty on the Law of Trademarks and by the model international

registration forms attached to both treaties. The reason for requiring registration of the transfer document or a memorandum stating the essential terms of the transfer is the need for transparency. Thus, it is essential for the instrument of transfer or memorandum to identify the precise right being transferred in order to give effective notice to searchers and to allow efficient utilization of assets. In addition, the intellectual property registries sometimes index registrations by the specific intellectual property, and not by the grantor's (the intellectual property rights holder's) identifier. This is because the central focus is on the intellectual property itself, which may have multiple co-inventors or co-authors and may be subject to multiple changes in ownership as transfers are made.

[*Note to the Working Group: The Working Group may wish to consider whether international intellectual property registries and their usefulness for the registration of security rights in intellectual property should be discussed in more detail. Enhanced use of international intellectual property registries may be helpful in achieving an integrated registration system with respect to security rights in intellectual property across national borders.*]

C. Coordination of registries

19. As the issue of coordination of registries may affect intellectual property law, the Guide addressed it through the general deference to intellectual property law and appropriate priority rules. Thus, the Guide does not address or purport to address in any way whether registration in the intellectual property registry is possible, the requirements for such registration or its effects. Even if an intellectual property registry does not provide for the registration of security rights or, having provided for their registration, does not give registration third-party effects, the Guide provides no recommendation to the contrary. However, the Guide does make recommendations concerning the registration of security rights in intellectual property in the general security rights registry. For this reason, to the extent that intellectual property law addresses the effects of registration of security rights in an intellectual property registry, the Guide defers to that law (recommendation 4, subparagraph (b)). By contrast, if intellectual property law does not address these issues, the Guide will apply. In addition, as noted above, the Guide ensures coordination of registries through appropriate priority rules. Thus, even in all cases where the Guide permits registration in the general security rights registry, in order to preserve the reliability of intellectual property (and other specialized) registries, and in particular in cases where intellectual property law provides no rule for determining priority between such registrations, the Guide provides that a security right registered in the relevant intellectual property registry has priority over a security right registered in the general security rights registry (see recommendation 77, subparagraph (a)). For the same reason, the Guide provides that a transferee of intellectual property acquires it, in principle, free of a previously created security right, unless the security right is registered in the intellectual property registry (assuming that the relevant intellectual property law provides that security rights may be registered in such a registry) (see recommendations 78 and 79).

20. States enacting the recommendation of the Guide may wish to consider additional ways aimed at coordinating their existing intellectual property registries

with the general security rights registry introduced by the Guide. For example, States might wish to consider requiring the transmission of a notice about a registration in an intellectual property registry to the general security rights registry (or vice versa). Of course, such a transmission of a notice might be easier, simpler and quicker in an electronic system rather than in a paper-based system.

D. Registration of notices about security rights in future intellectual property

21. An essential feature of the general security rights registry recommended in the Guide is that it can apply to future assets of the grantor. This means that the security right can cover assets to be later produced or acquired by the grantor (see recommendation 17). The notice may also cover assets identified by a generic description (see recommendation 66). Thus, if the security right covers all existing or future inventory, the notice may so identify such inventory. Since priority is determined by date of registration, the lender may maintain its priority position in future inventory. This approach greatly facilitates revolving credit arrangements, since a lender extending new credit under such a facility knows that it can maintain its priority position in new assets that are included in the borrowing base.

22. Existing intellectual property registries, however, in many States, do not readily accommodate registration of rights in future assets. As transfers of or security rights in intellectual property are indexed against each specific intellectual property right, they can only be effectively recorded after the intellectual property is first registered in the intellectual property registry. This means that a blanket recording of a security right in future intellectual property in an intellectual property would not be effective, but instead a new recording of the security right would be required each time new intellectual property is acquired.

23. If, under intellectual property law, intellectual property may not be acquired, transferred or encumbered before it is actually registered in an intellectual property registry, the Guide does not interfere with that prohibition and does not make the grant of a security right in such future intellectual property possible. However, if the creation of a security right in future intellectual property is not prohibited under intellectual property law, a security right in such an asset could be created and made effective against third parties under the Guide. States enacting the recommendations of the Guide may wish to consider reviewing their law relating to intellectual property to determine whether a notice of a security right may refer to future intellectual property.

E. Dual registration or search

24. As already mentioned, the Guide leaves to intellectual property law the details of registration of a security right in an intellectual property registry and expressly gives priority, as a matter of secured transactions law, to rights registered in such a registry. As also noted above, this means that the Guide often obviates the need for dual registration or search. In particular, registration only in the general security rights registry would seem to be necessary and useful for secured transactions purposes: (a) where the encumbered asset is a type of intellectual property with

respect to which no registration is required under intellectual property law (e.g. copyrights or trade secrets in many States); (b) where a security right in intellectual property is not registrable in an intellectual property registry; and (c) where there are other secured creditors that register only in the general security rights registry. On the other hand, registration in the relevant intellectual property registry may be preferable, for example: (a) where the encumbered asset is a type of asset for which a registration system exists that produces third-party effects and allows registration of security rights (e.g. patents or trademarks in many States); or (b) where the secured creditor needs to ensure priority over other secured creditors or transferees under applicable intellectual property law.

25. Before a secured transaction is entered into, a secured creditor exercising normal due diligence will typically conduct a search to determine whether there are prior competing claimants that have priority over the proposed security right. As a first step, the secured creditor will search the chain of title to identify prior transfers and to determine whether the grantor actually has rights in the intellectual property so that the security right can become effective in the first instance (but this due diligence requirement applies equally to all other movable assets). Unlike intellectual property registries, the general security rights registry does not record title and, as a result, a search of the chain of title will involve a search of the relevant intellectual property registry, provided that the relevant intellectual property is registrable. As a next step, the secured creditor will search to determine whether each prior party in the chain of title party has granted a security right which might have priority over the proposed security right. Finally, the secured creditor will determine the applicable priority as between rights registered in one of the two registration systems. In cases where the priority is determined solely by registration in the relevant intellectual property registry, as provided in the Guide, a search of only that registry may be sufficient. Otherwise (for example, where the specialized registry does not permit registration of security rights), a secured creditor may have to search in both registries.

F. Time of effectiveness of registration

26. Under patent and trademark law in many States jurisdictions, priority of a registered security or other right dates back to the date of application for registration (which is useful where the registry takes time to actually register the patent or trademark). Under the Guide, registration of a notice of a security right becomes effective when the information in the notice is entered into the registry records and becomes available to searchers (see recommendation 70). Where the registry is electronic, registration of a notice will become effective immediately upon registration. However, where the registry is paper-based, registration of a notice will become effective only some time after registration.

27. In view of the priority given by the Guide to registration of a security right in a specialized registry irrespective of the time of registration (see recommendations 77 and 78), this difference in the approach as to the time of effectiveness of registration may not cause any problems. When the security right in a patent or a trademark becomes effective against third parties by registration in a specialized registry as a matter of patent or trademark law, it will gain priority even over a security right that was registered earlier in a security rights registry.

G. Impact of a transfer of encumbered intellectual property on the effectiveness of registration

28. The Guide recommends that the secured transactions law should address the impact of a transfer of an encumbered asset on the effectiveness of registration in the general security rights registry introduced in the law (see recommendation 65). The commentary to recommendation 65 discusses three ways in which an enacting State may wish to address the matter. One way is to provide that, where the encumbered asset is transferred, the secured creditor must register an amendment identifying the transferee as a new grantor within a certain specified period after the transfer. If the secured creditor fails to do so, the original third-party effectiveness is maintained in principle. However, the security right is subordinated to intervening secured creditors and buyers whose rights arise after the transfer of the encumbered asset and before the amendment notice is registered. A second way in which enacting States may wish to address this issue is to provide that the grace period for the registration of an amendment is triggered only once the secured creditor acquires actual knowledge of the transfer of the encumbered asset by the grantor. A third way might be to provide that a transfer of an encumbered asset has no impact on the third-party effectiveness of a registered security right.

29. If an enacting State adopts the third approach, a secured creditor of the transferor need not register a notice of its security right again. However, transferees down in the chain of title might not be able to discover, through a registry search, a security right granted by any person other than their immediate transferor. In such cases, they would still have to search the chain of title and status of an encumbered asset outside the general security rights registry. On the other hand, if an enacting State adopts the first or the second approach discussed above, a secured creditor will have to register a new notice identifying the transferee as the new grantor. In such a case, the secured creditor will have the burden of monitoring the status of the encumbered asset (to a different degree, depending on whether the first or the second approach is followed). At the same time, however, transferees down the chain of title will be able to identify a security right granted by a person other than their immediate transferor.

30. This discussion is relevant to security rights in intellectual property where the encumbered intellectual property is transferred. States enacting the Guide will have to consider the relative advantages and disadvantages of these different approaches and, in particular, their impact on rights in intellectual property. For example, under the first approach mentioned above, a secured creditor extending credit against the entire copyright in a movie would need to make continuous registrations against tiers of licensees and sub-licensees (if the applicable copyright law treated a licence as a transfer that could be registered) to maintain its priority against them or their own secured creditors. This would be a significant burden on such lenders and might discourage credit against such assets. On the other hand, such an approach would make it easier for a lender to a sub-licensee to find a security right created by its grantor by a simple search only against the grantor. Here, the trade-off is between the relative costs of monitoring and multiple registrations by the lender to the "upstream" party as against the costs of conducting a search of the entire chain of title for security rights created by the "downstream" party. In this regard, it should be noted that typically under intellectual property law a prior transfer or security

right retains its priority over later transfers or security rights without the need for an additional registration in the name of a transferee of an encumbered asset.

H. Registration of security rights in trademarks

31. The International Trademark Association ("INTA") issued a series of recommendations with respect to the registration of security right in trademarks.[1] More specifically, INTA endorsed uniformity and best practise in registration mechanisms and methods regarding security rights in trademarks, recognizing that: intellectual property rights, including trademarks and service marks, are a major and growing factor in commercial lending transactions; lack of consistency in the recording of trademark security rights fosters commercial uncertainty, and also poses a risk that a trademark owner may forfeit or otherwise endanger its trademark-related rights; many States have no recording mechanisms (or have insufficient mechanisms) for the registration of security rights in trademarks; many countries apply different and conflicting criteria for determining what can and will be recorded; and international initiatives on security rights in intellectual property rights by organizations such as UNCITRAL will have broad implications for the way secured financing laws are implemented to deal with registration and other aspects of trademark security rights, especially in developing countries.

32. The main features of such best practices are the following:

(a) Security rights in registered trademarks and in marks covered by pending applications should be registrable;

(b) For purposes of giving notice of the security right, registration in the applicable national Trademark Office or in any applicable commercial registry is recommended, with free public accessibility, preferably through electronic means;

(c) The grant of a security right in a trademark should not effect a transfer of legal or equitable title to trademarks that are the subject of the security right, and should not confer upon the secured creditor a right to use the trademarks;

(d) The security agreement creating the security right should clearly set forth provisions acceptable under local law enabling the renewal of the trademarks by the secured creditor, if necessary to preserve the trademark registration;

(e) Valuation of trademarks for purposes of security rights should be made in any manner that is appropriate and permitted under local law and no particular system or method of valuation is preferred or recommended;

(f) Registration of security rights in the local Trademark Office should suffice for purposes of perfecting a security right in a trademark; at the same time, registration of a security right in any other place allowed under local law, such as a commercial registry, should also suffice;

(g) If local law requires that a security right be registered in a place other than the local Trademark Office in order to be perfected, such as in a commercial registry, dual registration of the security right should not be prohibited;

---

[1] See www.inta.org/index.php?option=com_content&task=view&id=1517&Itemi.

(h) Formalities in connection with registration of a security right and the amount of any government fees should be kept to a minimum; a document evidencing: (i) existence of a security right, (ii) the parties involved, (iii) the trademark(s) involved by application and/or registration number, (iv) a brief description of the nature of the security right, and (v) the effective date of the security right, should suffice for purposes of perfecting a security right;

(i) Regardless of the procedure, enforcement of a security right through foreclosure, after a judgement, administrative decision or other triggering event, should not be an unduly burdensome process;

(j) The applicable Trademark Office should promptly record the entry of any judgement or adverse administrative or other decision against its records and take whatever administrative action is necessary; the filing of a certified copy of the judgement or decision should be sufficient;

(k) In the event that enforcement is triggered by means other than a judgement or administrative decision, local law should provide for a simple mechanism enabling the holder of the security right to achieve registration, with free public accessibility, preferably through electronic means;

(l) In cases where the trademark owner is bankrupt or otherwise unable to maintain the trademarks which are subject to a security right, absent specific contract provisions the holder of the security right (or the administrator or executor, as the case may be) should be permitted to maintain the trademarks, provided that nothing shall confer upon the secured creditor the right to use the trademarks; and

(m) The relevant government agency or office should promptly record the filing of documentation reflecting release of the security right in its records, with free public accessibility, preferably through electronic means.

VI. Priority of a security right in intellectual property

[*Note to the Working Group: For paras. 33-61, see A/CN.9/WG.VI/WP.33/Add.1, paras. 1-25, and A/CN.9/649, paras. 41-56*.]

A. The concept of priority

33. Under the Guide, the concept of priority refers to the question of who among competing claimants may receive payment first out of the proceeds of the disposition of an encumbered asset in the case of the debtor's default. In intellectual property law, by contrast, the notion of priority may relate to notions of title and basic effectiveness. In many States, when intellectual property is transferred by a rights holder once, a second transfer by the former rights holder will transfer no rights to the second transferee. In such a case, no issue of priority in the sense this term is used in the Guide arises. Accordingly, the Guide would not apply and this matter would be left to intellectual property law. Under intellectual property law, a security right in intellectual property cannot be created by an unauthorized party. Likewise, under the Guide, a party that has no rights in, or the power to encumber, an asset may not create a security right in the asset (see recommendation 13).

B. Identification of competing claimants

34. The notion of "competing claimant" in a secured financing context means a secured creditor (which, under the Guide, includes a transferee in a transfer by way of security), a transferee of an encumbered asset, a judgement creditor or an insolvency representative in the insolvency of the grantor. In an intellectual property context, the notion of "conflicting transferees" is used instead and it includes transferees and licensees competing among themselves, or with infringers. Thus, under the principle enunciated in recommendation 4, subparagraph (b), the Guide would not apply to a conflict between transferees or licensees unless one of the transferees took its right through a transfer of intellectual property by way of security under secured transactions law and there is no priority rule of intellectual property law that applies to that conflict. Similarly, the Guide does not apply to a conflict between a transferee of an encumbered asset that took the asset from a secured creditor upon default and enforcement and another secured creditor that later received a right in the same asset from the same grantor, as this is not a real priority conflict under the Guide (this may well be a conflict addressed by intellectual property law).

35. On the other hand, the Guide does apply to priority conflicts: (a) between a security right registered in the general security rights registry and a security right registered in the relevant intellectual property registry (assuming that intellectual property law provides that security rights may be registered in such a registry); (b) between two security rights registered in the relevant intellectual property registry (assuming that intellectual property law provides that security rights may be registered in such a registry); (c) between the rights of a transferee or licensee and a security right; and (d) between two security rights registered in the general security rights registry.

C. Relevance of knowledge of prior transfers or security rights

36. Under the Guide, knowledge of the existence of a prior security right on the part of a competing claimant is irrelevant for determining priority (see recommendation 93). Thus, the security right of a creditor that has knowledge of a security right created earlier may nonetheless have priority over the earlier-created security right if a notice of it was registered (or was otherwise made effective against third parties) before the earlier-created security right. By contrast, many intellectual property laws provide that a later conflicting transfer or security right may only gain priority if it is registered first and taken without knowledge of a prior conflicting transfer. The deference to intellectual property law under recommendation 4, subparagraph (b), should preserve these knowledge-based priority rules. However, States enacting the Guide might wish to consider whether the policy underlying such knowledge-based priority rules should be maintained with respect to priority conflicts between a security right creditor and the right of a competing claimant (i.e. a secured creditor, transferee or other claimant).

D. Priority of a security right registered in an intellectual property registry

37. The Guide recommends that registration in a specialized registry (including an intellectual property registry, if intellectual property law provides that a security right may be registered in such a registry) should provide a security right with higher priority status than a security right registered in the general security rights registry, regardless of the respective order of registration in that registry (see recommendations 77 and 78). This recommendation is equally applicable to security rights in intellectual property.

38. More specifically, if there is a conflict between two security rights, one of which was registered in the general security rights registry and the other was registered in the relevant intellectual property registry, the Guide applies and gives priority to the security right that was registered in the relevant intellectual property registry (see recommendation 77, subparagraph (a)). If there is a conflict between security rights registered in the relevant intellectual property registry, the first right registered has priority, and the Guide confirms that result (see recommendation 77, subparagraph (b)).

[*Note to the Working Group: The Working Group may wish to consider whether the principle of deference would apply to a different priority rule in relation to intellectual property. If, for example, a priority rule based on prior knowledge were to displace the registration-based rule of the Guide, the policy of the Guide to ensure transparency of security rights could be seriously compromised. It would seem that, in the absence of registration in an intellectual property registry, no issue particular to intellectual property would arise and thus the Guide should apply*.]

39. In situations where security rights are registrable in an intellectual property registry but are not registered, the recommendations of the Guide on priority will apply to a priority conflict between such an unregistered security right and a security right registered in the general security rights registry. However, if intellectual property law provides that any such rights are not effective against subsequent transferees or licensees that have registered their rights in the intellectual property registry, the priority rule of the intellectual property registry will apply.

40. If there is a priority conflict between the rights of a transferee of intellectual property and a security right that, at the time of the transfer, was registered in the relevant intellectual property registry, the transferee would take the encumbered intellectual property subject to the security right. However, if the secured creditor had not registered its security right in the relevant intellectual property registry, the transferee takes the encumbered intellectual property free of the security right (see recommendations 78 and 79). Thus, if A creates a security right in a patent in favour of B that registers in the general security rights registry, and then A transfers title to the patent to C, which registers in the patent registry, under the Guide, C would take the patent free of the security right, because the security right was not registered in the patent registry (see recommendation 78). Similarly, if A, instead of making a transfer, creates a second security right in favour of C and only C registers in the patent registry, under the Guide, C would prevail (see recommendation 77, subparagraph (a)). In either case, as registration in the patent registry gives superior rights, under the Guide, third-party searches could rely on a search in that registry

and would not need to search in the general security rights registry. In all these examples, who is a transferee and what are the requirements for a transfer are matters of intellectual property law. It should also be noted that registration in the intellectual property registry would normally refer only to a security right in intellectual property. It would not refer to a security right in tangible assets with respect to which intellectual property is used.

E. Priority of a security right that is not registrable in an intellectual property registry

41. If a security right in intellectual property is not registrable in an intellectual property registry, in principle, the priority of that right will be determined by the order of registration of a notice with respect to that right in the general security rights registry (see recommendations 4, subparagraph (b), and 77). However, if there is a contrary priority rule that arises strictly as a matter of intellectual property law (rather than a contrary rule currently applicable in a State to intellectual property, but arising as a general matter of the law of property of obligations), that contrary rule would prevail.

42. A subsequent transferee or licensee would, in principle, take the encumbered intellectual property subject to the security right (see recommendation 79). If the intellectual property had been transferred by the grantor of the security right before the creation of the security right, the secured creditor will have no security right at all on the basis of the first-in-time rule (based on the generally acceptable *nemo dat* property law rule, the application of which the Guide does not affect).

F. Rights of transferees of encumbered intellectual property

43. As mentioned above, under the Guide, a transferee of an encumbered asset (including intellectual property) normally takes the asset subject to a security right that was effective against third parties at the time of the transfer (see recommendation 79). There are two exceptions to this rule. The first exception arises where the secured creditor authorizes the disposition free of the security right (see recommendation 80, subparagraph (a)). The second exception relates to a transfer in the ordinary course of the transferor's business (see recommendation 81, subparagraph (a)). It is important to note that, under the Guide, a licence of intellectual property is not a transfer of the intellectual property. Thus the rules of the Guide that apply to transfers of encumbered assets would not apply where there is a security right in intellectual property and then a licence of that intellectual property is granted. In any case, in view of the principle of deference to intellectual property law embodied in recommendation 4, subparagraph (b), the Guide does not affect the characterization of a licence (in particular, of an exclusive licence as a transfer) under intellectual property law.

G. Rights of licensees in general

44. Intellectual property is routinely licensed and the retained rights of a licensor, such as the ownership right or the right to receive royalties, as well as the licensee's

authorization to use the intellectual property under the terms of the licence agreement, are used as security for credit.

45. Where the rights holder of intellectual property creates a security right and makes it effective against third parties and thereafter grants a licence, in principle, the licensee takes the licence subject to the security right created by the licensor (see recommendation 79). This means that, if the licensor defaulted on the loan and the lender sought to enforce its security right in the royalties owed by the licensee to the licensor, the lender could collect the royalties from the licensee (see also recommendation 168), as licence royalties are treated as any other receivable. In addition, absent an agreement or the application of the exception for certain ordinary-course-of-business licences, the secured creditor of the licensor would typically, under intellectual property law, be entitled to terminate the subsequent licence.

46. If the licensee also creates a security right, that security right would be in a different asset (the licensee's rights under the licence agreement) and, in effect, be subject to the security right created by the licensor, as the licensee took its rights subject to that security right (see recommendation 79) and the licensee cannot give to its secured creditor more rights that the licensee has (based on the *nemo dat* principle). So, if the lender of the licensor enforced its security right, it could dispose of the encumbered intellectual property free of the licence. Thus, the licence would terminate and the licensee's lender would no longer have an asset encumbered by its security right. Likewise, whether or not the licensor had granted a security right to one of its creditors, if the licensee defaults on the licence agreement, the licensor can terminate it and the licensee's secured creditor would be again left without an asset encumbered by its security right.

47. The rights of the licensor and the licensee under the licence agreement and the relevant intellectual property law would remain unaffected by secured transactions law. So, if the licensee defaults on the licence agreement, the licensor can terminate it and the licensee's secured creditor would be again left without security. Similarly, secured transactions law would not affect an agreement between the licensor and the licensee prohibiting the licensee from granting sub-licences or assigning its claims to royalties owed by sub-licensors to the licensee.

48. There are two exceptions to the rule that a licensee of encumbered intellectual property takes the licence subject to a pre-existing security right. The first exception arises where the secured creditor authorizes the licence free of the security right (see recommendation 80, subparagraph (b)). The second exception relates to a non-exclusive licence in the ordinary course of the licensor's business (see recommendation 81, subparagraph (c), and paras. 49-55 below).

H. Rights of ordinary-course-of-business non-exclusive licensees

49. Under recommendation 81, subparagraph (c), a non-exclusive licensee that took a licence in the ordinary course of business of the licensor without knowledge that the licence violated a security right, would take free of a security right previously granted by the licensor. The result of this rule is that, in the case of enforcement of the security right by the secured creditor of the licensor, the secured

creditor could collect any royalties but not terminate the licence as long as the licensee performed the terms of the licence agreement.

50. This rule would apply only if the rights holder neither authorized nor prohibited the granting of a licence by the licensor. In other words, the contractual arrangement between the secured creditor and the licensor, which neither authorizes the owner/licensor to grant a licence nor prohibits the owner/licensor from granting a licence, does not produce third-party effects. If the rights holder authorized the granting of the licence, recommendation 80, subparagraph (b), would apply. If the rights holder prohibited the granting of a licence, nothing in the Guide would interfere with such prohibition and the secured creditor could terminate the licence. Whether a secured creditor with a security right in intellectual property is a rights holder for this purpose is determined under intellectual property law.

51. The phrase "takes free" does not mean that the non-exclusive licensee gets a "free" licence. The non-exclusive licensee may continue to use the licence following the secured creditor's foreclosure against the licensor only if the non-exclusive licensee complies with all of the terms of the licence (including payment of licence royalties to the person that acquired the licensor's rights at the sale in the context of enforcement of the security right). Thus, all of the licensee's obligations remain in place and the licensor's successor may terminate the licence agreement for non-performance by the licensee.

52. If the secured creditor of the licensor does not want to encourage non-exclusive licences, it can, in its security agreement (or elsewhere), require the borrower (the licensor) to place in all of the non-exclusive licences a provision that the licence will terminate if the licensor's secured creditor enforces its security right. Similarly, if the licensor does not want its licensee to grant any sub-licences, it can include in the licence agreement a provision that the grant of a sub-licence by the licensee is an event of default under the licence agreement that would entitle the licensor to terminate the licence. Nothing in the Guide would interfere with the enforcement of such provisions as between the secured creditor and its borrower (or as between the licensor and its licensee). Ordinarily, of course, the secured creditor will have no interest in doing that, since the licensor (and any licensee) is in the business of granting non-exclusive licences and the secured creditor expects the borrower to use the fees paid under those licence agreements to pay the secured obligation.

53. The exception in recommendation 81, subparagraph (c), will be relevant only if: (a) the secured creditor as the rights holder does not authorize its borrower to grant a licence (in this case recommendation 80, subparagraph (b), will apply); and (b) the secured creditor as the rights holder does not prohibit the borrower from granting a non-exclusive licence (if the secured creditor does that, the licence will terminate in the case of enforcement by the secured creditor). In any case, no licensee would take the encumbered intellectual property right free of the security right of the licensor's secured creditor, if the rights holder (the borrower or its secured creditor) had not authorized the granting of the licence. Thus, the fact that recommendation 81, subparagraph (c), provides for certain rights in the limited circumstances described above does not provide a justification for unauthorized or compulsory licences.

54. Somewhat comparable results may be obtained under intellectual property law. It is often the case that the secured creditor authorizes the licensor in the security agreement to grant licences. If the security agreement is silent on the point, but, as a matter of intellectual property law, the licensor, and not the secured creditor, remains the holder of the encumbered intellectual property rights, then the rights holder is typically authorized to grant licences as well. As this is common practice, in most cases licences will be authorized. Then, under typical intellectual property law priority rules, a secured creditor takes its security right in the intellectual property subject to these authorized licences. However, in some cases the secured creditor becomes a rights holder in intellectual property law terms. In such a case, if the borrower grants a licence (or a sub-licence), then the licence is unauthorized and infringing if not authorized by the secured creditor. The Guide does not interfere with this result.

55. To reflect the above-mentioned understanding, recommendation 81, subparagraph (c), may be supplemented by an asset-specific recommendation along the following lines:

> "The law should provide that recommendation 81, subparagraph (c), applies in the case of a security right in intellectual property only if: (a) the secured creditor as a rights holder under intellectual property law does not authorize its borrower to grant a licence (in this case recommendation 80, subparagraph (b), will apply); and (b) the secured creditor does not prohibit the borrower from granting a non-exclusive licence (but if the secured creditor as a rights holder does so prohibit the borrower, the licence will terminate in the case of enforcement by the secured creditor)."

[*Note to the Working Group: The Working Group may also wish to consider alternative wording along the following lines:*

> *"The law should provide that recommendation 81, subparagraph (c), does not apply to licences of intellectual property and the matter is left to the security agreement. If the security agreement does not address it, the secured creditor should be presumed to have authorized the licence in which case the rule in recommendation 80, subparagraph (b), applies."*

It is argued that, in the intellectual context, there are many cases where intellectual property is exploited under a non-exclusive licence where it is commonly understood that there may be prior security rights that will continue during the licence term and maintain priority. These include movie exhibition licences, patent licences, franchise licences and the like. In many cases, these licences provide for the payment of ongoing royalties over time and the credit-worthiness and performance of the licensee is important both to the licensor and the licensor's secured lender. In such cases, a lender may approve the licence and be content to allow the licence to continue in case of default and enforcement against the licensor, in which case recommendation 81, subparagraph (c), is unnecessary. But in other cases, the lender may want the right to terminate the licence in case of the licensor's default, unless the licensee negotiates an agreement otherwise, in which case recommendation 81, subparagraph (c), frustrates normal commercial expectations and may impair the extension of secured lending in this context.

In other words, it is argued that the concept of an "ordinary-course-of-business" licence has no precedent in intellectual property law, making it difficult to

distinguish an "ordinary-course-of-business" from a "non-ordinary-course-of-business" licence. Indeed, since most intellectual property earns value by licensing, in one sense all licences may be considered as being "ordinary-course-of-business" licences. On the other hand, since many licences are specifically negotiated (movie licences, franchise licences), in another sense, no licence is an "ordinary-course-of-business" licence. In addition, many licences may be "mixed" in the sense that they contain both exclusive and non-exclusive grants. For example, for patent licences it is common to grant a licence which is exclusive for certain periods or performance criteria, and otherwise non-exclusive. For copyrights, it is common to license some rights exclusively (e.g. distribution rights) and other rights non-exclusively (e.g. rights to make advertising materials). As such, it is argued that the concept of an "ordinary-course-of-business licence" has no commercial certainty in application to intellectual property and its use could act as an impediment to encouraging secured lending in this area.

It is suggested that current intellectual property law already addresses this issue in an appropriate manner by leaving it for the parties to decide in the security agreement. In some cases, the secured creditor may desire the grantor to undertake licensing practices, and may allow all licences or those that meet certain criteria to "take free" of the security right. Alternatively, the secured creditor may require prior approval of licences. In either case, the normal commercial expectation of a licensee should be to conduct appropriate due diligence to determine whether its licence is "free" of a prior security right (meaning than on enforcement of a prior security right the license can nonetheless continue) or "subject to" a prior security right (meaning that, in case of default and enforcement, the licence will terminate unless other arrangements are made with the secured creditor).]

I. Priority of a security right granted by a licensor as against a security right granted by a licensee

56. Where a licensor "finances" the acquisition of a licence by a licensee (in the sense that payment is made in future royalty instalments), the licensor's right to the payment of the royalties owed to it is not affected by any security right granted by the licensee in any royalties due to the licensee under any sub-licence agreement. Such a security right, though, can have an impact on the licensee's ability to pay the licensor if the licensee is in default with respect to its secured creditors inasmuch as they may seek to collect the sub-royalties themselves. However, the licensor has numerous ways to protect itself in this circumstance.

57. The licensor could protect its rights by: (a) prohibiting the licensee from assigning or encumbering its claim against sub-licensees for the payment of royalties owed under sub-licence agreements; or (b) terminating the licence in cases where the licensee assigned its royalty claims against sub-licensees. The Guide does not interfere with these provisions if they are effective under intellectual property law and the law of obligations.

58. In addition, the licensor could obtain a security right in royalty claims of the licensee against sub-licensees. However, the priority of the security right of the licensor would be subject to the general priority rules. This means that a secured creditor of A with a security right in all present and future assets of A that registered a notice of its security right on Day 1 would have priority over the rights of the

secured creditor of B, where B is a licensor and A is a licensee under a licence agreement entered into on Day 2 and the secured creditor of B registered a notice of its security right on Day 3.

59. In situations where the encumbered asset is a tangible asset with respect to which intellectual property is used, a secured creditor may obtain an acquisition security right. However, as discussed (see A/CN.9/WG.VI/WP.35/Add.1, paras. 91-94), that right encumbers the tangible asset and not the intellectual property. The right of the acquisition secured creditor to dispose of the encumbered assets as they are (i.e. including the intellectual property) is treated as a matter of enforcement and, as discussed below, is subject either to the exhaustion of the rights of the rights holder of the intellectual property used in the specific tangible encumbered assets or to the authorization given to the secured creditor by the rights holder to dispose of the encumbered assets as they are (see paras. 81-84 below).

J. Priority of a security right in intellectual property as against the right of a judgement creditor

60. Under the Guide, a security right that was made effective against third parties before a judgement creditor obtained rights in the encumbered asset has priority as against the right of the judgement. However, if an unsecured creditor obtained a judgement against the grantor and took the steps necessary under the law governing the enforcement of judgements to acquire rights in the encumbered assets before the security right became effective against third parties, the right of the judgement creditor has priority (see recommendation 84). This recommendation applies equally to security rights in intellectual property. In such a case, under intellectual property law, the judgement creditor will have to obtain a transfer of the intellectual property, which may have to be registered in an intellectual property registry. If this transfer takes place before a security right was made effective against third parties, both under the law recommended in the Guide and intellectual property law, the transferee of encumbered intellectual property will take the encumbered intellectual property free of the security right (see also recommendation 79).

K. Subordination

61. The Guide recognizes the principle of subordination (see recommendation 94). The principle applies equally to security rights in intellectual property. The essence of this principle is that, as long as the rights of third parties are not affected, competing claimants may alter by agreement the priority of their competing claims in an encumbered asset. This is important for intellectual property in view of the divisibility of the rights of rights holder, licensor or licensee.

VII. Rights and obligations of the parties to a security agreement relating to intellectual property

[*Note to the Working Group: For paras. 62-63, see A/CN.9/WG.VI/WP.33/Add.1, paras. 26-30, and A/CN.9/649, paras. 57-59.*]

A. Application of the principle of party autonomy

62. With few exceptions, the Guide generally recognizes the freedom of the parties to the security agreement to tailor their agreement so as to meet their practical needs (see recommendation 10). The principle of party autonomy applies equally to security rights in intellectual property, subject to any limitations specifically introduced by intellectual property law. For example, where the rights of a rights holder are encumbered, the right to sue infringers may not be part of the encumbered asset if intellectual property law provides that only a rights holder may exercise, transfer or encumber that right.

B. Right of the secured creditor to pursue infringers or renew registrations

63. Under secured transactions law, the secured creditor should be able to agree with the rights holder that the secured creditor would be entitled to pursue infringers and renew registrations, provided that this is permitted under intellectual property law. Otherwise, the encumbered asset could lose its value, if the rights holder of the encumbered intellectual property failed to exercise this right in a timely fashion. This result could negatively affect the use of intellectual property as security for credit. This approach would not interfere with the rights of the rights holder as its consent would be necessary. Similarly, this approach would not interfere with intellectual property law, if such agreements were not permitted. Of course, States enacting the recommendations of the Guide may wish to consider their intellectual property law so as to determine whether such agreements should be permitted, as this could facilitate the use of intellectual property as security for credit.

[*Note to the Working Group: The Working Group may wish to consider the following intellectual-property-specific recommendations:*

"The law should provide that[, unless prohibited by intellectual property law,] the grantor and the secured creditor may agree as to who may pursue infringers or new registrations of the encumbered intellectual property.

The law should provide that[, unless prohibited by intellectual property law,] the secured creditor should be entitled to pursue infringers and renew registrations if the rights holder fails to exercise these rights in a timely fashion."

The Working Group may wish to consider that the bracketed text is not necessary as: (a) recommendation 4, subparagraph (b), defers to intellectual property law any matter which is addressed in the Guide in a way that is inconsistent with intellectual property law; and (b) recommendation 18 already provides that any statutory limitations to the transferability of certain types of asset.]

VIII. Rights and obligations of third-party obligors in intellectual property financing transactions

[*Note to the Working Group: For para. 64, see A/CN.9/WG.VI/WP.33/Add.1, paras. 32, and A/CN.9/649, para. 60.*]

64. Where a licensor assigns its claim against a licensee for the payment of royalties under a licence agreement, the licensee (as the debtor of the assigned receivable) would be a third-party obligor under the Guide and its rights and obligations would be the same as the rights and obligations of the debtor of a receivable. Similarly, where a licensee assigned its claim against a sub-licensee for the payment of royalties under a sub-licence agreement, the sub-licensee would be a third-party obligor in the sense of the Guide.

IX. Enforcement of a security right in intellectual property

[*Note to the Working Group: For paras. 65-89, see A/CN.9/WG.VI/WP.33/Add.1, paras. 35-44, and A/CN.9/649, paras. 61-73*.]

A. Intersection of secured transactions law and intellectual property law

65. States typically do not provide for specific enforcement remedies for security rights in intellectual property in their intellectual property laws. The assumption is that the general law of secured transactions of that State applies to the enforcement of security rights in intellectual property. Moreover, to the extent that intellectual property law of some States actually does address the enforcement of security rights in different types of intellectual property, it merely engrafts existing secured transactions enforcement regimes onto the regime governing intellectual property. As a consequence, States that enact the Guide's recommendations will normally be simply substituting the Guide's recommended enforcement regime for the prior enforcement regime derived from, for example, a civil code and code of civil procedure, the common law of floating and fixed charges, a mortgage act or some other general law of enforcement, as the case may be.

66. This approach to the enforcement of security rights applies not only to intellectual property (for example, a patent, a copyright or a trademark), but also to other rights that are derived from these types of intellectual property. Hence, consistently with the United Nations Assignment Convention, assets such as royalties and licence fees are treated as receivables and are subject to the enforcement regime for receivables recommended in the Guide. Likewise, a licensor's or sub-licensor's other contractual rights as against a licensee or sub-licensee will also be governed by a State's general law of obligations, and security rights in these contractual rights will be enforced under a State's general secured transactions law. And again, a licensee's or sub-licensee's rights of use are treated in the same way as a lessee's or purchaser's rights, and are governed by a State's general law of obligations, except as regards (where specifically mentioned in intellectual property laws) questions of registration.

67. On occasion, States will incorporate special procedural controls on the enforcement of security rights in intellectual property into generic patent, trademark and copyright legislation. In addition, the general procedural norms of secured transactions law in a State may be given a specific content in the context of enforcement against intellectual property. So, for example, the determination of what is commercially reasonable where the encumbered asset is intellectual property may depend on intellectual property law and practice. This standard of commercial

reasonableness may well vary from State to State, as well as from intellectual property regime to intellectual property regime. The Guide recognizes this procedural specificity and, in so far as any procedural rules particular to intellectual property law impose greater obligations on parties than those of the enforcement regime set out in the recommendations of the Guide, they will, under the principle set out in recommendation 4, subparagraph (b), displace the general recommendations of the Guide. Of course, if these procedural rules and definitional specifications are part of the general law of a State, they will be displaced by the recommendations of the Guide in States that enact them.

68. As for substantive enforcement rights of secured creditors, once a State adopts the Guide's recommendations, there is no reason to develop different or unusual remedial principles to govern enforcement against intellectual property serving as encumbered assets. The Guide merely recommends a more efficient, transparent and effective enforcement regime of a secured creditor's rights, without in any way limiting the rights that the rights holder of intellectual property may exercise to protect its rights against infringement, or collect royalties from a licensee or sub-licensee. As pointed out in the section of this Annex on creation of a security right (see A/CN.9/WG.VI/WP.35, para. 75), the secured creditor can never acquire security in more rights than the rights with which the grantor is vested at the time enforcement occurs.

B. Enforcement of a security right in different types of intellectual property

69. The Guide elaborates a detailed regime governing the enforcement of security rights in different types of encumbered asset. Its basic assumption is that enforcement remedies must be tailored to ensure the most effective and efficient enforcement while ensuring appropriate protection of the rights of the grantor and third parties. This assumption and approach of the Guide should apply equally to the enforcement of security rights in the various categories of intellectual property. Currently, the law of most States recognizes a wide variety of rights relating to intellectual property, including:

(a) The intellectual property in itself;

(b) Receivables arising under a licence agreement;

(c) The licensor's other contractual rights under a licence agreement;

(d) The licensee's rights under a licence agreement;

(e) The rights holder's, licensor's and licensee's rights in tangible assets with respect to which intellectual property is used.

70. The enforcement regime recommended in the Guide, and applicable to each of these different rights in intellectual property, will be discussed separately in the following sections.

C. Taking "possession" of encumbered intellectual property

71. The right of the secured creditor to take possession of the encumbered asset as set out in recommendations 146 and 147 of the Guide is normally not relevant if the encumbered asset is an intangible asset such as intellectual property. These two recommendations deal only with the taking of possession of tangible assets. However, consistently with the general principle of extrajudicial enforcement, the secured creditor should be entitled to take possession of any documents necessary for the enforcement of its security right where the encumbered asset is intellectual property. Such a right will normally be provided for in the security agreement. In the event that the documents are accessory to the encumbered intellectual property, the creditor should be able to obtain possession whether or not those documents were specifically mentioned as encumbered assets in the security agreement.

72. It may be thought that, where a secured creditor takes possession of a tangible asset that is produced using intellectual property or in which a chip containing a programme produced using an intellectual property is included, the secured creditor is also taking possession of the encumbered intellectual property. This is not the case. It is important to distinguish properly the asset encumbered by the security right. Even though many tangible assets, whether equipment or inventory, may be produced through the application of intellectual property such as a patent, the creditor's security lies upon the tangible asset and does not, absent specific language in the security agreement purporting to encumber the intellectual property itself, encumber the intellectual property with the use of which the asset was produced. So, for example, the secured creditor may take possession of a tangible asset such as a compact disc or a digital video disc and may exercise its enforcement remedies against the discs under the Guide's recommendations. In cases where the secured creditor also wishes to take security over the intellectual property itself (including, to the extent the grantor has the right to sell or license the intellectual property, the right to sell or license), it would be necessary for the secured creditor to specifically mention such intellectual property as encumbered assets in the security agreement.

D. Disposition of encumbered intellectual property

73. Under the Guide, the secured creditor has the right upon the grantor's default to dispose of or grant a licence with respect to intellectual property encumbered by its security right, but always within the limits of the rights of the grantor. As a result, if the grantor is the rights holder, the secured creditor should, in principle, have the right to assign or license the intellectual property in which it has taken a security right. However, if the grantor had previously granted an exclusive licence to a third party that has priority over the security right, upon default, the secured creditor will be unable to grant another licence, as the grantor had no such right at the time the secured creditor acquired its security right (*nemo dat quod non habet*).

74. In the above-mentioned situation, under the Guide, the enforcing secured creditor does not acquire the intellectual property against which the security right is being enforced. Instead, the secured creditor disposes of the encumbered intellectual property (by assigning, licensing or sub-licensing it) in the name of the grantor. Until the assignee or licensee (as the case may be) that acquires the rights upon a

disposition by the enforcing creditor registers a notice of its rights in the relevant registry (assuming the rights in question are registrable), the grantor will appear on the registry as the rights holder of the relevant intellectual property.

E. Rights acquired through disposition of encumbered intellectual property

75. Under the Guide, rights in intellectual property acquired through judicial disposition would be regulated by the relevant law applicable to the enforcement of court judgements. In the case of an extrajudicial disposition in line with the provisions of secured transactions law, the first point to note is that the transferee or licensee takes its rights directly from the grantor. The secured creditor that chooses to enforce its rights in this manner does not become the rights holder as a result of this enforcement process.

76. The second point is that the transferee or licensee could only take such rights as were actually encumbered by the enforcing creditor's security right. Under the Guide, the transferee or licensee would take the intellectual property free of the security right of the enforcing secured creditor and any lower-ranking security rights, but subject to any higher-ranking security rights. The same rule applies to an extrajudicial disposition that is inconsistent with the provisions of the secured transactions law, provided that the transferee or licensee acted in good faith (see recommendations 161-163).

77. As a general principle of secured transactions law, the enforcing secured creditor takes the encumbered asset in the condition it is at the time of enforcement. Thus, a security right in a tangible asset extends to and may be enforced against attachments to that asset (see recommendations 21 and 166). To ensure that the security right also covers assets produced or manufactured from encumbered assets, the security agreement normally provides expressly that the security right extends to such manufactured assets. Where the encumbered asset is intellectual property, it is important to determine whether the asset that is disposed of to the transferee or licensee is simply the intellectual property as it existed at the time the security right became effective against third parties or whether it is that intellectual property including any subsequent enhancements to it (e.g. an improvement to a patent). Generally, intellectual property laws treat such improvements as separate assets and not as integral parts of existing intellectual property. As a result, the prudent secured creditor that wishes to ensure that improvements are encumbered with the security right should describe the encumbered asset in the security agreement in a manner that ensures that enhancements are directly encumbered by the security right.

F. Proposal by the grantor to accept the encumbered intellectual property

78. Under the enforcement regime recommended in the Guide, the secured creditor also has the right to propose to the grantor that it accept the grantor's rights in satisfaction of the secured obligation. If the grantor is the rights holder of intellectual property, the secured creditor could itself become the rights holder, provided that the grantor and its creditors do not object (see recommendations 156-159). Should the rights holder have licensed its intellectual

property to a licensee that has priority over the enforcing secured creditor, when the secured creditor accepts the intellectual property from the grantor, it acquires that right subject to the prior-ranking licence under the *nemo dat* principle. Once a secured creditor becomes the rights holder of intellectual property, its rights and obligations are regulated by the relevant intellectual property law. In particular, the secured creditor would be obliged to register its rights as a rights holder in the relevant intellectual property registry (assuming that rights in the intellectual property are registrable). Finally, the secured creditor that accepts the encumbered intellectual property in full or partial satisfaction of the secured obligation would take the intellectual property free of the security right of any lower-ranking security rights, but subject to any higher-ranking security rights (see recommendation 161).

G. Collection of royalties and licence fees

79. Under the Guide, where the encumbered asset is the right to receive payment of royalties or other fees under a licence agreement, the secured creditor should be entitled to enforce the security right by simply collecting the royalties and fees upon default and notification to the person that owes the royalties or fees (see recommendation 168). In all these situations, the royalties are, for the purposes of secured transactions laws, receivables, and the rights and obligations of the parties will be governed by the same principles pertaining to receivables that are elaborated in the United Nations Assignment Convention and the Guide for receivables. Once again, the secured creditor that has taken security over present and future royalty payments is entitled to enforce only such rights to receive payment of royalties as were vested in the grantor (licensor) at the time the security right in the receivable is enforced.

H. Licensor's other contractual rights

80. In addition to the right to collect receivables, the licensor will normally include a number of other contractual rights in its agreement with the licensee. These may include, for example, a limitation in the licence agreement on the right to sub-license or a prohibition on the granting of security over the licence or a right to terminate the licence agreement under a set of specified conditions. Merely because the licensor may have granted a security right in the right to collect royalties and this right to collect has become enforceable and is being enforced by the secured creditor has no direct bearing on these other rights of the licensor under its licence agreement or under generally applicable intellectual property law. These rights remain vested in the licensor, unless they themselves have been assigned to a third party or were included in the description of the encumbered asset over which the secured creditor that is enforcing its security right obtained a security right from the grantor.

I. Enforcement of security rights in tangible assets related to intellectual property

81. In principle, except where the so-called "exhaustion doctrine" applies, the rights holder has the right to control the manner and place in which tangible assets,

with respect to which intellectual property is used (of course, with the authorization of the rights holder), are sold. That is, in the event that the relevant intellectual property has not been exhausted, the secured creditor should be able to dispose of the assets upon default, if there is an authorization from the rights holder. In both these cases, it is assumed that the security agreement does not encumber the intellectual property itself.

82. There is no universal understanding of the "exhaustion doctrine" (often referred to as "exhaustion of rights" or "first sale doctrine") and the Annex makes reference to the doctrine not as a universal concept, but as it is actually understood in each enacting State. Nonetheless, where the exhaustion doctrine applies in intellectual property law, the basic idea is that a rights holder will lose or "exhaust" certain rights after their first use. For example, the ability of a trademark owner to control further sales of a product bearing its mark are generally "exhausted" following the sale of that product. The rule serves to immunize a reseller from infringement liability. However, it is important to note that such protection extends only to the point where the goods have not been altered so as to be materially different from those originating from the trademark owner. The reseller, for example, under intellectual property law in some States, may not remove or alter the trademark applied to the goods by the trademark owner.

83. In situations where the tangible asset is produced using intellectual property that has been licensed to the grantor, the licensor may provide that the licensee cannot grant security rights in such assets or that a creditor that takes security may only enforce its rights in a manner agreed to by the licensor. In both these cases, the licensor will typically provide in the licence agreement that the licence may be revoked if the grantor or secured creditor is in breach of the licence agreement. As a consequence, to enforce effectively its security rights against the tangible asset, the secured creditor would need to obtain the consent of the rights holder-licensor in line with the licence agreement and the relevant intellectual property law.

84. In cases where the secured creditor also wishes to take security over the intellectual property itself (including, to the extent the grantor has the right to sell or license the intellectual property, the right to sell or license), it would be necessary for the secured creditor to specifically mention such intellectual property as encumbered assets in the security agreement. Here, the encumbered asset is not the tangible asset produced using the intellectual property, but rather the intellectual property itself (or the licence to manufacture tangible assets using the intellectual property). A prudent secured creditor will normally take a security right in such intellectual property so as to be able to continue the production of partially completed tangible assets.

J. Enforcement of a security right in a licensee's rights

85. In the discussion above, the grantor of the security right has been assumed to be the rights holder of the relevant intellectual property. The encumbered asset was either the intellectual property itself, the right of the rights holder-licensor to receive royalties and fees or the right of the rights holder-licensor to enforce other contractual terms relating to the intellectual property. Only in the discussion of security over tangible assets produced by using intellectual property (section I) were

the rights of the rights holder-licensor and the rights of the licensee treated together. However, most of the issues addressed in sections C to H also are relevant in situations where the encumbered asset is not the intellectual property itself but the rights of a licensee (or sub-licensee) arising from a licence (or sub-licence) agreement. In cases where the encumbered asset is merely a licence, the secured creditor obviously may only enforce its security right against the licensee's rights and may do so only in a manner that is consistent with the terms of the licence agreement.

86. In situations where the grantor is a licensee, upon the grantor's default, the secured creditor will have the right to enforce its security right in the licence and to dispose of the licence to a transferee, provided that the licensor consents or the licence is transferable, which is rarely the case. Likewise, the enforcing creditor may grant a sub-licence, provided that the licensor consents or the grantor-licensee had, under the terms of the licence agreement, the right to grant sub-licences. In situations where the secured creditor proposes to a grantor-licensee to accept the licence in full or partial satisfaction of the secured obligation and neither the grantor nor other interested parties (e.g. the licensor) object, the secured creditor becomes vested with the licence according to the terms of the licence agreement between the licensee and the licensor. As in the case of a transferee or licensee that acquires intellectual property upon a disposition by a secured creditor, the licensee or secured creditor that accepts the licence in full or partial satisfaction of the secured obligation will be obliged to register its rights as a licensee in the relevant intellectual property registry, if this is possible under intellectual property law. Otherwise, the licensee or secured creditor will be obliged to register its rights in the general security rights registry under the law recommended in the Guide.

87. Where the encumbered asset is the sub-licensor's right to receive payment of royalties under a sub-licence agreement, the secured creditor is entitled to treat the asset as a receivable. This means that the secured creditor may collect payment of the royalties to the extent that these were vested in the grantor-sub-licensor at the time when the security right in the receivable is enforced. If enforcement against royalties payable by a sub-licensee constituted a breach of the licence agreement, then the secured creditor would not be able to enforce against any receivables arising after that breach.

88. Where the encumbered asset is another contractual right stipulated in the sub-licence agreement, the secured creditor may enforce its security right in this contractual right as if it were any other encumbered asset, and the fact that the licensor may have revoked the licence for the future, or may have itself claimed a prior right to receive payment of sub-royalties, has no direct bearing on the right of the secured creditor to enforce these other contractual rights set out in the licence agreement.

89. The rights acquired by a transferee of the licence, a sub-licensee upon disposition by the secured creditor or by a secured creditor that accepts the licence in full or partial satisfaction of the secured obligation may be significantly limited by the terms of the licence agreement. For example, a non-exclusive licensee cannot enforce the intellectual property against another non-exclusive licensee or against an infringer of the intellectual property. Only the licensor (or appropriate rights holder) may do so, although in some States exclusive licensees may join the licensor as a party to the proceedings. In addition, depending upon the terms of the licence

agreement and the description of the encumbered asset in the security agreement, a transferee of the licence may not have access to information such as a source code. In order to ensure the effectiveness of the licence being transferred or sub-licensed, the security agreement will have to include such rights within the description of the assets encumbered by the grantor-licensee, to the extent that the licence agreement permits it to encumber these rights as well.

X. Law applicable to a security right in intellectual property

[*Note to the Working Group: For paras. 90-98, see A/CN.9/WG.VI/WP.33/Add.1, paras. 53-57, and A/CN.9/649, paras. 77-80.*]

A. Law applicable to proprietary matters

90. International conventions that protect intellectual property generally adopt the principle of territoriality and, in many States, the law applicable to ownership issues concerning intellectual property is the law of the place where the intellectual property is protected (*lex protectionis*). Accordingly, a transferee or a licensee will ensure that the transfer or licence will be recognized in each State in which the transferee wishes to exercise its rights.

91. As a security right is a property right, consistency would dictate that the same territorial approach be followed for the determination of the law applicable to the creation, third-party effectiveness, priority and enforcement of a security right in intellectual property. Hence, many States refer to the *lex protectionis* for such issues. The benefit of referring to the *lex protectionis* for security rights in intellectual property is that the same law applies to both a security right and a transfer of ownership in the same assets. For example, a priority dispute between a secured creditor and a transferee under an outright transfer made by the grantor of the security right would be more easily resolved if reference is made to one single law to resolve the dispute.

92. Not all States, however, adopt the *lex protectionis* as the law applicable to security rights in intellectual property. Some States, in which the conflict-of-laws rule for intangible assets in general points to the location of the grantor, use the same rule for security rights in intellectual property, at least with respect to third-party effectiveness and priority issues. Under this approach, the general conflict-of-laws rule of the Guide for intangible assets (i.e. the law of the grantor's location) would also apply to intellectual property. Recommendations 208 and 218, read together, in effect generally result in the application of the law of grantor's location to the creation, third-party effectiveness, priority and enforcement of a security right in intangible assets. The same conflict-of-laws rule would then be applicable to intellectual property.

93. The advantage of an approach that refers to a single law for all issues is that a secured creditor that obtains a security right in all present and future intangible assets (including intellectual property) of a grantor would be entitled to ascertain the extent of its right by referring to only one law, even if the assets have connections with several States. This would also reduce transaction costs; for example, registrations would be required to be made in only one State.

94. However, as outright transfers would still be governed by the *lex protectionis*, such an approach would not refer to one single law to resolve a priority conflict between the rights of a secured creditor and an outright transferee. To achieve that goal, the approach based on the law of the grantor's location would have to be subject to a variation whereby a priority conflict involving the rights of an outright transferee would be governed by the *lex protectionis*. A similar (but not identical) variation is provided by the Guide in the case of a dispute between the rights of holder of a security right in a receivable arising from the sale or lease of immovable property and a competing claimant that has registered its right in the immovable property registry of the State in which the immovable property is situated (see recommendation 209).

95. With this variation, a secured creditor would also need to establish its right under the *lex protectionis* only in instances where a competition with an outright transferee is a concern. In the typical case where the insolvency of the grantor is the main concern, it would be sufficient for the secured creditor to rely on the law of the State in which the grantor is located, as would be the case for certain other categories of intangible assets (such as receivables).

96. A further variation would be to defer to the *lex protectionis* only where that law provides that the intellectual property concerned may be registered in an intellectual property registry. This further variation might, however, be found unsatisfactory for outright transferees of intellectual property not subject to registration under the *lex protectionis*. They would have to investigate the law of the State of the grantor's location to ensure that their transfer is not subject to a previous security right.

97. The approaches mentioned above may be summarized with the following alternatives:

Alternative A

The law should provide that the law applicable to the creation, effectiveness against third parties, priority and enforcement of a security in intellectual property is the law of the State in which the intellectual property is protected.

Alternative B

The law should provide that the law applicable to the creation, third-party effectiveness, priority and enforcement of a security right in intellectual property is the law of the State in which the grantor is located. [However, the law applicable to a priority conflict involving the right of a [competing claimant] [transferee or licensee] is the law of the State in which the intellectual property is protected [if under that law the intellectual property may be registered in an intellectual property registry] [if under that law a security right may be registered in an intellectual property registry.]

Alternative C

The law applicable to the creation, effectiveness against third parties, priority and enforcement of a security right in intellectual property subject to registration in an intellectual property registry is the law of the State under whose authority the registry is maintained.

[*Note to the Working Group: The Working Group may wish to note that, with the exception of the bracketed text, alternative B is similar to recommendation 209 and alternative C is similar to recommendation 205. The Working Group may also wish to consider whether renvoi should be permitted where the law of the State in which the intellectual property is protected permits renvoi or, under contract law principles, defers to the law of the State in which the secured creditor, the grantor or a third party is located, in particular where a security right in a specific type of intellectual property may not be registered in an intellectual property registry (e.g. copyright or trade secret)*.]

B. Law applicable to contractual matters

98. The mutual rights and obligations of the grantor and the secured creditor with respect to the security right may be left to party autonomy. In the absence of a choice of law by the parties, the law applicable to these matters might be the law governing the security agreement (see recommendation 216).

XI. The impact of insolvency on a security right in intellectual property

[*Note to the Working Group: For the discussion of this matter, see A/CN.9/WG.VI/WP.33/Add.1, paras. 58-72, A/CN.9/649, paras. 98-103 and A/63/17, para. 326. The Working Group may wish to consider the matter again once Working Group V (Insolvency Law) has had a chance to discuss it.*]

C. Report of the Working Group on Security Interests on the work of its fifteenth session (New York, 27 April-1 May 2009)

(A/CN.9/670) [Original: English]

CONTENTS

I. Introduction

1. At its present session, Working Group VI (Security Interests) continued its work on the preparation of an annex to the UNCITRAL Legislative Guide on Secured Transactions (hereinafter referred to as "the Guide")[1] specific to security rights in intellectual property, pursuant to a decision taken by the Commission at its fortieth session, in 2007.[2] The Commission's decision to undertake work on security rights in intellectual property was taken in response to the need to supplement its

[1] Currently available on the UNCITRAL website (www.uncitral.org/pdf/english/texts/security-lg/e/final-final-e.pdf). To be issued as a United Nations sales publication.

[2] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17* (A/62/17 (Part I)), para. 162.

work on the Guide by providing specific guidance to States as to the appropriate coordination between secured transactions and intellectual property law.[3]

2. At its thirty-ninth session, in 2006, the Commission considered its future work on secured financing law. It was noted that intellectual property rights (e.g. copyrights, patents and trademarks) were becoming an extremely important source of credit and should not be excluded from a modern secured transactions law. In addition, it was noted that the recommendations of the draft Guide generally applied to security rights in intellectual property to the extent that they were not inconsistent with intellectual property law. Moreover, it was noted that, as the recommendations of the draft Guide had not been prepared with the special intellectual property law issues in mind, enacting States should consider making any necessary adjustments to the recommendations to address those issues.[4]

3. 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 secured financing 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.[5] 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.[6]

4. Pursuant to those requests, the Secretariat organized in cooperation with WIPO a colloquium on security rights in intellectual property rights (Vienna, 18 and 19 January 2007). The colloquium was attended by experts on secured financing and intellectual property law, including representatives of Governments and national and international, governmental and non-governmental organizations. At the colloquium, several suggestions were made with respect to adjustments that would need to be made to the draft Guide to address issues specific to intellectual property financing.[7]

5. At the first part of its fortieth session (Vienna, 25 June-12 July 2007), the Commission considered a note by the Secretariat entitled "Possible future work on security rights in intellectual property" (A/CN.9/632). The note took into account the conclusions reached at the colloquium on security rights in intellectual property rights. In order to provide sufficient guidance to States as to the adjustments that they might need to make in their laws to avoid inconsistencies between secured

---

[3] Ibid., para. 157.

[4] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17* (A/61/17), paras. 81 and 82.

[5] Ibid., para. 83.

[6] Ibid., para. 86.

[7] See www.uncitral.org/uncitral/en/commission/colloquia/2secint.html.

financing and intellectual property law, the Commission decided to entrust Working Group VI (Security Interests) with the preparation of an annex to the draft Guide specific to security rights in intellectual property rights.[8]

6. At the resumed fortieth session (Vienna, 10-14 December 2007), the Commission finalized and adopted the Guide on the understanding that an annex to the Guide specific to security rights in intellectual property rights would subsequently be prepared.[9]

7. At its thirteenth session (New York, 19-23 May 2008), the Working Group considered a note by the Secretariat entitled "Security rights in intellectual property rights" (A/CN.9/WG.VI/WP.33 and Add.1). At that session, the Working Group requested the Secretariat to prepare a draft of the annex to the Guide on security rights in intellectual property rights ("the draft annex") reflecting the deliberations and decisions of the Working Group (see A/CN.9/649, para. 13). As the Working Group was not able to reach agreement as to whether certain matters related to the impact of insolvency on a security right in intellectual property (see A/CN.9/649, paras. 98-102) were sufficiently linked with secured transactions law so as to justify their discussion in the draft Annex, it decided to revisit those matters at a future meeting and to recommend that Working Group V (Insolvency Law) be requested to consider those matters (see A/CN.9/649, para. 103).

8. At its forty-first session (New York, 16 June-3 July 2008), the Commission noted with satisfaction the good progress achieved by the Working Group. The Commission also noted the decision of the Working Group with respect to certain matters related to the impact of insolvency on a security right in intellectual property and decided that Working Group V should be informed and invited to express any preliminary opinion at its next session. It was also decided that, should any remaining issue require joint consideration by the two working groups after that session, the Secretariat should have discretion to organize a joint discussion of the impact of insolvency on a security right in intellectual property.[10]

9. At its fourteenth session (Vienna, 20-24 October 2008), the Working Group continued its work based on a note prepared by the Secretariat entitled "Annex to the UNCITRAL Legislative Guide on Secured Transactions dealing with security rights in intellectual property (A/CN.9/WG.VI/WP.35 and Add.1). At that session, the Working Group requested the Secretariat to prepare a revised version of the draft annex reflecting the deliberations and decisions of the Working Group (see A/CN.9/667, para. 15). The Working Group also referred to Working Group V (Insolvency Law) certain matters relating to the impact of insolvency on a security right in intellectual property (see A/CN.9/667, paras. 129-140). In that connection, it was widely felt that every effort should be made to conclude discussions of these matters as soon as possible, so that the result of those discussions could be included in the draft annex by the fall of 2009 or the early spring of 2010 and the draft annex could be submitted to the Commission for final approval and adoption at its forty-third session in 2010 (see A/CN.9/667, para. 143).

---

[8] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17* (A/62/17 (Part I)), paras. 156, 157 and 162.

[9] Ibid., Sixty-second session, Supplement No. 17 (A/62/17 (Part II)), paras. 99-100.

[10] Ibid., Sixty-third session, Supplement No. 17 (A/63/17), para. 326.

II. Organization of the session

10. The Working Group, which was composed of all States members of the Commission, held its fifteenth session in New York from 27 April to 1 May 2009. The session was attended by representatives of the following States members of the Working Group: Algeria, Australia, Benin, Cameroon, Canada, Chile, China, Colombia, Czech Republic, Ecuador, Egypt, El Salvador, Fiji, France, Gabon, Germany, Greece, Guatemala, India, Iran (Islamic Republic of), Italy, Japan, Kenya, Madagascar, Mexico, Morocco, Nigeria, Norway, Pakistan, Paraguay, Republic of Korea, Russian Federation, South Africa, Spain, Switzerland, Thailand, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

11. The session was attended by observers from the following States: Bangladesh, Belgium, Ghana, Indonesia, Kuwait, Kyrgyzstan, Libyan Arab Jamahiriya, Mauritania, Netherlands, Philippines, Qatar, Romania and Slovenia.

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

(a) *United Nations system*: World Bank and World Intellectual Property Organization (WIPO);

(b) *Inter-governmental organizations*: European Space Agency (ESA) and European Union (EU);

(b) *International non-governmental organizations invited by the Commission*: American Bar Association (ABA), Center for International Legal Studies (CILS), Commercial Finance Association (CFA), European Law Student's Association (ELSA), Independent Film and Television Alliance (IFTA), International Trademark Association (INTA), New York City Bar Association and Union internationale des avocats (UIA).

13. The Working Group elected the following officers:

Chairperson: Ms. Kathryn SABO (Canada)

Rapporteur: Ms. Carolina SEPULVEDA V. (Chile)

14. The Working Group had before it the following documents: A/CN.9/WG.VI/WP.36 (Annotated provisional agenda) and A/CN.9/WG.VI/WP.37 and Addenda 1 to 4 (Draft Annex to the UNCITRAL Legislative Guide on Secured Transactions dealing with security rights in intellectual property).

15. 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. Security interests in intellectual property.
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

16. The Working Group considered a note by the Secretariat entitled "Draft annex to the UNCITRAL Legislative Guide on Secured Transactions dealing with security rights in intellectual property" (A/CN.9/WG.VI/WP.37 and Addenda 1 to 4). The Working Group also took note of a note by the Secretariat entitled "Discussion of intellectual property in the Legislative Guide on Insolvency Law" (A/CN.9/WG.V/WP.87). The deliberations and decisions of the Working Group are set forth below in chapters IV and V. The Secretariat was requested to prepare a revised draft of the annex reflecting those deliberations and decisions.

IV. Security rights in intellectual property

A. Introduction (A/CN.9/WG.VI/WP.37)

1. Background

17. The Working Group approved the substance of section A of the Introduction, dealing with the background of the project, on the understanding that it would be completed to refer to every new step in the development of the draft annex.

2. The interaction between secured transactions law and law relating to intellectual property

18. The Working Group approved the substance of section B of the Introduction dealing with the interaction between secured transactions law and law relating to intellectual property.

3. Terminology

19. There was general agreement that section C of the Introduction, dealing with terminology, usefully elaborated on the meaning of the terms used in the Guide in an intellectual property context. At the same time, several comments and suggestions were made to refine the presentation of the terminology section, including the following:

(a) With respect to paragraph 15, the suggestion was made that, in order to ensure clarity and consistency with the terminology used in law relating to intellectual property, reference should be made, instead of to a "lesser rights holder", directly to a "licensee" or "licensor";

(b) With respect to paragraph 16, the suggestion was made that the first sentence and the remaining two sentences should be presented in two separate paragraphs as they dealt with two different issues, namely that an intellectual property right was distinct from the income streams that flowed from it and that a licence was not a security right;

(c) The suggestion was also made that the text of paragraph 16 should be amplified to clarify that, while the question of whether an intellectual property owner could grant a licence was a matter of intellectual property law, the question whether the parties to a security agreement could agree to the contrary was a matter that should be addressed in the Guide;

(d) The suggestion was also made that the references throughout the annex to recommendation 4, subparagraph (b), should be aligned with the substance of recommendation 4, subparagraph (b);

(e) With respect to paragraph 17, the suggestion was made that reference should also be made, in addition to patents, trademarks and copyrights, to "plant varieties";

(f) With respect to paragraphs 19-21, the suggestion was made that the distinction between a "licence" as a right and a "licence agreement" as the agreement that created that right should be clarified, also by reference to statutory (or compulsory) licences and implied licences, which were not the product of an agreement;

(g) It was also suggested that reference should be made in paragraphs 19-21 to law relating to intellectual property in some States, under which a licence (such as an exclusive licence) might be treated as a property rather than as a personal right;

(h) With respect to paragraph 22, the suggestion was made that all the text after the first two sentences should be deleted as it contained unnecessary or not fully accurate references (e.g. to moral rights rather than author rights);

(i) With respect to paragraph 24, the suggestion was made that, in order to align it with the revised version of paragraph 15, language along the following lines should be included, replacing the wording after the first sentence: "Under intellectual property law, the rights of an intellectual property owner generally imply the right to prevent unauthorized use of its intellectual property and the right to transfer and conclude licensing contracts in relation to its intellectual property. For example, in the case of patents, a patent owner has exclusive rights to prevent certain acts, such as making, using, selling, in relation to the subject matter of a patent performed without his/her authorization. In that sense, it is an intellectual property owner who is considered to be a right holder. On the other hand, in the context of a secured transactions law, the term right holder is also used to refer to a lesser right holder, such as, for example, a licensee who may have the right to use IP vis-à-vis third parties. However, it is to be understood that the lesser right holders may not necessarily enjoy exclusive rights in the meaning of intellectual property law";

(j) With respect to paragraph 24, the suggestion was also made that the term "holder of intellectual property rights" might be used instead of the term "right holder", as it was clearer;

(k) With respect to paragraph 25, the suggestion was made that it should emphasize the fact that the rights of the licensor and the licensee depended on the terms of the licence agreement (except in the case of compulsory or implied licences where there was no agreement) and that the right to collect royalties and to terminate the contract was usually part of that agreement; and

(l) With respect to paragraph 27, it was suggested that the term "transfer" be examined to ensure consistency of use throughout the draft annex.

20. While with respect to the suggestion referred to in paragraph 3, subparagraph (i), above, it was stated that the essence of an intellectual property right could be explained in a positive way, there was support for the suggestions mentioned in paragraph 19 above. With respect to the suggestion referred to in

paragraph 19, subparagraph (c), above, the Working Group postponed its decision until it had an opportunity to consider the rights and obligations of the parties (see para. 96 below). Subject to the other changes referred to in paragraph 19 above, the Working Group approved the substance of section C of the Introduction on terminology.

4. Examples of intellectual property financing practices

21. There was broad support in the Working Group for section D of the Introduction on the examples of intellectual property financing practices. At the same time, a number of suggestions were made.

22. One suggestion was that examples 5 and 6 should be deleted. It was stated that they involved inventory, rather than intellectual property, financing. It was also observed that the fact that the value of inventory was enhanced by the intellectual property used with respect to the inventory was a practical or economic, but not a legal, matter. That suggestion was objected to. It was stated that, while tangible assets and intellectual property used with respect to those assets were two different types of asset, security rights could be created in both of those types of asset. It was also observed that security rights in inventory or equipment with respect to which intellectual property was used were sufficiently important to warrant reference in the examples section of the draft annex.

23. Another suggestion was that examples 5 and 6 should be placed in a separate section under a different heading and with a different introduction or the heading of that section and the introduction should be revised to clarify that examples 5 and 6 involved somehow different financing practices. While there was sufficient support for that suggestion, the way of its exact implementation was left to the Secretariat.

24. Yet another suggestion was that the examples should be supplemented by examples of acquisition financing practices. The Working Group postponed discussion of that suggestion until it had an opportunity to reconsider its decision that the principles of acquisition financing did not apply to intellectual property (see A/CN.9/649, paras. 74-76; see also paras. 91-93 below).

25. Yet another suggestion was that, in example 1, reference should be made to the bank's reliance on a prior check of the patent registry. While there was no objection as a matter of policy, it was widely felt that the matter was better discussed in the chapter on registration rather than in the section of the Introduction dealing with examples.

26. Subject to the changes referred to in paragraph 23 above, the Working Group approved the substance of section D of the Introduction dealing with examples of intellectual property financing practices.

5. Key objectives and fundamental policies

27. The Working Group approved the substance of section E of the Introduction, dealing with the key objectives and fundamental policies of the draft annex.

B. Scope of application and party autonomy (A/CN.9/WG.VI/WP.37/Add.1)

1. Broad scope of application

28. There was general support for a broad scope of application of the draft annex. However, with regard to the formulation of the text dealing with the scope of application of the draft annex, a number of suggestions were made, including the following:

(a) Paragraph 2 should refer in the second sentence to the possibility that a security right could be created in a patent, a trademark and the economic rights under a copyright "or other intellectual property right as defined under law relating to intellectual property", so as to avoid limiting the scope of intellectual property rights covered;

(b) Paragraphs 7 and 19 should clarify that they referred to true outright transfers and not to disguised secured transactions, reflecting the approach of the Guide that substance should prevail over form;

(c) The discussion on patents in section A.4 on limitations on scope should be revised to refer to a patent owner or co-owner, to registration or application for registration of a patent, and to protection being granted to the first person to invent the patent or the first person to file an application;

(d) A new section should be added to refer to neighbouring (allied or related) rights in section A.4 on limitations on scope;

(e) The examples in paragraphs 14-21 should be revised to clarify that they indicated the scope and the implications of the deference to law relating to intellectual property, setting out in an illustrative way the problems that might arise from the non-uniform approaches to intellectual property financing in law relating to intellectual property, rather then what the approach of law relating to intellectual property law should be;

(f) The references in paragraphs 16-20 to registration in an intellectual property registry of a security right in intellectual property should be revised to ensure that they were not unnecessarily inconsistent with each other; and

(g) The references in paragraph 17 to bona fide (good faith) purchasers of encumbered intellectual property should be deleted and the paragraph revised to avoid an implication that the law in all States was as described in that paragraph.

29. With respect to the examples in paragraphs 14-21, a number of additional suggestions were made.

30. One suggestion was that the examples in paragraphs 14-21 should be deleted. It was stated that the examples were not helpful in that they did not clarify the impact of the application of recommendation 4, subparagraph (b), or the problems that existed as a result of the non-harmonized or outdated approaches to intellectual property financing in the various laws relating to intellectual property. That suggestion was objected to. It was widely felt that, while the examples in paragraphs 14-21 could benefit from the clarifications mentioned in paragraph 28, subparagraph (e), above, they usefully clarified the scope and the impact of the application of recommendation 4, subparagraph (b), and should thus be retained. It

was also stated that those examples were helpful in clarifying the limits of a harmonization or modernization of secured transactions law and in particular the need to harmonize or modernize law relating to intellectual property (which was said to be beyond the mandate of the Working Group) in order to achieve optimal results with respect to intellectual property financing.

31. Another suggestion was that the examples should be placed in the appropriate context in the draft annex (e.g. on third-party effectiveness, registration, priority or enforcement). There was no sufficient support for that suggestion. It was widely felt that the examples were appropriately placed to explain the limitations on scope and usefully supplemented the general discussion on the interrelationship between secured transactions law and law relating to intellectual property included in section B of the Introduction (see A/CN.9/WG.VI/WP.37, paras. 9-14).

32. Subject to the changes mentioned in paragraph 28 above, the Working Group approved the substance of section B.1 on the broad scope of application of the draft annex.

2. Application of the principle of party autonomy to security rights in intellectual property

33. While there was support for the principle of party autonomy in the Working Group, a number of suggestions were made, including the following:

(a) Paragraph 23 should be revised to refer to an example of the application of the principle of party autonomy in an intellectual property financing context, as a general introduction of the matters discussed in chapter VII on the rights and obligations of the parties (see A/CN.9/WG.VI/WP.37/Add.3, paras. 19-22);

(b) Paragraph 24 should be revised to deal with the question whether parties could agree that damages for infringement, as well as for lost profits and devaluation of the encumbered intellectual property, formed part of the original encumbered intellectual property, or were to be treated as proceeds under the Guide, provided that that was not inconsistent with law relating to intellectual property.

34. Subject to those changes, the Working Group approved the substance of section B on the application of the principle of party autonomy to security rights in intellectual property.

C. Creation of a security right in intellectual property (A/CN.9/WG.VI/WP.37/Add.1)

1. The concepts of creation and third-party effectiveness

35. The Working Group approved the substance of section A dealing with the concepts of creation and third-party effectiveness of a security right in intellectual property.

2. Unitary concept of a security right

36. The Working Group approved the substance of section B dealing with the unitary concept of a security right.

3. Requirements for the creation of a security right in intellectual property

37. Differing views were expressed with regard to the degree of specificity of the description of encumbered intellectual property in the security agreement.

38. One view was that intellectual property was different from tangible assets and copyrights, for example, included a bundle of rights that had to be described with precision in the security agreement. It was stated that such an approach would ensure certainty but also allow a copyright owner to use unencumbered parts of its bundle of rights to obtain credit from other sources. It was emphasized that that right was essential to the copyright owner's ability to obtain credit.

39. Another view was that, in view of the divisibility of intellectual property rights, parties could always divide their intellectual property rights and use them to obtain credit from different sources, while having some discretion as to how to describe encumbered assets in a security agreement. It was observed that the general description of encumbered assets facilitated their use as security for credit and was a minimum standard, always leaving it to parties to describe the encumbered assets specifically, if they so wished. It was also pointed out that, unless there was a need to protect certain parties (such as the debtor or third parties), there was no need for the law to interfere with the autonomy of the parties to the security agreement.

40. Yet another view was that, under recommendation 14, subparagraph (d), encumbered assets had to be described in the security agreement "in a manner that reasonably allowed their identification". It was widely felt that that standard (which was also the standard for the description of the encumbered assets in the notice registered under recommendation 63) was sufficiently flexible to allow a general or less general description of the encumbered assets, depending on what was a "reasonable" description of the assets under the relevant law and practice. It was also observed that recommendation 4, subparagraph (b), would be sufficient to preserve any contrary rules of law relating to intellectual property.

41. In the discussion, the suggestion was made that references in the draft annex to the law preserved under recommendation 4, subparagraph (b), should be standardized. In response, it was noted that the term "law relating to intellectual property" was intended to serve that purpose. While there was broad support for the suggestion and the response, it was agreed that the relevant discussion in the terminology section should be reviewed to ensure that that point was sufficiently clarified and that term was consistently used throughout the draft annex.

42. After discussion, it was widely felt that reference should be made to the concept of "reasonable identification" of the encumbered assets in the security agreement (see recommendation 14, subparagraph (d)) that could vary depending on what was reasonable under the relevant law or practice. Subject to those changes, the Working Group approved the substance of section C on the requirements for the creation of a security right in intellectual property.

4. Rights of a grantor with respect to the intellectual property to be encumbered

43. With respect to paragraph 33, the Working Group recalled that all references in the draft annex to the term "lesser rights holder" should be replaced by direct references to a "licensee or a licensor" (see para. 19 (a) above). Subject to that

change, the Working Group approved the substance of section D on the rights of a grantor with respect to the intellectual property to be encumbered.

5. Distinction between a secured creditor and an owner with respect to intellectual property

44. The Working Group approved the substance of section E on the distinction between a secured creditor and an owner with respect to intellectual property.

6. Types of encumbered asset in an intellectual property context

(a) Rights of an owner

45. A number of drafting suggestions were made, including the following:

(a) The text in parenthesis at the end of paragraph 37 should be aligned with the revised version of section C (see para. 42 above);

(b) The words "in return for royalties" at the end of paragraph 39 should be deleted;

(c) Paragraph 41 should be revised to clarify that: (i) the question whether the right to sue infringers (seeking an injunction and compensation) was a movable asset was governed by law other than secured transactions law, and (ii) if that right was a movable asset, the question whether that asset could be subject to a security right was a matter of secured transactions law subject to recommendation 4, subparagraph (b);

(d) Paragraph 42 should be revised to clarify that the right of the secured creditor to sue infringers (in the name of the grantor) before default of the grantor was an elaboration of the right to protect the encumbered asset, a matter discussed in chapter VII of the draft annex on the rights and obligations of the parties to a security agreement (see A/CN.9/WG.VI/WP.37/Add.3, paras. 19-22); and

(e) Paragraph 43 should be revised to refer to the secured creditor dealing with national authorities during the various phases of the registration process rather than "to register" an already registered intellectual property right.

46. The suggestion was also made that paragraphs 41 and 42 should be deleted or placed elsewhere in the draft guide. It was stated that the right to sue infringers and possibly obtain compensation was an asset of uncertain value and could not be used as security for credit. It was also observed that typically the secured creditor could exercise that right only after the grantor's default in the context of the enforcement of its security right. There was no sufficient support for that suggestion. It was stated that the value of an encumbered asset and the risks involved were practical matters better left to parties. It was also observed that a secured creditor could also exercise the right to sue infringers if that right was given to the secured creditor by the grantor or the grantor failed to exercise that right.

47. Subject to the changes mentioned above (see para. 45), the Working Group approved the substance of section F.1 on the rights of an owner as an encumbered asset.

(b) Rights of a licensor

48. A number of drafting suggestions were made, including the following:

(a) The first two sentences of paragraphs 45 and 47 should be revised to clarify that the right to payment of royalties, referred to in those paragraphs, constituted the original encumbered asset where the grantor was a licensor, and not proceeds;

(b) The point that the right to payment of royalties could be proceeds of the original encumbered intellectual property should be made in the section discussing the rights of an owner as an encumbered asset;

(c) The reference to international accounting standards in paragraph 47 should be either supplemented with information as to why it was relevant for intellectual property or deleted;

(d) The references to the right to royalties in several paragraphs, including paragraphs 47 and 48, should be replaced by wording along the following lines "right to payment of royalties"; and

(e) The last two sentences of paragraph 51 should be revised to avoid inconsistencies and references to matters of insolvency law by referring to the fact that a licensor might not be able to control the flow of royalties by bilateral agreements but was owed payment of royalties.

49. Subject to those changes, the Working Group approved the substance of section F.2 on rights of a licensor as an encumbered asset.

(c) Rights of a licensee

50. A number of suggestions of a drafting nature were made, including the following:

(a) Paragraphs 53 and 54 should be revised to deal with the rights of a licensee, leaving issues arising where the licensee was a sub-licensor to the section on the rights of a licensor; and

(b) The second and third sentences of paragraph 54 should be revised to read along the following lines: "The reason is that it is important for the licensor to retain control over the licensed intellectual property and who can use it. If such control cannot be exercised, the value of the licensed intellectual property may be materially impaired or lost completely. If the rights of a licensee under a licence agreement are transferable and the licensee grants a security right in them, the secured creditor will take the licensee's rights subject to the terms and conditions of the licence agreement."

51. Subject to those changes, the Working Group approved the substance of section F.3 on the rights of a licensee as an encumbered asset.

(d) Rights in intellectual property used with respect to a tangible asset

52. A number of drafting suggestions were made, including the following:

(a) The heading of the section should be revised to read "rights in tangible assets with respect to which intellectual property is used";

(b) Paragraphs 56 and 57 should be revised to distinguish situations, in which the manufacturer of the encumbered tangible assets was the intellectual property owner (in which case the encumbered asset was the intellectual property), from situations, in which the manufacturer was the licensee (in which case the encumbered asset was the licensee's rights);

(c) Paragraph 58 should refer to the exhaustion "doctrine" or "principle" with a cross-reference to the chapter on enforcement; and

(d) The recommendation in paragraph 59 should be revised to read along the following lines: "The law should provide that, in the case of a tangible asset with respect to which intellectual property is used, …".

53. Subject to those changes, the Working Group approved the substance of section F.4 on rights in tangible assets with respect to which intellectual property was used (corrected heading).

7. Security rights in future intellectual property

54. The suggestion was made that the penultimate sentence in paragraph 63 should be revised to clarify the concept of "improvements", providing that, in some States, under law relating to copyright, a security right in an old version of software might extend to a new version of that software. In response, caution was advised in view of the fact that the approach to that issue differed from State to State. It was also observed that the discussion in section G was appropriate to the extent it emphasized that whether a security right extended to future intellectual property depended on the description of the encumbered asset, referred to legislative prohibitions emanating from law relating to intellectual property and explained that those prohibitions were not affected by the Guide. Subject to clarifying the concept of "improvements" under intellectual property law, the Working Group approved the substance of section G on security rights in future intellectual property.

8. Legal and contractual limitations on the transferability of intellectual property

55. The suggestion was made that the words "at least prior to actual receipt of payment by the author" in the third sentence of paragraph 65 were unnecessary and should be deleted. Subject to that change, the Working Group approved the substance of section H on legal and contractual limitations on the transferability of intellectual property.

D. Effectiveness of a security right in intellectual property against third parties (A/CN.9/WG.VI/WP.37/Add.2)

1. The concept of third-party effectiveness

56. The suggestion was made that, to ensure consistency, the first sentence of paragraph 2 should refer to the law "in some States" and the second sentence should refer to the law "in other States". The suggestion was also made that the last sentence of paragraph 3 was unnecessary and should be deleted. Subject to those changes, the Working Group approved the substance of section A on the concept of third-party effectiveness.

2. Third-party effectiveness of security rights in intellectual property that are registrable in an intellectual property rights registry

57. With respect to paragraph 4, it was suggested that it should be revised to clarify that only registries that ensured third-party effectiveness of security rights qualified as specialized registries under the Guide. There was support for the principle reflected in that suggestion. However, it was widely felt that it should be expressed not in narrow technical terms of third-party effectiveness but broader notions of public accessibility of registered information so as to ensure, for example, that specialized ship, aircraft or intellectual property registries that provided for effectiveness in general were not undermined, while registries serving purely administrative purposes would not qualify as specialized registries under the Guide. It was also suggested that sections B and C, might be reorganized to reflect more clearly the three possible alternatives, that is, specialized registries with opposability results, specialized registries without such results and specialized registries with opposability results in which, however, the secured creditor did not register.

58. With respect to paragraphs 5 and 6, it was suggested that they should be revised to indicate that registration in a specialized registry produced different results from State to State and that, in many cases, the results of such registration were not clear.

59. With regard to paragraph 7, it was suggested that the sentences referring to what the Guide was not meant to do should be deleted or explained. While there was broad support for the suggestion to explain the reasons for the approach of the Guide, the suggestion to delete those sentences did not receive sufficient support. The suggestion was also made that the last sentence should be supplemented by an additional sentence providing that States might also wish to consider providing for registration of security rights in intellectual property exclusively in the general security rights registry. That suggestion did not attract sufficient support as it would appear as recommending an approach that would be contrary to the options offered in recommendation 38. However, there was broad support for a suggestion to make the last sentence of paragraph 7 conditional on the existence of a specialized intellectual property registry and a decision by a State enacting the law recommended in the Guide to make use of the options offered in recommendation 38.

60. Subject to those changes mentioned above that attracted sufficient support, the Working Group approved the substance of section B on the third-party effectiveness of security rights in intellectual property that are registrable in an intellectual property registry.

3. Third-party effectiveness of security rights in intellectual property that are not registrable in an intellectual property rights registry

61. With respect to paragraph 8, it was suggested that the third sentence should be placed at the end as it applied to the whole paragraph. Subject to that change, the Working Group approved the substance of section C on the third-party effectiveness of security rights in intellectual property that are not registrable in an intellectual property registry.

E. The registry system (A/CN.9/WG.VI/WP.37/Add.2)

1. The general security rights registry

62. With respect to paragraphs 10 and 11, it was suggested that it should be possible to register in the general security rights registry a notice with a general or specific description of encumbered intellectual property. It was stated that the registry should also have an asset-based index for searchers to be able to identify a portfolio of encumbered intellectual property rights or specific intellectual property rights. It was also observed that consequent amendments should be made to the chapters on third-party effectiveness and priority. Differing views were expressed with regard to that suggestion. However, in view of the fact that that suggestion could have significant implications for the approaches recommended in several chapters of the Guide, the Working Group postponed its consideration until it had an opportunity to consider a comprehensive proposal in writing. Subject to its future decision on that proposal, the Working Group approved the substance of section A on the general security rights registry.

2. Asset-specific intellectual property registries

63. With respect to paragraph 13, it was suggested that, in line with its prior decision in the context of its discussion of limitations on the scope of the draft annex (see para. 28, subpara. (c), above), reference should be made to "co-owners" rather than "co-inventors". Subject to that change, the Working Group approved the substance of section B on asset-specific intellectual property rights.

3. Coordination of registries

64. With respect to paragraph 15, it was suggested that it should distinguish between registries that qualified as specialized registries under the Guide and registries that did not qualify (see para. 57 above).

65. With respect to paragraph 18, it was suggested that the last sentence should refer to the preservation of different priority rules of law relating to intellectual property (e.g. a rule that provided that a purchaser of intellectual property that was aware of a prior security right did not acquire the intellectual property free of the security right).

66. With respect to paragraph 19, it was suggested that it should be revised to avoid the inadvertent implication that the draft annex recommended the use of multiple registries.

67. Subject to those suggestions, the Working Group approved the substance of section C on the coordination of registries.

4. Registration of notices about security rights in future intellectual property

68. The Working Group approved the substance of section D on the registration of notices about security rights in future intellectual property.

5. Dual registration or search

69. With respect to paragraph 23, it was suggested that it should refer to specialized registries producing the effects agreed upon by the Working Group in the context of its discussion on section B of the chapter on third-party effectiveness (see para. 57 above). It was also suggested that an analysis of costs involved in registration in intellectual property and general security rights registries might be helpful to assess the impact of registration and search in one or the other registry, or in both. It was agreed that the Working Group could consider such information at a future meeting. Subject to those changes, the Working Group approved the substance of section E on dual registration or search.

6. Time of effectiveness of registration

70. With respect to paragraph 28, it was agreed that the phrase "under the law relating to intellectual property law" should be added in the first sentence after "specialized registration systems" in order to clarify that the rules mentioned in that paragraph referred to rules of law relating to intellectual property, to which the law recommended in the Guide would defer under recommendation 4, subparagraph (b).

7. Impact of a transfer of encumbered intellectual property on the effectiveness of registration

71. With respect to paragraph 32, it was suggested that the third alternative should apply to intellectual property so that a transfer of encumbered intellectual property should have no impact on the third-party effectiveness of a security right in that intellectual property. Both support for and opposition to that suggestion were expressed. In support, it was stated that without such a rule a secured creditor extending credit against the entire copyright in a movie would need to make continuous registrations against tiers of licensees and sub-licensees (if a licence was treated as a transfer under law relating to intellectual property). It was also observed that in such a case a significant monitoring burden would be imposed on intellectual property financiers that might discourage credit against such assets. In opposition, it was observed that there was no reason to follow a different approach from the approach followed in the Guide with respect to assets other than intellectual property. It was also pointed out that, with such an approach, lenders to a transferee or a licensee in a chain would not be able to discover a security right created by a person in the chain other than their grantor. Subject to the addition of a recommendation along the lines suggested within square brackets for consideration at a future session, the Working Group approved the substance of section G on the impact of a transfer of encumbered intellectual property on the effectiveness of registration.

8. Registration of security rights in trademarks

72. The Working Group approved the substance of section H on the registration of security rights in trademarks.

F. Priority of a security right in intellectual property (A/CN.9/WG.VI/WP.37/Add.2 and 3)

1. The concept of priority

73. With respect to paragraph 43, it was suggested that it should be revised to align the references to the meaning of the term "priority" with its explanation in the terminology section of the Guide and to clarify that a conflict between two parties, neither of whom was a secured creditor, was outside the scope of the Guide, irrespective of the *nemo dat* rule (nobody gives rights that they do not have). Subject to those changes, the Working Group approved the substance of section A on the concept of priority of a security right in intellectual property.

2. Identification of competing claimants

74. With respect to paragraph 45, it was suggested that it should be revised to clarify that coverage of transfers of intellectual property for security purposes in the Guide was not an exception as such transactions were treated as secured transactions under the Guide and not as true transfers and to align the reference to recommendation 4, subparagraph (b), with its wording. Subject to those changes, the Working Group approved the substance of section B on the identification of competing claimants.

3. Relevance of knowledge of prior transfers or security rights

75. With respect to paragraph 46, it was suggested that the reference to recommendation 81, subparagraph (a), should track its language more closely ("sold in the ordinary course of the sellers' business … violates the rights of the secured creditor under the security agreement") and to ensure a better flow between the first and the third sentence inverting their order. Subject to those changes, the Working Group approved the substance of section C on the identification of competing claimants.

4. Priority of a security right registered in an intellectual property registry

76. With respect to paragraph 49, it was suggested that the reference to the words "or other right" in the first sentence should be deleted as recommendations 77 and 78 referred only to a security right that was registered in the specialized registry or not. It was also suggested that the priority rule should be made subject to registration of a security right in a specialized registry that qualified as a specialized registry under the Guide.

77. With respect to the last sentences of paragraphs 50 and 51, it was suggested that they should be revised to avoid any inconsistency.

78. Subject to those changes, the Working Group approved the substance of section D on the priority of a security right registered in an intellectual property registry.

5. Priority of a security right that is not registrable in an intellectual property registry

79. The Working Group approved the substance of section E on the priority of a security right that was not registrable or registered in an intellectual property registry.

6. Rights of transferees of encumbered intellectual property

80. It was noted that, once the Working Group had reached a decision on recommendation 81, subparagraph (c), the references in paragraph 55 to recommendation 81 would need to be adjusted. Subject to that change, the Working Group approved the substance of section F on rights of transferees of encumbered intellectual property.

7. Rights of licensees in general

81. With respect to paragraph 3, it was suggested that it should be revised to clarify that:

(a) The secured creditor could not collect encumbered receivables before default of the grantor, unless the grantor and the secured creditor had agreed otherwise;

(b) The licensor's secured creditor enforcing its security right could sell the licence or grant another licence free of the pre-existing licence not as licensor but on behalf of the licensor.

82. Subject to those changes, the Working Group approved the substance of section G on rights of licensees in general.

8. Rights of certain licensees

83. The Working Group considered two alternatives for a recommendation dealing with the question whether a non-exclusive licensee in certain circumstances should take its licence free of a security right created by the licensor and whether, as a result, in the case of default of the owner, the licensee should be entitled to collect the royalties but not terminate the licence agreement (see A/CN.9/WG.VI/WP.37/Add.3, para. 10, Note to the Working Group).

84. Broad support was expressed for the substance of alternative A. It was stated that the recommendation should deal with the specific issue mentioned above in the relationship between the secured creditor as a secured creditor (and not as an owner or a person entitled to exercise the owner's rights) and the licensee under secured transactions law and not affect the relationship between the owner and the licensee or the rights and remedies of the owner or the secured creditor under intellectual property law. As to the particular formulation of alternative A, there was broad support for a narrow scope to cover transactions such as legitimate off-the-shelf purchases of copies of copyrighted software or patent pools used with respect to equipment. It was generally felt that such transactions involved the off-the-shelf mass licensing of intellectual property and that there was no off-the-shelf mass selling of intellectual property. It was also pointed out that reference to the concept of ordinary course of business should be avoided, since that term was not commonly used in law relating to intellectual property.

85. Some support was also expressed for alternative B. It was stated that, to the extent that it referred to the requirement that the secured creditor authorize the owner to grant licences free of the security right, alternative B was more appropriate. It was also observed that protection of buyers in off-the-shelf transactions might be left to consumer protection law. However, it was widely felt that the reference to the licensee taking its licence free of the security right of the owner's secured creditor only if the secured creditor had authorized the owner to grant licences free of the security right was unnecessary as it formed already part of recommendation 80, subparagraph (b). It was also observed that, to the extent that the rest of alternative B created a rebuttable presumption that the secured creditor had authorized the owner to grant licences free of the security right could be detrimental to the rights of a secured creditor, a result that could have a negative impact on the ability of the owner to use its intellectual property in order to obtain credit. In addition, it was pointed out that, while consumer transactions would certainly be covered by alternative A, other transactions would also be covered and that, in any case, the matter was typically addressed in secured transactions law rather than in consumer protection law.

86. After discussion, the Working Group requested the Secretariat to prepare a revised version of alternative A with appropriate commentary, implementing the above-mentioned common understanding of the Working Group (see para. 84).

9. Priority of a security right granted by a licensor as against a security right granted by a licensee

87. It was noted that, in a priority conflict between a security right granted by a licensor and a security right granted by the licensee, the security right of the licensee's secured creditor would prevail over the security right of the licensor's secured creditor, unless the licensee's secured creditor registered a notice of its security right in the general security rights registry, while the licensor's secured creditor registered a document or notice of its security right in the relevant intellectual property registry. It was also noted that, where rights in the encumbered intellectual property were not registrable in an intellectual property registry that qualified as a specialized registry under the Guide, priority would be determined by the order of registration of a notice of the security right in the general security rights registry (see recommendations 76-78).

88. In addition, it was noted that the licensor could protect its rights, for example, by: (a) prohibiting the licensee from assigning or granting a security right in its claim against sub-licensees for the payment of royalties owed under sub-licence agreements; (b) terminating the licence in cases where the licensee assigned its royalty claims against sub-licensees in breach of such a prohibition; (c) agreeing that any sub-licensee pay its sub-royalties directly to the licensor; (d) requiring the secured creditor of the licensee to enter into a subordination agreement with the licensor's secured creditor; or (e) by obtaining a security right in royalty claims of the licensee against sub-licensees.

89. However, it was stated that none of the above-mentioned ways offered adequate protection, since: (a) prohibitions or terminations of contracts were contrary to the economic interest of the parties and were not sufficient when a violation of a licence agreement had taken place with the resulting damage to the relevant intellectual property; (b) "lock-box" arrangements did not constitute an

efficient way of addressing the problem nor were easy for parties to agree upon; (c) similarly, subordination agreements were not easy to obtain; and (d) the priority of a security right of the licensor as against another security right granted by the licensee in those royalty claims would be subject to the general first-to-file priority rules.

90. In addition, it was observed that, where the encumbered asset was a tangible asset, a security right might qualify as an acquisition security right with the result that a seller, financial lessor or lender might obtain priority over a secured creditor of a buyer, financial lessee or borrower, even if the seller, financial lessor or lender registered second.

91. In that connection, the suggestion was made that acquisition financing transactions relating to intellectual property should be treated in a similar way as acquisition financing transactions relating to tangible assets. A number of transactions that should be covered were mentioned, including the following: (a) transactions in which a financier financed the research for the development of a drug taking a security right in the receivables from future sales of the patented drug; (b) transactions in which a financier financed the acquisition of intellectual property against a security right in the intellectual property and future royalty payments from licence agreements; and (c) transactions in which a financier financed the acquisition of a licence of intellectual property against a security right in future sub-royalty payments (that financier could be a third party or the licensor itself).

92. In all these transactions, it was suggested, the secured creditor of the owner or licensor should enjoy the special priority of an acquisition financier, provided that that secured creditor registered a notice of its security right in the general security rights registry within a short period of time after "delivery" of the intellectual property to the buyer or the granting of the licence to the licensee. In support of that suggestion, it was observed that the secured creditor of the owner or licensor deserved that treatment, since without that start-up financing no asset or value would be created for other financiers to take a security right in.

93. While some interest was expressed in that suggestion, it was widely felt that there was no complete analogy with acquisition financing relating to tangible assets; nor were there widely practiced intellectual property financing transactions such as retention-of-title sales or financial leases of tangible assets. It was also widely felt that, in any case, any analogy between intellectual property and tangible assets would result in special priority being extended to the security right in the original encumbered intellectual property and not its cash proceeds, since that was the rule for acquisition security rights in inventory. After discussion, the Working Group agreed to consider the merits of that suggestion at a future session based on a State's written proposal to be prepared (see para. 24 above).

10. Priority of a security right in intellectual property as against the right of a judgement creditor

94. The Working Group approved the substance of section J on the priority of a security right in intellectual property as against the right of a judgement creditor.

11. Subordination

95. The Working Group approved the substance of section K on subordination.

G. Rights and obligations of the parties to a security agreement relating to intellectual property (A/CN.9/WG.VI/WP.37/Add.3)

1. Application of the principle of party autonomy

96. There was broad support for the principle of party autonomy, subject to specific limitations introduced by law relating to intellectual property. As to the particular formulation of the relevant commentary, a number of suggestions were made. One suggestion was that further examples of the application of the principle of party autonomy in an intellectual property financing context should be given. Examples mentioned included: the right of the secured creditor to limit the right of the owner to grant licences (and in particular exclusive licences) without the consent of the secured creditor (see para. 20 above); and the right of the owner's secured creditor to collect royalties owed to the licensor even before default by the owner. There was sufficient support for that suggestion.

97. Another suggestion was to introduce rules to deal with those matters that would be applicable in the absence of contrary agreement of the parties. That suggestion was objected to. It was widely felt that it would be difficult to devise such rules that would be appropriate for all the different types of intellectual property financing transactions and, in any case, the matter should better be left to party autonomy.

98. Subject to the above-mentioned change that attracted sufficient support (see para. 96 above), the Working Group approved the substance of section A on the application of the principle of party autonomy.

2. Right of the secured creditor to pursue infringers or renew registrations

99. There was broad support for the right of the grantor and the secured creditor to agree that the secured creditor could pursue infringers and renew registrations, unless prohibited by law relating to intellectual property, as well as for including in the draft annex both commentary and a recommendation to deal with that matter. As to the particular formulation of that recommendation, differing views were expressed. One view was that the recommendation should be formulated in broad terms to permit the parties to agree as to who might pursue infringers and renew registrations, as well as under what circumstances the secured creditor might do so. Another view was that the recommendation should be formulated in narrower terms to provide that the law did not prevent the parties to agree that the secured creditor could pursue infringers and renew registrations, as well as under what circumstances the secured creditor might do so.

100. The suggestion was also made that the commentary should discuss patent revocation and limitation and the approach taken in many legal systems, under which the patent owner was not entitled to revoke or limit the encumbered patent without the consent of the secured creditor. There was sufficient support for that suggestion.

101. Furthermore, the Working Group considered commentary and recommendation relating to the issue whether a secured creditor could sue infringers if the intellectual property owner failed to do so within a reasonable period of time after a request by the secured creditor. There was no support for a recommendation along those lines. It was widely felt that such a recommendation could interfere with law relating to intellectual property. It was also stated that such a recommendation would be unclear and cause confusion as it would be difficult to determine what constituted a "reasonable" time period in the absence of an agreement of the parties.

102. However, there was sufficient support for discussing that matter in the commentary, provided that reference would be made to a request of the secured creditor to the grantor. It was stated that: (a) if the grantor accepted the request, the secured creditor would be entitled to exercise those rights of the grantor with the explicit consent of the grantor; (b) if the grantor did not respond, the secured creditor would be entitled to exercise those rights of the grantor with the implicit consent of the grantor; and (c) if the grantor rejected the request, the secured creditor would not be entitled to exercise those rights of the grantor. The suggestion was also made that the commentary should also discuss the possibility that, if the grantor failed to exercise its right to sue infringers or renew registrations, the secured creditor would consider that that failure constituted an event of default and would exercise its remedies in enforcing its security right in the encumbered intellectual property, rather than pursue infringers.

103. Subject to the above-mentioned changes, the Working Group approved the substance of section B on the right of the secured creditor to pursue infringers and renew registrations.

H. Rights and obligations of third-party obligors in intellectual property financing transactions (A/CN.9/WG.VI/WP.37/Add.3)

104. The Working Group approved the substance of chapter VIII on the rights and obligations of third-party obligors in intellectual property financing transactions.

I. Enforcement of a security right in intellectual property (A/CN.9/WG.VI/WP.37/Add.3)

1. Intersection of secured transactions law and law relating to intellectual property

105. With respect to paragraph 27, it was agreed that, in order to align the last sentence with recommendation 13 of the Guide, reference should be made to the time of conclusion of the security agreement, rather than to the time of enforcement of the security right. Subject to that change, the Working Group approved the substance of section A on the intersection of secured transactions law and law relating to intellectual property.

2. Enforcement of a security right in different types of intellectual property

106. The Working Group approved the substance of section B on the enforcement of a security right in different types of intellectual property.

3. Taking "possession" of encumbered intellectual property

107. It was agreed that the heading of the section should be changed to read along the following lines: "Taking possession of documents necessary for the enforcement of a security right in intellectual property". It was also agreed that, in paragraph 30, reference should be made to documents "necessary to enforce a security right in the encumbered intellectual property", rather than to "documents that are accessory to the encumbered intellectual property". Subject to those changes, the Working Group approved the substance of section C on taking "possession" of encumbered intellectual property.

4. Disposition of encumbered intellectual property

108. The Working Group approved the substance of section D on the disposition of encumbered intellectual property.

5. Rights acquired through disposition of encumbered intellectual property

109. The Working Group agreed that the first sentence of paragraph 36 was unnecessary and confusing in referring to the "condition" of the encumbered asset and should thus be deleted. Subject to that change, the Working Group approved the substance of section E on rights acquired through disposition of encumbered intellectual property.

6. Proposal by the secured creditor to accept the encumbered intellectual property

110. It was agreed that, in line with the terminology used in the Guide, reference should be made to the right of the secured creditor to "acquire" rather than to "accept" the encumbered asset in satisfaction of the secured obligation. It was also agreed that a new sentence should be inserted after the second sentence of paragraph 37 to clarify that, as was the case with the acquisition of ownership or rights other than security rights in assets covered in the Guide, which was a matter of law other than secured transactions law, the acquisition of rights other than security rights in intellectual property was a matter of law relating to intellectual property. In addition, it was agreed that the wording in parenthesis in the penultimate sentence of paragraph 37 should be revised to read along the following lines: "assuming that such registration is required to make it effective". Subject to those changes, the Working Group approved the substance of section F on a proposal by the secured creditor to accept the encumbered intellectual property.

7. Collection of royalties and licence fees

111. In line with the change made in paragraph 27 of section A of the enforcement chapter (see para. 105 above), the Working Group agreed that also in paragraph 38 reference should be made to the time of the conclusion of the security agreement, rather than to the time a security right in a receivable was enforced. Subject to that change, the Working Group approved the substance of section G on the collection of royalties and licence fees.

8. Licensor's other contractual rights

112. It was agreed that in the first sentence of paragraph 39, for reasons of clarity, reference should be made to "royalties", rather than to "receivables". It was also

agreed that the last two sentences of paragraph 39 should be replaced by language along the following lines: "These rights will remain vested in the licensor if the security right is only in the royalties. However, if the secured creditor also wants to obtain a security right in these other rights of the licensor, they would have to be included in the description of the encumbered assets in the security agreement." Subject to those changes, the Working Group approved section H on the licensor's other contractual rights.

9. Enforcement of security rights in tangible assets related to intellectual property

113. It was agreed that, in order to avoid inadvertently creating the impression that there was a universal understanding of the "exhaustion doctrine" and otherwise clarify the second sentence of paragraph 41, the words "when specific conditions are met, such as the first marketing or sale of the product embodying intellectual property" should be inserted after the words "certain rights". It was also agreed that the last sentence of paragraph 41 was not accurate and should be deleted, since a trademark owner would typically request the removal of the trademark before the encumbered products bearing the trademarks were resold. It was also agreed that the last sentence of paragraph 42 should be revised to read along the following lines: "As a consequence, to enforce effectively its security right in the product, in the absence of prior agreement between the secured creditor and the licensor, the secured creditor would either need to obtain the consent of the owner/licensor or rely on the relevant law relating to intellectual property and the operation of the exhaustion doctrine". Subject to those changes, the Working Group approved the substance of section I on the enforcement of security rights in tangible assets related to intellectual property.

10. Enforcement of a security right in a licensee's rights

114. It was agreed that, to the extent it suggested that registration of licences was a universal practice, the penultimate sentence of paragraph 45 was unnecessary and confusing, and should thus be deleted. It was also agreed that the first sentence of paragraph 46 should make it clearer that, under the Guide, rights to payment of royalties, were receivables. Subject to those changes, the Working Group approved the substance of section J on the enforcement of a security right in a licensee's rights.

J. Law applicable to security right in intellectual property (A/CN.9/WG.VI/WP.37/Add.4)

115. It was agreed that a variation of alternative A should be prepared and placed within square brackets for the consideration of the Working Group. It was stated that that variation should provide that the creation of a security right in intellectual property would be subject to a single law, namely, either the law of the grantor's location or the law chosen by the parties (the latter alternative should appear within separate square brackets as it departed from the general approach recommended in the Guide). It was also agreed that the commentary should set out the advantages and disadvantages of all the alternatives. In addition, it was agreed that alternative C should be explained as being the only alternative, under which the law applicable to the effectiveness of a security right in intellectual property against an insolvency

representative would be one law, that is, the law of the grantor's location. Moreover, it was agreed that the chapter should emphasize the importance of conflict-of-laws rules including examples and cross-references to the conflict-of-laws chapter of the Guide. Subject to those changes, the Working Group approved the substance of chapter X on the law applicable to a security right in intellectual property.

K. The impact of insolvency of a licensor or licensee of intellectual property on a security right in that party's rights under a licence agreement (A/CN.9/WG.VI/WP.37/Add.4)

1. General

116. The Working Group noted with appreciation a note by the Secretariat entitled "Discussion of intellectual property in the Legislative Guide on Insolvency Law (A/CN.9/WG.V/WP.87), setting out references to intellectual property law in the discussions of Working Group V (Insolvency Law), the consequences of rejection of a contract and provisions in the UNCITRAL Legislative Guide on Insolvency Law (hereinafter referred to as the "UNCITRAL Insolvency Guide") concerning the decision to continue a contract and protection of the value of the encumbered asset.

117. It was agreed that the note in the chapter on insolvency of the draft annex, describing the work done by Working Groups V and VI on the intersection of insolvency law, law relating to intellectual property and secured transactions law should be updated and placed in the introduction of the draft annex. It was also agreed that references to the right of the insolvency representative to reject a licence agreement only if it was not fully performed by the debtor and its counterparty were extremely important and should be retained.

118. In response to a question raised with regard to the treatment of personal service contracts in the case of insolvency, it was noted that the UNCITRAL Insolvency Guide addressed that question in paragraph 143 of part two, chapter II, which provided that: "Exceptions to the power to reject may also be appropriate in the case of labour agreements, agreements where the debtor is a lessor or franchisor or a licensor of intellectual property and termination of the agreement would end or seriously affect the business of the counterparty, in particular where the advantage to the debtor may be relatively minor, and contracts with government, such as licensing agreements and procurement contracts."

119. It was agreed that the draft annex should incorporate language along those lines. It was widely felt that that language would also provide some guidance as to the possible treatment of licence agreements in the insolvency of a licensor. It was also agreed that: (a) the phrase "the license of" should be inserted before the words "subsequent sub-licensees and sub-licensors" at the end of paragraph 23; and (b) the word "a" in front of the word "one" in the second sentence of paragraph 26 should be deleted. Subject to those changes, the Working Group approved the substance of section A of the insolvency chapter of the draft annex and referred it to Working Group V.

2. Insolvency of the licensor

120. It was widely felt that paragraph 29 appropriately discussed the impact of the insolvency of the licensor on the security right of the secured creditor of the insolvent licensor or of a licensee or sub-licensee, explaining that, if the licensor's insolvency representative decided to reject the licence agreement, the secured creditors of both the licensor and the licensee would practically be deprived of their security rights and would be left with a claim for damages as unsecured creditors. On that basis, the Working Group agreed that the discussion in paragraphs 30-35 as to how a secured creditor could be protected in such circumstances was useful and should be retained. The Working Group also agreed that paragraph 36 should be retained outside square brackets as a modest suggestion for consideration by States. In addition, it was agreed that, inasmuch as paragraphs 30-35 referred not only to approaches taken in laws but also to commercial practices, language along the following lines should be inserted at the end of paragraph 36: "States might also wish to consider to what extent the commercial practices described in paragraphs 30 and 31 would provide adequate practical solutions". Subject to those changes, the Working Group approved the substance of section B of the insolvency chapter of the draft annex and referred it to Working Group V.

3. Insolvency of the licensee

121. It was agreed that the words "that the licensor" should be added before the words "or has a right to terminate the license agreement" in the first sentence of paragraph 40. Subject to that change, the Working Group approved the substance of section C of the insolvency chapter of the draft annex and referred it to Working Group V.

4. Appendix

122. The Working Group approved the substance of the appendix to the insolvency chapter of the draft annex and referred it to Working Group V.

V. Future work

123. The Working Group noted that its sixteenth and seventeenth sessions were scheduled to take place from 2 to 6 November 2009 and from 8 to 12 February 2010 respectively, those dates being subject to approval by the Commission at its forty-second session (Vienna, 29 June to 17 July 2009).

124. At the close of the present session, the Working Group considered its future work programme after completion of the draft annex. Several suggestions were made, including that the Working Group could prepare:

(a) A supplement to the Guide on security rights in securities not covered by the draft Convention on Substantive Rules regarding Intermediated Securities, being prepared by the International Institute for the Unification of Private Law ("Unidroit"), and the Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary, prepared by the Hague Conference on Private International Law;

(b) A legislative guide on registration of security rights;

(c) A contractual guide on secured financing agreements;

(d) A contractual guide on intellectual property licensing;

(e) A model law on secured transactions, incorporating the recommendations of the Guide; and

(f) A text on franchising.

125. With respect to security rights in securities, the Working Group noted the decision of the Commission that future work should be undertaken with a view to preparing an annex to the Guide on certain types of securities, taking into account work by other organizations, in particular Unidroit.[11] It was stated that work would depend on the scope of the Unidroit draft Convention and on whether Unidroit would be prepared to cover securities not addressed in that Convention. With respect to a legislative guide on general security rights registries, it was observed that work would appropriately supplement the work of the Commission on the Guide and preparatory work could be undertaken through a colloquium or discussion at the sixteenth session of the Working Group early in 2010, provided that the Working Group would have completed its work on the draft annex. With respect to a model law on secured transactions incorporating the recommendations of the Guide, it was pointed out that it would be an extremely useful text that would further enhance the work of the Commission on the Guide.

126. With respect to a contractual guide on secured financing agreements, it was mentioned that it would usefully provide assistance to parties to such transactions with a discussion of the issues that should be addressed in such agreements and a set of rules that would be applicable in the absence of contrary agreement of the parties. With respect to a contractual guide on intellectual property licensing, it was observed that it would be an extremely important project, which would address key issues of law relating to intellectual property, and thus the lead for such a project should be left to the World Intellectual Property Organization ("WIPO") and other relevant organizations. In that connection, the Working Group noted that WIPO had prepared a number of guides on intellectual property licensing and was currently undertaking further work. It was also noted that WIPO would welcome suggestions by Member States for further work in that area of law and in that context would also welcome cooperation with UNCITRAL. With respect to the text on franchising, it was observed that would be a useful project that would address important practices including relating to trademarks. It was also pointed out that work of other organizations would have to be considered, including the Model Franchise Disclosure Law, prepared by Unidroit.

---

[11] Ibid., Sixty-second session, Supplement No. 17 (A/62/17), paras. 147 and 160.

D. Note by the Secretariat on the Draft Annex to the UNCITRAL Legislative Guide on Secured Transactions dealing with security rights in intellectual property submitted to the Working Group on Security Interests at its fifteenth session

(A/CN.9/WG.VI/WP.37 and Add.1-4) [Original: English]

CONTENTS

I. Introduction

A. Background

[*Note to the Working Group: For paras. 1-8, see A/CN.9/WG.VI/WP.35, paras. 1-7, A/CN.9/667, para. 16, A/CN.9/WG.VI/WP.36, para. 12, A/CN.9/WG.VI/WP.33, paras. 1-5, A/CN.9/WG.VI/WP.34, paras. 10-11 and A/63/17, para. 326*.]

1. At its thirty-ninth session, in 2006, the Commission considered its future work on secured financing law. It was noted that intellectual property rights (e.g. copyrights, patents and trademarks) were increasingly becoming an extremely important source of credit and should not be excluded from a modern secured transactions law. In addition, it was noted that the recommendations of the draft Legislative Guide on Secured Transactions ("the draft Guide") generally applied to security rights in intellectual property to the extent that they were not inconsistent with intellectual property law. Moreover, it was noted that, as the recommendations had not been prepared with the special intellectual property law issues in mind, the draft Guide suggested that enacting States might consider making any necessary adjustments to the recommendations to address those issues.[1]

2. In order to provide more guidance to States, the suggestion was made that the Secretariat should prepare, in cooperation with international organizations with

[1] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17* (A/61/17), paras. 81 and 82.

expertise in the fields of secured financing 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.[2] 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.[3]

3. Pursuant to that decision of the Commission, the Secretariat organized in cooperation with WIPO a colloquium on security rights in intellectual property rights (Vienna, 18 and 19 January 2007). The colloquium was attended by experts on secured financing and intellectual property law, including representatives of Governments and national and international, governmental and non-governmental organizations. At the colloquium, several suggestions were made with respect to adjustments that would need to be made to the draft Guide to address issues specific to intellectual property financing.[4]

4. At the first part of its fortieth session (Vienna, 25 June-12 July 2007), the Commission considered a note by the Secretariat entitled "Possible future work on security rights in intellectual property" (A/CN.9/632). The note took into account the conclusions reached at the colloquium. In order to provide sufficient guidance to States as to the adjustments that they might need to make in their laws to avoid inconsistencies between secured financing and intellectual property law, the Commission decided to entrust Working Group VI (Security Interests) with the preparation of an annex to the draft Guide specific to security rights in intellectual property rights.[5]

5. At its resumed fortieth session (Vienna, 10-14 December 2007), the Commission finalized and adopted the UNCITRAL Legislative Guide on Secured Transactions (the "*Guide*") on the understanding that an annex to the *Guide* specific to security rights in intellectual property rights would subsequently be prepared.[6]

6. At its thirteenth session (New York, 19-23 May 2008), Working Group VI considered a note by the Secretariat entitled "Security rights in intellectual property rights" (A/CN.9/WG.VI/WP.33 and Add.1). At that session, the Working Group requested the Secretariat to prepare a draft of the annex to the *Guide* on security rights in intellectual property ("the Annex") reflecting the deliberations and decisions of the Working Group (see A/CN.9/649, para. 13). At the same session, the Working Group felt that, while due deference should be expressed to intellectual

---

[2] Ibid., para. 83.

[3] Ibid., para. 86.

[4] See www.uncitral.org/uncitral/en/commission/colloquia/2secint.html.

[5] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17* (A/62/17 (Part I)), paras. 156, 157 and 162.

[6] Ibid., *Sixty-second Session, Supplement No. 17* (A/62/17 (Part II)), paras. 99-100.

property law, the point of reference for the Annex should be the *Guide* and not national secured transactions law (see A/CN.9/649, para. 14). As the Working Group was not able to reach agreement as to whether certain matters related to the impact of insolvency on a security right in intellectual property (see A/CN.9/649, paras. 98-102) were sufficiently linked with secured transactions law so as to justify their discussion in the Annex, it decided to revisit those matters at a future meeting and to recommend that Working Group V (Insolvency Law) be requested to consider those matters (see A/CN.9/649, para. 103).

7. At its forty-first session (New York, 16 June-3 July 2008), the Commission noted with satisfaction the good progress achieved by the Working Group. The Commission also noted the above-mentioned discussion and decision of Working Group VI with respect to certain insolvency-related matters and decided that Working Group V should be informed and invited to express any preliminary opinion at its next session. It was also decided that, should any remaining issue require joint consideration by the two Working Groups after that session, the Secretariat should have the discretion to organize, after consulting with the chairpersons of the two Working Groups, a joint discussion of the impact of insolvency on a security right in intellectual property when the two Working Groups meet back to back in the Spring of 2009.[7]

8. At its fourteenth session (Vienna, 20-24 October 2008), the Working Group continued its work based on a note prepared by the Secretariat entitled "Annex to the UNCITRAL Legislative Guide on Secured Transactions dealing with security rights in intellectual property (A/CN.9/WG.VI/WP.35 and Add.1). At that session, the Working Group requested the Secretariat to prepare a revised version of the draft Annex reflecting the deliberations and decisions of the Working Group (see A/CN.9/667, para. 15). The Working Group also referred to Working Group V (Insolvency Law) certain matters relating to the impact of insolvency on a security right in intellectual property (see A/667, paras. 129-140). In that connection, it was widely felt that every effort should be made to conclude discussions of these matters as soon as possible, so that their results could be included in the draft Annex by the fall of 2009 or the early spring of 2010 and the draft Annex could be submitted to the Commission for final approval and adoption at its forty-third session in 2010 (see A/CN.9/667, para. 143).

B. The interaction between secured transactions law and law relating to intellectual property

[*Note to the Working Group: For paras. 9-14, see A/CN.9/WG.VI/WP.35, paras. 8-11, A/CN.9/667, paras. 17-19 and A/CN.9/WG.VI/WP.33, paras. 76-82*.]

9. With only limited exceptions, the recommendations of the *Guide* apply to security rights in all types of movable asset, including intellectual property (see recommendations 2 and 4-7). With respect to intellectual property, the law recommended in the *Guide* does not apply in so far as its provisions are inconsistent with national law or international agreements, to which the State enacting the law is a party, relating to intellectual property (see recommendation 4, subparagraph (b)).

---

[7] Ibid., *Sixty-second Session, Supplement No. 17* (A/62/17), para. 326.

10. Recommendation 4, subparagraph (b), sets out the basic principle with respect to the interaction of secured transactions and intellectual property law. The meaning given to the term "intellectual property" is intended to ensure consistency of the *Guide* with intellectual property laws and treaties (see para. 15 below). The term "law relating to intellectual property" includes both statutory and case law and is broader than the term "intellectual property law", but narrower than general contract or property law. The scope of recommendation 4, subparagraph (b), will, consequently, be broader or narrower, depending on how a State defines the scope of intellectual property. It is understood that a State will do so in compliance with its international obligations flowing from intellectual property law treaties (such as the Agreement on Trade Related Aspects of Intellectual Property Rights — generally referred to as "the TRIPS Agreement"), as provided in those treaties.

11. The purpose of recommendation 4, subparagraph (b), is to ensure that, when States adopt the recommendations of the *Guide*, they do not inadvertently change basic rules of law relating to intellectual property. As issues relating to the existence, validity and content of a grantor's intellectual property rights are matters to which the *Guide* does not speak (see A/CN.9/WG.VI/WP.37/Add.1, section II.A.4), the occasions for possible conflict in regimes on these issues are limited. Nevertheless, in matters relating to the creation, third-party effectiveness, priority and enforcement of a security right in intellectual property, it is possible that in some States the two regimes will provide for different rules. Where this is the case, recommendation 4, subparagraph (b), preserves the precedence of the intellectual property-specific rule.

12. It bears noting, however, that rules of law relating to intellectual property in some States relate only to forms of secured transactions that are not unique to intellectual property and that will no longer be available once a State adopts the recommendations of the *Guide* (e.g. pledges, mortgages and transfers or trusts of intellectual property for security purposes). For this reason, States that adopt the *Guide* may also wish to review their law relating to intellectual property to coordinate it with the secured transactions law recommended in the *Guide*. In that connection, States enacting the law recommended in the *Guide* will have to ensure that their law reflects in particular the integrated and functional approach recommended in the *Guide*, without modifying the basic policies and objectives of their law relating to intellectual property.

13. The Annex is intended to provide guidance to States with respect to such an integrated secured transactions and intellectual property law system. Building on the commentary and the recommendations of the *Guide*, the Annex discusses how the principles of the *Guide* apply where the encumbered asset consists of intellectual property and, where necessary, adds new commentary and recommendations. As is the case with the other asset-specific commentary and recommendations, the intellectual-property-specific commentary and recommendations modify or supplement the general commentary and recommendations of the *Guide*. Accordingly, subject to contrary provisions of law relating to intellectual property and any asset-specific commentary and recommendations of the Annex, a security right in intellectual property may be created, be made effective against third parties, have priority and be enforced as provided in the general recommendations of the *Guide*.

14. While it is not the purpose of the Annex to make any recommendations for changes to a State's law relating to intellectual property, as mentioned above, it may have an impact on that law. The Annex discusses this impact and, occasionally, includes in the commentary modest suggestions for the consideration of enacting States (the expression used is "States might" or "States may wish to consider …", rather than "States should"). These suggestions are based on the premise that, by enacting secured transactions laws of the type recommended by the *Guide*, States have made a policy decision to modernize their secured transactions law. The suggestions seek, therefore, to point out where this modernization might lead States to consider how best to coordinate their secured transactions law with their law relating to intellectual property.

C. Terminology

[*Note to the Working Group: For paras. 15-32, see A/CN.9/WG.VI/WP.35, paras. 12-21, A/CN.9/667, paras. 20-22, A/CN.9/WG.VI/WP.33, paras. 39-60, and A/CN.9/649, paras. 104-107*.]

(a) Intellectual property

15. As already mentioned, the *Guide* uses the term "intellectual property", referring to intellectual property rights, such as copyrights, trademarks and patents. Thus, references in the *Guide* to "intellectual property" are to be understood as references to "intellectual property rights", such as the rights of an author or inventor (an "owner"), or a lesser rights holder, such as licensor, that is not an owner, or a licensee. The commentary explains that the meaning given to the term "intellectual property" in the *Guide* is intended to ensure consistency of the *Guide* with law relating to intellectual property, while at the same time respecting the right of a State enacting the recommendations of the *Guide* to align the definition with its own law (national law and treaties). That is, as already mentioned, the *Guide* treats as "intellectual property", for the purposes of the *Guide*, whatever an enacting State considers to be intellectual property in compliance with its international obligations.

16. For purposes of secured transactions law, the intellectual property right itself is distinct from the income streams that flow from it, such as the income received from the exercise of broadcasting rights. In addition, a licence agreement is not a secured transaction and does not create a security right. Thus, secured transactions law does not affect the rights and obligations of a licensor or a licensee under a licence agreement. For example, the owner's or lesser rights holder's ability to limit the transferability of its intellectual property rights remains unaffected.

(b) Law and law relating to intellectual property

17. As also already mentioned, the commentary also clarifies that references to the term "law" throughout the *Guide* include both statutory and non-statutory law. In addition, the *Guide* clarifies that the expression "law relating to intellectual property" (see recommendation 4, subparagraph (b)) is broader than intellectual property law (dealing, for example, with patents, trademarks or copyrights) but narrower than general contract or property law. In particular, the expression "law relating to intellectual property" means law that governs specifically security rights in intellectual property, and not law that generally governs security rights in various

types of asset and that may happen to govern security rights in intellectual property. An example of such a "law relating to intellectual property" might be intellectual property law that applies specifically to pledges of rights in software.

(c) Security right

18. The *Guide* uses the term "security right" to refer to all types of property right in a movable asset that are created by agreement to secure payment or other performance of an obligation, irrespective of how they are denominated. Thus, the term "security right" would cover the right of a pledge or mortgagee of intellectual property, as well as of transferee in a transfer for security purposes. States that adopt the recommendation of the *Guide* may wish to review their law relating to intellectual property and coordinate the terminology used in that law with the terminology used in the law recommended in the *Guide*.

(d) Licence

19. The *Guide* also uses the term "licence" and, in intellectual-property-specific contexts, draws a distinction, first, between the licence agreement and the licence (i.e. the authorization to use the licensed intellectual property) and, second, between exclusive licences and non-exclusive ones. In addition, under the *Guide*, a licence agreement does not create a security right and a right to terminate a licence agreement is not a security right.

20. However, the exact meaning of these terms is left to law relating to intellectual property, as well as to contract and other law that may be applicable (such as the Joint Recommendation Concerning Trademark Licences, adopted by the Paris Union Assembly and the WIPO General Assembly (2000)[8] and the Singapore Treaty on the Law of Trademarks (2006)).[9] In particular, the *Guide* does not interfere with the limits or terms of a licence agreement that may refer to the description of the specific intellectual property, the authorized or restricted uses, geographic area of use, and the duration of use. For example, an exclusive licence to exercise the "theatrical rights" in Film A in Country X for "10 years starting 1 Jan. 2008" may be given and it will be different from an exclusive licence to exercise the "video rights" in Film A in Country Y for "10 years starting 1 Jan. 2008".

21. In addition, the *Guide* does not affect in any way the particular characterization of rights under a licence agreement given by law relating to intellectual property. For example, the *Guide* does not affect the nature of rights created under an exclusive licence agreement as rights in rem or the nature of an exclusive licence as a transfer, as is the case under some laws relating to intellectual property. Moreover, the *Guide* does not affect any limitations included in the licence agreement as to the transferability of licensed rights.

(e) Encumbered asset

22. The *Guide* uses the term "encumbered asset" to denote an asset that is subject to a security right. While the *Guide* refers by convention to "a security right in an encumbered asset", what is really encumbered and meant is "a security right in whatever right the grantor has in an encumbered asset". The point is clear when a

---

[8] www.wipo.int/export/sites/www/about-ip/en/development_iplaw/pdf/pub835.pdf.

[9] www.wipo.int/treaties/en/ip/singapore.

lessee encumbers its limited rights in a movable asset or in immovable property, but less clear when the encumbered asset is an intellectual property right. With respect to intangible assets such as intellectual property rights, the additional complication is that they may exist without material support. For example, a copyright in music may exist without it being recorded or performed or even transcribed onto a music sheet. The copyright arises as a moral right from its inception, even though some form of material support may be necessary for purposes of evidence or registration (where registration is foreseen under law relating to copyright).

23. The *Guide* also uses various terms to denote the particular type of intellectual property that may be used as an encumbered asset without interfering with the nature, the content or the legal consequences of such terms for purposes of intellectual property, contract or property law. These types of intellectual property that may be used as security for credit are the rights of an author or inventor (an "owner"), the rights of a lesser rights holder that is not an owner such as a licensor or licensee under a licence agreement, and the rights in intellectual property used with respect to a tangible asset. The owner or lesser rights holder can transfer all its rights to a transferee and that transferee becomes an owner or rights holder. The owner or lesser rights holder may also transfer only part of its rights to a licensee and to that extent the licensee becomes a rights holder.

24. The term "owner" refers to the person that is entitled to enforce the exclusive rights flowing from intellectual property or its transferee (i.e. the creator, author or inventor and its successor). The term "rights holder" refers to a person that has some rights (e.g. a licensee typically has the right to use the licensed intellectual property). A secured creditor (or, in some States, an exclusive licensee) may be an owner or a rights holder, provided that that is the will of the parties and that law relating to intellectual property permits it.

25. The rights of a licensor include the right to claim payment of royalties. The rights of a licensee include the licensee's authorization to use the licensed intellectual property in accordance with the terms of the licence agreement and possibly the right to enter into sub-licence agreements and the right to obtain payment of sub-royalties. The rights of a grantor of a security right in a tangible asset with respect to which intellectual property is used are described in the agreement between the secured creditor and the grantor (owner or lesser rights holder of the relevant intellectual property) in line with secured transactions law and law relating to intellectual property.

(f) Receivable and assignment

26. The term "receivable" is used in the *Guide* and in the United Nations Assignment Convention to reflect a right to payment of a monetary obligation and thus, for the purposes of the *Guide*, includes the right of a licensor (that may be an owner or a lesser rights holder) to obtain payment of licence royalties (without affecting terms and conditions of the licence agreement relating to the payment of royalties, such as that payments are to be staggered or that there might be percentage payments depending on market conditions or sales figures).

27. The term "assignment" is used in the *Guide* with respect to receivables to denote not only outright transfers but also transfers for security purposes (treated under the *Guide* as security devices) and transactions creating a security right in a

receivable. To avoid creating the impression that the recommendations of the *Guide* relating to assignments of receivables apply also to "assignments" of intellectual property, the term "transfer" (rather than the term "assignment") is used in the Annex to denote the transfer of the rights of an intellectual property owner. While the term "assignment" used with respect to receivables includes "outright assignments of receivables", the term "transfer" used with respect to intellectual property rights does not include the outright transfer of intellectual property rights. Similarly, the term "transfer" is not used in the *Guide* to denote a licence agreement. Whether a licence agreement is a transfer under law relating to intellectual property is a different matter.

(g) Grantor

28. As already mentioned, in a secured transaction relating to intellectual property, the encumbered asset may be the intellectual property rights of the intellectual property owner or the rights of a holder of lesser rights, such as the rights of a licensor or the authorization of the licensee to use the licensed intellectual property and perhaps the right to grant sub-licences and receive payment of sub-royalties. Thus, depending on the kind of asset that is encumbered, the term "grantor" will refer to an owner or a lesser rights holder, such as a licensor or a licensee. Finally, as is the case with any secured transactions relating to other types of movable asset, the term "grantor" may reflect a third party granting a security right in intellectual property to secure the obligation owed by a debtor to a secured creditor.

(h) Competing claimant

29. In secured transactions law, the concept of a "competing claimant" is used to identify parties other than the secured creditor in a specific security agreement that might claim a right in the encumbered assets or the proceeds from its disposition. Thus, the *Guide* uses the term "competing claimant" in the sense of a claimant that competes with a secured creditor (i.e. another secured creditor with a security right in the same asset, another creditor of the grantor that has a right in the same asset, the insolvency representative in the insolvency of the grantor, or a buyer or other transferee or a lessee or licensee of the same asset). The term competing claimant is essential for the application in particular of the priority rules recommended in the *Guide*, such as for example of the rule in recommendation 76, under which a secured creditor with a security right in receivables that registered a notice of its security right in the general security rights registry has priority over another secured creditor that received a security right in the same receivables by the same grantor before the other secured creditor but failed to register.

30. In law relating to intellectual property, however, the notion of a "competing claimant" is not used, and priority conflicts typically refer to conflicts among transferees and licensees, even if no conflict with a secured creditor is involved (infringers are not competing claimants and, if they are only alleged infringers that prove that they have a legitimate claim, they are transferees or licensees, and not infringers). Secured transactions law does not interfere with the resolution of such conflicts that do not involve a secured creditor, unless, of course, the transfer is a transfer for security purposes, which is treated as a secured transaction. Thus, a conflict between two outright transferees would not be covered by the *Guide*. However, a conflict between an outright transferee of intellectual property rights

and a transferee for security purposes of the same intellectual property rights by the same grantor would be covered by the *Guide* (subject to the limitation of recommendation 4, subparagraph (a)).

(i) Secured creditor

31. The *Guide* recognizes that a security agreement creates a security right, that is, a limited property right, not an ownership right, in an encumbered asset, provided, of course, that the grantor has the right to create a security right in the asset. Thus, in the *Guide*, the term "secured creditor" (which includes a transferee by way of security) is not used to denote a transferee or an owner. In other words, a secured creditor that acquires a security right under the *Guide* is not presumed to acquire ownership thereby. This approach is mainly intended to protect the grantor/owner that retains ownership and often possession or control of the encumbered asset, while sufficiently securing the secured creditor if the grantor or other debtor defaults on the payment of the secured obligation. In any case, secured creditors normally do not wish to accept the responsibilities and costs of ownership, and the *Guide* does not require that the secured creditor do so. This means, for example, that, even after the creation of a security right, the owner of the encumbered asset may exercise all its rights as an owner (subject, of course, to any limitations it may have agreed to with the secured creditor). Accordingly, when the secured creditor disposes of the encumbered asset enforcing its security right after default, the secured creditor does not necessarily become an owner. In this case, the secured creditor merely exercises its security right. Only where, after default, the secured creditor becomes the owner after exercising the remedy of proposing to acquire the grantor's ownership rights in the encumbered asset in total or partial satisfaction of the secured obligation (in the absence of any objection by the debtor and the debtor's other creditors), or acquires the grantor's ownership rights by purchasing the asset at a public sale, may the secured creditor become an owner.

32. For the purposes of secured transactions law, this characterization of a security agreement and the rights of a secured creditor applies to situations where the encumbered asset is intellectual property. However, the *Guide* does not affect different characterizations under law relating to intellectual property law with respect to matters specific to intellectual property. Under law relating to intellectual property, a security agreement may be characterized as a transfer of the intellectual property rights of an owner and the secured creditor may have the rights of an owner (or a lesser rights holder), such as to deal with State authorities, grant licences or sue infringers. So, for example, nothing in secured transactions law prevents a secured creditor from agreeing with the grantor/owner (or lesser rights holder) to become an owner (or a lesser rights holder) of the encumbered intellectual property. If the agreement does or is intended to secure the performance of an obligation and intellectual property law permits a secured creditor to become an owner (or a lesser rights holder), the term "secured creditor" may denote an owner (or a lesser rights holder) to the extent permitted under law relating to intellectual property. In such a case, secured transactions law will apply with respect to issues normally addressed in that law, such as the creation, third-party effectiveness, priority and enforcement of a security right; and law relating to intellectual property will apply with respect to issues that are normally addressed in that law, such as dealing with State authorities, granting licences or suing infringers.

D. Examples of intellectual property financing practices

[*Note to the Working Group: For paras. 33-46, see A/CN.9/WG.V/WP.35, paras. 22-41, A/CN.9/667, paras. 23-24, A/CN.9/WG.VI/WP.33, paras. 8-21, and A/CN.9/649, para. 108*.]

33. To provide a backdrop for the analysis in the Annex, this section sets forth a number of hypothetical fact patterns involving secured transactions in which intellectual property rights are used as encumbered assets.

34. Secured transactions involving intellectual property rights can usefully be divided into three broad categories. The first category consists of transactions in which the intellectual property rights themselves serve as security for the credit (i.e. the rights of an owner, the rights of a licensor or the rights of a licensee). In these transactions, the provider of credit is granted a security right in patents, trademarks, copyrights or other intellectual property rights of the borrower. Examples 1 though 4 below each involve such a situation. In examples 1 and 2, the encumbered assets are the rights of an owner. In example 3, the encumbered assets are the rights of a licensor, and, in example 4, the encumbered assets are the rights of a licensee.

35. The second category of transactions involves situations in which assets other than intellectual property rights, such as inventory or equipment, serve as security for credit, but the value of these assets is based to some extent upon intellectual property rights with which they are associated. This category of transactions is illustrated by examples 5 and 6.

36. The third category of transaction involves financing transactions that combine the elements of the first two categories. An illustration of this type of transaction is found in Example 7, which involves a credit facility to a manufacturer, secured by a security right covering substantially all of the manufacturer's assets, including its intellectual property rights.

37. Each of the examples illustrates how owners, licensors and licensees of intellectual property rights, or owners of assets that rely for their value on intellectual property, can use these assets as security for credit. In each case, a prudent prospective lender will engage in due diligence to ascertain the nature and extent of the rights of the owners and licensees of the intellectual property involved, and to evaluate the extent to which the proposed financing would or would not interfere with such rights. The ability of a lender to address these issues in a satisfactory manner, obtaining consents and other agreements where necessary from the owners of the intellectual property, will affect the lender's willingness to extend the requested credit and the cost of such credit. Each of these categories of transaction involves not only different types (or combinations) of encumbered asset, but also presents different legal issues for a prospective lender or other credit provider.[10]

---

[10] Some of these questions might be addressed in asset-specific intellectual property legislation. For example, article 19 of the Council Regulation (EC) No. 40/94 on the Community Trademark provides that a security right may be created in a community trademark and, on request of one of the parties, such a right may be registered in the community trademark registry.

38. A practical question applicable to all examples is how the borrower can ensure that it receives an accurate appraisal of the value of its intellectual property. Valuation of assets to be encumbered is an issue that any prudent secured creditor will have to address irrespective of the type of asset to be encumbered. However, valuation of intellectual property is harder as it raises the issue whether intellectual property may be exploited economically to generate income. For example, once a patent is created, the question arises whether it has any commercial application and, if so, what would be the amount of income that could be generated from the sales of any patented product.

39. Secured transactions law cannot answer this question. However, insofar as it affects the use of intellectual property as security for credit, some of the complexities involved in appraising the value of intellectual property need to be understood and addressed. For example, although the appraisal must take into account the value of the intellectual property itself and the expected cash flow, there are no universally accepted formulae for so doing. Because of the increasing importance of intellectual property as security for credit, in some States, lenders and borrowers are often able to seek guidance from independent appraisers of intellectual property. National authorities develop valuation methodologies. In addition, international organizations, such as WIPO, provide training for valuation of intellectual property in general or for the purpose of licence agreements in particular. Moreover, other international organizations, such as the Organization for Economic Cooperation and Development, have developed standards for the valuation of intellectual property as assets that can be used as security for credit.

Example 1 (rights of an owner in a portfolio of patents and patent applications)

40. Company A, a pharmaceutical company that is constantly developing new drugs, wishes to obtain a revolving line of credit from Bank A secured in part by Company A's portfolio of existing and future drug patents and patent applications. Company A provides Bank A with a list of all of its existing patents and patent applications, as well as their chain of title. Bank A evaluates which patents and patent applications it will include in the "borrowing base" (that is, the pool of patents and patent applications to which Bank A will agree to attribute value for borrowing purposes), and at what value they will be included. In connection therewith, Bank A obtains an appraisal of the patents and patent applications from an independent appraiser of intellectual property. Bank A then obtains a security right in the portfolio of patents and patent applications and registers a notice of its security right in the appropriate national patent registries (assuming that the applicable law provides for registration of security rights in the patents registry). When Company A obtains a new patent, it provides its chain of title and valuation to Bank A for inclusion in the borrowing base. Bank A evaluates the information, determines how much additional credit it will extend based on the new patent, and adjusts the borrowing base. Bank A then makes appropriate registrations in the patent offices reflecting its security right in the new patent.

Example 2 (rights of a licensor in royalties from the licence of comic characters)

41. Company B, a publisher of comic books, licenses its copyrighted characters to a wide array of manufacturers of clothing, toys, interactive software and accessories. The licensor's standard form of licence agreement requires licensees to

report sales, and pay royalties on such sales, on a quarterly basis. Company B wishes to borrow money from Bank B secured by the anticipated stream of royalty payments arising under these licence agreements. Company B provides Bank B with a list of the licences, the credit profile of the licensees, and the status of each licence agreement. Bank B then requires Company B to obtain an "estoppel certificate" from each licensee verifying the existence of the licence, the absence of default and the amount due, and confirming the licensee's agreement to pay future royalties to Bank B until further notice.

Example 3 (rights of a licensor in royalties from the licence of a motion picture)

42. Company C, a motion picture company, wishes to produce a motion picture. Company C sets up a separate company to undertake the production and hire the individual writers, producers, directors and actors. The production company obtains a loan from Bank C secured by the copyright, service contracts and all revenues to be earned from the exploitation of the motion picture in the future. The production company then enters into licence agreements with distributors in multiple countries who agree to pay "advance guarantees" against royalties upon completion and delivery of the picture. For each licence, the production Company C, Bank C and the distributor/licensee enter into an "acknowledgement and assignment" agreement under which the licensee acknowledges the prior security right of Bank C and the assignment of its royalty payments to Bank C, while Bank C agrees that, in case of enforcement of its security right in the licensor's rights, it will not terminate the licence so long as the licensee makes payments and otherwise abides by the terms of the licence agreement.

Example 4 (authorization of a licensee to use licensed software)

43. Company D is a developer of sophisticated software used in various architectural applications. In addition to certain software components created by the company's in-house software engineers (which the company licenses to its customers), Company D also incorporates into its products software components that it licenses from third parties (and then sub-licences to its customers). Company D wishes to borrow money from Bank D secured by a security right in its rights as licensee of intellectual property from third parties, that is, its right to use and incorporate into its software some software components that it licenses from third parties. For evidence, the software developer can provide Bank D with a copy of its software components licence.

Example 5 (rights of a manufacturer of trademarked inventory)

44. Company E, a manufacturer of designer jeans and other high-fashion clothing, wishes to borrow money from Bank E secured in part by Company E's inventory of finished products. Many of the items manufactured by Company E bear well-known trademarks licensed from third parties under licence agreements that give Company E the right to manufacture and sell the products. Company E provides Bank E with its trademark licence agreements evidencing its right to use the trademarks. Bank E extends credit to Company E against the value of the inventory.

Example 6 (rights of a distributor of trademarked inventory)

45. Company F, one of Company E's distributors, wishes to borrow money from Bank F secured in part by its inventory of designer jeans and other clothing that it purchases from Company E, a significant portion of which bears well-known trademarks licensed by Company F from third parties. Company F provides Bank F with invoices from Company E evidencing that it acquired the jeans in an authorized sale, or copies of the agreements with Company E evidencing that the jeans distributed by Company F are genuine. Bank F extends credit to Company F against the value of the inventory.

Example 7 (security right in all assets of an enterprise)

46. Company G, a manufacturer and distributor of cosmetics, wishes to obtain a €200 million credit facility to provide ongoing working capital for its business. Bank J is considering extending this facility, provided that the facility is secured by an "enterprise mortgage" granting to the bank a security right in substantially all of Company G's existing and future assets, including all existing and future intellectual property rights that it owns or licenses from third parties.

E. Key objectives and fundamental policies

[*Note to the Working Group: For paras. 47-53, see A/CN.9/WG.VI/WP.35, paras. 42-45, A/CN.9/667, paras. 25-28, A/CN.9/WG.VI/WP.33, paras. 61-75, and A/CN.9/649, paras. 88-97*.]

47. The overall objective of the *Guide* is to promote secured credit. In order to achieve this general objective, the *Guide* elaborates and discusses several additional objectives, including the objectives of predictability and transparency (see Introduction, section B, of the *Guide*). The *Guide* also rests on and reflects several fundamental policies. These include providing for comprehensiveness in the scope of secured transactions laws, the integrated and functional approach to secured transactions (under which all transactions performing security functions, however denominated, are considered to be security devices) and the possibility of granting a security right in future assets (see Introduction, section D, 3, of the *Guide*).

48. These key objectives and fundamental policies are equally relevant to secured transactions relating to intellectual property. Accordingly, the overall objective of the *Guide* with respect to intellectual property is to promote secured credit for businesses that own or have the right to use intellectual property, by permitting them to use rights pertaining to intellectual property as encumbered assets, while not interfering with the legitimate rights of the owners, licensors and licensees of intellectual property under law relating to intellectual property, contract or general property law. Similarly, all the objectives and fundamental policies mentioned above apply to secured transactions in which the encumbered asset is or includes intellectual property. For example, the *Guide* is designed to:

(a) Allow persons with rights in intellectual property to use intellectual property as security for credit (see Key objective 1, subparagraph (a));

(b) Allow persons with rights in intellectual property to use the full value of their assets to obtain credit (see Key objective 1, subparagraph (b));

(c) Enable persons with rights in intellectual property to create a security right in such rights in a simple and efficient manner (see Key objective 1, subparagraph (c));

(d) Allow parties to secured transactions relating to intellectual property maximum flexibility to negotiate the terms of their security agreement (see Key objective 1, subparagraph (i));

(e) Enable interested parties to determine the existence of security rights in intellectual property in a clear and predictable way (see Key objective 1, subparagraph (f));

(f) Enable secured creditors to determine the priority of their security rights in intellectual property in a clear and predictable way (see Key objective 1, subparagraph (g)); and

(g) Facilitate efficient enforcement of security rights in intellectual property (see Key objective 1, subparagraph (h)).

49. A general policy of law relating to intellectual property law is to encourage the creation and dissemination of new ideas or discoveries. To accomplish this general policy, law relating to intellectual property accords certain exclusive rights to intellectual property owners and lesser rights holders, such as licensors or licensees. To ensure that the key objectives of secured transactions law will be achieved in a way that does not interfere with the objectives of intellectual property law and thus provide mechanisms to fund the development and dissemination of new works, the *Guide* states a general principle for dealing with the interaction of secured transactions law and law relating to intellectual property. The principle is set out in recommendation 4, subparagraph (b) (see A/CN.9/WG.VI/WP.37/Add.1, section II, A, 4).

50. At this stage, it is sufficient to note that the regime elaborated in the *Guide* does not, in itself, in any way define the content of any intellectual property right, describe the scope of the rights that an owner or lesser rights holder, such as a licensor or licensee, may exercise or impede their rights to preserve the value of their intellectual property rights by preventing their unauthorized use. In this regard, it should be emphasized that the key objective of promoting secured credit with respect to intellectual property should be achieved in a way that does not interfere with the objectives of law relating to intellectual property to prevent unauthorized use of intellectual property or to protect the value of intellectual property and thus to encourage further innovation and creativity.

51. Similarly, this key objective of promoting secured credit while not interfering with the objectives of law relating to intellectual property means that neither the existence of the secured credit regime nor the creation of a security right in intellectual property should diminish the value of intellectual property. Thus, for example, it is important to note that the creation of a security right in intellectual property should not be misinterpreted as constituting an inadvertent abandonment of intellectual property (e.g. failure to use a trademark properly, to use it on all goods or services or to maintain adequate quality control may result in loss of value to, or even abandonment of, the intellectual property) by the owner or the secured creditor.

52. In addition, in the case of goods or services associated with marks, secured transactions law should avoid causing consumer confusion as to the source of goods or services (e.g. where a secured creditor replaces the manufacturer's name and address on the goods with a sticker bearing the creditor's name and address or retains the trademark and sells the goods in a jurisdiction where the trademark is owned by a different person).

53. Finally, secured transactions law should not provide that the purported creation of a security right in the rights of a licensee that are, as a matter of law relating to intellectual property, not transferable except with the consent of the licensor results in the transfer of such rights without the consent of the owner.

(A/CN.9/WG.VI/WP.37/Add.1) [Original: English]

Note by the Secretariat on the Draft Annex to the UNCITRAL Legislative Guide on Secured Transactions dealing with security rights in intellectual property submitted to the Working Group on Security Interests at its fifteenth session

ADDENDUM

CONTENTS

II. Scope of application and party autonomy

[*Note to the Working Group: For paras. 1-24, see A/CN.9/WG.VI/WP.35, paras. 46-67, A/CN.9/667, paras. 29-31, A/CN.9/WG.VI/WP.33, paras. 82-108, and A/CN.9/649, paras. 81-87.*]

A. Broad scope of application

1. The *Guide* applies to security rights in all types of movable asset, including intellectual property, created or acquired by a legal or natural person, to secure all types of obligation, and to all transactions serving security purposes, regardless of how they are denominated by the parties or characterized by prior law (see

recommendations 2 and 8). The Annex has an equally broad scope with respect to security rights in intellectual property.

1. Encumbered assets covered

2. The question of characterization of types of intellectual property and the question of whether each type of intellectual property is transferable and may thus be encumbered are matters of law relating to intellectual property. However, the *Guide* and the Annex are based on the general assumption that a security right may be created in a patent, a trademark and the economic rights under a copyright (but not in the moral rights of an author, if not permitted under law relating to intellectual property). The *Guide* and the Annex are also based on the assumption that the encumbered asset may be various exclusive rights of an owner, the rights of a licensor, the rights of a licensee or the rights in intellectual property used with respect to a tangible asset.

3. However, there is an important qualification to the scope of the *Guide* and the Annex as just set out. In line with general rules of property law, the right to be encumbered has to be transferable under general property law and law relating to intellectual property law. It should be noted that, with the exception of statutory limitations to the assignability of future receivables and receivables assigned in bulk, the law recommended in the *Guide* does not override provisions of any other law (including law relating to intellectual property) to the extent that they limit the creation or enforcement of a security right in or the transferability of specific types of asset, including intellectual property (see recommendation 18).

2. Transactions covered

4. As mentioned, the *Guide* applies to all transactions serving security purposes, regardless how they are denominated by the parties or by law relating to intellectual property. In other words, whether law relating to intellectual property characterizes the transfer of an intellectual property right to a creditor for security purposes as a conditional transfer or even as an "outright" transfer of the right, the *Guide* characterizes this transaction as giving rise to a security right and thus applies to it.

3. Outright transfers of intellectual property

5. The *Guide* applies to the outright transfer (i.e. a transfer of ownership) of receivables (see recommendation 3). As the *Guide* treats royalties payable by the licensee of intellectual property as receivables, it applies to the outright transfer of the right to receive royalties. The inclusion of outright transfers of receivables in the scope of the *Guide* reflects the fact that such transfers are usually seen as financing transactions and are often difficult in practice to distinguish from loans against the receivables.

6. The *Guide* also applies to transfers of all movable assets for security purposes, which it treats as security devices (see recommendation 2, subparagraph (d)). Thus, if a State enacts the recommendations of the *Guide*, a transfer of intellectual property rights (whether full title or rights limited in scope, time or territory) for security purposes would be treated as a secured transaction. Accordingly, parties will be able to simply create a security right in intellectual property using the methods provided in the law recommended in the *Guide* without the need to adopt

other formalities of a "transfer". This result will not affect licence practices as, under the *Guide*, a licence agreement does not create a security right and the right to terminate a licence agreement is not a security right.

7. However, the *Guide* does not apply to outright transfers of any other movable asset, including intellectual property, except to the extent that there is a priority conflict between an outright transferee of the asset and a secured creditor with a security right in the asset. The reason for the exclusion of outright transfers of any other movable asset, including intellectual property, is that they are sufficiently covered by other law, including law relating to intellectual property and, in the case of some types of intellectual property, made subject to specialized registration.

4. Limitations on scope

8. The *Guide* assumes that, in order to facilitate access to financing based on intellectual property, States enacting the recommendations of the *Guide* will include rules on security rights in intellectual property in their modern secured transactions regime. Accordingly, States enacting the recommendations of the *Guide* may wish to review their laws relating to intellectual property with a view to replacing all devices by way of which a security right is created in intellectual property (including fictional assignments) with a general security right. However, the *Guide* also recognizes that this must be done in a manner that is consistent with the policies and infrastructure of law relating to intellectual property of each enacting State (see recommendation 4, subparagraph (b)).

9. The potential points of intersection between secured transactions law and law relating to intellectual property are dealt with in detail in the various chapters of this Annex. To provide a context for this more detailed discussion of the implications of recommendation 4, subparagraph (b), it is helpful at this point to delineate: (a) issues that are clearly the province of law relating to intellectual property and are not intended to be affected in any way by the *Guide*; and (b) issues on which the rules set out in the *Guide* may be pre-empted or supplemented by a rule of the law relating to intellectual property that regulates the same issue in a different manner from the *Guide*.

(a) Distinction between intellectual property rights and security rights in intellectual property rights

10. The *Guide* addresses only legal issues unique to secured transactions law as opposed to issues relating to the nature and legal attributes of the asset that is the object of the security right. The latter are the exclusive province of the body of property law that applies to the particular asset (with the partial unique exception of receivables to the extent outright transfers of receivables are also covered in the *Guide*).

11. In the context of intellectual property financing, it follows that the *Guide* does not affect, and does not purport to affect, issues relating to the existence, validity, enforceability and content of a grantor's intellectual property rights. These issues are determined solely by law relating to intellectual property. Of course, the secured creditor will need to pay attention to those rules in order to assess the existence and quality of the assets to be encumbered, but this would apply to any other asset. What follows is an indicative, non-exhaustive list of issues that may be addressed by law

relating to intellectual property relevant to that assessment. Law relating to intellectual property may, of course, deal with issues not included in the list that follows.

Copyright:

(a) The determination of who is the author or joint author;

(b) The duration of copyright protection;

(c) The economic rights granted under the law and limitations on and exceptions to protection;

(d) The nature of the protected subject matter (expression embodied in the work, as opposed to the idea behind it, and the dividing line between these);

(e) The transferability of economic rights as a matter of law;

(f) The possibilities to terminate transfers and licences and other provisions regulating transfers or licences of rights;

(g) The scope and non-transferability of moral rights;

(h) Presumptions relating to the exercise and transfer of rights and limitations relating to who may exercise rights;

(i) Attribution of original ownership in the case of commissioned works and works created by an employee within the scope of employment.

Patents:

(a) The determination of who is the inventor or co-inventor;

(b) The validity of a patent and in which country it is to be applied for (or filed) and registered;

(c) The limitations on and exceptions to protection;

(d) Scope and duration of protection;

(e) The grounds for invalidity challenges (obviousness or lack of novelty);

(f) Whether certain prior publication precludes patentability;

(g) Whether protection is granted to a person who uses the patent first or to a person who files an application first.

Trademarks and service marks:

(a) The determination of who is the first user or the owner of the mark;

(b) Whether protection of the mark is granted to a person that uses the mark first or to a person that files an application first;

(c) Whether ex ante use is a prerequisite to registration in a mark registry or whether the right is secured by initial registration and maintained by later use;

(d) The basis of protection of the right (distinctiveness);

(e) The basis for losing protection (holder’s failure to ensure that mark retains its association with the owner’s goods in the marketplace), as in the case of:

(i) Licensing without the licensor directly or indirectly controlling the quality or character of the goods or services associated with the mark (so called "naked licensing"); and

(ii) Altering the mark so its appearance does not match the mark as registered;

(f) Whether the mark may be transferred with or without goodwill.

(b) Areas of potential overlap between secured transactions law and law relating to intellectual property

12. The issues just addressed do not create any necessity for deference to law relating to intellectual property, since the *Guide* does not purport to address these issues in the first instance. In other words, they are not issues where the principle of recommendation 4, subparagraph (b), has any application. The deference issue arises when the law relating to intellectual property of the enacting State provides an intellectual-property-specific rule on an issue falling within the scope of the *Guide*, namely, an issue relating to the creation, third-party effectiveness, priority, enforcement of or law applicable to a security right in intellectual property.

13. The precise scope and implications of deference cannot be stated in the abstract since there is great variation among States on the extent to which intellectual-property-specific rules have been established, and indeed even within the same State depending on which category of intellectual property is at issue. The following examples are, however, illustrative of some typically encountered patterns.

Example 1

14. Some States, in which security rights are created by a transfer of title to the encumbered asset, do not permit security rights to be created in a trademark, owing to concerns that the secured creditor's title would impair the quality control required of the trademark holder. Adoption of the recommendations of the *Guide* by such a State would make transfers unnecessary and eliminate the rationale for this prohibition, since the grantor retains ownership of encumbered assets under the *Guide's* concept of security right (whether the secured creditor substitutes the owner or lesser rights holder in its rights for the purposes of law relating to intellectual property is a different matter). Nonetheless, adoption of the recommendations of the *Guide* would not automatically eliminate the prohibition. The requirement for deference means that a specific amendment to relevant intellectual-property-specific legislation would be needed.

Example 2

15. In a few States, as a matter of law relating to intellectual property, registration of a transfer of or a security right in intellectual property in a specialized intellectual property registry is a mandatory prerequisite to either the creation or the third-party effectiveness either of outright transfers only or both of outright transfers and security rights in the category of intellectual property subject to that registry. In view of the principle of deference to law relating to intellectual property embodied in recommendation 4, subparagraph (b), adoption of the *Guide's* recommendations would not affect the operation of such a rule and such specialized registration will

continue to be required. However, deference to law relating to intellectual property will not be sufficient to address the issue of coordination between the general security rights registry and intellectual property registries (see A/CN.9/WG.VI/WP.37/Add.2, paras. 15-19) or the question whether a security right may be created in and a notice may refer to a future intellectual property right (see paras. 60-63 below and A/CN.9/WG.VI/WP.37/Add.2, paras. 20-22).

Example 3

16. In some States, law relating to intellectual property provides for registration of both outright transfers and security rights in their intellectual property registries, but registration is not mandatory in the sense of being an absolute precondition to creation or third-party effectiveness. However, registration has priority consequences in that an unregistered transaction can be defeated by a registered transaction. In the case of such a State, recommendation 4, subparagraph (b), would preserve that rule of law relating to intellectual property of the State and, accordingly, a secured creditor desiring optimal protection may need to both register a notice of its security right in the general security rights registry and the security agreement or a notice thereof in the intellectual property registry (although, if the intellectual property registry permits registration of security rights, registration there would be sufficient for all purposes). This is because: (a) registration in the general security rights registry is a necessary prerequisite to third-party effectiveness under secured transactions law; and (b) registration in the intellectual property registry will be necessary to protect the secured creditor against the risk of finding its security right defeated by the registration of a competing outright transfer or security right in the intellectual property registry under the intellectual-property-specific priority rules.

17. In some States, registration of transfers and security rights in the relevant intellectual property registry only provides protection against a prior unregistered transfer or security right only if the person with the registered right took without notice of the unregistered right (e.g. if the person is a bona fide purchaser). In States, in which this rule is a rule of law relating to intellectual property to which the *Guide* defers pursuant to recommendation 4, subparagraph (b) (as opposed to a general rule of secured transactions law present throughout the State's legal system), adoption of the *Guide*'s recommendation will raise the further question as to whether registration of a notice of a security right in intellectual property in the general security rights registry constitutes constructive notice to a subsequent secured creditor that registers its security right in the intellectual property registry. If so, under the law of a State that has such a bona fide purchaser rule, it would be unnecessary for a secured creditor that has registered a notice of its security right in the general security rights registry to also register a document or notice thereof in the intellectual property registry in order to prevail as against subsequent transferees and secured creditors. Otherwise, under the law of that State, registration of a document or notice of the security right in the intellectual property registry may be required to gain priority over subsequent bona fide purchasers.

Example 4

18. As a matter of law relating to intellectual property, some States provide for registration in the relevant intellectual property registry of a document or notice of a

transfer of, but not of a security right in, intellectual property. In such situations, registration has priority consequences only as between transferees, and not as between a transferee and a secured creditor. In States that adopt this approach, a secured creditor will need to ensure that a document or notice of all transfers of intellectual property to its grantor are duly registered in the intellectual property registry so as to avoid the risk of the grantor's title being defeated by a subsequent registered transfer. Otherwise, however, the secured creditor's rights will be determined by the secured transactions regime. Likewise, the secured creditor will need to ensure that a document or notice of a transfer for security purposes made to it by the grantor is duly registered in the intellectual property registry in order to avoid the risk that a subsequent transferee of the grantor will defeat the security transfer to the secured creditor.

Example 5

19. As a matter of law relating to intellectual property, in some States, registration of a document or notice of a transfer and a security right in an intellectual property registry is purely permissive and intended only to facilitate identification of the current owner. Failure to register neither invalidates the transaction nor affects its priority (although it might create evidentiary presumptions). In States that adopt this approach, the position is essentially the same as when no specialized registry exists at all, as is often the case for copyright. Where these issues are dealt with by law relating to intellectual property, the *Guide* defers to it. Where, however, these issues are left to be determined by general property law, no issue of deference arises since the pre-*Guide* rules were not derived from the law relating to intellectual property but rather from property law generally. Thus, adoption of the *Guide* will replace the existing rules on creation, third-party effectiveness, priority and so forth for security rights in intellectual property. Of course, the old rules on these issues will continue to apply to outright transfers of intellectual property since the *Guide* only covers security rights in intellectual property. Consequently, the secured creditor will need to verify the quality of any outright transfers of intellectual property to its grantor. But this type of risk management is no different from that necessary for any other type of encumbered asset for which a specialized registry does not exist.

Example 6

20. The question of who is the intellectual property owner in a chain of transferees of intellectual property is a matter of law relating to intellectual property. At the same time, the question of whether a transfer is an outright transfer or a transfer for security purposes is a matter of general property and secured transactions law. Finally, the legal nature of a licence under a licence agreement is a matter of law relating to intellectual property and contract law.

Example 7

21. If law relating to intellectual property has specialized rules governing specifically the enforcement of a security right in intellectual property, these rules will prevail over the enforcement regime of the *Guide*. However, if there is no specific rule of law relating to intellectual property on the matter and the enforcement of security rights in intellectual property is a matter left to general civil procedure law, the enforcement regime for security rights elaborated in the *Guide*

would take precedence. Similarly, if there is no specific rule of law relating to intellectual property on extrajudicial enforcement, the relevant regime of the *Guide* on extrajudicial enforcement of security rights would apply (see A/CN.9/WG.VI/WP.37/Add.3, chapter on enforcement).

B. Application of the principle of party autonomy to security rights in intellectual property

22. The *Guide* generally recognizes the principle of party autonomy, although it does elaborate a number of exceptions (see recommendations 10 and 111-112). This principle applies equally to security rights in intellectual property to the extent that law relating to intellectual property does not limit party autonomy (see A/CN.9/WG.VI/WP.37/Add.3, paras. 23-25). It should be noted that recommendations 111-113 apply only to tangible assets, as they refer to the possession of encumbered assets and intangible assets are by definition not subject to possession.

23. A special expression of the principle of party autonomy in secured transactions relating to intellectual property would be the following: a grantor and a secured creditor may agree that the secured creditor may acquire certain of the rights of an owner or lesser rights holder under law relating to intellectual property and thus become an owner or lesser rights holder entitled, for example, to register or renew registrations, as well as to sue infringers. This agreement could take the form of a special clause in the security agreement or a separate agreement between the grantor and the secured creditor, since, under the *Guide*, a secured creditor does not, by the mere fact of obtaining a security right, become an owner.

24. It should also be noted that damages received as a result of infringement of intellectual property rights would fall under the definition of "proceeds" ("whatever is received in respect of encumbered assets"), to which the security right in the original encumbered intellectual property would be extended. However, the right to pursue infringement claims (as opposed to the right to receive payment of damages for infringement) is a different matter. This right would not constitute proceeds as it would not fall under the words "whatever is received in respect of encumbered assets" in the definition that qualify the indicative (i.e. non-exhaustive) list of items contained in the definition ("including … and claims arising from defects in, damage or loss of an encumbered asset").

III. Creation of a security right in intellectual property

[*Note to the Working Group: For paras. 25-64, see A/CN.9/WG.VI/WP.35, paras. 68-102, A/CN.9/667, paras. 32-54, A/CN.9/WG.VI/WP.33, paras. 112-133, and A/CN.9/649, paras. 16-28.*]

25. The general remarks and recommendations of the *Guide* with respect to the creation of a security right apply to security rights in intellectual property (see recommendations 13-19), as supplemented by the asset-specific remarks in the following paragraphs.

A. The concepts of creation and third-party effectiveness

26. With respect to all types of encumbered asset (including intellectual property), the *Guide* draws a distinction between the creation of a security right (its effectiveness as between the parties) and its effectiveness against third parties, providing different requirements to achieve each of these outcomes. In effect, this means that the requirements for the creation of a security right can be kept to a minimum, while any additional requirements are aimed at addressing the rights of third parties. The main reason for this distinction is to achieve three of the key objectives of the law recommended in the *Guide*, namely, establishing a security right in a simple and efficient way, while at the same time enhancing certainty and transparency and establishing clear priority rules (see recommendation 1, subparagraphs (c), (f) and (g)).

27. Under the *Guide*, a security right may be created by an agreement between the grantor and the secured creditor (see recommendation 13). For the security right to be effective against third parties, an additional step is required. For intangible assets this step is notice to third parties of the possible existence of the security right, which establishes an objective criterion for determining priority between a secured creditor and a competing claimant has not taken place (see recommendation 29). Accordingly, if a security right has been created in accordance with the requirements set out in the *Guide*, the security right is effective between the grantor and the secured creditor even if the additional steps necessary to make the security right effective against third parties have not been taken (see recommendation 30). As a result, the secured creditor may enforce the security right in accordance with the procedures set out in Chapter IX of the *Guide*, subject of course to the rights of competing claimants in accordance with the priority rules set out in chapter V.

28. This distinction applies equally to security rights in intellectual property. Thus, under the *Guide* a security right in intellectual property can be effective between the grantor and the secured creditor even if it is not effective against third parties. In some States, law relating to intellectual property draws such a distinction. In other States, however, such a distinction is not drawn in law relating to intellectual property, which provides that the same actions are required for both the creation of a security right and its effectiveness against third parties. In such a case, as required by recommendation 4, subparagraph (b), the *Guide* defers to that law. To ensure better coordination between secured transactions law and law relating to intellectual property, States enacting the recommendations of the *Guide* may wish to consider reviewing their law relating to intellectual property. Such a review should make it possible for States to determine whether: (a) the fact that law relating to intellectual property does not draw a distinction between creation and third-party effectiveness of a security right in intellectual property serves specific policy objectives of law relating to intellectual property (rather than other law, such as general property law, contract law or secured transactions law) and should be retained; or (b) the distinction should be introduced in law relating to intellectual property so as to harmonize it with the relevant approach of the law recommended in the *Guide*.

B. Unitary concept of a security right

29. To the extent law relating to intellectual property permits the creation of a security right in intellectual property, it may do so by referring to outright or conditional transfers of intellectual property, mortgages, pledges, trusts or similar terms. The *Guide* uses the term "security right" to refer to all transactions that serve security purposes. This is referred to as the "unitary approach" to secured transactions. Although the *Guide* contemplates, by exception, that States taking the non-unitary approach in the limited context of acquisition financing may retain transactions denominated as retention of title or financial lease, this exception only applies to tangible assets, and would, consequently, not be relevant in an intellectual property context. Thus, States enacting the recommendations of the *Guide* may wish to review their law relating to intellectual property with a view to: (a) replacing all terms used to refer to the right of a secured creditor with the term "security right"; or (b) providing that, whatever the term used, rights performing security functions are treated in the same way and that such a way is not inconsistent with the treatment of security rights in the *Guide*.

C. Requirements for the creation of a security right in intellectual property

30. Under the *Guide*, the creation of a security right in an intangible asset requires a written agreement. In addition, the grantor must have rights in the asset to be encumbered or the power to encumber it. The agreement must reflect the intent of the parties to create a security right, identify the secured creditor and the grantor, and describe the secured obligation and the encumbered assets (see recommendations 13-15). As already mentioned, no additional step is required for the creation of a security right in an intangible asset. The additional steps (e.g. registration of a notice in a general security rights registry) required for third-party effectiveness of that security right are not required for the security right to be created effectively as between the grantor and the secured creditor.

31. However, law relating to intellectual property in many States impose different requirements for the creation of a security right in intellectual property. For example, registration of a document or notice of a security right in intellectual property (e.g. a transfer for security purposes, a mortgage or pledge of intellectual property) in the relevant intellectual property registry may be required for the creation of the security right. In addition, under law relating to intellectual property, the intellectual property to be encumbered may need to be described specifically in a security agreement. Thus, a sufficient description under the *Guide* (e.g. one that embraces "all intellectual property") may not be sufficient under intellectual property law. All depends on the particular provisions of the relevant law relating to intellectual property. Similarly, as some intellectual property registries index registered transactions by the specific intellectual property to which they relate, and not the grantor's name or other identifier, registration of a document that merely states "all intellectual property of the grantor" would not be sufficient to create a security right. It would instead be necessary to identify each intellectual property right in the security agreement or in any other document to be registered in the intellectual property registry for the purposes of creating the security right.

32. In all these situations, under the principle embodied in recommendation 4, subparagraph (b), the law recommended in the *Guide* would apply only in so far as it is not inconsistent with law relating to intellectual property. Of course, States enacting the *Guide* may wish to consider reviewing their laws relating to intellectual property to determine whether the different concepts and requirements with respect to the creation of security rights in intellectual property serve specific policy objectives of law relating to intellectual property and should be retained or whether they should be harmonized with the relevant concepts and requirements of the law recommended in the *Guide*.

D. Rights of a grantor with respect to the intellectual property to be encumbered

33. As already mentioned, a grantor of a security right must have rights in the asset to be encumbered or the power to encumber it (see recommendation 13). This is a principle of secured transactions law that applies equally to intellectual property. A grantor may encumber its full rights or only limited rights. So, an intellectual property owner or lesser rights holder may encumber its full rights or rights limited in time, scope or territory. In addition, as a matter of general property law, a grantor may encumber its assets only to the extent that the assets are transferable under general property law. This principle also applies to secured transactions relating to intellectual property. So, an owner or lesser rights holder may only encumber its rights to the extent these rights are transferable under law relating to intellectual property.

E. Distinction between a secured creditor and an owner with respect to intellectual property

34. For the purposes of secured transactions law under the *Guide*, the creation of a security right does not change the owner (or lesser rights holder) of the encumbered intellectual property (in other words, who is the owner or rights holder) and the secured creditor does not become an owner (or lesser rights holder) on the sole ground that it acquired a security right in intellectual property.

35. However, under the enforcement chapter of the *Guide*, upon default of the grantor the secured creditor may exercise its security right by disposing of the encumbered asset (the right of an intellectual property owner or lesser rights holder) or may propose to retain it in satisfaction of the secured obligation (see recommendations 156-157). In certain circumstances, the secured creditor may later be the buyer at a disposition that it conducts (see recommendations 141 and 148). Thus, while the *Guide* does not provide that the creation of a security right in intellectual property changes the owner (or lesser rights holder) of the encumbered intellectual property rights, the exercise of the secured creditor's rights upon default of the grantor will often result in the grantor's encumbered intellectual property rights being transferred (and, thus, the identity of the owner or lesser rights holder, as determined by law relating to intellectual property, might change). In situations in which the enforcement of the security right in the intellectual property results in a disposition to the secured creditor or retention of the intellectual property in

satisfaction of the secured obligation, at that time, the secured creditor may become the owner or lesser rights holder, depending on the rights of the grantor.

36. In any case, the question of who is the owner (or lesser rights holder) with respect to intellectual property and whether the parties may determine it for themselves is a matter of law relating to intellectual property. Under law relating to intellectual property, a secured creditor may be treated as an owner (and may, for example, renew registrations or pursue infringers) or may be entitled to agree with the owner that the secured creditor will become the owner.

F. Types of encumbered asset in an intellectual property context

37. Under the *Guide*, a security right may be created not only in the rights of an intellectual property owner but also in the rights of a lesser rights holder, such as a licensor or a licensee under a licence agreement. In addition, a security right may be created in a tangible asset with respect to which intellectual property is used (e.g. designer watches or clothes bearing a trademark). As already mentioned, the intellectual property to be encumbered needs to be described in the security agreement (a general description is sufficient; see recommendation 14, subparagraph (d)).

38. It should be noted that the *Guide* (with the exception of legal limitations to the assignability of future receivables as future receivables, or of receivables assigned in bulk; see recommendation 23) does not override any provisions of law relating to intellectual property (or other law) that limit the creation or enforcement of a security right or the transferability of an intellectual property (or other) asset (see recommendation 18). Similarly, the *Guide* does not affect contractual limitations to the transferability of intellectual property rights (but does affect contractual limitations to the assignability of receivables; see recommendation 24). As a result, if, under law relating to intellectual property, a security right may not be created or enforced in an intellectual property right or if that intellectual property right is non-transferable, the law recommended in the *Guide* will not interfere with these limitations.

1. Rights of an owner

39. The *Guide* applies to secured transactions in which the encumbered assets are the rights of an owner. Typically the essence of the rights of an owner is the right to enjoy its intellectual property, the right to prevent unauthorized use of its intellectual property and to sue infringers, the right to register intellectual property and the right to authorize others to use the intellectual property in return for royalties.

40. If, under law relating to intellectual property, a security right may be created and enforced in these rights or these rights are transferable, the owner may encumber all or some of them with a security right under the law recommended in the *Guide* and that law will apply to such a security right. If these rights may not be encumbered or transferred under law relating to intellectual property, they may not be encumbered by a security right under the law recommended in the *Guide*, since, as already mentioned, the *Guide* does not affect legal provisions that limit the creation or enforcement of a security right, or the transferability of assets, with the

exceptions of provisions relating to the assignability of future receivables and receivables assigned in bulk (see recommendation 18).

41. Similarly, whether the right of an owner to sue infringers and obtain compensation, which is incidental to the rights of the owner, may be used as an encumbered asset separately from the other rights of the owner is a matter for law relating to intellectual property. In particular, with respect to the right of the owner to sue infringers and obtain compensation, whether it is part of the original encumbered rights of an owner, the security right extends to any compensation as proceeds or a transferee of the encumbered intellectual property right may continue a pending lawsuit and obtain any compensation would depend on the circumstances.

42. Accordingly, if, at the time a security right is created in the rights of an owner, an infringement has been committed, the owner has sued infringers and infringers have paid compensation to the owner, the amount paid prior to the creation of a security right would not be part of the encumbered rights of the owner and the secured creditor could not claim it in the case of default as part of the original encumbered asset. However, if the compensation is paid to the owner after the creation of the security right (for an infringement that occurred before or after the creation of the security right), the secured creditor may claim it but only as proceeds of the original encumbered asset. If the compensation has not been paid, the receivable could be part of the original encumbered intellectual property, if it is included in the description of the original encumbered assets in the security agreement; otherwise, in the case of default, the secured creditor could claim the receivable as proceeds of the original encumbered assets. Finally, if the lawsuit is still pending at the time of creation of the security right, a person that bought the intellectual property in an enforcement sale should be able to take over the lawsuit and obtain any compensation granted (again, if permitted under law relating to intellectual property).

43. Similar considerations apply to the question of whether the right to register intellectual property or renew a registration may be encumbered or transferred, and thus be part of the encumbered rights of an owner. Whether the right to register or renew registration of intellectual property may be encumbered or is an inalienable right of the owner is a matter of law relating to intellectual property. Whether it is part of the encumbered rights of the owner is a matter of the description of the encumbered asset in the security agreement.

2. Rights of a licensor

44. Under the *Guide*, a security right may be created in a licensor's rights under a licence agreement. If a licensor is an owner, it can create a security right in (all or part of) its rights as mentioned above. If a licensor is not an owner but a licensee that grants a sub-licence, typically, it may create a security right in its right to receive payment of royalties owed under the sub-licence agreement (for the licensee's rights, see paras. 53-54 below). Such a licensor may also create a security right in other contractual rights of value that the licensor might have under the licence agreement and the relevant law. These other contractual rights might include, for example, the licensor's right to compel the licensee to advertise the licensed intellectual property or product with respect to which the intellectual property is used, or the right to compel the licensee to market the licensed

intellectual property only in a particular manner, as well as the right to terminate the licence agreement on account of the licensee's breach.

45. Following the approach taken in most legal systems and reflected in the United Nations Assignment Convention, the *Guide* treats rights to receive payment of royalties arising from the transfer or licence of intellectual property as proceeds of intellectual property in the form of receivables. This means that the general discussion and recommendations dealing with security rights in proceeds, as modified by the receivables-specific discussion and recommendations, apply to rights to payment of royalties. Thus, under the *Guide*, statutory prohibitions that relate to the assignment of future receivables or receivables assigned in bulk or partial assignments are rendered unenforceable (see recommendation 23). However, other statutory prohibitions or limitations are not affected (see recommendation 18). In addition, a licensee could raise against an assignee of the royalties all defences or rights of set-off arising from the licence agreement or any other agreement that was part of the same transaction (see recommendation 120).

46. In this context, it is important to note that the statutory prohibitions set aside refer to future receivables only as future receivables. They do not affect statutory prohibitions based on the nature of receivables, for example, as wages or royalties that may by law be payable directly only to authors or collecting societies. Many countries have "author-protective" or similar legislation that designates a certain portion of income earned from exploitation of the intellectual property rights as "equitable remuneration" or the like which must be paid to authors or other entitled parties or their collecting societies. These laws often make such payment rights expressly non-assignable. The *Guide's* recommendations with respect to limitations to the assignment of receivables do not apply to these or other legal limitations.

47. Furthermore, it is important to note that the treatment of the right to receive payment of royalties for the purposes of secured transactions law as proceeds of intellectual property in the form of receivables does not affect the different treatment of this right to royalties under law relating to intellectual property. Such laws would include, in particular, international accounting rules as to how or when royalties are earned (e.g. International Accounting Standard No. 38 of the International Accounting Standards Board). Thus, the parties to a licence agreement and to a security agreement creating a security right in the licensor's right to receive such royalties should take these rules into account.

48. Finally, it is equally important to note that the treatment of rights to receive payment of royalties in the same way as any other receivable does not affect the terms and conditions of the licence agreement relating to the payment of royalties, such as that payments are to be staggered or that there might be percentage payments depending on market conditions or sales figures.

49. Under the *Guide*, if a licence (or a sub-licence) agreement, under which royalties are payable, includes a contractual provision that restricts the ability of the licensor (or a sub-licensor) to assign the royalties to a third party ("assignee"), an assignment of the royalties by the licensor (or sub-licensor) is nonetheless effective and the licensee (or sub-licensee) cannot terminate the licence agreement (or sub-licence agreement) on the sole ground of the assignment of the royalties (see recommendation 24). However, under the *Guide*, the rights of a licensee (as a debtor of the assigned receivables) are not affected except as otherwise provided in the

secured transactions law recommended in the *Guide* (see recommendation 117, subparagraph (a)). Specifically, the licensee is entitled to raise against the assignee all defences or rights of set-off arising from the licence agreement or any other agreement that was part of the same transaction (see recommendation 120, subparagraph (a)). In addition, the *Guide* does not affect any liability that the licensor (or sub-licensor) may have under other law for breach of the anti-assignment agreement (see recommendation 24).

50. It is important to note that recommendation 24 applies only to receivables, and not to intellectual property rights. This means that it does not apply to an agreement between a licensor and a licensee according to which the licensee does not have the right to grant sub-licences.

51. It is equally important to note that recommendation 24 applies only to an agreement between a creditor of a receivable and the debtor of the receivable that the receivable owed to the creditor by the debtor may not be assigned. It does not apply to an agreement between a creditor of a receivable and the debtor of the receivable that the debtor may not assign receivables that may be owed to the debtor by third parties. Thus, recommendation 24 does not apply to an agreement between a licensor and a licensee that the licensee will not assign its right to receive payment of sub-licence royalties from third-party sub-licensees. Such an agreement may exist, for example, where the licensor and the licensee agree that sub-licence royalties will be used by the licensee to further develop the licensed intellectual property. Thus, recommendation 24 does not affect the right of the licensor to negotiate the licence agreement with the licensee so as to control by agreement who can use the intellectual property or the flow of royalties from the licensee and sub-licensees. However, a licensor cannot control by agreement the flow of royalties in situations where the licensee in its capacity as a sub-licensor creates a security right in its right to receive payment of sub-royalties (unless, of course, the licensor prohibits sub-licences). In addition, if the licensee becomes insolvent, the licensor would be treated as an unsecured creditor, unless it obtained a security right in the right to receive payment of the royalties.

52. In addition, recommendation 24 does not apply to an agreement between a licensor and a licensee that the licensor will terminate the licence agreement if the licensee violates the agreement not to assign royalties payable to the licensee by sub-licensees. In this context, it should be noted that the right of the licensor to terminate the licence agreement if the licensee breaches this agreement gives the sub-licensees a strong incentive to make sure that the licensor gets paid. Moreover, recommendation 24 does not affect the right of the licensor to: (a) agree with the licensee that part of the licensee's royalties (representing a source for the payment of the royalties the licensee owes to the licensor) be paid by sub-licensees to an account in the name of the licensor; or (b) obtain a security right in the licensee's future royalties to be paid by sub-licensees, register a notice in that regard in the general security rights registry (or the relevant intellectual property registry) and thus obtain a security right with priority over the licensee's other creditors (subject to the rules of the *Guide* for obtaining third-party effectiveness and priority of security rights).

3. "Rights" of a licensee

53. Typically, a licensee is authorized to use the licensed intellectual property in line with the terms of the licence agreement. A licensee may also have the right to grant sub-licences and to receive as a sub-licensor the payment of any royalties flowing from a sub-licence agreement, unless the licence agreement or law relating to intellectual property provides otherwise. The discussion above with respect to the rights of a licensor would apply equally to the rights of a licensee as a sub-licensor.

54. Some laws relating to intellectual property provide that the licensee may not create a security right in its authorization to use the licensed intellectual property or in its right to receive, as a sub-licensor, royalties from sub-licensees without the licensor's consent (an exception may arise where the licensee sells its business as a going concern). The reason is that it is important that the licensor has control over the licensed intellectual property, determining who can use it. Otherwise, the confidentiality and the value of the information associated with the intellectual property right may be jeopardized. If the licence is assignable and the licensee assigns it, the assignee will take the licence subject to the terms and conditions of the licence agreement. The *Guide* does not affect these licensing practices.

4. Rights in intellectual property used with respect to a tangible asset

55. Intellectual property may be used with respect to a tangible asset. For example: a tangible asset may be manufactured according to a patented process or through the exercise of patented rights; jeans may bear a trademark or cars may contain a chip which includes a copy of copyrighted software; or a CD may contain a software programme or a heat pump may contain a patented product.

56. Where intellectual property is used in connection with a tangible asset, two different types of asset are involved. One is the intellectual property; another is the tangible asset. These assets are separate. Law relating to intellectual property allows an owner the ability to control many but not all uses of the tangible asset. For example, law relating to copyright allows an author (or other rights holder) to prevent unauthorized duplication of a book, but not to prevent an authorized bookstore that bought the book in an authorized sale to re-sell it or the end-buyer to make notes in the margin while reading. As such, a security right in intellectual property does not extend to the tangible asset with respect to which intellectual property is used, and a security right in a tangible asset does not extend to the intellectual property used with respect to the tangible asset.

57. Of course, the parties to the security agreement may agree that a security right is granted both in a tangible asset and in intellectual property used with respect to that asset. For example, a security right may be taken in inventory of trademarked jeans and in the trademark giving the right to the secured creditor in the case of default of the grantor to sell both the encumbered trademarked jeans and the right to produce other jeans bearing the encumbered trademark. In other words, the extent of the security right depends on the description of the encumbered asset in the security agreement. In this regard, the question arises as to whether the description of the encumbered tangible assets should be specific (e.g. "my entire inventory with all associated intellectual property rights and other rights") or whether a general description ("my entire inventory") would suffice. It would seem that a general description would be in line with the principles of the *Guide* and the reasonable

expectations of the parties, with the realization that separate assets are involved. At the same time, key principles of law relating to intellectual property with respect to the description of intellectual property to be encumbered in a security agreement should be respected.

58. As already mentioned, a security right in a tangible asset, in connection with which an intellectual property right is used, does not extend to the intellectual property used with respect to the tangible asset, but does apply to the tangible asset itself, including those characteristics of the asset that use the intellectual property (e.g. the security right applies to a television set as a functioning television set). Thus, a security right in such an asset does not give the secured creditor the right to manufacture additional assets using the intellectual property. Upon default, however, the secured creditor with a security right in the tangible assets could exercise the remedies recognized under secured transactions law, provided that such exercise of remedies did not interfere with rights existing under law relating to intellectual property. It may be that, under applicable law relating to intellectual property, the concept of "exhaustion" (or similar concepts) might apply to the enforcement of the security right (for a discussion of enforcement issues, see A/CN.9/WG.VI/WP.37/Add.3).

59. The above-mentioned remarks may be reflected in the following recommendation:

> "The law should provide that, in the case of a security right in a tangible asset with respect to which intellectual property is used, unless otherwise specified in the security agreement, a security right in intellectual property does not extend to the tangible assets with respect to which it is used, and a security right in such tangible assets does not extend to the intellectual property. However, nothing in this recommendation limits the remedies that a secured creditor with a security right in such intellectual property has with respect to the tangible assets to the extent permitted by law relating to intellectual property, nor does it limit the enforcement remedies that a secured creditor with a security right in the tangible assets has with respect to the tangible assets to the extent permitted by law relating to intellectual property."

G. Security rights in future intellectual property

60. The *Guide* provides that grantors may grant security rights in future assets, namely assets created or acquired by the grantor after the creation of a security right (see recommendation 17). This recommendation applies to intellectual property, except in so far as it is inconsistent with law relating to intellectual property (see recommendation 4, subparagraph (b)). Accordingly, under the *Guide*, a security right could be created in future intellectual property (as to legislative limitations in that regard, see recommendation 18 and paras. 65-66 below). This approach is justified by the commercial utility in allowing a security right to extend to future intellectual property.

61. Many laws relating to intellectual property follow the same approach, allowing owners to obtain financing useful in the development of new works, provided of course that their value can be reasonably estimated in advance. For example, in some States it is possible to create a security right in a patent application before the

patent is issued. Similarly, it is common practice to fund the production of motion pictures or software to be produced in the future.

62. However, in certain cases, law relating to intellectual property may limit the transferability of various types of future intellectual property to achieve specific policy goals. For example, in some cases, a transfer of rights in new media or technological uses that are unknown at the time of the transfer may not be effective in view of the need to protect authors. In other cases, transfers of future rights may be subject to a statutory right of cancellation after a certain period. In other cases, the notion of "future intellectual property" may include registrable rights created but not yet registered. Statutory prohibitions may also take the form of a requirement for a specific description of intellectual property. Finally, as is the case with assets other than intellectual property, statutory prohibitions may be the result of the *nemo dat* principle, in accordance with which a creditor obtaining a security right does not obtain any rights greater than the rights of the grantor. In this connection, it should be noted that, if the grantor were a licensee, the licensee could not give anything more than the right granted to the licensee from the licensor.

63. Other limitations on the use of future intellectual property as security for credit may be the result of the meaning of the concepts of "improvements" or "adaptations" under law relating to intellectual property. The secured creditor should understand how these concepts are interpreted under law relating to intellectual property and how they may affect the concept of "ownership", which is essential in the creation of a security right in intellectual property. This determination is of particular relevance in the case of software, for example. In this case, a lender's security on a version of a software which exists at the time of the financing may not extend to modifications made to that version following the financing if it is determined that, under law relating to intellectual property, the modifications to such version are considered to be new works (adaptations) for which a new transfer is required. Similar considerations may apply if software incorporates patents that are subject to "improvements". As is the case with other statutory prohibitions, the *Guide* does not affect these prohibitions (see recommendation 18).

64. If law relating to intellectual property limits the transferability of future intellectual property, the law recommended in the *Guide* does not apply to this matter in so far as it is inconsistent law relating to intellectual property (see recommendation 4, subparagraph (b)). Otherwise, the *Guide* applies and permits the creation of a security right in future assets (see recommendation 17). Where law relating to intellectual property includes limitations to the transferability of future intellectual property, these limitations are often intended to protect the owner. Again, States enacting the *Guide* may wish to review their law relating to intellectual property with a view to establishing whether the benefits from these limitations (e.g. protection of the owner) outweigh the benefits from the use of such assets as security for credit (e.g. the financing of research and development activities).

H. Legal or contractual limitations on the transferability of intellectual property

65. Specific rules of law relating to intellectual property may limit the ability of an intellectual property owner or lesser rights holder to create an effective security right in certain types of intellectual property. In many States, only the economic rights of an author are transferable; the moral rights are not transferable. In addition, legislation in many States provides that an author's right to receive equitable remuneration may not be transferable, at least prior to actual receipt of payment by the author. Moreover, in many States, trademarks are not transferable without their associated goodwill. The *Guide* respects all these limitations on the transferability of intellectual property (see recommendation 18).

66. The only limitations on the transferability of certain assets that the *Guide* may affect are the legislative limitations on the transferability of future receivables, receivables assigned in bulk and parts of or undivided interests in receivables, as well as to contractual limitations on the assignment of receivables arising for the sale or licence of intellectual property rights (see article 8 of the United Nations Assignment Convention and recommendations 23-25). In addition, the *Guide* may affect contractual limitations, but only with respect to receivables (not intellectual property) and only in a certain context, that is, in an agreement between the creditor of a receivable and the debtor of that receivable (see paras. 60-64 above).

(A/CN.9/WG.VI/WP.37/Add.2) [Original: English]

Note by the Secretariat on the Draft Annex to the UNCITRAL Legislative Guide on Secured Transactions dealing with security rights in intellectual property submitted to the Working Group on Security Interests at its fifteenth session

ADDENDUM

CONTENTS

IV. Effectiveness of a security right in intellectual property against third parties

[*Note to the Working Group: For paras. 1-9, see A/CN.9/WG.VI/WP.35/Add.1, paras. 1-14, A/CN.9/667, paras. 55-63, A/CN.9/WG.VI/WP.33, paras. 137-145, and A/CN.9/649, paras. 29-31.*]

A. The concept of third-party effectiveness

1. As already noted, the *Guide* distinguishes between creation of a security right (effectiveness of the security right as between the parties) and its effectiveness against third parties. Subject to recommendation 4, subparagraph (b), this distinction applies equally to security rights in intellectual property (see A/CN.9/WG.VI/WP.37/Add.1, paras. 26-28).

2. In many States, there are no special rules governing the creation and third-party effectiveness of security rights in intellectual property and those issues are governed by the same rules that apply to security rights in other types of intangible asset. It is very common, however, for law relating to intellectual property to provide for particular methods in which a security right in some types of intellectual property may be made effective against third parties. The practices differ for rights in intellectual property that are subject to a specialized registration or recordation system (such as patents, trademarks and, in some countries, copyrights), and rights in intellectual property that are not subject to such registration (such as trade secrets, industrial designs and, in some countries, copyrights). These matters are addressed in sections B and C below.

3. In the *Guide*, the concept of "effectiveness against third parties" refers to whether a security right in an encumbered asset is effective against parties other than the grantor and the secured creditor that have (or may have in the future) a security or other right in that encumbered asset. Such third parties include creditors of the grantor, as well as transferees, lessees and licensees of the encumbered asset. In law relating to intellectual property, by contrast, the phrase "third-party effectiveness" is often used to refer to the effectiveness of ownership or other similar rights in intellectual property itself, rather than to the effectiveness of a security right. These two sorts of references should not be confused. While effectiveness of a security right in intellectual property as against persons that have a competing right in the encumbered intellectual property is a matter of secured transactions law, effectiveness of ownership rights or lesser rights, such as the rights of a licensor, in intellectual property against transferees or licensees is only a matter of law relating to intellectual property. In this context, it should be noted that infringers are not competing claimants or legitimate third parties. Thus, the *Guide* does not apply to a "conflict" between a secured creditor and an infringer and, if, for example, an infringer asserts as a defence against a secured creditor that the infringer is a transferee or a licensee of the encumbered intellectual property, the matter is to be determined in accordance with the law relating to intellectual property. Of course, if an alleged infringer is a legitimate transferee or licensee, the *Guide* will apply to that conflict.

B. Third-party effectiveness of security rights in intellectual property that are registrable in an intellectual property registry

4. Under the *Guide*, security rights in intangible assets may be made effective against third parties by registration of a notice in the general security rights registry or of a document or notice in a specialized registry if such registry exists for the relevant encumbered asset and accepts registrations of documents or notices of security rights (see recommendation 38).

5. Thus, under the *Guide*, if under law relating to intellectual property a document or notice of a security right is registrable in an intellectual property registry that provides for third-party effects or similar effects (e.g. effects against all parties), a security right in intellectual property may be made effective against third parties by registration of a document or notice in the intellectual property registry or of a notice in the general security rights registry (see recommendation 38). Consequently, should registration of a document or notice of a security right in an intellectual property registry not be possible or should such registration not produce third-party or similar effects, that registry would not be a specialized registry under the *Guide* and recommendations of the *Guide* relating to specialized registries would not apply (see also paras. 14-18 below).

6. Under law relating to intellectual property, in some States, a security right is not effective against third parties or even as between the parties (i.e. is not created), unless and until a document or notice if it is registered in the relevant intellectual property registry. In other States, law relating to intellectual property provides that a security right is created and becomes effective against third parties when the security agreement is entered into, even without registration. In these cases, registration in the relevant intellectual property registry allows certain third parties, typically bona fide transferees without notice, to invoke a priority rule to take precedence over unregistered prior security right, but the unregistered security right still remains effective against other third parties. In still other States, a security right is created when the security agreement is entered into, but registration in the relevant intellectual property registry is necessary to make the security right effective against any third parties, for example, by way of an evidentiary rule that prohibits evidence of unregistered security rights. In still other States, the registration system does not readily accommodate registration of documents or notices of security rights, and third-party effectiveness must be achieved outside the intellectual property registration system. Finally, in some States, it is possible to achieve third-party effectiveness of a security right by using either the intellectual property registry or an available general security rights registry. If any of these methods is intended to be the exclusive method of obtaining effectiveness of a security right against third parties, in accordance with recommendation 4, subparagraph (b), it takes precedence over any of the methods provided in the law recommended in the *Guide*.

7. The *Guide* does not recommend that States that currently do not have a specialized registry for certain types of intellectual property create such registries in order to permit the registration of a notice of a security right in intellectual property. Nor does it recommend that States that currently do not permit the registration of a notice of a security right in an intellectual property registry amend their laws to permit such registrations. Finally, the *Guide* does not recommend a rule that

requires registration of a notice of a security right in both the relevant intellectual property registry and in the general security rights registry. However, States enacting the recommendations of the *Guide* may wish to review their law relating to intellectual property and consider whether to permit the registration of notices of security rights in already existing intellectual property registries.

C. Third-party effectiveness of security rights in intellectual property that are not registrable in an intellectual property registry

8. As already mentioned, under the *Guide*, a security right in intellectual property may become effective against third parties by registration of a notice in the general security rights registry (see recommendation 32). This is possible even if the encumbered intellectual property rights are not registrable in an intellectual property registry (e.g. copyrights, industrial designs or trade secrets). However, this is not possible if law relating to intellectual property provides that a security right in intellectual property may be made effective against third parties only by registration in an intellectual property registry. The same rule would apply in cases where a document or notice of a security right in intellectual property is registrable in an intellectual property registry but it is not actually registered and in cases where registration in an intellectual property registry produces no third-party or similar effects. In all of these cases, registration of a notice in the general security rights registry is sufficient and the effect of registration is to make the security right effective against third parties (see recommendations 29, 32-33 and 38).

9. Under law relating to intellectual property, there are different approaches to the question of registration of a document or notice of a security right in intellectual property. In some States, often those whose secured transactions law derives from non-possessory pledge concepts, the lack of a general registration system for specific types of intellectual property means that a security right cannot be made effective against third parties by registration under the currently existing secured transactions law, at least to the extent that there is no registration system available or only transfers are registrable. In other States, often those whose secured transactions law utilizes mortgage concepts, a security right is treated as another type of "title" transfer and is, therefore, made effective against third parties to the same extent as any other title transfer registrable in an intellectual property registry. Consequently, in those States, a document or notice of title-based security rights must be registered in an intellectual property registry in order to be effective against third parties, but non-title-based security rights cannot be so registered. Finally, in a few States, there are additional requirements. These commonly include payment of a stamp duty or other transaction tax, or a requirement to give notice to an administrative body, such as a national authors association or collecting society. States enacting the recommendations of the *Guide* may wish to consider harmonizing their secured transactions laws and their laws relating to intellectual property, replacing all existing security devices with an integrated notion of a security right, or, at least, subjecting title-based security rights to the same rules that are applicable to security rights.

V. The registry system

[*Note to the Working Group: For paras. 10-42, see A/CN.9/WG.VI/WP.35, 15-31, A/CN.9/667, paras. 64-85, see A/CN.9/WG.VI/WP.33, paras. 149-161, and A/CN.9/649, paras. 32-40.*]

A. The general security rights registry

10. As already noted, the *Guide* recommends that States establish a general security rights registry (see recommendations 54-75). In general, the purpose of the registry system in the *Guide* is to provide an efficient method for making a security right in existing or future assets effective against third parties, to establish an effective point of reference for priority rules based on the time of registration and to provide an objective source of information for third parties dealing with a grantor's assets as to whether the assets are encumbered by a security right. Under this approach, registration is accomplished by registering a notice as opposed to the security agreement or other document (see recommendation 54, subparagraph (b)). The notice need only provide basic information concerning the security right (see recommendation 57).

11. The *Guide* provides precise rules for identifying the grantor of the security right, whether an individual or a legal person. This is because notices are indexed and can be retrieved by searchers according to the name or some other reliable identifier of the grantor (see recommendations 54, subparagraph (h), and 58-63). The *Guide* contains other recommendations to simplify the operation and use of the registry. For example, the *Guide* provides that, to the extent possible, the registry has to be electronic and permit registration and searching by electronic means (see recommendation 54, subparagraph (j)). The *Guide* also provides that fees for registration and searching, if any, should be set at a level no higher than necessary to permit cost recovery (see recommendation 54, subparagraph (i)).

B. Asset-specific intellectual property registries

12. As discussed above, many States maintain registries for registering (or recording) transactions (such as transfers) relating to intellectual property. In some of those registries, security rights may also be filed (i.e. an application for registration may be made) and registered. For example, patent and trademark registries exist in most States, but not all provide for the registration of a document or notice of a security right. In addition, in some States, the registration of a notice (whether of a security right or some other right) does not produce third-party effects. Moreover, a number of States have similar registries for copyrights, but the practice is not universal.

13. While some States have notice-based intellectual property registries, a larger number of States use recording act structures or "document registration" systems. In those systems, it is necessary to record the entire instrument of transfer, or, in some cases, a memorandum describing essential terms of the transfer. A more modern approach is to simplify the registration process by registering a limited amount of information (such as the names of the parties and a general description of the

encumbered assets). For example, the registration requirements for trademarks are simplified by articles 10 and 11 of the Trademark Law Treaty (1994) and the Singapore Treaty on the Law of Trademarks, as well as by the Madrid Agreement (1891), and the Madrid Protocol (1989), and by the model international registration forms attached to both treaties. Similarly, the Patent Law Treaty (Geneva, 2000) and the Council Regulation (EC) No. 40/94 of 20 December 1993 on the Community Trademark simplify registration requirements. The reason for requiring registration of the transaction document or a memorandum stating the essential terms of the transaction is the need for transparency. Thus, it is essential for a transfer instrument or memorandum to identify the precise right being transferred in order to give effective notice to searchers and to allow efficient utilization of assets. In addition, the intellectual property registries sometimes index registrations by the specific intellectual property, and not by the grantor's/owner's identifier. This is because the central focus is on the intellectual property itself, which may have multiple co-inventors or co-authors and may be subject to multiple changes in ownership as transfers are made.

14. In addition to national registries, there are a number of international intellectual property registries and registration in these registries is subject to relatively modern treaties or other international legislative texts that simplify the registration process. For example, under the Community Trademark regulation, a statement may be registered referring not only to ownership but also to security rights with third-party effects. Another example is the treaty on the International Registration of Audiovisual Works ("Film Register Treaty"), adopted at Geneva on April 18, 1989, under the auspices of WIPO. The Film Register Treaty creates an international registry, which permits the registration of statements concerning audiovisual works and rights in such works, including, in particular, rights relating to their exploitation (the records of the diplomatic conference indicate statements concerning security rights were also contemplated). The Film Register Treaty provides an evidentiary presumption of validity for registered statements. The international registry allows two types of application. A work-related application identifies an existing or future work at least by title or titles. A "person-related application" identifies one or more existing or future works by the natural person or legal entity that makes or owns, or is expected to make or own, the work or works. The international registry maintains an electronic database that allows cross-indexing between the different types of registrations. There is also a procedure to request removal of contradictory filings.

C. Coordination of registries

15. As already mentioned (see paras. 4-5 above), the *Guide* neither recommends the creation of a specialized registration system (for intellectual property or for other assets), if one does not exist, nor interferes with existing specialized registration systems. However, where, under law relating to intellectual property, a document or notice of a security right in intellectual property is registrable in an intellectual property registry and, at the same time, under the law recommended in the *Guide*, that security right is registrable in the general security rights registry, there is a need to address the issue of coordination between these two registries. In order to avoid interfering with law relating to intellectual property, the *Guide*

addresses it through the general deference to law relating to intellectual property (see recommendation 4, subparagraph (b)) and appropriate priority rules.

16. Thus, the *Guide* does not address or purport to address in any way whether registration of a security right in intellectual property in an intellectual property registry is possible, the requirements for such registration (e.g. document or notice registration) or its effects (e.g. effectiveness or presumption of effectiveness against all parties or only against third parties). Even if an intellectual property registry does not provide for the registration of security rights, provides for the registration of a document rather than a notice thereof or, having provided for such registration, does not give registration third-party effects, the *Guide* provides no recommendation to the contrary and takes the specialized registration system, if any, as is.

17. However, the *Guide* does make recommendations concerning the registration of a notice of a security right in intellectual property in the general security rights registry. For this reason, to the extent that law relating to intellectual property addresses the effects of registration of security rights in an intellectual property registry in a way that would be inconsistent with the third-party effects given to such registration by the *Guide* (see recommendation 38), the *Guide* defers to that law (recommendation 4, subparagraph (b)). By contrast, if law relating to intellectual property does not address these issues, there is no overlap or conflict with law relating to intellectual property, the issue of deference to law relating to intellectual property will not arise and thus the *Guide* will apply giving such specialized registration third-party effects.

18. In addition, the *Guide* addresses the issue of coordination between an intellectual property (or other specialized) registry and the general security rights registry recommended in the *Guide* through appropriate priority rules. Thus, in order to preserve the reliability of intellectual property (and other specialized) registries (in particular, in cases where law relating to intellectual property provides no rule for determining priority), the *Guide* provides that a security right in intellectual property a document or notice of which is registered in the relevant intellectual property registry has priority over a security right in the same intellectual property, a notice of which is registered in the general security rights registry (see recommendation 77, subparagraph (a)). For the same reason, the *Guide* provides that a transferee of intellectual property acquires it, in principle, free of a previously created security right in that property, unless a document or notice of the security right is registered in the intellectual property registry (see recommendations 78 and 79).

19. States enacting the recommendation of the *Guide* may wish to consider ways aimed at coordinating their existing intellectual property registries with the general security rights registry introduced by the *Guide*. For example, States may wish to consider permitting the registration of a notice of a security right in intellectual property in an intellectual property registry with third-party effects. In addition, States may wish to consider whether asset-based intellectual property registries should also have a debtor-based index (and vice versa). Moreover, States may wish to consider requiring the transmission of a notice about a registration in an intellectual property registry to the general security rights registry (or vice versa). Of course, coordination of registries in this way would be easier, simpler, quicker

and less expensive in an electronic registration system rather than in a paper-based registration system.

D. Registration of notices about security rights in future intellectual property

20. An essential feature of the general security rights registry recommended in the *Guide* is that a notice of a security right can refer to future assets of the grantor. This means that the security right can cover assets to be later produced or acquired by the grantor (see recommendation 17). The notice may also cover assets identified by a generic description (see recommendation 66). Thus, if the security right covers all existing or future inventory, the notice may so identify such inventory. Since priority is determined by date of registration, the lender may maintain its priority position in future inventory. This approach greatly facilitates revolving credit arrangements, since a lender extending new credit under such a facility knows that it can maintain its priority position in new assets that are included in the borrowing base.

21. Existing intellectual property registries, however, in many States, do not readily accommodate registration of rights in future assets. As transfers of or security rights in intellectual property are indexed against each specific intellectual property right, they can only be effectively recorded after the intellectual property is first registered in the intellectual property registry. This means that a blanket recording of a security right in future intellectual property in an intellectual property registry would not be effective, but instead a new recording of the security right would be required each time new intellectual property is acquired.

22. If, under law relating to intellectual property, intellectual property may not be acquired, transferred or encumbered before it is actually registered in an intellectual property registry, the *Guide* does not interfere with that prohibition and does not make the grant of a security right in such future intellectual property possible. However, if the creation of a security right in future intellectual property is not prohibited under law relating to intellectual property (as is the case, for example, with a patent or trademark while the application for its registration in the patent or trademark registry is pending), a security right in such an asset could be created and made effective against third parties under the *Guide*. States enacting the recommendations of the *Guide* may wish to consider reviewing their law relating to intellectual property to determine whether a notice of a security right may refer to future intellectual property.

E. Dual registration or search

23. As already mentioned, the *Guide* leaves to law relating to intellectual property the details of registration of a document or notice of a security right in an intellectual property registry and expressly gives priority, as a matter of secured transactions law, to rights with respect to which a registration is made in such a registry. As also noted above, this means that the *Guide* often obviates the need for dual registration or search. In particular, registration only in the general security rights registry would seem to be necessary and useful for secured transactions

purposes: (a) where the encumbered asset is a type of intellectual property with respect to which no registration is required under law relating to intellectual property (e.g. copyrights or trade secrets in many States); (b) where a document or notice of security right in intellectual property is not registrable in an intellectual property registry; (c) where a notice of security right in intellectual property is registrable in an intellectual property registry, but such registration has effects that are inconsistent with third-party effects; and (d) where there are other secured creditors that register only in the general security rights registry. On the other hand, registration in the relevant intellectual property registry may be preferable, for example: (a) where the encumbered asset is a type of asset for which a registration system exists that produces third-party or similar effects and allows registration of documents or notices of security rights (e.g. patents or trademarks in many States); or (b) where the secured creditor needs to ensure priority over other secured creditors or transferees under the relevant law relating to intellectual property.

24. Before a secured transaction is entered into, a secured creditor exercising normal due diligence will typically conduct a search to determine whether there are prior competing claimants that have priority over the proposed security right. As a first step, the secured creditor will search the chain of title to identify prior transfers and to determine whether the grantor actually has rights in the intellectual property so that the security right can become effective in the first instance (this due diligence requirement applies to all movable assets). Unlike intellectual property registries, the general security rights registry does not record title and, as a result, a search of the chain of title will involve a search of the relevant intellectual property registry, provided that the relevant intellectual property is registrable. As a next step, the secured creditor will search to determine whether each prior party in the chain of title has granted a security right which might have priority over the proposed security right. Finally, the secured creditor will determine the applicable priority as between rights registered in one of the two registries. In cases where the priority is determined solely by registration in the relevant intellectual property registry, as provided in the *Guide*, a search of only that registry may be sufficient. Otherwise, a secured creditor may have to search in both registries.

25. Under the *Guide*, it is envisaged that the general security rights registry will be electronic and will accept registration of notices of possible security rights with third-party effects at a nominal cost (based on cost recovery), if any, for registration and searching (see recommendation 54). This means that registration and searching in the general security rights registry is likely to be simple, quick and inexpensive. However, under law relating to intellectual property, registries may not necessarily be fully electronic, documents filed may have to be checked by the registry staff as the legal consequence of registration may be conclusive or presumptive evidence of the existence of a right in intellectual property.

26. Thus, the cost of registration of a document of a security right in an intellectual property registry may be higher that the cost of registration of a notice of a security right in the general security rights registry. As to the cost and time of searching, again searching in a document registry is likely to be more time-consuming and costly than searching in an electronic notice-based general security rights registry. These differences, of course, will be minimized to the extent that an intellectual property registry permits the registration of a notice of a security right

with third-party effects by electronic means and is organized in a way that also permits searching in a time- and cost-efficient way.

F. Time of effectiveness of registration

27. Under the *Guide*, registration of a notice of a security right becomes effective against third parties when the information in the notice is entered into the registry records and becomes available to searchers (see recommendation 70). Where the registry is electronic, registration of a notice will become effective immediately upon registration. However, where the registry is paper-based, registration of a notice will become effective only some time after registration.

28. Specialized registration systems may have different rules with respect to the time of effectiveness of registration of a security right. For example, under law relating to patents and trademarks in many States, third-party effectiveness of a registered security or other right in a patent or a trademark dates back to the date of filing (i.e. submission to the registry of an application for registration), which is useful where the registry takes time to actually register the security right in the patent or trademark.

29. As already mentioned, the *Guide* deals with coordination issues by giving priority to a security right a document or notice of which is registered in a specialized registry (or with respect to which a notation is made on a title certificate) irrespective of the time of registration (see recommendations 77 and 78). Thus, the difference in the approach as to the time of effectiveness of registration may not cause any problems.

G. Impact of a transfer of encumbered intellectual property on the effectiveness of registration

30. The *Guide* recommends that the secured transactions law should address the impact of a transfer of an encumbered asset on the effectiveness of registration of a notice in the general security rights registry (see recommendation 62). This recommendation is equally applicable to security rights in intellectual property made effective against third parties by registration of a notice in the general security rights registry.

31. However, this recommendation is irrelevant if:

(a) The transferee of an encumbered asset acquires it free of the security right, as is the case, for example, where the transfer is authorized by the secured creditor free of the security right (see recommendation 80);

(b) A document or notice of the security right has been registered in an intellectual property (or other specialized) registry;

(c) The grantor has transferred all its rights in the encumbered asset before granting a security right in that asset (in such situations, under the *Guide*, no security right is created; see recommendation 13); and

(d) There is no security right, but a licence in intellectual property, unless a licence is treated as a transfer under law relating to intellectual property (under the

Guide, licences are not transfers).

32. The commentary discusses three ways in which an enacting State may wish to address the matter. One way is to provide that, where the encumbered asset is transferred and the transferee does not acquire it free of the security right, the secured creditor must register an amendment identifying the transferee as a new grantor within a certain specified period after the transfer. If the secured creditor fails to do so, the original third-party effectiveness is maintained in principle. However, the security right is subordinated to intervening secured creditors and transferees whose rights arise after the transfer of the encumbered asset and before the amendment notice is registered. A second way in which enacting States may wish to address this issue is to provide that the grace period for the registration of an amendment is triggered only once the secured creditor acquires actual knowledge of the transfer of the encumbered asset by the grantor. A third way might be to provide that a transfer of an encumbered asset has no impact on the third-party effectiveness of a registered security right.

33. If an enacting State adopts the third approach, a secured creditor of the transferor need not register a notice of its security right again identifying the transferee. In such a case, the security right in the asset now owned by the transferee would remain effective against third parties. However, transferees down in the chain of title might not be able to discover, through a search in the general security rights registry, a security right granted by any person other than their immediate transferor. In such cases, they would still have to search the chain of title and status of an encumbered asset outside the general security rights registry. On the other hand, if an enacting State adopts the first or the second approach discussed above, a secured creditor will have to register a new notice identifying the transferee as the new grantor. In such a case, the secured creditor will have the burden of monitoring the status of the encumbered asset (to a different degree, depending on whether the first or the second approach is followed). At the same time, however, transferees down the chain of title will be able to identify a security right granted by a person other than their immediate transferor.

34. States enacting the *Guide* will have to consider the relative advantages and disadvantages of these different approaches and, in particular, their impact on rights in intellectual property. For example, under the first approach mentioned above, a secured creditor extending credit against the entire copyright in a movie would need to make continuous registrations against tiers of licensees and sub-licensees (if the applicable law relating to copyrights treated a licence as a transfer that could be registered) to maintain its priority against them or their own secured creditors. This would be a significant burden on such lenders and might discourage credit against such assets. On the other hand, such an approach would make it easier for a lender to a sub-licensee to find a security right created by its grantor by a simple search only against the grantor. Here, the trade-off is between the relative costs of monitoring and multiple registrations by the lender to the "upstream" party as against the costs of conducting a search of the entire chain of title for security rights created by the "downstream" party. In this regard, it should be noted that typically under law relating to intellectual property a prior transfer or security right retains its priority over later transfers or security rights without the need for an additional registration in the name of a transferee of an encumbered asset.

35. As already mentioned, if a State does not follow the third option, a secured creditor would have to register a notice of amendment in the general security rights registry each time the encumbered intellectual property became the subject of an unauthorized transfer, licence or sub-licence (if licences are treated as transfers under the relevant law relating to intellectual property), at the risk of losing its priority if it were not informed and had not acted promptly.

36. This problem would not arise with respect to licences and sub-licences, if the secured creditor did not authorize a licence (i.e. if the licensee did not acquire the asset free of the security right) and enforced its security right. In this case, enforcement would result in termination of the licence and any sub-licence, which would make all the "licensees" infringers. Thus, the secured creditor could seek the cancellation of security rights granted by unauthorized licensees. In any case, the third-party effectiveness of a security right in intellectual property against infringers is a matter left to law relating to intellectual property. In addition, this problem would be minimized, if a security right relates to a type of intellectual property that is registrable in an intellectual property registry, at least to the extent that a secured creditor would be informed and could register an amendment notice, which in the case of registration in the general security rights registry could be registered easily, quickly and inexpensively.

H. Registration of security rights in trademarks

37. The International Trademark Association ("INTA") issued a series of recommendations with respect to the registration of security rights in trademarks and service marks (collectively referred to a "marks").[1] More specifically, INTA endorsed uniformity and best practice in registration mechanisms and methods regarding security rights in trademarks, recognizing that: intellectual property rights, including trademarks and service marks, are a major and growing factor in commercial lending transactions; lack of consistency in the registration of security rights in marks fosters commercial uncertainty, and also poses a risk that a mark owner may forfeit or otherwise endanger its mark-related rights; many States have no recording mechanisms (or have insufficient mechanisms) for the registration of security rights in marks; many countries apply different and conflicting criteria for determining what can and will be recorded; and international initiatives on security rights in intellectual property rights by organizations such as UNCITRAL will have broad implications for the way secured financing laws are implemented to deal with registration and other aspects of trademark security rights, especially in developing countries. It should be noted that the recommendations do not address issues relating to the registration of security rights in marks that are not registrable in a trademark office, leaving those issues to domestic secured transactions law (including the law recommend in the *Guide*). In addition, the recommendations address third-party effectiveness issues but do not set out priority rules, leaving them to domestic secured transactions law (including the law recommended in the *Guide*).

[1] See www.inta.org/index.php?option=com_content&task=view&id=1517&Itemi.

38. The main features of such best practices are the following:

(a) A security right in a mark covered by a pending application or registration should be registrable in the national Trademark Office;

(b) For purposes of giving notice of a security right, registration in the applicable national Trademark Office or in any applicable commercial registry is recommended, with free public accessibility, preferably through electronic means;

(c) The grant of a security right in a mark should not have the effect of a transfer of legal or equitable title to the mark that is subject to the security right, and should not confer upon the secured creditor a right to use the mark;

(d) The security agreement creating the security right should clearly set forth provisions acceptable under local law enabling the renewal of the marks by the secured creditor, if necessary to preserve the mark registration;

(e) Valuation of marks for purposes of security rights should be made in any manner that is appropriate and permitted under local law and no particular system or method of valuation is preferred or recommended;

(f) Registration of security rights in the local Trademark Office should suffice for purposes of perfecting a security right in a mark; at the same time, registration of a security right in any other place allowed under local law, such as a commercial registry, should also suffice;

(g) If local law requires that a security right be registered in a place other than the local Trademark Office in order to be perfected, such as in a commercial registry, dual registration of the security right should not be prohibited;

(h) Formalities in connection with registration of a security right and the amount of any government fees should be kept to a minimum; a document evidencing: (i) existence of a security right, (ii) the parties involved, (iii) the mark(s) involved by application and/or registration number, (iv) a brief description of the nature of the security right, and (v) the effective date of the security right, should suffice for purposes of making a security right effective against third parties;

(i) Regardless of the procedure, enforcement of a security right through foreclosure, after a judgement, administrative decision or other triggering event, should not be an unduly burdensome process;

(j) The applicable Trademark Office should promptly record the entry of any judgement or adverse administrative or other decision against its records and take whatever administrative action is necessary; the filing of a certified copy of the judgement or decision should be sufficient;

(k) In the event that enforcement is triggered by means other than a judgement or administrative decision, local law should provide for a simple mechanism enabling the holder of the security right to achieve registration, with free public accessibility, preferably through electronic means;

(l) In cases where the mark owner is bankrupt or otherwise unable to maintain the marks which are subject to a security right, absent specific contract provisions the holder of the security right (or the administrator or executor, as the case may be) should be permitted to maintain the marks, provided that nothing shall confer upon the secured creditor the right to use the marks; and

(m) The relevant government agency or office should promptly record the

filing of documentation reflecting release of the security right in its records, with free public accessibility, preferably through electronic means.

39. Recommendations (a), (b), (f) and (g), dealing with third-party effectiveness of a security right in a mark, are compatible with the *Guide* in that they promote the objectives of transparency and registration in any existing specialized registry or a general security rights or other commercial registry (but the *Guide* does not recommend the establishment of such registries if they do not exist).

40. Recommendation (c), providing that the creation of a security right in a mark does not result in a transfer of the mark or confer upon the secured creditor the right to use the mark, is also compatible with the *Guide*. However, under the *Guide*, the secured creditor has a right, but no obligation, to maintain the mark, and the concept of the "excusable non-use" of a mark could result in the preservation of the mark in the case of non-use because of insolvency of the owner.

41. In addition, recommendation (d) is compatible with the *Guide* in that it sets forth a default rule for the rights of the parties within the limits of the applicable law. Recommendation (e) is also compatible with the *Guide* to the extent it emphasizes the importance of valuation of marks without suggesting any particular system of valuation. Recommendation (h) is also compatible with the *Guide* in that it recommends notice filing even in relation to mark registries. It should be noted that the reference to "the date of the security right" is a reference to the effectiveness of the security right between the parties and not against third parties.

42. Moreover, recommendations (i), (j) and (k) are compatible with the *Guide* in the sense that they provide for efficient enforcement mechanisms and registration of court judgements or administrative enforcement decisions. Finally, recommendation (m), subject to approval by the appropriate Government authorities, is compatible with the *Guide's* recommendations with respect to efficient registration procedures.

VI. Priority of a security right in intellectual property

[*Note to the Working Group: For paras. 43-55 and paras. 1-23 of A.CN.9/WG.VI/WP.37/Add.3, see A/CN.9/WG.VI/WP.35/Add.1, paras. 33-61, A/CN.9/667, paras. 86-103, A/CN.9/WG.VI/WP.33/Add.1, paras. 1-25, and A/CN.9/649, paras. 41-56.*]

A. The concept of priority

43. Under the Guide, the concept of priority of a security right as against competing claimants refers to the question of who as between the secured creditor and each competing claimant (see para. 44 below) may receive payment first out of the proceeds of the disposition of an encumbered asset in the case of the debtor's default. In law relating to intellectual property, by contrast, the notion of the priority of intellectual property rights may relate to notions of title and basic effectiveness. In many States, when intellectual property is transferred by the intellectual property owner once, a second transfer by the same person will normally transfer no rights to the second transferee (subject to the parties' compliance with statutory recordation or knowledge requirements under law relating to intellectual property). In such a

case, no issue of priority in the sense this term is used in the *Guide* arises. Accordingly, the *Guide* would not apply and this matter would be left to law relating to intellectual property. Likewise, under the *Guide*, a party that has no rights in, or the power to encumber, an asset may not create a security right in the asset (see recommendation 13).

B. Identification of competing claimants

44. Under the *Guide*, the notion of "competing claimant" with a right in an encumbered asset means another secured creditor with a security right in the same asset (which includes a transferee in a transfer by way of security), a transferee, lessee or licensee of the encumbered asset, a judgement creditor with a right in the encumbered asset or an insolvency representative in the insolvency of the grantor. Thus, the *Guide* applies to priority conflicts: (a) between a security right, a notice of which is registered in the general security rights registry, and a security right, a document or notice of which is registered in the relevant intellectual property registry; (b) between two security rights, a document or notice of which is registered in the relevant intellectual property registry; (c) between the rights of a transferee or licensee of intellectual property and a security right in that intellectual property; and (d) between two security rights in intellectual property, notice of which is registered in the general security rights registry (see recommendations 76-78).

45. In an intellectual property context, the notion of "conflicting transferees" is used instead and it includes transferees and licensees competing among themselves. As already mentioned, the *Guide* generally does not apply to a conflict between the rights of transferees or licensees, unless there is also a security right involved. However, the *Guide* does apply in such a case if one of the transferees took its right through a transfer of intellectual property by way of security under the secured transactions law recommended in the *Guide* and, under the principle enunciated in recommendation 4, subparagraph (b), there is no priority rule of law relating to intellectual property that applies specifically to that conflict. Similarly, the *Guide* does not apply to a conflict between a transferee of an encumbered asset that took the asset from a secured creditor upon the grantor's default and the secured creditor's proper enforcement and another secured creditor that later received a right in the same asset from the same grantor (that no longer had any rights in the encumbered asset), as this is not a real priority conflict under the *Guide* (this may well be a conflict addressed by law relating to intellectual property).

C. Relevance of knowledge of prior transfers or security rights

46. Under the *Guide*, knowledge of the existence of a prior security right on the part of a competing claimant is generally irrelevant for determining priority (see recommendation 93). However, knowledge that a transfer of an encumbered asset violates a security right in the asset may be relevant (see recommendation 81, subparagraph (a)). Thus, the security right of a secured creditor that has knowledge of a security right created earlier may nonetheless have priority over the earlier-created security right if a notice of the later-created security right was registered (or was otherwise made effective against third parties) before the earlier-created

security right was made effective against third parties (see recommendation 76, subparagraph (a)).

47. By contrast, many laws relating to intellectual property provide that a later conflicting transfer or security right may only gain priority if it is registered first and taken without knowledge of a prior conflicting transfer. The deference to law relating to intellectual property under recommendation 4, subparagraph (b), should preserve these knowledge-based priority rules to the extent they apply specifically to security rights in intellectual property.

D. Priority of a security right registered in an intellectual property registry

48. As already mentioned, if law relating to intellectual property has priority rules dealing with the priority of security rights in intellectual property that apply specifically to intellectual property and the priority rules of the law recommended in the *Guide* are inconsistent with those rules, the law recommended in the *Guide* does not apply (see recommendation 4, subparagraph (b)). However, if law relating to intellectual property does not have such rules or the priority rules of the law recommended in the *Guide* are not inconsistent with those rules, the priority rules of the law recommended in the *Guide* apply.

49. The *Guide* recommends that a security or other right with respect to which a document or notice was registered in a specialized registry should have priority over a security right with respect to which a notice was registered in the general security rights registry, regardless of the order of those registrations (see recommendations 77 and 78).

50. This recommendation is equally applicable to security rights in intellectual property. Thus, if there is a conflict between two security rights in intellectual property, one of which is the subject of a notice registered in the general security rights registry and the other is the subject to a document or notice registered in the relevant intellectual property registry, the *Guide* applies and gives priority to the security right that is the subject of the notice registered in the relevant intellectual property registry (see recommendation 77, subparagraph (a)). If there is a conflict between security rights that are the subject of documents or notices registered in the relevant intellectual property registry, the right that is the subject of the first document or notice registered has priority, and the *Guide* confirms that result (see recommendation 77, subparagraph (b)).

51. If there is a priority conflict between the rights of a transferee of intellectual property and a security right with respect to which, at the time of the transfer, a document or notice was registered in the relevant intellectual property registry, the transferee would take the encumbered intellectual property subject to the security right. However, if the secured creditor had not registered a document or notice of its security right in the relevant intellectual property registry, the transferee takes the encumbered intellectual property free of the security right (see recommendation 78). In some States, under law relating to intellectual property, a secured creditor would have priority in this case, if the transferee is not a bona fide purchaser. The *Guide* would defer to that rule if it applied specifically to intellectual property.

52. Thus, if A creates a security right in a patent in favour of B that registers a notice of its security right in the general security rights registry, and then A transfers title to the patent to C, which registers a document or notice of its transfer in the patent registry, under the *Guide*, C would take the patent free of the security right, because no document or notice of the security right was registered in the patent registry (see recommendation 78). Similarly, if A, instead of making a transfer, creates a second security right in favour of C and only C registers a document or notice of the security right in the patent registry, under the *Guide*, C would prevail (see recommendation 77, subparagraph (a)). In either case, as registration of a document or notice in the patent registry gives superior rights, under the *Guide*, third-party searches could rely on a search in that registry and would not need to search in the general security rights registry. In all these examples, who is a transferee and what are the requirements for a transfer are matters of law relating to intellectual property. It should also be noted that registration in the intellectual property registry would normally refer only to a security right in intellectual property. It would not refer to a security right in tangible assets with respect to which intellectual property is used.

E. Priority of a security right that is not registrable or registered in an intellectual property registry

53. Under the *Guide*, if a document or notice of a security right is not registrable (or not registered) in a specialized registry, but a notice of it is registered in the general security rights registry, its priority will be determined by the order of registration in that registry (see recommendation 76, subparagraph (a)). In addition, a transferee, lessee or licensee of an encumbered asset, with respect to which a document or notice of a security right is not registrable (or not registered) in a specialized registry, will normally take the asset subject to such a security right (see recommendation 79).

54. These recommendations apply equally to security rights in intellectual property except if, under recommendation 4, subparagraph (b), there is a contrary priority rule of the law relating to intellectual property that applies specifically to intellectual property. Thus, if a document or notice of a security right in intellectual property is not registrable (or not registered) in an intellectual property registry, but a notice in respect of that security right is registered in the general security rights registry, its priority will be determined by the order of registration of the notice. Similarly, a transferee or licensee of intellectual property will take the encumbered intellectual property subject to the security right. If the intellectual property had been transferred by the grantor of the security right before the creation of the security right, the secured creditor will have no security right at all on the basis of the generally acceptable *nemo dat* property law rule, the application of which the *Guide* does not affect. This approach is reflected in the general rule in the *Guide* that a grantor can create a security right only in an asset in which the grantor has rights or the power to create a security right (see recommendation 13).

F. Rights of transferees of encumbered intellectual property

55. As mentioned above, under the *Guide*, a transferee of an encumbered asset (including intellectual property) normally takes the asset subject to a security right that was effective against third parties at the time of the transfer (see recommendation 79). There are two exceptions to this rule. The first exception arises where the secured creditor authorizes the disposition free of the security right (see recommendation 80, subparagraph (a) for sales of encumbered assets and subparagraph (b) for leases or licences of encumbered assets). The second exception relates to a transfer in the ordinary course of the transferor's, lessor's or licensor's business (see recommendation 81). It is important to note that, under the *Guide*, a licence of intellectual property is not a transfer of the licensed intellectual property. Thus, the rules of the *Guide* that apply to transfers of encumbered assets would not apply where there is a security right in intellectual property and then a licence of that intellectual property is granted. In any case, in view of the principle of deference to law relating to intellectual property embodied in recommendation 4, subparagraph (b), the *Guide* does not affect the characterization of a licence (in particular, of an exclusive licence as a transfer) under law relating to intellectual property.

(A/CN.9/WG.VI/WP.37/Add.3) [Original: English]

Note by the Secretariat on the Draft Annex to the UNCITRAL Legislative Guide on Secured Transactions dealing with security rights in intellectual property submitted to the Working Group on Security Interests at its fifteenth session

ADDENDUM

CONTENTS

VI. Priority of a security right in intellectual property (*continued*)

G. Rights of licensees in general

1. Intellectual property is routinely licensed. In such cases, the retained rights of a licensor, such as the ownership right, rights associated with ownership and the rights of a licensor under a licence agreement (such as the right to receive royalties) may be used by the licensor as security for credit. Similarly, the licensee's authorization to use the intellectual property or the licensee's right to grant sub-licences and receive royalties (in both cases according to the terms of the licence agreement) may be used by the licensee as security for credit.

2. Where the intellectual property owner has created a security right in favour of a secured creditor and the security right is made effective against third parties, the owner may still grant a licence in the encumbered intellectual property as long as it remains the intellectual property owner. However, under general principles of law relating to intellectual property, the owner may not grant a licence in its encumbered intellectual property if: (a) the secured creditor becomes the owner; (b) to the extent permitted under law relating to intellectual property, the owner and the secured creditor have agreed that the secured creditor will be or will act as an owner; (c) the owner and the secured creditor have agreed that any licences granted by the owner would terminate upon the secured creditor's enforcement of its security right. In the first two situations, a licence granted by the original owner would be under law relating to intellectual property an unauthorized licence and a secured creditor acquiring a security right in that licence would obtain nothing based on the *nemo dat* principle.

3. In the last situation mentioned in the preceding paragraph, the owner may theoretically grant a licence, but the result would normally be the same as in the first two situations, because the granting of a licence by the owner in breach of its agreement with the secured creditor would be an event of default. As a result, the licensor's secured creditor could enforce its security right by selling the licensed intellectual property or granting another licence free of the pre-existing licence (and any security right granted by the licensee) as that licensee would normally have taken its licence subject to the security right of the licensor's secured creditor (see recommendations 79 and 161-163). Alternatively, the secured creditor of the licensor could seek to collect the royalties owed by the licensee to the licensor (as proceeds of the encumbered intellectual property; see recommendations 19, 39, 40, 100 and 168), as licence royalties are treated as any other receivable. Of course, if the licensee took the licensed intellectual property free of the security right granted by the owner/licensor in the intellectual property (that is, if the secured creditor authorized the granting of the licence or the licence is a non-exclusive licence granted by the licensor in its ordinary course of business, the licensee could retain its licence and the secured creditor could only seek to collect the royalties owed by the licensee to the licensor (see recommendations 80, subparagraph (b), and 81, subparagraph (c)).

4. If the licensee also creates a security right in its rights under the licence agreement (i.e. mainly the authorization to use the licensed intellectual property), that security right would be in a different asset (i.e. not in the licensor's rights to claim the payment of royalties) and, in effect, be subject to the security right created

by the licensor, as the licensee would have taken its rights subject to that security right (see recommendation 79) and the licensee could not have given to its secured creditor more rights that the licensee has (based on the *nemo dat* principle). So, if the secured creditor of the licensor enforced its security right, it could dispose of the encumbered intellectual property free of the licence. Thus, the licence would terminate upon that disposition and the licensee's encumbered asset would cease to exist. Likewise, whether or not the licensor had granted a security right to one of its creditors, if the licensee defaults on the licence agreement, the licensor can terminate it to the extent permitted under law relating to intellectual property and the licensee's secured creditor would be again left without an asset encumbered by its security right.

5. The rights of the licensor and the licensee under the licence agreement and the relevant law relating to intellectual property would remain unaffected by secured transactions law. So, if the licensee defaults on the licence agreement, the licensor can terminate it and the licensee's secured creditor would be again left without security. Similarly, secured transactions law would not affect an agreement between the licensor and the licensee prohibiting the licensee from granting sub-licences or assigning its claims to royalties owed by sub-licensors to the licensee.

6. As already mentioned, there are two exceptions to the rule that a licensee of encumbered intellectual property takes the licence subject to a pre-existing security right. The first exception arises where the secured creditor authorizes the licence free of the security right (see recommendation 80, subparagraph (b)). The second exception relates to a non-exclusive licence in the ordinary course of the licensor's business (see recommendation 81, subparagraph (c), and paras. 7-10 below).

H. Rights of certain licensees

7. To the extent that law relating to intellectual property addresses this matter and provides that a licensee of encumbered intellectual property takes the licence subject to a security right created by the licensor, unless the secured creditor authorized the granting of the licence free of the security right, the law recommended in the *Guide* (that is, in this case, recommendation 81, subparagraph (c)) does not apply (see recommendation 4, subparagraph (b)). As a result, unless the secured creditor authorized the granting of licences unaffected by the security right (which will typically be the case as the grantor/licensor will rely on its royalty income to pay the secured obligation), the licensee would take the licence subject to the security right. Thus, in the case of the grantor's/licensor's default, the secured creditor of the licensor would be able to enforce its security right in the licensed intellectual property and sell or licence it free of the licence granted by the grantor/licensor. In addition, a person obtaining a security right from the licensee will not obtain an effective security right as the licensee would have received an unauthorized licence and would have no right to give.

8. If law relating to intellectual property does not address this matter at all or does not address it inconsistently with recommendation 81, subparagraph (c), recommendation 81, subparagraph (c), will apply (see recommendation 4, subparagraph (b)). Under recommendation 81, subparagraph (c), a non-exclusive licensee that takes a licence in the ordinary course of business of the licensor without knowledge that the licence violated a security right in the licensed

intellectual property, takes its rights under the licence agreement unaffected by a security right previously granted by the licensor. The result of this rule is that, in the case of enforcement of the security right in the licensed intellectual property by the secured creditor of the licensor, the secured creditor could collect any royalties owed by the licensee to the licensor, but not sell the licensed intellectual property or grant another licence in with the effect of terminating the rights of the existing licensee as long as the licensee performed the terms of the licence agreement. This rule is intended to protect everyday, legitimate transactions, such as off-the-shelf purchases of copies of copyrighted software with end-user licence agreements. In such transactions, purchasers should not have to do a search in a registry or acquire the software subject to security rights created by the software developer or its distributors.

9. Recommendation 81, subparagraph (c), is based on the assumption that the grantor retains ownership of the encumbered intellectual property and does not authorize the granting of licences by a grantor that is no longer the intellectual property owner or the holder of that right. In addition, it does not affect the relationship between the licensor and the licensee and does not mean that the licensee would obtain a licence free of the terms and conditions of the licence agreement and the law applicable to it (nor does it affect limitations in the licence agreement on the licensee entering into sub-licence agreements). Moreover, this recommendation or the *Guide* does not interfere with the enforcement of provisions as between the secured creditor and the grantor/licensor (or between the licensor and its licensee) that the grantor/licensor place in all of the non-exclusive ordinary-course-of-business licences a provision that the licence will terminate if the licensor's secured creditor enforces its security right.

10. The secured creditor may elect to avoid extending any credit until it has an opportunity to review and approve the terms of the sub-licences to ensure, for example, that expected royalties are paid upfront, termination be permitted in the case of non-payment of royalties and assignment of sub-royalties be prohibited. In addition, if the secured creditor of the licensor does not want to encourage non-exclusive licences, it can, in its security agreement (or elsewhere), require the borrower (the licensor) to place in all of the non-exclusive licences a provision that the licence will terminate if the licensor's secured creditor enforces its security right. Similarly, if the licensor does not want its licensee to grant any sub-licences, it can include in the licence agreement a provision that the grant of a sub-licence by the licensee is an event of default under the licence agreement that would entitle the licensor to terminate the licence. Nothing in the *Guide* would interfere with the enforcement of such provisions as between the secured creditor and its borrower (or as between the licensor and its licensee). Ordinarily, of course, the secured creditor will have no interest in doing that, since the licensor (and any licensee) is in the business of granting non-exclusive licences and the secured creditor expects the borrower to use the fees paid under those licence agreements to pay the secured obligation.

[*Note to the Working Group: With respect to security rights in intellectual property, the Working Group may wish to consider modifying recommendation 81, subparagraph (c), to the extent that it applies to security rights to intellectual property (but not to other intangible assets), by one of the following alternative asset-specific recommendations:*

Alternative A

The law should provide that the rights of a licensee of intellectual property to use the licensed intellectual property pursuant to the terms of the licence agreement are not affected by a security right in the intellectual property granted by the licensor, provided that:

(a) The licence is non-exclusive;

(b) The owner of the encumbered intellectual property is generally in the business of granting non-exclusive licences in that intellectual property under substantially the same terms as those of the licensee's licence agreement without customization of the intellectual property for the licensee; and

(c) At the time of the conclusion of the licence agreement, the licensee does not have knowledge that the licence violates the rights of the secured creditor.

Alternative B

[The law should provide that a licensee of encumbered intellectual property takes its licence subject to a security right granted by the licensor, unless the secured creditor acting as an owner has authorized the granting of the licence free of the security right.] If the security agreement does not address the matter, the secured creditor acting as an owner is deemed to have authorized the licence free of the security right.

The Working Group may wish to note that: alternatives A and B appear within square brackets as they have not been approved by the Working Group yet; and that the first sentence of alternative B is within additional square brackets as it repeats the rule embodied in recommendation 80, subparagraph (b). They are proposed by the Secretariat in an effort to assist the Working Group to reach an agreement on this matter (see A/CN.9/667, paras. 97-100). The other alternative would be to explain how recommendation 81, subparagraph (c), would apply in an intellectual property context along the lines of paragraphs 7-10 above (see also A/CN.9/WG.VI/WP.35/Add.1, paras. 49-55), and leave the matter to the principle of deference to intellectual property law embodied in recommendation 4, subparagraph (b). As a result, recommendation 81, subparagraph (c), would not apply in so far as it would be inconsistent with law relating to intellectual property. Thus, law relating to intellectual property law would not be interfered with.

In addition, the Working Group may wish to note that both alternatives A and B are based on the assumption that the security right is effective against third parties (under the Guide, no priority issue can arise if a security right is not effective against third parties). Moreover, the Working Group may wish to note that: alternative A is a reformulation of the principle embodied in recommendation 81, subparagraph (c); and alternative B reiterates and elaborates further on the principle embodied in recommendation 80, subparagraph (b).

The following example may assist the Working Group in considering the results of the application of alternative A or B.

Video distributor A normally obtains exclusive licences from movie producers for the reproduction and sale of movie videos and is in the business of granting non-exclusive sub-licences under substantially the same terms without customization. A grants under these terms non-exclusive sub-licences to B, C and D for the reproduction and sale of these movie videos. Video distributor A agrees to pay the producers a royalty of 25 per cent of its net income from royalties for

exploiting the video rights. Video distributor A also agrees with its non-exclusive sub-licensees B, C and D that they would pay royalties equal to 50 per cent of their royalty income. Video distributor A obtains a line of credit from secured creditor E and grants secured creditor E a security right in its rights under the video licences and its expected royalty income. Non-exclusive sub-licensees B, C and D operate video store chains, selling and renting video tapes to customers while granting to them in effect non-exclusive sub-licences under the same terms without customization. B, C and D obtain lines of credit from secured creditor F secured from their licence rights and royalties.

Even without alternative A or B, the rights of a licensee would not be affected by a security right of a secured creditor of the licensor, if the secured creditor authorized the licensor to grant the licence unaffected by the security right see recommendation 80, subparagraph (b).

Under alternative A, non-exclusive licensees B, C and D licence rights would not be affected by the security right created by video distributor A (that in its normal course of business grants non-exclusive licences on substantially the same terms without customization) in favour of secured creditor E, if, at the time of the conclusion of the licence agreement B, C and D did not know that the licences violated the rights of secured creditor E (see recommendation 81, subparagraph (c) and alternative A). Similarly, the customers of B, C and D buying or renting video tapes would not be affected by any security right granted by B, C and D, if, as would normally be the case, they did not know that the licences they received violated the rights of secured creditor F. In fact, in both situations, the secured creditor would have no interest in disrupting the stream of royalty payments to their borrowers.

Under alternative B, non-exclusive sub-licensees B, C and D would take their licence rights unaffected by the security right created by video distributor A in favour of secured creditor E, if the security agreement did not address the matter (if secured creditor E authorized the granting of the licences by video distributor A to non-exclusive sub-licensees B, C and D unaffected by the security right, recommendation 80, subparagraph (b), would apply). The same would apply to the customers of B, C and D if the security agreements with secured creditor F did not address the matter.]

I. Priority of a security right granted by a licensor as against a security right granted by a licensee

11. The licensor's right to the payment of the royalties owed to the licensor by the licensee under a licence agreement is not affected by any security right granted by the licensee in any royalties due to the licensee under any sub-licence agreement. Such a security right, though, can have an impact on the licensee's ability to pay the licensor if the licensee is in default with respect to its secured creditor inasmuch as that secured creditor may seek to collect the sub-royalties itself.

12. The following example may be useful in illustrating the problem. Intellectual property owner A grants a licence to licensee B under a licence agreement permitting B to grant sub-licences. B grants a sub-licence to C and creates a security right in its sub-royalties in favour of secured creditor SC1 who registers a notice of its security right in the general security rights registry. Intellectual property owner A

then creates a security right in favour of SC2 in its intellectual property ownership rights and the right to receive payment of royalties. Secured creditor SC2 then registers a notice of its security right in the general security rights registry. Licensee's B secured creditor SC1 will prevail over the owner's secured creditor SC2, unless the licensee's secured creditor SC1 registered a notice of its security right in the general security rights registry, while the licensor's secured creditor SC2 registered a document or notice of its security right in the relevant intellectual property registry. Where the encumbered intellectual property is not registrable in a specialized registry, priority will be determined by the order of registration of a notice of the security right in the general security rights registry (see recommendations 76-78).

13. However, the licensor has numerous ways to protect itself in this circumstance. For example, the licensor could protect its rights by: (a) prohibiting the licensee from assigning or granting a security right in its claim against sub-licensees for the payment of royalties owed under sub-licence agreements; (b) terminating the licence in cases where the licensee assigned its royalty claims against sub-licensees in breach of such a prohibition; (c) agreeing that any sub-licensee pay its sub-royalties directly to the licensor; or (d) requiring the secured creditor of the licensee to enter into a subordination agreement with the licensor's secured creditor. The *Guide* does not interfere with these provisions if they are effective under law relating to intellectual property and the law of obligations.

14. In addition, the licensor could insist that the licensee grant to the licensor a security right in royalty claims of the licensee against sub-licensees. However, the priority of the security right of the licensor as against another security right granted by the licensor in those royalty claims would be subject to the general priority rules. This means that the security right that was first made effective against third parties or the subject of a notice registered in the general security rights registry (or a document or notice registered in a specialized registry, if applicable) would have priority.

15. In situations where the encumbered asset is a tangible asset with respect to which intellectual property is used, in certain circumstances, a security right may qualify as an acquisition security right. This means that a secured creditor of an owner/lessor may obtain priority over a secured creditor of a lessee of tangible assets, even if the owner's/lessor's secured creditor registers second. However, as discussed in the chapter on enforcement, that right encumbers the tangible asset and not the intellectual property. The right of the acquisition secured creditor to dispose of the encumbered assets as they are (i.e. including the application of the intellectual property in that specific encumbered asset) is treated as a matter of enforcement and, as discussed below, is subject either to the exhaustion of the rights of the owner of the intellectual property used in the specific tangible encumbered assets or to the authorization given to the secured creditor by the owner to dispose of the encumbered assets as they are (see paras. 40-43 below).

J. Priority of a security right in intellectual property as against the right of a judgement creditor

16. Under the *Guide*, a security right that was made effective against third parties before a judgement creditor obtained rights in the encumbered asset has priority as

against the right of the judgement creditor. However, if an unsecured creditor obtained a judgement against the grantor and took the steps necessary under the law governing the enforcement of judgements to acquire rights in the encumbered assets before the security right became effective against third parties, the right of the judgement creditor has priority (see recommendation 84).

17. This recommendation applies equally to security rights in intellectual property. In such a case, under law relating to intellectual property the judgement creditor may have to obtain a transfer of the intellectual property and a document or notice thereof may have to be registered in an intellectual property registry for the judgement creditor to obtain priority. If this transfer takes place before a security right was made effective against third parties, both under the law recommended in the *Guide* and law relating to intellectual property, the transferee of encumbered intellectual property will take the encumbered intellectual property free of the security right (see also recommendation 79).

K. Subordination

18. The *Guide* recognizes the principle of subordination (see recommendation 94). The principle applies equally to security rights in intellectual property. The essence of this principle is that, as long as the rights of third parties are not affected, competing claimants may alter by agreement the priority of their competing claims in an encumbered asset. This is important for intellectual property in view of the divisibility of intellectual property rights.

VII. Rights and obligations of the parties to a security agreement relating to intellectual property

[*Note to the Working Group: For paras. 19-22, see A/CN.9/WG.VI/WP.35/Add.1, paras. 62-63, A/CN.9/667, paras. 104-108, A/CN.9/WG.VI/WP.33/Add.1, paras. 26-30, and A/CN.9/649, paras. 57-59*.]

A. Application of the principle of party autonomy

19. With few exceptions, the *Guide* generally recognizes the freedom of the parties to the security agreement to tailor their agreement so as to meet their practical needs (see recommendation 10). The principle of party autonomy applies equally to security rights in intellectual property, subject to any limitations specifically introduced by law relating to intellectual property. For example, where the rights of an owner are encumbered, the right to sue infringers may not be part of the encumbered asset, if law relating to intellectual property provides that only an owner may exercise, transfer or encumber that right.

B. Right of the secured creditor to pursue infringers or renew registrations

20. Under secured transactions law, the secured creditor should be able to agree with the intellectual property owner that the secured creditor would be entitled to pursue infringers and renew registrations, provided that this is permitted under law relating to intellectual property. Otherwise, the encumbered asset could lose its value, if the owner of the encumbered intellectual property failed to exercise this right in a timely fashion. This result could negatively affect the use of intellectual property as security for credit. This approach would not interfere with the rights of the owner as its consent would be necessary. Similarly, this approach would not interfere with law relating to intellectual property because such an agreement would be null and void, if it were concluded in violation of law relating to intellectual property. Of course, States enacting the recommendations of the *Guide* may wish to consider their law relating to intellectual property so as to determine whether such agreements should be permitted, as this could facilitate the use of intellectual property as security for credit.

21. Similarly, unless prohibited by law relating to intellectual property, the secured creditor should be able to protect the value of the encumbered intellectual property, for example, by renewing registration and suing infringers if the owner failed to do so within a reasonable period of time after being asked by the secured creditor. Otherwise, the value of the encumbered intellectual property could diminish, a result t hat could negatively affect the use of intellectual property as security for credit. Again, this result would not interfere with law relating to intellectual property as recommendation 4, subparagraph (b) would defer to that law in case of any inconsistency.

22. The following two new asset-specific recommendations could added to the *Guide*:

"The law should provide that[, unless prohibited by law relating to intellectual property,] the grantor and the secured creditor may agree as to who may pursue infringers or renew registrations of the encumbered intellectual property.

[The law should provide that[, unless prohibited by law relating intellectual property,] the secured creditor should be entitled to pursue infringers and renew registrations if the owner fails to exercise these rights within a reasonable period of time.]"

[*Note to the Working Group: The Working Group may wish to consider that the bracketed wording in both recommendations is not necessary as: (a) recommendation 4, subparagraph (b), would be sufficient in deferring to law relating to intellectual property with respect to any matter that is addressed in the Guide in a way that is inconsistent with law relating to intellectual property; and (b) recommendation 18 already preserves that any statutory limitations to the transferability of certain types of asset.*]

VIII. Rights and obligations of third-party obligors in intellectual property financing transactions

[*Note to the Working Group: For para. 23, see A/CN.9/WG.VI/WP.35/Add.1, para. 64, A/CN.9/667, para. 109, A/CN.9/WG.VI/WP.33/Add.1, paras. 32, and A/CN.9/649, para. 60*.]

23. Where a licensor assigns its claim against a licensee for the payment of royalties under a licence agreement, the licensee (as the debtor of the assigned receivable) would be a third-party obligor under the *Guide* and its rights and obligations would be the rights and obligations of a debtor of a receivable. Similarly, where a licensee assigned its claim against a sub-licensee for the payment of royalties under a sub-licence agreement, the sub-licensee would be a third-party obligor in the sense of the *Guide*.

IX. Enforcement of a security right in intellectual property

[*Note to the Working Group: For paras. 24-48, see A/CN.9/WG.VI/WP.35/Add.1, paras. 65-89, A/CN.9/667, paras. 110-123, A/CN.9/WG.VI/WP.33/Add.1, paras. 35-44, and A/CN.9/649, paras. 61-73*.]

A. Intersection of secured transactions law and law relating to intellectual property

24. States typically do not provide for specific enforcement remedies for security rights in intellectual property in their laws relating to intellectual property. The general law of secured transactions normally applies to the enforcement of security rights in intellectual property. To the extent that law relating to intellectual property in some States actually does address the enforcement of security rights in different types of intellectual property, it merely engrafts existing secured transactions enforcement regimes onto the regime governing intellectual property. As a consequence, States that enact the *Guide*'s recommendations will normally be simply substituting the *Guide*'s recommended enforcement regime for the prior enforcement regime derived from, for example, a civil code and code of civil procedure, the common law of floating and fixed charges, a mortgage act or some other general law of enforcement, as the case may be.

25. This approach to the enforcement of security rights applies not only to intellectual property (for example, a patent, a copyright or a trademark), but also to other rights that are derived from these types of intellectual property. Hence, consistently with the United Nations Assignment Convention, assets, such as royalties and licence fees, are treated as receivables and are subject to the enforcement regime recommended in the *Guide* for assignments (i.e. outright transfers, security transfers and security rights) in receivables. Likewise, a licensor's or sub-licensor's other contractual rights as against a licensee or sub-licensee will also be governed by a State's general law of obligations, and security rights in these contractual rights will be enforced under a State's general secured transactions law. And again, a licensee's or sub-licensee's rights of use are treated in the same way as a lessee's or purchaser's rights, and are governed by a

State's general law of obligations, except as regards questions of registration (where specifically mentioned in law relating to intellectual property).

26. On occasion, States incorporate special procedural controls on the enforcement of security rights in intellectual property into law relating to intellectual property. In addition, the general procedural norms of secured transactions law in a State may be given a specific content in the context of enforcement of security rights in intellectual property. So, for example, the determination of what is commercially reasonable where the encumbered asset is intellectual property may depend on law and practice relating to intellectual property. This standard of commercial reasonableness may well vary from State to State, as well as from intellectual property regime to intellectual property regime. The *Guide* recognizes this procedural specificity and, in so far as any procedural rules apply specifically to security rights in intellectual property and impose greater obligations on parties than those of the enforcement regime set out in the recommendations of the *Guide*, they will, under the principle set out in recommendation 4, subparagraph (b), displace the general recommendations of the *Guide*. Of course, if these procedural rules and definitional specifications apply to security rights in assets other than intellectual property as well, they will be displaced by the recommendations of the *Guide* in States that enact them.

27. As for substantive enforcement rights of secured creditors, once a State adopts the *Guide*'s recommendations, there is no reason to develop different or unusual remedial principles to govern enforcement of security rights in intellectual property serving as encumbered assets. The *Guide* merely recommends a more efficient, transparent and effective enforcement regime of a secured creditor's rights, without in any way limiting the rights that the owner of intellectual property may exercise to protect its rights against infringement or to collect royalties from a licensee or sub-licensee. As pointed out in the section of this Annex on creation of a security right (see A/CN.9/WG.VI/WP.37/Add.1, paras. 30 and 33), the secured creditor can never acquire security in more rights than the rights with which the grantor is vested at the time enforcement occurs.

B. Enforcement of a security right in different types of intellectual property

28. The *Guide* elaborates a detailed regime governing the enforcement of security rights in different types of encumbered asset. Its basic assumption is that enforcement remedies must be tailored to ensure the most effective and efficient enforcement while ensuring appropriate protection of the rights of the grantor and third parties. This assumption and approach of the *Guide* should apply equally to the enforcement of security rights in the various categories of intellectual property. Currently, the law of most States recognizes a wide variety of rights relating to intellectual property, including:

(a) The intellectual property in itself;

(b) Receivables arising under a licence agreement;

(c) The licensor's other contractual rights under a licence agreement;

(d) The licensee's rights under a licence agreement;

(e) The owner's, licensor's and licensee's rights in tangible assets with respect to which intellectual property is used.

29. The enforcement regime recommended in the *Guide*, and applicable to each of these different rights in intellectual property, will be discussed separately in the following sections.

C. Taking "possession" of encumbered intellectual property

30. The right of the secured creditor to take possession of the encumbered asset as set out in recommendations 146 and 147 of the *Guide* is normally not relevant if the encumbered asset is an intangible asset such as intellectual property (as the term "possession", as defined in the *Guide*, means *actual* possession). These two recommendations deal only with the taking of possession of tangible assets. However, consistently with the general principle of extrajudicial enforcement, the secured creditor should be entitled to take possession of any documents necessary for the enforcement of its security right where the encumbered asset is intellectual property. Such a right will normally be provided for in the security agreement. In the event that the documents are accessory to the encumbered intellectual property, the creditor should be able to obtain possession whether or not those documents were specifically mentioned as encumbered assets in the security agreement.

31. It may be thought that, where a secured creditor takes possession of a tangible asset that is produced using intellectual property or in which a chip containing a programme produced using an intellectual property is included, the secured creditor is also taking possession of the encumbered intellectual property. This is not the case. It is important to distinguish properly the asset encumbered by the security right. Even though many tangible assets, whether equipment or inventory, may be produced through the application of intellectual property such as a patent, the creditor's security lies upon the tangible asset and does not, absent specific language in the security agreement purporting to encumber the intellectual property itself, encumber the intellectual property with the use of which the asset was produced. So, for example, the secured creditor may take possession of a tangible asset, such as a compact disc or a digital video disc, and may exercise its enforcement remedies against the discs under the *Guide*'s recommendations. In cases where the secured creditor also wishes to obtain a security right in the intellectual property itself (including, to the extent the grantor has the right to sell or otherwise dispose of, or license the intellectual property, the right to sell or otherwise dispose of, or license), it would be necessary for the secured creditor to specifically mention such intellectual property as encumbered assets in the security agreement with the owner of such intellectual property.

D. Disposition of encumbered intellectual property

32. Under the *Guide*, the secured creditor has the right upon the grantor's default to dispose of or grant a licence with respect to intellectual property encumbered by its security right, but always within the limits of the rights of the grantor. As a result, if the grantor is the owner, the secured creditor should, in principle, have the right to sell or otherwise dispose of, or license the intellectual property in which it has obtained a security right. However, if the grantor had previously granted an

exclusive licence to a third party free of the security right, upon default, the secured creditor will be unable to grant another licence, as the grantor had no such right at the time the secured creditor acquired its security right (*nemo dat quod non habet*).

33. In the above-mentioned situation, under the *Guide*, the enforcing secured creditor does not acquire the intellectual property against which the security right is being enforced. Instead, the secured creditor disposes of the encumbered intellectual property (by assigning, licensing or sub-licensing it) in the name of the grantor. Until the assignee or licensee (as the case may be) that acquires the rights upon a disposition by the enforcing creditor registers a notice (or other document) of its rights in the relevant registry (assuming the rights in question are registrable), the grantor will appear on the registry as the owner of the relevant intellectual property.

E. Rights acquired through disposition of encumbered intellectual property

34. Under the *Guide*, rights in intellectual property acquired through judicial disposition would be regulated by the relevant law applicable to the enforcement of court judgements. In the case of an extrajudicial disposition in line with the provisions of secured transactions law, the first point to note is that the transferee or licensee takes its rights directly from the grantor. The secured creditor that chooses to enforce its rights in this manner does not become the owner as a result of this enforcement process, unless the secured creditor acquires the encumbered intellectual property in satisfaction of the secured obligation or at an enforcement sale (see, for example, recommendations 148 and 156).

35. The second point is that the transferee or licensee could only take such rights as were actually encumbered by the enforcing creditor's security right. Under the *Guide*, the transferee or licensee would take the intellectual property free of the security right of the enforcing secured creditor and any lower-ranking security rights, but subject to any higher-ranking security rights. The same rule applies to an extrajudicial disposition that is inconsistent with the provisions of the secured transactions law, provided that the transferee or licensee acted in good faith (see recommendations 161-163).

36. As a general principle of secured transactions law, the enforcing secured creditor takes the encumbered asset in the condition it is at the time of enforcement. Thus, a security right in a tangible asset extends to and may be enforced against attachments to that asset (see recommendation 21 and 166). To ensure that the security right also covers assets produced or manufactured from encumbered assets, the security agreement normally provides expressly that the security right extends to such manufactured assets. Where the encumbered asset is intellectual property, it is important to determine whether the asset that is disposed of to the transferee or licensee is simply the intellectual property as it existed at the time the security right became effective against third parties or whether it is that intellectual property including any subsequent enhancements to it (e.g. an improvement to a patent). Generally, laws relating to intellectual property treat such improvements as separate assets and not as integral parts of existing intellectual property. As a result, the prudent secured creditor that wishes to ensure that improvements are encumbered with the security right should describe the encumbered asset in the security

agreement in a manner that ensures that enhancements are directly encumbered by the security right.

F. Proposal by the secured creditor to accept the encumbered intellectual property

37. Under the enforcement regime recommended in the *Guide*, the secured creditor also has the right to propose to the grantor that it accept the grantor's rights in satisfaction of the secured obligation. If the grantor is the owner of intellectual property, the secured creditor could itself become the owner, provided that the grantor and its creditors do not object (see recommendations 156-159). Should the owner have licensed its intellectual property to a licensee that acquired its rights under the licence agreement free of the rights of the enforcing secured creditor, when the secured creditor accepts the intellectual property from the grantor, it acquires that right subject to the prior-ranking licence under the *nemo dat* principle. Once a secured creditor becomes the owner of intellectual property, its rights and obligations are regulated by the relevant law relating to intellectual property. In particular, the secured creditor should register to enjoy the rights of an owner in the relevant intellectual property registry (assuming that rights in the intellectual property are registrable). Finally, the secured creditor that accepts the encumbered intellectual property in full or partial satisfaction of the secured obligation would take the intellectual property free of the security right of any lower-ranking security rights, but subject to any higher-ranking security rights (see recommendation 161).

G. Collection of royalties and licence fees

38. Under the *Guide*, where the encumbered asset is the right to receive payment of royalties or other fees under a licence agreement, the secured creditor should be entitled to enforce the security right by simply collecting the royalties and fees upon default and notification to the person that owes the royalties or fees (see recommendation 168). In all these situations, the royalties are, for the purposes of secured transactions laws, receivables, and the rights and obligations of the parties will be governed by the principles pertaining to receivables that are elaborated in the United Nations Assignment Convention and the *Guide* for receivables. Once again, the secured creditor that has taken security over present and future royalty payments is entitled to enforce only such rights to receive payment of royalties as were vested in the grantor (licensor) at the time the security right in the receivable is enforced. In addition, subject to any contrary provision of law relating to intellectual property (see recommendation 4, subparagraph (b)), the secured creditor's rights to collect royalties includes the right to collect or otherwise enforce any personal or property right that secures payment of the royalties (see recommendation 169).

H. Licensor's other contractual rights

39. In addition to the right to collect receivables, the licensor will normally include a number of other contractual rights in its agreement with the licensee. These may include, for example, a limitation in the licence agreement on the right of the licensee to grant any sub-licence or a prohibition on the granting of security

rights by the licensee in its rights under the licence agreement, including the right to terminate the licence agreement under a set of specified conditions. Merely because the licensor may have granted a security right in its right to collect royalties and this right to collect has become enforceable and is being enforced by the secured creditor has no direct bearing on these other rights of the licensor under its licence agreement or under generally applicable law relating to intellectual property. These rights remain vested in the licensor, unless they themselves have been assigned to a third party or were included in the description of the encumbered asset over which the secured creditor that is enforcing its security right obtained a security right from the grantor.

I. Enforcement of security rights in tangible assets related to intellectual property

40. In principle, except where the so-called "exhaustion doctrine" applies, the intellectual property owner has the right to control the manner and place in which tangible assets, with respect to which intellectual property is used (of course, with the authorization of the owner), are sold. That is, in the event that the relevant intellectual property right has not been exhausted, the secured creditor should be able to dispose of the assets upon default, if there is an authorization from the intellectual property owner. In both these cases, it is assumed that the security agreement does not encumber the intellectual property itself.

41. There is no universal understanding of the "exhaustion doctrine" (often referred to as "exhaustion of rights" or "first sale doctrine") and the Annex makes reference to the doctrine not as a universal concept, but as it is actually understood in each enacting State. Nonetheless, where the exhaustion doctrine applies under law relating to intellectual property, the basic idea is that an intellectual property owner will lose or "exhaust" certain rights after their first marketing or sale. For example, the ability of a trademark owner to control further sales of a product bearing its mark are generally "exhausted" following the sale of that product. The rule serves to protect a person that resells that product from infringement liability. However, it is important to note that such protection extends only to the point where the products have not been altered so as to be materially different from those originating from the trademark owner. The reseller, for example, under law relating to intellectual property in some States, may not remove or alter the trademark applied to the products by the trademark owner.

42. In situations where a product is produced with the use of intellectual property that has been licensed to the grantor, the licensor may provide that the licensee cannot grant security rights in such products or that a creditor that takes security may only enforce its rights in a manner agreed to by the licensor. In both these cases, the licensor will typically provide in the licence agreement that the licence may be revoked if the grantor or secured creditor is in breach of the licence agreement. As a consequence, to enforce effectively its security right in the product, the secured creditor would need to obtain the consent of the owner-licensor in line with the licence agreement and the relevant law relating to intellectual property and subject in particular to the operation of the exhaustion doctrine.

43. In cases where the secured creditor also wishes to obtain a security right in the intellectual property itself (including, to the extent the grantor has the right to sell or

license the intellectual property, the right to sell or license), it would be necessary for the secured creditor to specifically mention such intellectual property as encumbered assets in the security agreement with the intellectual property owner. Here, the encumbered asset is not the product produced using the intellectual property, but rather the intellectual property itself (or the licence to manufacture tangible assets using the intellectual property). A prudent secured creditor will normally take a security right in such intellectual property so as to be able to continue the production of partially completed products.

J. Enforcement of a security right in a licensee's rights

44. In the discussion above, the grantor of the security right has been assumed to be the owner of the relevant intellectual property. The encumbered asset was either the intellectual property itself, the right of the owner-licensor to receive royalties and fees or the right of the owner-licensor to enforce other contractual terms relating to the intellectual property. Only in the discussion of security rights in tangible assets produced by using intellectual property (section I) were the rights of the owner-licensor and the rights of the licensee treated together. However, most of the issues addressed in sections C to H also are relevant in situations where the encumbered asset is not the intellectual property itself but the rights of a licensee (or sub-licensee) arising from a licence (or sub-licence) agreement. In cases where the encumbered asset is merely a licence, the secured creditor obviously may only enforce its security right against the licensee's rights and may do so only in a manner that is consistent with the terms of the licence agreement.

45. In situations where the grantor is a licensee, upon the grantor's default, the secured creditor will have the right to enforce its security right in the licence and to dispose of the licence to a transferee, provided that the licensor consents or the licence is transferable, which is rarely the case. Likewise, the enforcing creditor may grant a sub-licence, provided that the licensor consents or the grantor-licensee had, under the terms of the licence agreement, the right to grant sub-licences. In situations where the secured creditor proposes to a grantor-licensee to accept the licence in full or partial satisfaction of the secured obligation and neither the grantor nor other interested parties (e.g. the licensor) object (and the licence agreement does not prohibit the transfer of the licence), the secured creditor becomes vested with the licence according to the terms of the licence agreement between the licensee and the licensor. As in the case of a transferee or licensee that acquires intellectual property upon a disposition by a secured creditor, the licensee/secured creditor that accepts the licence in full or partial satisfaction of the secured obligation should register to enjoy its rights as a licensee in the relevant intellectual property registry. Assuming that registration of licences is possible under law relating to intellectual property, such registration may be a condition of the effectiveness of the licensee's rights or may simply serve information purposes.

46. Where the encumbered asset is the sub-licensor's right to receive payment of royalties under a sub-licence agreement, the secured creditor is entitled to treat the asset as a receivable. This means that the secured creditor may collect payment of the royalties to the extent that these were vested in the grantor/sub-licensor at the time when the security right in the receivable is enforced. If enforcement of the security right in the right to receive payment of royalties payable by a sub-licensee

constituted a breach of the licence agreement, then the secured creditor would not be able to enforce its security right in any receivables arising after that breach.

47. Where the encumbered asset is another contractual right stipulated in the sub-licence agreement, the secured creditor may enforce its security right in this contractual right as if it were any other encumbered asset, and the fact that the licensor may have revoked the licence for the future, or may have itself claimed a prior right to receive payment of sub-royalties, has no direct bearing on the right of the secured creditor to enforce these other contractual rights set out in the licence agreement.

48. The rights acquired by a transferee of the licence, a sub-licensee upon disposition by the secured creditor or by a secured creditor that accepts the licence in full or partial satisfaction of the secured obligation may be significantly limited by the terms of the licence agreement. For example, a non-exclusive licensee cannot enforce the intellectual property against another non-exclusive licensee or against an infringer of the intellectual property. Only the licensor (or the owner) may do so, although, in some States, exclusive licensees may join the licensor as a party to the proceedings. In addition, depending upon the terms of the licence agreement and the description of the encumbered asset in the security agreement, a transferee of the licence may not have access to information such as a source code. In order to ensure the effectiveness of the licence being transferred or sub-licensed, the security agreement will have to include such rights within the description of the assets encumbered by the grantor/licensee, to the extent that the licence agreement and relevant law permits it to encumber these rights as well.

(A/CN.9/WG.VI/WP.37/Add.4) [Original: English]

Note by the Secretariat on the Draft Annex to the UNCITRAL Legislative Guide on Secured Transactions dealing with security rights in intellectual property submitted to the Working Group on Security Interests at its fifteenth session

ADDENDUM

CONTENTS

X. Law applicable to a security right in intellectual property

[*Note to the Working Group: For paras. 1-21, see A/CN.9/WG.VI/WP.35/Add.1, paras. 90-98, A/CN.9/667, paras. 124-128, A/CN.9/WG.VI/WP.33/Add.1, paras. 53-57, and A/CN.9/649, paras. 77-80.*]

A. Law applicable to proprietary matters

1. In many States, the conflict-of-laws rule that applies to security rights in intangible assets applies also to security rights in intellectual property. Similarly, the conflict-of-laws rules recommended in the *Guide* with respect to security rights in intangible assets also applies to security rights in intellectual property.

2. Thus, if a State enacts the conflict-of-laws recommendations of the *Guide*, without making any changes with respect to intellectual property, the law of the grantor's location would apply to the creation, third-party effectiveness, priority and enforcement of a security right in intellectual property (see recommendations 208, and 218, subparagraph (b)). The location of the grantor is defined as its place of central administration, that is, the real rather than the statutory seat, of the grantor (see recommendation 219). Of course, recommendation 4, subparagraph (b), would

also apply and defer to any applicable law rule of the law relating to intellectual property that applied specifically to intellectual property.

3. The principal advantage of the grantor's law approach is that it leads to the application of a single law to the creation, third-party effectiveness, priority and enforcement of a security right. So, for example, a secured creditor that obtains a security right in all present and future intangible assets (including intellectual property) of a grantor could obtain a security right, make it effective against third parties, ascertain its priority and have it enforced by referring to the law of only one State, even if the assets have connections with several States. In particular, both registration and searching costs would in most cases be reduced, as a secured creditor would need to register and a searcher would need to search only in the State in which the grantor is located. This would reduce transaction costs and enhance certainty, a result that is likely to have a beneficial impact on the availability and the cost of credit.

4. However, international conventions that protect intellectual property generally adopt the principle of territoriality. Thus, in many States, the law applicable to ownership of intellectual property is the law of the State where the intellectual property is protected (*lex protectionis*), while the law applicable to contractual matters is the proper law of the contract (*lex contractus*). Accordingly, the law applicable to issues of protection of intellectual property rights country by country (such as the comparative rights of an intellectual property owner as against a licensee in a particular country) is the *lex protectionis*. A common example is a licence to copyrighted work transmitted routinely across national borders via satellite.

5. While there is very little precedent on the application of the *lex protectionis* to security rights in intellectual property, a conflict-of-laws rule on security rights in intellectual property must take into account the *lex protectionis*, as a security right in intellectual property could not be created, made effective against third parties and be enforced in a country where the encumbered intellectual property right does not exist. This would be necessary in particular to the extent that, under law relating to intellectual property, a secured creditor may be treated as a transferee. In any case, if an approach based on the law of the grantor's location were to be followed, in the case of a priority conflict between a security right in intellectual property and the ownership right of an outright transferee of the encumbered intellectual property, as outright transfers would still be governed by the *lex protectionis*, such an approach would not refer to one single law to resolve a priority conflict between the rights of a secured creditor and an outright transferee.

6. As already mentioned, in order for a secured creditor to be able to obtain an effective and enforceable security right in an intellectual property right under the law of a State, the intellectual property right must exist under the law of that State. So, the principal advantage of the *lex protectionis* is that, in recognition of the principle of territoriality adopted in international conventions on the protection of intellectual property, it would result in the same law applying to both security rights and ownership rights in intellectual property.

7. However, there are also disadvantages in applying the *lex protectionis* as the applicable law for security rights, especially in transactions in which the encumbered assets are not limited to intellectual property that is used and protected

under the law of a single State. The advantages and disadvantages of the two approaches mentioned above may be illustrated with the following examples dealing separately with creation, third-party effectiveness, priority and enforcement issues.

8. Intellectual property owner A located in State X creates, pursuant to a single security agreement, a security right in its patent, trademark and copyright portfolio, protected under the laws of States X and Y, in favour of secured creditor SC1 located in State Y. Under the law of the grantor's location approach, for the creation of its security right (i.e. its effectiveness between the grantor and the secured creditor), A and SC1 need to meet the requirements of State X. Under the *lex protectionis* approach, A and SC1 have to meet the creation requirements of State X with respect to the rights protected under the laws of State X and the requirements of State Y with respect to the rights protected under the laws of State Y. If they fail to do so, the security agreement may achieve only part of its intended purpose, that is, create a security right under the law of State X, but fail to create a security right under the law of State Y.

9. When the differences between the laws of States X and Y with respect to the creation of a security right are only a matter of form (as when, for example, State X that has not enacted the recommendations of the *Guide* requires more formalities in a security agreement than does State Y that has enacted the recommendations of the *Guide*), this difficulty can be overcome by preparing the security agreement so that it satisfies the requirements of the most stringent State. Even that will create additional costs for the transaction. When States X and Y have inconsistent requirements with respect to formalities, though, this approach will not suffice. Similarly, when the agreement contemplates multiple present and future intellectual property rights as encumbered assets, difficulties cannot be overcome when some of the relevant States have enacted the recommendations of the *Guide* (allowing a single security agreement to create security rights in multiple present and future assets), while other States do not allow a security agreement to create a security right in assets not yet in existence or not yet owned by the grantor or do not allow multiple assets to be encumbered in the same agreement. As creation of a security right means its effectiveness between the grantor and the secured creditor (and not as against third parties), the policy that underlies the *lex protectionis* does not appear to dictate referring the creation of a security right to that law.

10. In order to make its security right effective against third parties, under the grantor's location approach, it would be sufficient for secured creditor SC1 to meet the third-party effectiveness requirements of State X. Any potential creditors of intellectual property owner A would need to search only in the relevant registry in State X. Under the *lex protectionis* approach, however, secured creditor SC1 would need to meet the third-party effectiveness requirements of States X and Y to make its security right in intellectual property rights effective against third parties in States X and Y. This would possibly necessitate the filing of multiple notices with respect to the security right in the relevant registries of those States; and potential creditors would have to search in all those registries. Of course, this disadvantage would be alleviated if there were an international registry in which notices with respect to security rights, the third-party effectiveness of which is governed by different States, could be registered. This situation could be further complicated by the fact that some of those States might utilize the general security rights registry for such notices, other States might provide the option of utilizing a specialized

registry, and still other States, might utilize an intellectual property registry that is mandatory under recommendation 4, subparagraph (b). However, if secured creditor SC1 has to register a notice of its security right in a patent registry, such registration can only take place in the patent registry in the State in which the patent is registered. It cannot take place in the patent registry in State Z in which the patent is not protected.

11. If intellectual property owner A creates another security right in its patent and trademarks protected in State Y in favour of secured creditor SC2, there will be a priority conflict between the security rights of SC1 and SC2 in the patents and trademarks protected in State Y. Under the law of the grantor's location approach, this priority conflict would be governed by the law of the State in which the grantor is located, that is, State X. Under the *lex protectionis* approach, however, this priority conflict would be governed by the laws of State Y. In particular in situations in which third-party effectiveness is established by way of registration in a specialized registry, the State in which the intellectual property right is registered would be the State whose law would be the most appropriate to resolve priority disputes.

12. Another example will illustrate how the law of the grantor's location will apply in the case of multiple transfers in a chain of title, where the transferor and each transferee create security rights. A, who is located in State X, owns a patent in State X. Owner A grants a security right in the patent to secured creditor SC1. A then transfers the patent to B, who is located in State Y and who grants a security right to SC2. Whether transferee B obtains the patent subject to the security right of SC1 will be determined in accordance with the law of State X, the law of the grantor's location. If B takes the patent subject to the security right, then SC2 acquires no more rights than B had. If B assigns the patent to C, who is located in State Z and who grants a security right to SC3, C and SC3 will not acquire more rights than B had.

13. In the example mentioned in the preceding paragraph, if grantor A is located in State X and the patent is protected in State Y, application of the law of the grantor's location will not allow SC1 to obtain an effective security right with priority over the rights of the transferee because the patent does not exist in State X. Only the application of the *lex protectionis* will allow SC1 to obtain an effective security right in the patent with priority over the rights of transferee B.

14. Finally, if intellectual property owner A does business in States X, Y and Z and uses a particular trademark under the laws of each of those States, those trademark rights may well have greater value taken together than they do separately because they operate collectively. Thus, if A grants a security right in those trademark rights, secured creditor SC1 would likely prefer to dispose of them together upon A's default because such a disposition would likely yield greater proceeds (thus also benefitting A). Yet, this is likely to be difficult or impossible if States X, Y and Z have different rules for disposition of encumbered assets that are intellectual property rights. If State X allows judicial disposition, while States Y and Z allow non-judicial disposition by the secured creditor, disposition of the trademark rights in a single transaction might be impossible. Even if all of the relevant States allow non-judicial disposition, though, the differences in required procedures may make disposition of the rights in a single transaction inefficient at best.

15. Moreover, enforcement of a security right is not a single event; rather it is a series of actions. So, upon A's default, secured creditor SC1, located in State Y, may notify A, located in State X that the security right in its trademark right protected under the laws of State Z is in default. Secured creditor SC1 may then advertise the disposition of the trademark right in States X, Y and Z; indeed, it may advertise the disposition worldwide by use of the Internet. Secured creditor SC1 may then identify a buyer located in State Z, who buys the encumbered asset pursuant to a contract governed by the laws of State X. Under the *lex protectionis* approach, secured creditor SC1 would need to enforce its security right in the trademark protected in State X in accordance with the law of State X, its security right in the trademark protected in State Y in accordance with the law of State Y and its security right in the trademark protected in State Z in accordance with the law of State Z. Under the grantor's law approach, enforcement of the security right in the trademark would be governed by the law of the State in which the grantor, that is A, has the place of its central administration. Of course, no matter which approach is followed, if secured creditor SC1 sells the encumbered trademarks, the transferee has to register its rights in the trademark registry of the State in which the trademark is registered and protected, that is States X, Y and Z.

16. However, another example may illustrate the importance of the *lex protectionis* approach. In the previous example, A's patents may have only been issued in State Y but not in State X. Under the law of State X (the State of the grantor's location), for a security right in a patent to be effective against third parties, it must be registered in the national patent registry. If State Y has a law of location of the grantor rule (referring to the law of State X) to determine third-party effectiveness and priority of a security right, then A could not grant B an effective and enforceable security right in its patents in State Y because in State X the patent is not protected and no registration of a security right is possible in a non-existent patent. If grantor A were located in State Y, then A could grant B such a security right, because in State Y the patent exists and a security right may be registered in the patent registry. This example illustrates that intellectual property does not exist "in the abstract" but rather is a legal right supported by a specific national legal system, which must of necessity be responsible for its recognition and enforcement against third parties within the borders of a national jurisdiction.

17. Where grantor A, located in State X, grants a security right in a patent registered in the national patent office in State Y and then grantor A becomes insolvent, the law applicable to the creation, third-party effectiveness, priority and enforcement of the security right will be the law of State X or Y, depending on whether a grantor's law approach or a *lex protectionis* approach is followed in the forum State. Under the *Guide*, the application of any of these laws is subject to the *lex fori concursus* with respect to issues such as avoidance, treatment of secured creditors, ranking of claims or distribution of proceeds (see recommendation 223). Where the insolvency proceeding is opened in State X in which the grantor is located, the *lex fori concursus* and the law of the grantor's location will be the law of one and the same jurisdiction. Where the insolvency proceeding is opened in another State, where, for example, the grantor has assets, that may not be the case.

18. To combine consistency with the law applicable to ownership rights and the benefit of the application of a single law for security rights issues, the *lex protectionis* could be combined with the law of the grantor's location in the sense

that creation and enforcement of a security right could be referred to the law of the grantor's location, while third-party effectiveness and priority could be referred to the *lex protectionis*.

19. Other combinations of the two approaches might be possible. For example, the approach based on the law of the grantor's location could be subject to a variation whereby a priority conflict involving the rights of an outright transferee would be governed by the *lex protectionis*. With this variation, a secured creditor would also need to establish its right under the *lex protectionis* only in instances where a competition with an outright transferee is a concern. In the typical case where the insolvency of the grantor is the main concern, it would be sufficient for the secured creditor to rely on the law of the State in which the grantor is located, as would be the case for certain other categories of intangible assets (such as receivables). The problem with this approach would be that, to ensure priority over potential outright transferees, secured creditors would need to establish their rights under the *lex protectionis* in any case.

20. A further variation would be to defer to the *lex protectionis* only where that law provides that the intellectual property concerned may be registered in an intellectual property registry. This further variation might, however, be unsatisfactory for outright transferees of intellectual property not subject to registration under the *lex protectionis*. They would have to investigate the law of the State of the grantor's location to ensure that their transfer is not subject to a previous security right. This approach would not provide sufficient certainty as to the law applicable.

[*Note to the Working Group: The Working Group may wish to consider the following alternatives:*

Alternative A

The law should provide that the law applicable to the creation, effectiveness against third parties, priority and enforcement of a security in intellectual property is the law of the State [or region] in which the intellectual property is protected.

Alternative B

The law should provide that the law applicable to the creation and enforcement of a security right in intellectual property is the law of the State in which the grantor is located. However, the law applicable to the third-party effectiveness and priority of a security right in intellectual property is the law of the State [or region] in which the intellectual property is protected.

Alternative C

The law should provide that the law applicable to the creation, third-party effectiveness, priority and enforcement of a security right in intellectual property is the law of the State in which the grantor is located. However, the law applicable to a priority conflict involving the right of a transferee or licensee is the law of the State [or region] in which the intellectual property is protected.]

B. Law applicable to contractual matters

21. The mutual rights and obligations of the grantor and the secured creditor with respect to the security right may be left to party autonomy. In the absence of a choice of law by the parties, the law applicable to these matters might be the law governing the security agreement (see recommendation 216).

XI. The impact of insolvency of a licensor or licensee of intellectual property on a security right in that party's rights under a licence agreement

[*Note to the Working Group: The Working Group may wish to note that Working Group V (Insolvency Law) prepared the Legislative Guide on Insolvency Law (the "Insolvency Guide") culminating with its adoption by UNCITRAL on 25 June 2004 and endorsement by the General Assembly on 2 December 2004. Working Group VI (Security Interests) prepared the Legislative Guide on Secured Transactions (the "Secured Transactions Guide") culminating with its adoption by the Commission on 14 December 2007 and endorsement by the General Assembly on 11 December 2008.*

Throughout the preparation of both Legislative Guides, Working Groups V and VI worked in close coordination so that the final products would be not only compatible but also consistent with each other. In fact, two joint sessions of Working Groups V and VI were held to discuss and resolve crossover issues. As a result, the Insolvency Guide and the Secured Transactions Guide are fully compatible.

The same process of coordination between Working Groups V and VI has occurred in regard to the preparation of the draft Annex to the Secured Transactions Guide dealing with security rights in intellectual property. The underlying principle has been to maintain the integrity of the Guides previously prepared and to provide explanatory text where needed in preparation of the draft Annex. The present working paper has been prepared pursuant to the request of Working Groups V and VI.

The Working Group may wish to consider whether paragraphs 1-4 below (properly adjusted and supplemented with references to further considerations by Working Group V and Working Group VI) should be placed in the discussion of the background of the draft Annex (see A/CN.9/WG.VI/WP.37, paras. 1-8). The Working Group may wish to note that the background of the UNCITRAL Legislative Guide on Secured Transactions is set out in a preface (and not in chapter XII on the impact of insolvency on a security right).

1. At its thirteenth session (New York, 19-23 May 2008), Working Group VI considered a note by the Secretariat entitled "Security rights in intellectual property rights" (A/CN.9/WG.VI/WP.33 and Add.1). That note included a brief discussion of insolvency-related matters. At that session, the Working Group decided to revisit those matters at a future meeting and to recommend to the Commission that Working Group V (Insolvency Law) be requested to consider those matters (see A/CN.9/649, para. 103).

2. At its forty-first session (New York, 16 June-3 July 2008), the Commission noted the decision of Working Group VI and decided that Working Group V should be informed with respect to issues involving security rights in intellectual property

that implicate insolvency law and invited to express a preliminary opinion (see A/63/17, para. 326).

3. At its fourteenth session (Vienna, 20-24 October 2008), Working Group VI referred to Working Group V certain matters relating to the impact of insolvency on a security right in intellectual property (see A/CN.9/667, paras. 129-143).

4. At its thirty-fifth session (Vienna, 17-21 November 2008), Working Group V reviewed the issues involving insolvency law referred to it by Working Group VI for inclusion in the draft Annex and confirmed that the responses given in the table at the end of document A/CN.9/667 accurately reflected the impact of the Insolvency Guide. In that connection, it was suggested that those considerations might be included in a commentary to be prepared. With respect to the possibility that a licensee under a licence agreement rejected by the insolvency representative of the licensor might be permitted, under some laws, to continue to exercise its rights under that agreement notwithstanding the rejection, the Working Group agreed that it was not in a position to properly consider that question without a better understanding of the scope and extent of the issues involved and requested the Secretariat to prepare a working paper, for consideration at its next session, that would provide background information on the discussion of the treatment of contracts that had taken place in the course of the development of the Insolvency Guide and the recommendations that had been adopted. Working Group V reached the same conclusion with respect to the issue of whether a secured creditor could request the licensor's insolvency representative or the insolvency court to set a deadline within which the insolvency representative should decide whether to continue or reject a licence agreement and set a special hearing before the insolvency court to address any dispute (see A/CN.9/666, 112-117).]

A. General

22. A licensor or a licensee of intellectual property under a licence agreement may create a security right in its rights under the licence agreement. If the grantor is the licensor, typically its secured creditor will have a security right in the licensor's right to receive royalties from the licensee as well as the right to enforce non-monetary terms of the licence agreement and the right to terminate the license agreement upon breach. If the licensee is the grantor, typically its secured creditor will have a security right in the licensee's right to use the licensed intellectual property under the licence agreement (subject to the terms of the licence agreement), but not a security right in the intellectual property itself. The secured creditor may then take the steps necessary to make that security right effective against third parties (see Secured Transactions Guide, recommendation 29).

23. Insolvency law, subject to avoidance actions, will typically respect the effectiveness of such a security right (see Insolvency Guide, recommendation 88). Similarly, insolvency law, subject to any limited and clearly stated exceptions, will respect the priority of a security right that is effective against third parties (see Secured Transactions Guide, recommendations 238-239). However, if the licensor or the licensee becomes subject to insolvency proceedings, there may be an effect on the rights of the parties to the licence agreement that will have an impact on a security right granted by the licensor or the licensee. In the case of a chain of licence and sub-licence agreements, the insolvency of any party in the chain will have an impact on several other parties in the chain and their secured creditors

(e.g. an insolvency of a party in the middle of the chain will affect subsequent sub-licenses and sub-licensors, but not previous ones).

24. Outside of insolvency, there may be statutory or contractual limitations on the ability of the licensor and the licensee to grant and enforce a security right in a right to receive payment of royalties (i.e. a receivable). Secured transactions law will typically not affect statutory limitations, other than mainly those relating to a future receivable as such. Secured transactions law may affect contractual limitations (see Secured Transactions Guide, recommendations 18 and 23-25). What effect, if any, an insolvency proceeding may have on those limitations on the assignment of receivables independent of secured transactions law is a matter of insolvency law (see Insolvency Guide, recommendations 83-85).

25. The Insolvency Guide contains extensive recommendations concerning the impact of insolvency proceedings on contracts with respect to which both the debtor and its counterparty have not fully performed their obligations under the contract (see Insolvency Guide, recommendations 69-86). A licence agreement could be such a contract, if it has not been fully performed by both parties and the term of the licence agreement is not completed (so that there is remaining performance by the licensor). However, a licence agreement is not such a contract, if it has been fully performed by the licensee through an advance payment of the entire amount of the royalties owed by the licensee to the licensor, as may be the case in the event of an exclusive licence agreement, and the absence of any ongoing obligations of the licensor. The insolvent debtor could be the licensor (owing the licensee the right to use the licensed intellectual property in line with the licence agreement) or the licensee (owing payment of royalties and the obligation to use the licensed intellectual property in accordance with the licence agreement).

26. Under the recommendations of the Insolvency Guide, the insolvency representative may continue or reject a licence agreement as a whole, if it has not been fully performed by both parties (see Insolvency Guide, recommendations 72-73). In the case of a one licence agreement, continuation or rejection of the licence agreement by the insolvency representative of one party will affect the rights of the other party. In the case of a chain of licence and sub-licence agreements, continuation or rejection will affect the rights of all subsequent parties in the chain. Finally, in the case of cross-licensing agreements (where a licensor grants a licence, the licensee then further develops the licence and grants a licence in the further developed licensed product to the licensor), continuation or rejection will affect each party both in its capacity as licensor and licensee.

27. If the insolvency representative chooses to continue a licence agreement, which has not been fully performed by both parties and as to which the insolvent debtor (licensor or licensee) is in breach, the breach must be cured, the non-breaching counterparty must be substantially returned to the economic position that it was in before the breach, and the insolvency representative must be able to perform the licence agreement (see Insolvency Guide, recommendation 79). In this case, the insolvency proceedings will have no impact on the legal status of a security right granted by the licensor or the licensee. However, if the insolvency representative chooses to reject the licence agreement, there will be an impact on a security right granted by the licensor or the licensee (for a full understanding of the treatment of contracts in the case of insolvency, the reader is referred to the text of the Insolvency Guide).

B. Insolvency of the licensor

28. If the licensor's insolvency representative decides to continue a licence agreement, there will be no impact on a security right granted by the licensor or the licensee. If the licensor is the insolvent debtor and has granted a security right in its rights under the licence agreement, and the licensor's insolvency representative decides to continue the licence agreement, the licence agreement will remain in place, the licensee will continue to owe royalties under the licence agreement and the licensor's secured creditor will continue to have a security right in those royalty payments. In this case of the licensor's insolvency, if the licensee has granted a security right in its rights under the licence agreement, the licensor will continue to owe the licensee unimpeded use of the licensed intellectual property under the licence agreement and the licensee's secured creditor will continue to have a security right in the licensee's rights under that agreement.

29. However, if the licensor's insolvency representative decides to reject the licence agreement, there will be an impact on a security right granted by the licensor or the licensee. If the licensor has granted a security right in its rights under the licence agreement, the licence agreement will no longer be effective, the licensee will no longer owe royalties under the licence agreement, and, thus, there will be no royalties for the licensor's secured creditor to be able to apply to satisfy the secured obligation. In this case of the licensor's insolvency, if the licensee has granted a security right in its rights under the licence agreement, the licensee will no longer have the authority to use the licensed intellectual property and its secured creditor will lose its security right in the encumbered asset (i.e. the licensee's authority to use the licensed intellectual property).

30. As a practical matter, a secured creditor with a security right in a licensor's rights under a licence agreement may protect itself from the consequences of a rejection of the licence agreement by the licensor's insolvency representative by, for example, obtaining (and making effective against third parties), in addition to a security right in the licensor's rights under the licence agreement (principally the royalties), a security right in the licensed intellectual property itself. Then, if the insolvency representative of the licensor rejects the licence agreement, the secured creditor of the licensor (subject to the stay and any other limitations imposed by insolvency law on the enforcement of security rights in insolvency proceedings) can enforce its security right in the licensed intellectual property by disposing of it or by entering into a new licence agreement with a new licensee similar to the licence that had been rejected and thus re-establishing the royalty stream (see recommendation 149 of the Secured Transactions Guide). The funds received from the disposition of the encumbered intellectual property or the royalties received pursuant to this new licence agreement would then be distributed to the secured creditor pursuant to recommendations 152-155 of the Secured Transactions Guide. As a practical matter, however, this arrangement would be worthwhile only for significant licence agreements.

31. Similarly, a secured creditor with a security right in a licensee's rights under a licence agreement may seek to protect itself from the consequences of a rejection of the licence agreement by the licensor's insolvency representative, by, for example, declining to make the secured loan unless the licensee obtains and makes effective against third parties a security right in the licensed intellectual property to secure

the licensee's rights under the licence agreement. Then, if the insolvency representative of the licensor rejects the licence agreement, the licensee (subject to the stay and any other limitations imposed by insolvency law on the enforcement of security rights in insolvency proceedings) can enforce the security right in the licensed intellectual property itself by disposing of it or by entering into a new licence agreement with a new licensor, and the rights thereby obtained would be proceeds in which the secured creditor would have a security right. As a practical matter, this arrangement would be worthwhile only for significant licence agreements.

32. As already mentioned, if at least one party has fully performed its obligations with respect to a licence agreement, the license agreement is not subject to the recommendations of the Insolvency Guide concerning treatment of contracts. Where neither the licensor nor the licensee has fully performed its obligations under the license agreement, however, the license agreement would be subject to rejection under those recommendations. To protect long-term investments of licensees and in recognition of the fact that a licensee may depend on the use of rights under a licence agreement, some States have adopted rules that give additional protection to a licensee (and, in effect, its secured creditor) in the case of a licence agreement that would otherwise be subject to rejection in the insolvency of the licensor. Such protection is particularly important where there is a chain of licence and sub-licence agreements and thus several parties may be affected by the insolvency of one party in the chain.

33. For example, some States give a licensee the right to continue to use the licensed intellectual property, following the rejection of the licence agreement by the licensor's insolvency representative, as long as the licensee continues to pay royalties to the estate as provided in the licence agreement and otherwise continues to perform the licence agreement. The only obligation imposed upon the licensor's estate as a result of this rule is the obligation to continue honouring the intellectual property licence, an obligation that does not impose upon the resources of the licensor's estate. This approach has the effect of balancing the interest of the insolvent licensor to escape affirmative burdens under the licence agreement and the interest of the licensee to protect its investment in the licensed intellectual property.

34. In other States, licence agreements may not be subject to rejection under insolvency law because: (a) a rule that excludes the leases of immovable property from insolvency rules on rejection in the case of the lessor's insolvency applies by analogy to licence agreements in the licensor's insolvency; (b) licence agreements relating to exclusive licences create property rights (rights *in rem*) that are not subject to rejection (but may be subject to avoidance); (c) licence agreements are not regarded as contracts that have not been fully performed by both parties as the licensor has already performed its obligations by granting the licence. In these States, the licensee may be able to retain the licence as long as it pays the royalties owed under the licence agreement.

35. In yet other States, licence agreements may be rejected, subject to the application of the so called "abstraction principle". Under this principle, the licence does not depend on the effectiveness of the underlying licence agreement. Thus, the licensee may retain the right to use the licensed intellectual property, even if a licence agreement has been rejected by the licensor's insolvency representative. However, the licensor's insolvency representative has a claim for the withdrawal of

the licence based on the principle of unjust enrichment. Until such withdrawal, the licensee has to pay for the use of the licensed intellectual property on the basis of the principle of unjust enrichment an amount equal to the royalties owed under the licence agreement that was rejected.

[*Note to the Working Group: The Working Group may wish to note that paragraph 36 is placed within square brackets as the issue discussed therein has not been considered by Working Group V.*]

36. [To protect long-term investments and expectations of licensees and their creditors from the ability of the licensor's insolvency representative in effect to renegotiate licence agreements existing at the commencement of insolvency proceedings, States might wish to consider adopting rules similar to those described in the preceding paragraphs. Any such rules would have to take account of the general rules of insolvency law and the overall effect on the insolvency estate, as well as law relating to intellectual property.]

C. Insolvency of the licensee

37. If the licensee is the insolvent debtor and has granted a security right in its rights under the licence agreement, and the licensee's insolvency representative decides to continue the licence agreement, the licence agreement will remain in place, the licensee will continue to have its rights under the licence agreement to use the licensed intellectual property (to the extent stated in the licence agreement) and the licensee's secured creditor will continue to have a security right in those rights. In this case, if the licensor has granted a security right in its rights to receive royalties under the licence agreement, the licensor's secured creditor will continue to have a security right in the licensor's right to receive the royalties.

38. In cases in which the licensee's insolvency representative decides to reject the licence agreement, however, and the licensee has granted a security right in its rights under the licence agreement, the licence agreement will no longer be effective, the licensee will no longer have a right to use the licensed intellectual property and the licensee's secured creditor will not be able to use the value of the licensee's rights under the licence agreement to satisfy the secured obligation. In this case too, if the licensor has granted a security right in its right to receive royalties under the licence agreement, the licensor will lose its royalty stream and its secured creditor will lose its encumbered asset.

39. A secured creditor with a security right in a licensor's or licensee's rights under a licence agreement may seek to protect itself from the consequences of a rejection of the licence agreement by the licensee's insolvency representative by adopting comparable measures as described above (see paras. 9-10).

40. In the case of the insolvency of the licensee, it is important to ensure that the licensor either receive its royalties and the licensee otherwise performs the licence agreement, or has a right to terminate the licence agreement. Insolvency law rules, such as those relating to curing any default of the licence agreement in the event that the licence agreement is continued (see para. 6 above) are essential. In addition, in situations where the insolvent licensee has granted a security right in its rights to receive sub-royalties, those sub-royalties will likely be a source of funds for the licensee to pay the royalties that it owes to the licensor. If the licensee's secured

creditor claims all the royalties and the licensee does not have another source for payment of royalties to the licensor, it is essential that the licensor has a right to terminate the license to protect its rights.

Appendix

	Licensor is insolvent	*Licensee is insolvent*
Licensor grants a security right in its rights under a licence contract (primarily the right to receive royalties)	Question: What happens if the licensor or its insolvency administrator decides to continue the performance of the licence contract under the insolvency law (see recommendations 69-86 of the *UNCITRAL Legislative Guide on Insolvency Law*)?[a] Answer: The licensee continues to owe royalties under the licence contract and the secured creditor of the licensor continues to have a security right both in the licensor's right to royalties under the licence contract and in the proceeds of that right, in other words, any royalty payments that are paid.	Question: What happens if the licensee or its insolvency representative decides to continue the performance of the licence contract under the insolvency law (see recommendations 69-86 of the *UNCITRAL Legislative Guide on Insolvency Law*)? Answer: The licensor continues to have a right to receive royalties under the licence contract and thus the secured creditor of the licensor continues to have a security right both in the licensor's right to royalties under the licence contract and in the proceeds of that right, in other words, any royalty payments that are made.
	Question: What happens if the licensor or its insolvency administrator rejects the licence contract under the insolvency law (see recommendations 69-86 of the *UNCITRAL Legislative Guide on Insolvency Law*)? Answer: The licensee does not owe royalties under the licence contract with respect to periods after rejection, but still owes any unpaid royalties for periods before rejection; the secured creditor of the licensor thus has a security right in the right to collect such royalties for periods prior to the rejection and in the royalties paid for those periods, but has no security right in rights to any future royalties because there will be no future royalties under the rejected contract.	Question: What happens if the licensee or its insolvency administrator rejects the licence contract under the insolvency law (see recommendations 69-86 of the *UNCITRAL Legislative Guide on Insolvency Law*)? Answer: The licensee does not continue to owe royalties under the licence contract with respect to periods after rejection, but still owes any unpaid royalties for periods before rejection; the secured creditor of the licensor thus has a security right in the right to collect such royalties for periods prior to the rejection and in the royalties paid for those periods, but has no security right in rights to any future royalties because there will be no future royalties under the rejected contract.
Licensee grants a security right in its rights under a licence contract (primarily the right to use the intellectual property)	Question: What happens if the licensor decides to continue the performance of the licence contract under the insolvency law (see recommendations 69-86 of the *UNCITRAL Legislative Guide on Insolvency Law*)? Answer: The licensee continues to have rights under the licence contract and the secured creditor of the licensee continues to have a security right in those rights under the licence contract.	Question: What happens if the licensee decides to continue the performance of the licence contract under the insolvency law (see recommendations 69-86 of the *UNCITRAL Legislative Guide on Insolvency Law*)? Answer: The licensee continues to have rights under the licence contract and the secured creditor of the licensee continues to have a security right in those rights under the licence contract.

	Licensor is insolvent	*Licensee is insolvent*
	Question: What happens if the licensor or its insolvency administrator rejects the licence contract under the insolvency law (see recommendations 69-86 of the *UNCITRAL Legislative Guide on Insolvency Law*)? Answer: The licensee does not have rights under the licence contract with respect to periods after rejection, but retains any rights it may still have with respect to periods before rejection; the secured creditor of the licensee continues to have a security right in those rights of the licensee with respect to periods before rejection.	Question: What happens if the licensee or its insolvency administrator rejects the licence contract under the insolvency law (see recommendations 69-86 of the *UNCITRAL Legislative Guide on Insolvency Law*)? Answer: The licensee does not have rights under the licence contract with respect to periods after rejection, but retains rights it may still have with respect to periods before rejection; the secured creditor of the licensee continues to have a security right in those rights of the licensee with respect to periods before rejection.

[a] United Nations publication, Sales No. E.05.V.10.

V. POSSIBLE FUTURE WORK

A. Possible future work in the area of electronic commerce (A/CN.9/678) [Original: English]

CONTENTS

I. Introduction

1. In 2004, having completed its work on the Convention on the Use of Electronic Communications in International Contracts, UNCITRAL Working Group IV (Electronic Commerce) requested the Secretariat to continue monitoring various issues related to electronic commerce, including issues related to cross-border recognition of electronic signatures, and to publish the results of its research with a view to making recommendations to the Commission as to whether future work in those areas would be possible (see A/CN.9/571, para. 12).

2. At its thirty-eighth session in 2005, the Commission took note of the work undertaken by other organizations in various areas related to electronic commerce and requested the Secretariat to prepare a more detailed study, which should include proposals as to the form and nature of a comprehensive reference document discussing the various elements required to establish a favourable legal framework for electronic commerce, which the Commission might in the future consider preparing with a view to assisting legislators and policymakers around the world.[1]

3. At its thirty-ninth session in 2006, the Commission considered a note prepared by the Secretariat pursuant to that request (A/CN.9/604). The note identified several areas as possible components of a comprehensive reference document. At that session, the Commission requested the Secretariat to prepare a sample portion of the comprehensive reference document dealing specifically with issues related to authentication and cross-border recognition of electronic signatures.[2]

---

[1] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 17* (A/60/17), para. 214.

[2] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17* (A/61/17), para. 206.

4. The sample chapter prepared pursuant to that request (A/CN.9/630 and Add.1-5) was submitted to the Commission at its fortieth session in 2007. While the Commission commended the Secretariat for the preparation of the sample chapter and requested the Secretariat to publish it as a stand-alone publication,[3] it was not in favour of requesting the Secretariat to undertake similar work in other areas with a view to preparing a comprehensive reference document.[4]

5. At its forty-first session in 2008, the Commission requested the Secretariat to continue to follow closely legal developments in the relevant areas, with a view to making appropriate suggestions in due course.[5] Accordingly, the Secretariat has continued to follow technological developments and new business models in the area of electronic commerce that may impact international trade.

II. The use of single windows in international trade: policy considerations and legal issues

6. One area that the Secretariat has examined closely concerns legal issues arising out of the use of single windows in international trade. This is in line with the Commission's request, expressed at its forty-first session, that the Secretariat should engage actively, in cooperation with the World Customs Organization (WCO) and the United Nations Centre for Trade Facilitation and Electronic Business (UN/CEFACT), and with the involvement of experts, in the study of the legal aspects involved in implementing a cross-border single window facility with a view to formulating a comprehensive international reference document on legal aspects of creating and managing a single window, and should report to the Commission on the progress of that work at its next session.[6]

7. The Secretariat pursued the establishment of the WCO-UNCITRAL Joint Legal Task Force on Coordinated Border Management incorporating the International Single Window (the "Joint Legal Task Force"). The first meeting of the Joint Legal Task Force took place from 17 to 21 November 2008 at the premises of the WCO in Brussels. Several Governments, one Regional Economic Integration Organization and industry representatives attended that meeting, which offered a first occasion for exchange of information with a view to assessing the way forward. Reference was made to the mandate and working methods of UNCITRAL and of the WCO, as well as to the main relevant legal instruments, including UNCITRAL and

---

[3] UNCITRAL, *Promoting Confidence in Electronic Commerce: Legal Issues on International Use of Electronic Authentication and Signature Methods* (United Nations publication, Sales No. E.09.V.4, February 2009).

[4] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17* (A/62/17), para. 195.

[5] Ibid.

[6] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17* (A/63/17), para. 338.

WCO texts, as well as UN/CEFACT Recommendation No. 33[7] and the preparatory work for UN/CEFACT draft recommendation No. 35.[8]

8. At that meeting, the importance of ensuring that principles contained in UNCITRAL texts on electronic commerce would be fully taken into consideration in the preparation of any future legal texts as well as of promoting the adoption of UNCITRAL texts complementing trade-related legislation falling outside the mandate of UNCITRAL was emphasized. The desirability of including all States in the consultation process, irrespective of their level of technological and economic development, so as to provide them with an opportunity to convey their needs and views was also stressed.

9. An outcome of the meeting was consensus on the desirability of harmonizing as much as possible the legal framework for single windows with that applicable to business-to-business transactions. It was noted that the trade facilitation mandate of the WCO and of its constituents furthered this goal. A number of relevant legal issues were identified during preliminary discussions.[9] However, it was felt that, given that single window facilities may pose different legal issues depending on their architecture, a preliminary clarification on the various options available was necessary. It was suggested that the WCO could lead that analysis in light of its expertise and experience with single windows management. It was also suggested that the study of the legal issues relating to cross-border single windows entailed consideration of legal issues relating to national single window facilities.

10. Cross-border single windows facilities are also the object of work by regional inter-governmental organizations such as the Asia Pacific Economic Cooperation (APEC) and the Association of Southeast Asian Nations (ASEAN). In addition, the UNCITRAL Secretariat was invited to contribute to the UNESCAP/UNECE High-Level Symposium on Building Regional Capacity for Paperless Trade, held in Bangkok on 24 and 25 March 2009. One major outcome of that Symposium was the launch of the United Nations Network of Experts for Paperless Trade in Asia Pacific (UN NExT), tasked, inter alia, with carrying out work on the regulatory framework for single windows. The UNCITRAL Secretariat may be requested to further contribute to that exercise in the future.

11. The number of on-going initiatives on single window facilities demonstrates the significant importance that policymakers attribute to this tool in facilitating cross-border trade. Moreover, an analysis of commercial practice shows interest in merging business-to-business transactions, on the one hand, and business-to-government and government-to-government transactions, on the other hand, in a single enabling environment. Given the state of the art, such an environment could be based, at least to some extent, on existing or future single window facilities. In this framework, the widespread use of UNCITRAL instruments relating to

---

[7] UN/CEFACT, *Recommendation and Guidelines on Establishing a Single Window — Recommendation No. 33*. September 2004 (United Nations publication, Sales No. 05.II.E.9, 2005); available at www.unece.org/cefact/recommendations/rec33/rec33_trd352e.pdf).

[8] UN/CEFACT, *Establishing a Legal Framework for an International Trade Single Window — Draft Recommendation No. 35*. February 2009 (Public Review Draft); available at www.unece.org/cefact/recommendations/rec35/Rec35-PublicReviewDraftv9-Feb09.doc).

[9] WCO-UNCITRAL Joint Legal Task Force, *Possible Legal Research Agenda for the JLTF — Note by the Secretariat* (JLTF107E (a)), para. 8.

electronic commerce, such as the United Nations Convention on the Use of Electronic Communications in International Contracts (2005)[10] and the relevant provisions of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (2008)[11] could be particularly relevant to address business needs, in particular, by permitting the electronic transfer of rights and documents en route or at the warehouse and terminal stage.

12. In light of the above, the Commission may wish to confirm the mandate to the Secretariat to participate in the work of the WCO, with the involvement of experts, and to report to the Commission on its progress at its forty-third session. The Commission may also wish to consider convening a session of Working Group IV (Electronic Commerce) in the first half of 2010 in order to review the work on single windows carried out by the Joint Legal Task Force and by other organizations, and to exchange views and formulate recommendations on possible legislative work in that domain, and, in particular, on electronic transfer of rights and documents.

III. Comprehensive reference document on legal issues relating to electronic commerce

13. At the Commission's thirty-ninth session, support was expressed 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.[12] However, the preparation of a comprehensive document drafted along the lines of the sample chapter submitted for its review was not requested at that time.[13]

14. The view that a reference document on electronic commerce would significantly assist countries, in particular developing ones, in the preparation of legislative texts has been reiterated, including in the context of the technical assistance activities carried out by the Secretariat. Such a document would aim to present the legislative principles of electronic commerce in a comprehensive framework and to discuss their implementation in other fields of international trade law, including other areas of work of UNCITRAL. In that respect, the document would address certain specific requests, such as one regarding a reference text on the intersection of arbitration and electronic commerce. It was suggested that that comprehensive reference document should also cover topics not yet dealt with in the work programme of UNCITRAL, such as, for instance, privacy and data protection in electronic commerce and cybercrime.

15. Work on a comprehensive reference document could be undertaken separately from that arising from single window facilities or other legislative work requested by the Commission in the field of electronic commerce, and would foresee extensive cooperation with other UNCITRAL Working Groups, with other intergovernmental

---

[10] United Nations publication, Sales No. E.07.V.2.

[11] A/RES/63/122, annex.

[12] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17* (A/61/17), para. 205.

[13] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17* (A/62/17), para. 195.

organizations involved in the preparation of legislative standards and with experts in order to provide a thorough overview of current issues relating to the use of electronic means in international trade.

16. In considering the desirability of undertaking such work, the Commission may wish to consider the potential impact of the suggested document on the challenges posed to developing countries by the digital divide. In that respect, it will be recalled that Goal 8 of the Millennium Development Goals, and, in particular, its Target 8.F, aims at wider availability of the benefits of new technologies.

B. Possible future work in the area of electronic commerce — Recommendations for future work of Working Group IV (Electronic Commerce) submitted by the United States of America

(A/CN.9/681 and Add.1-2) [Original: English]

CONTENTS

I. Introduction

1. In preparation for the forty-second session of UNCITRAL, the Government of the United States of America submitted to the Secretariat recommendations relating to possible future work on electronic commerce as well as a proposal on electronic transferable records and a proposal on online dispute resolutions. The submissions are reproduced, respectively, in documents A/CN.9/681, A/CN.9/681/Add.1 and A/CN.9/681/Add.2, in the form in which they were received by the Secretariat.

II. Recommendations for future work of Working Group IV (Electronic Commerce)

2. We welcome the Note by the Secretariat (A/CN.9/678) re "Possible future work on electronic commerce" and have set out our recommendations in two parts, (1) the first recommending a further study by the Secretariat to expand the work already authorized as noted in document A/CN.9/678 Item II, "single windows in international trade", and (2) the second to also recommend a new study on the feasibility of work on electronic dispute resolution. In addition, (3) we are prepared to support further work on the "Comprehensive reference document" on the basis of further elaboration of what topics would be considered and an outline of issues on recommended topics so that an appropriate selection may be made for such work.

3. With regard to Item II, we note that the Commission has previously authorized work to be undertaken in connection with development of structured electronic messaging to support trade in import-export goods, with respect to such matters as electronic customs procedures, managing the flow of shipping, insurance, financing and release of goods, and related matters under the framework of proposed "Single Window" systems. Included in the proposal before the Commission was the related proposal of the United States to seek progress on legal infrastructure for transferability of goods in transit by electronic means. These topics were presented in the context of work underway at several international bodies, primarily the recent

"Single Window" project at the World Customs Organization (WCO), as well as related work at organizations such as UNECE, UNESCAP, ASEAN and others. The Note by the Secretariat for the 41st session in July 2008 (A/CN.9/655) remains a very useful survey of the types of issues raised by "Single Window" projects.

4. At the time, it was anticipated that Working Group IV would initiate its activity in response to progress on the Single Window at WCO. That work remains at a preliminary stage, and the time schedule for that is yet to be finally determined. Therefore, based on consultations, we recommend that the Secretariat be authorized to:

(1) Continue its monitoring of progress at WCO so as to assess whether WCO's framework project can be examined in detail at a meeting of the Working Group in spring 2010;

(2) Assess general electronic commerce issues relating to "Single Window" developments which may benefit other bodies or countries seeking to implement such systems;

(3) Assess whether preparation of legal standards may be achievable on electronic transferability of rights to goods in transit, in or outside of a "Single Window" system, including assessment of the legal issues attendant to transferability systems such as the previous European-based Bolero system and other such initiatives; and

(4) Assess whether preparation of legal standards may be achievable on electronic documents for bills of lading, letters of credit, insurance and other trade in and transportation of goods.

5. For purposes of these assessments, reference should be made to the previous United States proposal circulated at the 41st session of the Commission as documentation relevant to the WCO Single Window project on transferability of rights by electronic means (A/CN.9/XLI/CRP.4, 19 June 2008). That proposal is now resubmitted for reference at the 42nd session (A/CN.9/681/Add.1). In addition to WCO-related documentation, documentation and projects concluded or under way at bodies such as the UNECE's CEFACT, UNESCAP, ASEAN, UNCTAD and others should be consulted. Regional projects on electronic commerce such as OAS work at CIDIP-VII on electronic registries would also be relevant. This assessment should involve experts from Working Group III (Transportation) in view of the provisions related to electronic documents contained in the recent United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea to be known as the "Rotterdam Rules".

6. In addition, the United States supports the suggestions by the Secretariat in Item III of document A/CN.9/678 with regard to the "comprehensive reference document on legal issues relating to electronic commerce". A selection of which topics should be pursued for such a survey should be made by the Commission and could be properly focused by presentation by the Secretariat of brief outlines of topics and issues therein to be covered, possibly starting with selected topics from document A/CN.9/604 presented at the meeting of the Plenary Session.

7. The United States recommends that these studies and background information be authorized to be prepared by the Secretariat subject to availability of staff

resources. The third recommendation by the United States concerning feasibility of work on electronic dispute resolution is set out in an adjoining document.

A/CN.9/681/Add.1 (Original: English)

Possible future work in the area of electronic commerce - Proposal of the United States of America on electronic transferable records

ADDENDUM

CONTENTS

---

1. In the present international commercial environment, there is a significant opportunity for businesses to improve greatly their efficiency and productivity by migrating to the use of electronic transferable records — that is, electronic transferable (negotiable and non-negotiable) instruments and electronic documents of title. As businesses adapt to the capabilities made available to them by new technologies, there will be an increasing need for transferable records that are compatible with these business methods.

2. This area of the law, however, continues to be unresolved. There is, quite simply, no broad international consensus on how to go about establishing systems that will support legally reliable electronic transferable records. Moreover, there is no broad agreement as to the methods by which electronic transferable records can be implemented, and the legal and risk issues that such a move would entail. There is for example not yet agreement as to how to deal with third-party rights. Achieving progress in this subject by UNCITRAL might be one of the most significant things that can be done to promote electronic commerce.

3. In December 2000, the Secretariat prepared a paper for Working Group IV entitled "**Possible future work on electronic commerce: Transfer of rights in**

tangible goods and other rights" (A/CN.9/WG.IV/WP.90).[1] This paper was prepared in contemplation of the completion of its work on the **Model Law on Electronic Signatures** in 2001,[2] and identified and explained many issues involved in this subject. The Commission decided first to have Working Group IV address fundamental issues relating to electronic contracting, and it proceeded with a project to develop the **Convention on the Use of Electronic Communications in International Contracts**,[3] which was completed in 2005.

4. There has been some progress in the development of specific applications of electronic transferable records. The Commission has prepared the **United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea**,[4] which addresses aspects of electronic transferable records in that environment. Our proposal also cites other international examples of electronic transferable record work. Some domestic examples are drawn from practice in the United States, simply as a way to initiate discussion. If the Commission authorizes the Secretariat to expand this work, examples and experience of other States and regions would be included.

5. In light of the success UNCITRAL has demonstrated in building a global legal foundation and vocabulary with respect to the fundamental issues of electronic signatures and electronic contracting, we believe that it is now time for UNCITRAL to apply its considerable expertise to a wider range of applications of electronic commerce, and accordingly to address the equivalent global legal foundation issues surrounding electronic transferable records.

1. Sectoral application

6. This paper briefly outlines some basic principles and considerations of electronic transferability that the Commission might wish to consider addressing in a future project. These principles will serve as a foundation to a wide spectrum of applications. In addition, UNCITRAL might wish to assist sectors in understanding how best to develop approaches to electronic transferable records that meet their needs.

7. It is important to keep in mind that applications of electronic transferable records will vary by sector and possibly within sectors and business applications as well, because particular applications entail a different set of parties, industries, technologies, system architectures and, therefore, attendant risks. This has always been true for successful systems. Indeed, traditional paper cheques themselves utilize a combination of "tokens" (the negotiable instrument) and "registries" (e.g., the bank account). These terms are further described below.

8. Electronic transferable records may, for example, have differing requirements depending on the application, for authentication, security, access by third parties,

---

[1] Available at www.uncitral.org/uncitral/en/commission/working_groups/4Electronic_Commerce.html.

[2] United Nations publication, Sales No. E.02.V.8, available at www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2001Model_signatures.html.

[3] United Nations publication, Sales No. E.07.V.2, available at www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention.html.

[4] General Assembly Resolution A/RES/63/122, Annex, available at www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/2008rotterdam_rules.html.

conversion from electronic to paper (and vice-versa), system cost constraints, transaction ranges, volumes and scalability, mobility, negotiability, party capabilities, automated transaction processing, timeliness and transaction finality, single registries vs. multiple registries (and interoperability and transfers between systems), fraud risk, evidentiary and regulatory concerns. In addressing these factors, many sectors will rely to a significant extent on private system rules, with associated legislation to address such areas as third-party property rights.

9. These differing requirements serve to emphasize the need for clarification of the fundamental considerations in this area, as well as the need to rationalize approaches to solving specific problems. Accordingly, we believe that the Working Group should focus at a high level on the common problems and approaches in establishing a viable electronic transferable record system. It should develop basic principles and considerations that will be common to all unique implementation systems, and offer a means to allow the specific needs of each system to be adequately addressed. It can then refine these principles with respect to particular sectors, as appropriate.

2. Subject matter — electronic transferable records

10. For the purposes of this paper and as adopted in some laws in order to avoid implications of terms used in prior practice, an **electronic transferable record** may be considered an electronic equivalent of a transferable instrument (negotiable or non-negotiable) or transferable document.

- **Transferable instruments** are financial instruments that permit transfer of the instrument to persons who are not parties to the underlying transaction. They may contain an unconditional promise to pay a fixed amount of money to the holder of the instrument, or an order to a third party to pay the holder of the instrument. Examples of transferable instruments include promissory notes, drafts, cheques, and certificates of deposit. They may also include chattel paper (e.g. retail instalment sales contracts, promissory notes secured by an interest in personal property, and equipment leases).
- **Transferable documents**, also called documents of title, include transport documents, bills of lading, dock warrants, dock receipts, warehouse receipts, or orders for the delivery of goods, and also any other documents which in the regular course of business or financing are treated as adequately evidencing that the person in possession of it is entitled to receive, hold, and dispose of the document and the goods it covers (subject to any defences to enforcement of the document).
- **Negotiable instruments and documents** are a subset of transferable instruments and documents for which the transferee may, under certain circumstances, obtain better title than the transferor. This permits the instrument or document to be transferred in commerce independent of the underlying obligation, for which information may be unobtainable due to remoteness of the underlying transaction.

11. Today, both transferable instruments and transferable documents typically exist as paper documents (jointly referred to as “transferable paper”). Each of these types of paper documents evidence an obligation owed by the person issuing the paper document to another person named in the document. For example, a

promissory note evidences an obligation to repay a debt. A negotiable warehouse receipt represents an obligation by the warehouse operator to deliver goods stored in the warehouse to the owner of the receipt.

12. Documents comprising transferable paper "reify" the obligations they represent; that is, physical delivery of the paper document itself to the transferee, coupled with the transferor's signed declaration of an intent to transfer (either written on the document or attached to it), may constitute evidence of the transferee's right to enforce the underlying obligation. Stated differently, title to transferable paper (and the rights it comprises) passes by endorsement and delivery of the original paper document, and the transferee in good faith and for a consideration of value may acquire title against the whole world, subject to relevant defences.

13. Thus, three characteristics of transferable paper are relevant: (1) **uniqueness** — i.e., there must be a single unique document (or token) that represents the value inherent in the transferable paper and that can be transferred to an assignee, (2) **possession** — i.e., possession of the unique document (or token) is what is used to determine who is entitled to the value represented therein, and (3) **ownership** — i.e., good title to the instrument by the holder, often indicated by means of a signature or endorsement.

3. The challenges of electronic transferable records

14. One of the most significant challenges faced in updating or adapting transferable paper legal regimes to accommodate electronic transferable records is replicating the need for uniqueness of the document (or token) that represents the value/obligation, and identifying the person who is considered to have possession of that document and thus the owner of the value it represents. Current developments may suggest solutions different than those focused on at an earlier phase of electronic commerce.

15. An electronic record — even if electronically signed — generally can be copied, bit-for-bit, in a way that creates a copy identical to the first and indistinguishable from it. Thus, absent special measures or widespread application of technologies not today in common use, there is little certainty that an electronic record is unique. Furthermore, many of the methods currently used to create and store electronic records render irrelevant or misleading the concept of a unique "original". For example, electronic records are often held in storage as dynamic files — the record that is accessed and viewed is actually composed of a dataset, which is specific to the transaction, and a document template that may be propagated with data from the dataset and may be used with thousands of transactions. The "complete" record does not exist, as a unitary file, until it is accessed. The component parts are only then assembled for viewing or printing. When access is terminated, so is the "complete" record.

16. While these concerns have, in the past, been considered a difficult problem in the creation of a legal framework for electronic transferable records, recent approaches (such as registries, indemnity provisions, and the like) have pointed the way to potential solutions. For example, difficulties in achieving uniqueness call for not only solving issues technologically, but for some sectors would need to rest also on wide application of those technologies and at an acceptable cost commercially.

Recent progress on data storage and retrievability at costs lower than previously experienced make electronic registries more feasible which could avoid the need to achieve low-cost uniqueness.

4. Concept of "control" as a replacement for possession

17. In some transferable record legal models, the concept of "control" over an electronic record is used instead of possession. Specifically, control serves as the substitute for delivery, endorsement and possession of a transferable promissory note or transferable document of title.

18. In a paper environment, possession of transferable paper is generally required in order to become entitled to enforce the document. The purpose of the possession requirement is to protect the maker or drawer from multiple liability on the same instrument. Possession is important not because tangible paper tokens are per se valuable, but because only one person can be in possession of a tangible object at one time. If a computer system can be set up to prevent claims of ownership of an electronic transferable record by more than one person at a time, then a possession requirement for the instrument may be unnecessary.

(a) Establishing control

19. Legal systems using "control" as a replacement for "possession" often specifically recognize that the control requirements may be satisfied through the use of a trusted third-party registry system. In the United States, it has been noted that "A system relying on a third-party registry is likely the *most effective way* to satisfy the requirements … that the Transferable Record remain unique, identifiable and unalterable, while also providing the means to assure that the transferee is clearly noted and identified."[5] But there may also be technological approaches to achieve the same goal.

20. Because it has been seen as a substitute for the possession requirement in the paper world, the concept of "control" is typically defined in a manner that focuses on the identity of the person entitled to enforce the transferable record. For example, under United States law: "A person has control of a Transferable Record if a system employed for evidencing the transfer of interests in the Transferable Record reliably establishes that person as the person to which the Transferable Record was issued or transferred."[6] The key point is that a system, whether involving third-party registry or technological safeguards, must be shown to reliably establish the identity of the person entitled to payment or delivery of goods.[7]

(b) How might a system "reliably establish" identity of person in control

21. In general, two basic approaches have been advanced to establish the identity of the person to whom the transferable record was issued or transferred.

---

[5] Uniform Electronic Transactions Act (UETA) Section 16, Official Comment 3 (emphasis added).

[6] UETA § 16 (b); 15 U.S.C. § 7021 (b).

[7] UETA Section 16, Official Comment 3.

(i) Person identified in electronic transferable record itself (Token Model)

Under the first approach (the Token Model), the identity of the owner of the electronic transferable record is contained in the electronic record itself, and changes in ownership (e.g., assignments) are noted by modifications directly to the electronic transferable record. With this approach, "reliably establishing" the owner of the electronic transferable record requires the system to maintain careful control over the electronic record itself, as well as the process for transfers of control. In other words, like transferable paper, there may be a need for technological or security safeguards to ensure the existence of a unique "single authoritative copy", that cannot be copied or altered,[8] and that can be referenced to determine the identity of the owner (as well as the terms of the note itself). Achieving this goal may also require a means to identify all other copies of the electronic transferable record as "not authoritative" in order to provide assurance that they cannot be used for fraudulent or improper purposes (e.g., transferring copies to multiple unsuspecting buyers who take in good faith). Otherwise, even accurate copies of the electronic transferable record may pose a risk. Thus, in this kind of system, the concept of control often focuses on security for a single copy of the electronic transferable record.

(ii) Person identified in a separate registry (Registry Model)

Under the second approach (the Registry Model), the identity of the owner of the electronic transferable record is contained in a separate independent third-party registry. With this approach, "reliably establishing" the owner of the electronic transferable record requires careful control over the registry, and the uniqueness of a copy of the electronic transferable record itself becomes less important. The electronic transferable record merely contains a reference to the registry where the identity of the owner can be found and does not change over time.

22. With this approach, the concern regarding multiple accurate copies of the electronic transferable record is not necessarily present, since ownership is not determined by possession of the copy itself, and transfer does not involve altering or indorsing those copies.[9] The primary concern regarding the copies of the electronic transferable record is that there be a mechanism to determine whether any particular copy is accurate (i.e., that its integrity is intact) so that anyone viewing the copy is on notice as to where the owner is identified, and so that the true owner identified in the registry can enforce it. Thus, in this kind of system, the concept of control and associated security concerns focus primarily on the registry rather than the electronic transferable record itself.

5. Using "designation" to address the "uniqueness" requirement

23. Signed electronic records do not inherently possess a characteristic of uniqueness when used with most current technologies. To address this issue, some

---

[8] This might be accomplished by the technology used to create the record (which may not yet exist), or by keeping the record under very tight security such that no one can access it to copy or modify it.

[9] In some systems, the registry also holds the authoritative copy as well as the identity of the person in control of it. In other systems, the registry simply holds only the digital signature of the authoritative copy, which is then available to verify the integrity of any copy the person in control later seeks to enforce.

legal systems take the view that, in the electronic environment, it is not necessary that the electronic record possess an intrinsic characteristic that makes it a truly "unique" electronic record in the sense that identical copies cannot exist. Instead they focus on a characteristic that distinguishes one electronic copy from other copies. That characteristic can presumably be intrinsic to the record itself (if and when the technology is available), or can be provided by designation.

24. One approach is to recognize that the characteristics associated with uniqueness can also be established by designation (e.g., within a computer system), rather than by anything intrinsic to the electronic transferable record itself. To that end, some legal systems permit the use of information systems that have been designed to keep track of the record through the use of something like a registry, and that restrict access to the record or control the input process to authorized persons only. Other systems focus on technology, process or agreement. For example, an authoritative copy stored within a controlled-access system may be provided with a unique control number, or be held in a specified server or other location that makes it distinguishable from other copies.

6. Existing work

25. In the past few years there have been several legal and commercial efforts to address the use of a variety of different electronic records.

26. The **legal efforts** include work by UNCITRAL, the Hague Conference on Private International Law, the Organization of American States (OAS), as well as the domestic law of a number of States.

- The **UNCITRAL Model Law on Electronic Commerce (1996)**[10] addresses issues pertaining to carriage of goods and transport documents in Articles 16 and 17, including transferable rights. In particular, Article 17 (3) allows for a personal right or obligation to be represented by a data message, provided a reliable method is used to render the data message unique. Article 17 (5) permits conversion from electronic data messages to paper, provided the data message has been terminated and a statement of such termination is included in the paper replacement document.
- At the Hague Conference on Private International Law, the **2006 Convention on the Law Applicable to Certain Rights in respect of Securities held with an Intermediary** deals with intangible securities held by an intermediary.[11]
- 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 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)**,[12] which

---

[10] United Nations publication, Sales No. E.99.V.4, available at www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model.html.

[11] Hague Conference on Private International Law, Convention on the Law Applicable to Certain Rights in respect of Securities held with an Intermediary, available at www.hcch.net/index_en.php?act=conventions.text&cid=72. Legal issues in transferable records are also being considered by UN/CEFACT, see www.unece.org/cefact.

[12] Inter-American Uniform Through Bill of Lading for the International Carriage of Goods by the Road (Negotiable), available at www.oas.org/DIL/CIDIP-VI-billoflanding-Eng.htm.

provides for the possibility of electronic signatures, as well as other signature types, if authorized by applicable law. In 2002 the OAS also adopted a **Model Inter-American Law on Secured Transactions**,[13] including an **Annex, Uniform Inter-American Rules for Electronic Documents and Signatures**[14] which supports the use of electronic communications technologies for both the Inter-American Uniform Through Bill of Lading for the International Carriage of Goods by the Road (Negotiable) and the Model Inter-American Law on Secured Transactions.

- In the United States, several current laws support electronic transferable instruments and electronic documents of title. **Article 7 of the Uniform Commercial Code (UCC)**, on **Documents of Title** (covering warehouse receipts, bills of lading and other documents of title) includes recognition of electronic documents of title, **Article 8 of the UCC on Investment Securities** includes parallels to the 2006 Hague Convention, cited above, **Article 9 of the UCC** on **Secured Transactions** includes recognition of electronic chattel paper, and the **Uniform Electronic Transactions Act (UETA)** and the **Electronic Signatures in Global and National Commerce Act (E-SIGN)** recognize electronic transferable records.

- In addition, Unidroit's **Convention on International Interests in Mobile Equipment** (the "Cape Town Convention")[15] establishes an electronic registry system for the registration of international interests in equipment with no fixed location in order to give notice of their existence to third parties and enable the creditor to preserve its priority against subsequently registered interests, as well as against unregistered interests and the debtor's insolvency administrator.

27. **Commercial efforts** include a variety of projects, such as the following:

- The Association of National Numbering Agencies (ANNA) has issued Guidelines for its International Securities Identification Numbering (ISIN) system under ISO6166.[16] Each ISIN is a 12-character number that uniquely identifies a security. The most recent update to the Guidelines provides more explicit explanations of corporate actions applying on physical certificates compared to a paperless environment.

- The Comité Maritime International,[17] has developed Rules for Electronic Bills

---

[13] Available at 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 www.oas.org/main/main.asp?sLang=E&sLink=www.oas.org/dil/. The Model Law itself may be accessed (in Spanish and English) at www.oas.org/dil/Annex_cidipviRES.%205-02.pdf.

[14] Available at www.oas.org/main/main.asp?sLang=E&sLink=http://www.oas.org/dil/.

[15] Available at www.unidroit.org/english/conventions/mobile-equipment/main.htm.

[16] ISIN Guidelines (Version 7, June 2004), available at www.anna-web.com/neu/ISO_6166/ISIN_Guidelines_Version_7_%20June_2004.pdf; ISIN allocation rules for debt instruments issued under Rule 144A and Regulation S, available at www.anna-web.com/neu/ISO_6166/ISIN_Guidelines_AnnexA_RegS_144A.pdf.

[17] "Comité Maritime International". It is a non-governmental not-for-profit international organization established in Antwerp in 1897, the object of which is to contribute by all appropriate means and activities to the unification of maritime law in all its aspects. To this end it shall promote the establishment of national associations of maritime law and shall cooperate with other international organizations. See www.comitemaritime.org.

of Lading.[18]

- Bolero[19] has developed a neutral platform enabling paperless trading between buyers, sellers, and their logistics service and bank partners.
- The United States Mortgage Industry Standards Maintenance Organization has done extensive work regarding electronic promissory notes and electronic mortgages,[20] and established an electronic registry system for electronic promissory notes.
- The United States Motor Vehicle Dealership Financing Industry has developed Electronic Chattel Paper Standards for Electronic Motor Vehicle Retail Sale and Lease Contracts.[21]

28. These efforts highlight the value that UNCITRAL can bring to this topic: (i) to define and develop consistency in underlying principles, (ii) to raise the general level of understanding of electronic transferable record considerations for users and the global community, (iii) to build on the experiences of others, and (iv) to minimize unnecessary duplication of effort.

7. Recommendations regarding work to be done by the Commission

29. We propose that UNCITRAL undertake a project to identify the basic issues and define the fundamental principles that must be addressed to develop workable international legal systems for electronic transferable records, and to assist States in developing domestic systems that affect international commerce. Presumably, other aspects of electronic transferable records that have not been extensively dealt with in this paper will be addressed, as appropriate. Such work will likely focus to some extent on the use of electronic registries, but should recognize that specific solutions will vary based on sector and application requirements. The project would include a clear set of high-level principles that can be incorporated in any international system for transferable records. Additional guidance could be provided to assist States, international organizations, and industries to assess the legal risks as well as the options available to them, and to help them through the process of crafting approaches to transferability best suited to their needs and the needs of global commerce. If appropriate, following this phase, consideration could then be given to the possible need for and feasibility of elaborating additional instruments that could promote commerce and trade by boosting the effectiveness of electronic records.

---

[18] Available at www.comitemaritime.org/cmidocs/rulesebla.html.

[19] Available at www.bolero.net/.

[20] Available at www.mismo.org.

[21] See, e.g., www.spers.org/EFSCconference/TomBuitewegElectronicChattelPaper.htm. In addition, the United States cotton industry has begun to use electronic cotton warehouse receipts, following an amendment to the United States Warehouse Act (7 U.S.C. 259 (c)) and regulations by the United States Department of Agriculture making electronic warehouse receipts equivalent to paper receipts. See, e.g., http://southwestfarmpress.com/mag/farming_electronic_warehouse_receipts/.

A/CN.9/681/Add.2 (Original: English)

Possible future work in the area of electronic commerce — Proposal of the United States of America on online dispute resolution

ADDENDUM

1. The United States recommends that the Secretariat be asked to prepare, subject to the availability of sufficient staff resources, a study on possible future work that UNCITRAL might engage in on the subject of online dispute resolution in cross-border e-commerce transactions. If such a study is undertaken, it would be expected that the Secretariat would consult with and inform member and observer States on the progress made in developing its recommendations concerning future work and suggests that the Secretariat consider holding a colloquium of experts on the matter.

2. For a number of years UNCITRAL has monitored online dispute resolution systems currently being experimented within the field of e-commerce with the understanding that at some point in time it could propose a course of action for the Commission in the field of online dispute resolution (ODR).[1] In 2003 the UNCITRAL Secretariat concluded that:

> the best course of action … is to monitor and review emerging practices with respect to ODR, to analyse the various experiments done in field, to gather information and prepare studies as to the perceived or objectively identified legal, technical and commercial difficulties arising with respect to ODR, with a view to enlightening further debate as to the better way in which those issues might be addressed in a comprehensive framework. Subject to the findings of such analyses and studies, our opinion is that it is still too early for the United Nations to engage in the preparation of any normative instrument.[2]

3. Since then the Commission at its plenary sessions has consistently maintained online dispute resolution as possible future work for both Working Group II (arbitration) or Working Group IV (e-commerce).[3] However, the Commission has not specifically requested that the Secretariat prepare any subsequent studies concerning the legal, technical and commercial difficulties arising from ODR or possible future work on the matter. As some studies indicate that cross-border e-commerce has not grown as fast as could have been expected, due, in part, to

---

[1] Current Work by UNCITRAL in the Field of Electronic Commerce, UN Doc. TRADE/CEFACT/2002/20 at 4 (18 April 2002), available at www.unece.org/cefact/cf_plenary/plenary02/docs/02cf20.pdf.

[2] UNCITRAL Secretary Jernej Sekolec letter dated January 17, 2003, to CEFACT Trade Division Director concerning a draft recommendation on online alternative dispute resolution, at 6, available at http://markmail.org/download.xqy?id=iupo4oag7aijppnj&number=1.

[3] Report of the Commission sessions for 2008 (UN Doc. A/63/17, para. 316); 2007 (UN Doc. A/62/17, para. 176); 2006 (UN Doc. A/61/17, para. 187); 2005 (UN Doc. A/60/17, paras. 178, 215); 2004 (UN Doc. A/59/17, para. 60). See also *Reducing Time and Costs on International Arbitration*, José María Abascal Zamora, presented at the fortieth annual session of UNCITRAL Vienna, 9-12 July 2007, available at www.uncitral.org/pdf/english/congress/Abascal-rev.pdf.

concerns about where the parties can turn if disputes arise, the United States believes it would be timely for the Secretariat to revisit these matters.

4. A study by the Secretariat might consider some of the following issues:

i. Types of conflicts that may be solved by ODR systems

The Secretariat might wish to explore the types of e-commerce transactions where ODR can be most successful.[4]

The study might also consider the issue of whether any possible future work on ODR mechanisms should include e-commerce disputes involving both business-to-business as well as business-to-consumer transactions.

ii. Accrediting ODR providers

The Secretariat might also explore whether it would be possible or desirable to maintain a single database of certified ODR providers for e-commerce transactions.[5]

iii. Procedural rules

The Secretariat might also consider whether it is appropriate to draft procedural rules for online dispute resolution in cross-border e-commerce transactions which utilize fast-track procedures which comply with due process requirements.[6]

iv. Enforcement of online awards

---

[4] The first international body to enter into this field was the World Intellectual Property Organization (WIPO) Arbitration and Mediation Center, which was established to provide an internet-based, online dispute resolution system that can provide a neutral, speedy and inexpensive means of resolving disputes including under the Uniform Domain Name Dispute Resolution Policy (UDRP). See Record Number of Cybersquatting Cases in 2008, WIPO Proposes Paperless UDRP, PR/2009/585, March 16, 2009, available at www.wipo.int/pressroom/en/articles/2009/article_0005.html. At least part of the success of the UNRP would appear to based on the fact that the process is mandatory for all domain name registrants and the remedy is easily enforceable. See also Redress & Alternative Dispute Resolution in Cross-Border E-commerce Transactions, Briefing Note European Parliament, at ii, 7 (January 2007), available at www.europarl.europa.eu/comparl/imco/studies/0701_crossborder_ecom_en.pdf (recommending that for the short term "[f]urther empirical research is necessary to identify if other niche areas, akin to the UDRP domain name situation, exist where hard ODR can be successful."). It may now be possible to develop practical incentives for compliance with online awards through use of trustmarks provided to entities that comply with awards and agreements. Id. at 8.

[5] The U.S. Federal Trade Commission and consumer protection agencies in 23 other countries have created an International ADR Directory containing contact information of dispute resolution service providers that can help consumers resolve problems with cross-border sellers, The Directory is available at www.econsumer.gov/english/resolve/directory-of-adrs.shtm. Similarly, the European Commission together with its member States, currently maintains a central database of ADR bodies which are considered to be in conformity with the Commission's Recommendations on dispute resolution. The data is maintained on the website of the Health and Consumer Protection Directorate General. See http://ec.europa.eu/consumers/redress_cons/adr_en.htm.

[6] In the OAS CIDIP VII negotiations the United States has proposed Draft Model Rules for Electronic Arbitration of Small Cross-Border Consumer Claims. The rules are intended to provide practical procedures for resolution of certain common types of small consumer disputes that are simple, economical, effective, fast and fair.

Consideration could be given to the applicability to awards made through the ODR process of the relevant international conventions on the recognition and enforcement of arbitral awards.[7] However, given the small size of many e-commerce claims, reliance on these treaties may not be cost-effective in the typical case. For this reason, it may be useful to consider how to establish practical incentives for compliance with such online awards.

---

[7] For the relevant instruments see the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958); the Inter-American Convention on International Commercial Arbitration (Panama, 1975); and the European Convention on International Commercial Arbitration (Geneva, 1961).

C. Proposal of the Delegation of Spain Concerning the Future Work of Working Group IV (Electronic Commerce)

(A/CN.9/682) [Original: English]

1. During the forty-first session of the Commission, several proposals were put forward to guide the possible future work of Working Group IV on the creation and regulation of "single windows" (SW) in international trade. The goals that could be achieved by identifying the legal and operational principles applicable to SW include the fostering of legal certainty and security in the exchange of electronic documents in cross-border operations and the simplification of procedures based on the exchange of information, both for traders and for State administrations. It was also stated that, closely linked to this topic, another possible area of work related to electronic negotiable documents and, more generally, the transfer of rights through electronic communications.

2. The delegation of Spain supported the proposals made along these lines and continues to find interesting the approaches on which they are based. As the delegation of Spain indicated at the time, of all the topics proposed, the one that elicited the most interest was the regime for the creation and transfer of negotiable electronic records and the negotiation of rights by electronic means. The identification and promotion of a harmonized regime, or at least a number of harmonized principles, relating to such activities, could yield many benefits by making it possible to develop rules for all the legal processes based on the use of electronic communication and on the exchange of information for more specific purposes. Mechanisms for the transfer or negotiation of rights, including those based on the flow of written documents, show a very similar structure irrespective of the area in which they take place and the nature and content of the rights concerned. Such similarities will probably increase as use of electronic means for this purpose becomes more widespread.

3. Existing systems for the transfer of rights or documents that rely on information structures within or outside the network for electronic communications are based on the creation of registries. The systems that have been emerging in the electronic environment over the past two decades either have a registry-based structure that has been created on an ad hoc basis or make use of registries already in existence. In the field of e-commerce law, both national and international (in the case of the latter as a result of the work of UNCITRAL), negotiable or transferable electronic records already enjoy the same legal recognition as paper records. Such recognition is based on the idea that an electronic (intangible) record can be handled in much the same way as any paper record. The most important consideration in deciding whether to recognize title to a document and the rights contained therein is the notion of control of the record or document. Contrary to what one might initially think, this notion has been conceived with the aim of encompassing registry systems precisely because such systems are all there is at present.

4. There is a clear and compelling need for a minimally harmonized regulation governing the electronic transfer or negotiation of rights or documents that is capable of fostering the migration of cross-border processes and operations of this kind to the electronic environment. Such a regulation might focus on the transfer of rights through the assignment regime by electronic means, but it should also include

other specific modes of transfer based on the issue and use of certain documents or securities (transferable securities, cash-based securities, instruments of title or securities based on property or rights in rem in property, etc.). A key requirement for the viability and success of such processes, whose role and significance must therefore be taken into account by any future legal framework, is the involvement of what are known as trusted third parties.

5. Trusted third parties, such as certification entities or authorities, play a very significant role in some legally recognized cases in areas such as electronic signatures. Their presence in the electronic environment, however, is acquiring and will doubtless continue to acquire substantially greater importance and to exert a far greater impact on the degree of certainty and security of relations in electronic environments. This is due to operators' vital need in such relations to enjoy a minimum degree of certainty as to the identity of the parties involved, the authenticity and content of the information, the legal consistency and content of the intangible assets (such as rights) that may be exchanged solely by way of mutual notification and, of course, the applicable legal regime.

6. In the case of many of these procedures, some of which lie outside the scope of legal norms, while being implicit in their aims, the only means currently available for building the desired degree of confidence and certainty among the parties and promoting the security of transactions consists in involving a trusted third party. This is exactly what happens in registry systems for the negotiation of rights. Such systems normally rely on the contractual authority conferred on one or more entities that provide, in addition to the communication system and the electronic signature infrastructure (which may in turn rely on a specific national public-key infrastructure), the registry infrastructure, with the legal status that it may acquire in relations between the operators involved.

7. A regulation dealing with trusted third parties and their functions in the context of the transfer or negotiation of rights, documents or securities and in an electronic context could also lay the foundations for a set of rules dealing more broadly with their role in electronic relations and transactions in pursuit of any contractual goal. Existing efforts in this context and their outcome could thus have a highly beneficial impact on, and develop a measure of synergy with, other activities and relations based or dependent on exchanges of information in the network and their legal, legislative and contractual regime. This applies to both strictly private relations and relations with the public authorities (in many cases it is the authorities themselves who assume the role of a trusted third party).

8. With regard to the aims pursued by the approach described above and the formal means whereby they might be achieved, the delegation of Spain has no desire to submit non-negotiable proposals. It does, however, consider that the resulting instrument should regulate:

- The ways in which rights should be negotiated or transmitted electronically and the formal conditions to be met;
- The broad consequences of transmission and the specific consequences that should be associated with the regime governing documents, securities or negotiable or transferable rights;

- The types of documents or negotiable instruments that would come within the scope of the proposed regulation;
- The responsibility to be assumed by the transmitter;
- The extent to which the debtor of the underlying obligation should be involved in the transfer or negotiation and its consequences;
- The protection to be enjoyed by a third-party buyer in good faith, in respect of the different modes of transmission of rights regulated, vis-à-vis both the debtor and the rights of other third parties;
- The consequences of the intervention of third-party entities or certifying authorities (whether or not they are providers of other services), including:
    - Implications of their intervention for the position of the parties (debtor, transmitter and buyer);
    - Liability for damages ensuing from their conduct;
- The relevant notion of a trusted third-party certifier and its possible submission to national supervisory authorities.

9. Without wishing to rule out other possibilities, the delegation of Spain also draws attention to the positive experience with and high success rate of model laws in the area of electronic commerce law. A model law may well be the appropriate framework for an initiative such as that proposed, given the greater flexibility of implementation it offers to States contemplating its use and the greater ease of improving its content after it has been elaborated.

D. Possible future work in the area of transport law: commentary on the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea ("Rotterdam Rules")

(A/CN.9/679) [Original: English]

CONTENTS

I. Introduction

1. At its forty-first session, in 2008,[1] the Commission approved the text of what was then known as the draft United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea ("the Convention" or "the Rotterdam Rules") and the subsequent adoption of the Convention by the General Assembly on 11 December 2008.[2] The General Assembly authorized the Convention to be opened for signature at a signing ceremony in Rotterdam on 23 September 2009[3] and called upon all Governments to consider becoming a party to the Convention.[4]

2. During its deliberations on the draft text of the Convention from 2002 to 2008, Working Group III (Transport Law) considered whether certain aspects of the text should be further elaborated in a commentary or explanatory notes that could accompany the Convention upon its publication. For example, there are two such references in the last draft text of the Convention that was published with footnotes (A/CN.9/WG.III/WP.101). Footnote 6 to article 3 on "Form requirements", the possibility of including an explanatory note to the effect that any notices contemplated in the Convention that are not included in article 3 may be made by any means, including orally or by exchange of data messages that do not necessarily meet the definition of "electronic communications" in draft article 1 (18). In addition, footnote 20 to article 9, considered whether detail related to the term "readily ascertainable" should be specified in a note or a commentary accompanying publication of the Convention. No specific decision was made by the Working Group in those cases.

3. As the text of the Rotterdam Rules has now been adopted by the General Assembly, preparations should be made for its publication and dissemination. The

---

1 *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17* (A/63/17), para. 298.

2 Resolution 63/122, para. 2.

3 Ibid., para. 3.

4 Ibid., para. 4.

Commission may therefore wish to consider whether the text of the Convention should be accompanied by explanatory notes or commentary, and what form those additional materials should take.

II. Possible models for commentary or explanatory notes on the Rotterdam Rules

4. Several models could be examined by the Commission in its consideration of what sort of commentary or note, if any, should accompany the publication of the Convention. Note that all three examples below are called "explanatory notes", and specifically state that they do not constitute an official commentary on the convention in issue.

5. The explanatory notes accompanying the Hamburg Rules consist of brief introductory and background paragraphs, followed by a summary of the "salient features" of the Hamburg Rules, concluding with a brief discussion on the uniformity of law relating to the carriage of goods by sea. The text of the note is written in a narrative style, and without specific references to the discussion of particular issues in the *travaux preparatoires*. For example, the paragraphs in respect of article 4 on the period of responsibility of the carrier are as follows:

"2. Period of responsibility

"14. The Hague Rules cover only the period from the time the goods are loaded onto the ship until the time they are discharged from it. They do not cover loss or damage occurring while the goods are in the custody of the carrier prior to loading or after discharge.

"15. In modern shipping practice carriers often take and retain custody of goods in port before and after the actual sea carriage. It has been estimated that most loss and damage to goods occurs while the goods are in port. In order to ensure that such loss or damage is the responsibility of the party who is in control of the goods and thereby best able to guard against that loss or damage, the Hamburg Rules apply to the entire period the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge."

6. Another possible model that the Commission may wish to consider is that of the explanatory note accompanying the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit. The notes contain a slightly more detailed introduction, followed by a summary of the main features and provisions of the Convention. The text is written in a slightly more detailed narrative style than that accompanying the Hamburg Rules, but again without specific references to the discussion of particular issues in the *travaux preparatoires*. For example, the note referring to article 3 on the independence of the undertaking states as follows:

"D. Definition of 'independence'

"17. While it is widely recognized that undertakings of the type covered by the Convention are 'independent', there has been a lack of uniformity internationally in the understanding and recognition of that essential characteristic. The Convention will promote such uniformity by providing a definition of 'independence' (article 3). That definition is phrased in terms of the undertaking not being dependent upon the existence or validity of the

underlying transaction, or upon any other undertaking. The latter reference, to other undertakings, clarifies the independent nature of a counter-guarantee from the guarantee that it relates to and of a confirmation from the stand-by letter of credit or independent guarantee that it confirms.

"18. In addition, to fall within the scope of the Convention, an undertaking must not be subject to any terms or conditions not appearing in the undertaking. It is specified that, to fall within the Convention, an undertaking should not be subject to any future, uncertain act or event, with the exception of presentation of a demand and other documents by the beneficiary or of any other such act or event that falls within the 'sphere of operations' of the guarantor/issuer. That is in line with the notion that the role of the guarantor/issuer in the case of independent undertakings is one of paymaster rather than investigator."

7. A third possible model that the Commission may wish to consider is the explanatory note accompanying the United Nations Convention on the Use of Electronic Communications in International Contracts. Although called an explanatory note, the text is much more detailed than the previous two examples, and is more along the lines of a guide to enactment. The note contains a brief introduction, followed by a discussion of the main features of the instrument, a summary of the preparatory work, and concluding with quite detailed remarks on an article-by-article basis, including specific references to the discussion of particular issues in the *travaux preparatoires*. For example, the note referring to article 3 on party autonomy, which consists of a single sentence, states as follows:

"Article 3. Party autonomy

"1. Extent of power to derogate

"84. In preparing the Electronic Communications Convention, UNCITRAL was mindful of the fact that, in practice, solutions to the legal difficulties raised by the use of modern means of communication were mostly sought within contracts. The Convention reflects the view of UNCITRAL that party autonomy is vital in contractual negotiations and should be broadly recognized by the Convention. [Footnote: Ibid., para. 33.]

"85. At the same time, it was generally accepted that party autonomy did not extend to setting aside statutory requirements that imposed, for instance, the use of specific methods of authentication in a particular context. This is particularly important in connection with article 9 of the Convention, which provides criteria under which electronic communications and their elements (e.g. signatures) may satisfy form requirements, which are normally of a mandatory nature since they reflect decisions of public policy. Party autonomy does not allow the parties to relax statutory requirements (for example, on signature) in favour of methods of authentication that provide a lesser degree of reliability than electronic signatures, which is the minimum standard recognized by the Convention (see A/CN.9/527, para. 108; see also A/CN.9/571, para. 76).

"86. Nevertheless, as provided in article 8, paragraph 2, the Convention does not require the parties to accept electronic communications if they do not want to. This also means, for instance, that the parties may choose not to accept electronic signatures (see A/CN.9/527, para. 108).

"87. Under the Convention, party autonomy applies only to provisions that create rights and obligations for the parties, and not to the provisions of the Convention that are directed to contracting States (see A/CN.9/571, para. 75).

"2. Form of derogation

"88. Article 3 is intended to apply not only in the context of relationships between originators and addressees of data messages but also in the context of relationships involving intermediaries. Thus, the provisions of the Electronic Communications Convention can be varied either by bilateral or multilateral agreements between the parties, or by system rules agreed to by them.

"89. It was the understanding of UNCITRAL that derogations from the Convention did not need to be explicitly made but could also be made implicitly, for example by parties agreeing to contract terms at variance with the provisions of the Convention (see A/CN.9/548, para. 123). [Footnote: Ibid., para. 32.]

"References to preparatory work

"UNCITRAL, 38th session (Vienna, 4-15 July 2005)	A/60/17, paras. 31-34
"Working Group IV, 44th session (Vienna 11-22 October 2004)	A/CN.9/571, paras. 70-77
"Working Group IV, 43rd session (New York, 15-19 March 2004)	A/CN.9/548, paras. 119-124
"Working Group IV, 41st session (New York, 5-9 May 2003)	A/CN.9/528, paras. 70-75
"Working Group IV, 40th session (Vienna 14-18 October 2002)"	A/CN.9/527, paras. 105-110

8. Should the Commission decide that an explanatory note or commentary should be published, it may decide not to choose any one of the above illustrations as a model. Instead, an alternative or hybrid approach more tailored to the specific characteristics of the Rotterdam Rules might be considered more suitable. Specific considerations in that regard include:

(a) The fact that the Convention harmonizes three separate existing conventions on the carriage of goods by sea, plus several competing regional and domestic regimes, as well as conforming with current industry practice, complicates the drafting of a detailed note;

(b) The scope of the Rotterdam Rules is much broader than previous conventions in the area, since it goes beyond the simple regulation of liability issues;

(c) The Convention is much longer than the texts of the models discussed above, and its provisions are highly detailed; and

(d) The Working Group met for a total of 26 weeks, thus the *travaux preparatoires* is voluminous, and users of the Rotterdam Rules could benefit from materials that refer to the specific discussion of issues by the Working Group and the Commission throughout the period of discussion of the text.

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.2), 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
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 cooperation and assistance (A/CN.9/675 and Add.1) [Original: English]

CONTENTS

I. Introduction

1. The United Nations Commission on International Trade Law (UNCITRAL) plays an important role in developing the legal framework for international trade and investment through its mandate to prepare and promote the use and adoption of legislative and non-legislative instruments in a number of key areas of trade law, including: sales; dispute resolution; government contracting; banking and payments; security interests; insolvency; transport; and electronic commerce. Those instruments are widely accepted, offering solutions appropriate to different legal traditions and to countries at different stages of economic development and include:

(a) In the area of sale of goods, the United Nations Convention on Contracts for the International Sale of Goods (CISG)[1] and the United Nations Convention on

[1] 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.

the Limitation Period in the International Sale of Goods (the Limitation Convention);[2]

(b) In the area of dispute resolution, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[3] (the New York Convention, a United Nations convention adopted prior to the establishment of the Commission, but actively promoted by it), the UNCITRAL Arbitration Rules,[4] the UNCITRAL Conciliation Rules,[5] the UNCITRAL Model Law on International Commercial Arbitration and revised articles,[6] the UNCITRAL Notes on Organizing Arbitral Proceedings,[7] and the UNCITRAL Model Law on International Commercial Conciliation;[8]

(c) In the area of government contracting, the UNCITRAL Model Law on Procurement of Goods, Construction and Services,[9] the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects[10] and the UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects;[11]

(d) In the area of banking and payments, the United Nations Convention on International Bills of Exchange and International Promissory Notes,[12] the UNCITRAL Model Law on International Credit Transfers,[13] and the United Nations Convention on Independent Guarantees and Standby Letters of Credit;[14]

(e) In the area of security interests, the United Nations Convention on the Assignment of Receivables in International Trade[15] and the UNCITRAL Legislative Guide on Secured Transactions;[16]

---

2 *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.

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

4 *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.

5 *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.*

6 *Official Records of the General Assembly, Fortieth Session, Supplement No. 17* (A/40/17), annex I; *UNCITRAL Yearbook 1985*, part three, chap. I; *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17* (A/61/17), annex I.

7 *UNCITRAL Yearbook 1996*, part three, chap. II.

8 *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17* (A/57/17), annex I; *UNCITRAL Yearbook 2002*, part three.

9 *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17* (A/49/17), annex I; *UNCITRAL Yearbook 1994*, part three, chap. I.

10 United Nations publication, Sales No. E.01.V.4, A/CN.9/SER.B/4.

11 *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 17* (A/57/17), annex I.

12 *UNCITRAL Yearbook 1988*, part three, chap. I; General Assembly resolution 43/165, annex.

13 *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 17* (A/47/17), annex I.

14 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.

15 *UNCITRAL Yearbook 2002*, part three; General Assembly resolution 56/81, annex.

16 *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17* (A/62/17 Part II), para. 99.

(f) In the area of insolvency, the UNCITRAL Model Law on Cross-Border Insolvency (MLCBI)[17] and the UNCITRAL Legislative Guide on Insolvency Law;[18]

(g) In the area of transport, the United Nations Convention on the Carriage of Goods by Sea (Hamburg Rules),[19] the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade,[20] and the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the "Rotterdam Rules");[21] and

(h) In the area of electronic commerce, the UNCITRAL Model Law on Electronic Commerce (MLEC),[22] the UNCITRAL Model Law on Electronic Signatures (MLES),[23] and the United Nations Convention on the Use of Electronic Communications in International Contracts (ECC).[24]

2. Technical cooperation and assistance activities aimed at promoting the use and adoption of its texts are one of UNCITRAL's priorities, pursuant to a decision taken at its twentieth session (1987),[25] and are particularly useful for developing countries and economies in transition lacking capacity in the areas of trade law covered by the work of UNCITRAL. Since trade law reform, based on harmonized international instruments, has a clear impact on the ability to participate in international trade, the Secretariat's technical cooperation and assistance work aimed at promoting use and adoption of texts can facilitate economic development.

3. The status of adoption of treaties and enactment of model laws is regularly updated and available on the UNCITRAL website. It is also available in the annual report to the Commission entitled "Status of conventions and model laws", which highlights new treaty actions and enactments of model laws.

4. In its resolution 63/120 of 15 January 2009, the General Assembly reaffirmed the importance, in particular for developing countries and economies in transition, of the technical cooperation and 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 cooperation and assistance programme of the Commission and to cooperate and coordinate their activities with those of the Commission. The General Assembly also 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

---

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 New York, 11 December 2008, General Assembly Resolution A/RES/63/122, annex.

22 *Official Records of the General Assembly, Fifty-first Session, Supplement No. 17* (A/51/17), annex I.

23 Ibid., *Fifty-sixth Session, Supplement No. 17* (A/56/17), annex II.

24 New York, 23 November 2005, General Assembly resolution A/RES/60/21, annex.

25 *Official Records of the General Assembly, Forty-second Session, Supplement No. 17* (A/42/17), para. 335.

those conventions.

5. This note lists the technical cooperation and assistance activities of the Secretariat subsequent to the date of the previous note submitted to the Commission at its forty-first session in 2008 (A/CN.9/652 of 8 April 2008), and reports on the development of resources to assist technical cooperation and assistance activities.

II. Technical cooperation and assistance activities

6. Technical cooperation and assistance activities undertaken by the UNCITRAL Secretariat promote the adoption of UNCITRAL legislative texts and include providing advice to States considering signature, ratification or accession to UNCITRAL conventions, adoption of an UNCITRAL model law or use of a UNCITRAL legislative guide. They also support implementation of these texts and their uniform interpretation. Technical cooperation and assistance may involve: undertaking briefing missions and participating in seminars and conferences, organized at both regional and national levels, on UNCITRAL texts; assisting countries to review existing legislation and assess their need for law reform in the trade field; assisting with the drafting of national legislation to implement UNCITRAL texts; assisting multilateral and bilateral development agencies 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 training activities to facilitate the implementation and interpretation of legislation based on UNCITRAL texts by judiciaries and legal practitioners.

7. Activities included below that are denoted with an asterisk were funded by the UNCITRAL Trust Fund for Symposia.

A. Activities addressing multiple topics

1. Regional activities

8. A number of technical cooperation and assistance activities undertaken since the last report covered several of the topic areas noted in paragraph 1 above. The UNCITRAL Secretariat participated in the following regional events:

(a) The 5th ASEAN Law Forum (Association of Southeast Asian Nations) which discussed how ASEAN member countries can best achieve the harmonization of trade laws, with emphasis on adherence to relevant international instruments. Topics discussed by the Forum included: the CISG, the ECC, the UNCITRAL Legislative Guide on Secured Transactions, and UNCITRAL legislative texts on international commercial arbitration (Bangkok, 7-8 May 2008);

(b) The International Conference of Lawyers of the Union for the Mediterranean. The Secretariat provided information on the CISG and the UNCITRAL legislative texts on arbitration and electronic commerce that might be considered for adoption by the members of the Union (Nice, France, 28-29 June 2008);

(c) *A Capacity-Building Workshop on Treaty Law and Practice and the Domestic Implementation of Treaty Obligations organized by the Economic

Community of West African States (ECOWAS) in collaboration with the Treaty Section of the United Nations Office of Legal Affairs, UNCITRAL, UNODC and UNHCR and hosted by the Ministry of Foreign Affairs and the Attorney's General Office in Ghana. The workshop, attended by ECOWAS countries, provided the opportunity to discuss the CISG; the ECC; the UNCITRAL Model Laws on International Commercial Arbitration and International Commercial Conciliation and the New York Convention. A specific consultation was organized by the West African Monetary Institute (WAMI) and the UNCITRAL Secretariat to discuss the United Nations Convention on Independent Guarantees and Stand-By Letters of Credit; the UNCITRAL Legislative Guide on Secured Transactions and issues related to the Indicators of Commercial Fraud (Accra, 10-12 June 2008); and

(d) Since 2007, the Secretariat has provided regular advice to the sub-project Regional Implementation of the Convention on International Sales of Goods and International Commercial Arbitration, a component of the Project Open Regional Fund for South East Europe — Legal Reform, implemented by the Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ). The Project involves Albania, Bosnia-Herzegovina, Croatia, the former Yugoslav Republic of Macedonia, Montenegro and Serbia. In the context of the sub-project, the Secretariat participated in the following activities: an expert meeting to discuss country reports on the implementation of CISG and arbitration legislative texts prepared by national experts (Becici, Montenegro, 16-19 June 2008); a joint mission to discuss adoption of the CISG by Albania (Tirana, 14-17 October 2008); a round table during the 21st Kopaonik School of Natural Law where the country reports on CISG and arbitration legislation were presented (Kopaonik, Serbia, 15 December 2008); an Arbitration Conference and the second open Pre-Moot jointly organized by GTZ and the Faculty of Law, University of Belgrade; and a Regional Round Table, conducted during the Pre-Moot, to discuss how to promote the uniform application of the CISG and the enactment of UNCITRAL texts on arbitration and e-commerce in the region (Belgrade, 27-29 March 2009).

2. Country-specific activities

9. At the country level, the Secretariat participated in the following technical cooperation and assistance activities covering several of the topics noted in paragraph 1 above:

(a) An international seminar "Uniform Trade Law — Principles and Practice", organized by the Italian Committee of the Union International des Avocats and the Regional Bar Association of the Triveneto to present the CISG and UNCITRAL texts on arbitration and conciliation (Venice, Italy, 3-5 October 2008); and

(b) An international conference "Institutional Arbitration in Infrastructure & Construction" organized by the Construction Industry Arbitration Council (CIAC) to disseminate information on the CISG, on arbitration and on UNCITRAL texts relating to construction works; and the conference on "International Commercial Arbitration & Sale of Goods: UNCITRAL Perspective" organized by the Federation of Indian Chambers of Commerce and Industry (FICCI) — Indian Council of Arbitration (ICA) to present UNCITRAL texts on arbitration, the New York Convention and the CISG (New Delhi, 16-18 October 2008).

(c) As part of the USAID World Trade Organization (WTO) Accession Plus Project in Ethiopia, the Secretariat contributed to a position paper on reinforcing

Ethiopia's international trade law framework for a stronger business environment as part of the preparation for negotiating accession to the WTO. The paper suggested this might be achieved by becoming a party to the New York Convention and the CISG. Further work to follow up on the paper's recommendations will be undertaken in conjunction with USAID in 2009.

3. Briefings for Permanent Missions in Vienna

10. The Secretariat provided a briefing on UNCITRAL and its working methods at the Orientation Seminar for Members of Permanent Missions Accredited to the International Organizations in Vienna organized by the United Nations Institute for Training and Research (UNITAR) at the United Nations Office at Vienna (30-31 October 2008). Briefings on various working group topics are regularly being offered in Vienna by the Secretariat.

11. The Secretariat met with nine Permanent Missions from the African Group to discuss issues of mutual interest to better address the needs of African countries, including enhancing participation in the legislative work of UNCITRAL and technical cooperation and assistance (Vienna, 5 December 2008).

12. The Secretariat met with the Permanent Missions from CAFTA-DR and GRUCA (Grupo Centroamericano) countries to discuss issues of mutual interest, including technical cooperation and assistance and possible regional activities with a view to fostering closer regional economic integration through the adoption of uniform texts (Vienna, 18 February 2009).

13. The Secretariat conducted a briefing for Permanent Missions of European Union member states to present the UNCITRAL Model Law on International Commercial Conciliation (2002) in relation to the Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (Vienna, 6 October 2008).

4. Other activities addressing multiple topics

14. At the request of the International Training Centre of the International Labour Organization (ITCILO), the Secretariat provided substantial and methodological inputs to the implementation of the MSc Programme on Public Procurement Management. The Secretariat conducted training sessions at the ITCILO Campus (Turin, Italy) on: the UNCITRAL Public Procurement Model Law (4 September 2008); the CISG (22 October 2008); and the legal aspects of e-procurement and the UNCITRAL Model Laws on e-commerce and e-signatures (11 December 2008).

B. Sale of goods

15. The Secretariat has been active in promoting adoption and uniform interpretation of the CISG, at the regional level, as well as through Permanent Missions to the United Nations in Vienna, Geneva and New York and directly with relevant officials in the capitals. As part of these activities, the Secretariat:

(a) Participated at the international conference "The spirit and interpretation of the CISG" organized by the Steering Committee for the CISG Tokyo Congress, the University of Tokyo Law School, the Institute of International Commercial Law of the Pace University School of Law, and co-sponsored by the Ministries of Foreign Affairs and Justice of Japan, and UNCITRAL. The Conference followed

Japan's accession to the CISG in July 2008 (Tokyo, 16-18 November 2008); and

(b) Presented a note on the promotion of the adoption of the CISG at the international conference "Issues on the CISG Horizon — Conference in Honour of Peter Schlechtriem (1933-2007) (Vienna, 2 April 2009).

16. Assistance was also provided to States in the final stage of the adoption process, with particular regard to formulation of reservations and the deposit of instruments of consent to be bound. Since the last report, the CISG was acceded to by Armenia, Japan and Lebanon, and Belgium acceded to the Limitation Convention.

C. Dispute resolution

17. The Secretariat has promoted adoption of the texts relating to arbitration and conciliation through participation in activities organized both on a regional basis and with individual countries, as well as activities organized by arbitral institutions. Regional activities included:

(a) The annual tripartite meeting of the International Commercial Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, Mongolian National Arbitration Centre and China International Economic and Trade Arbitration Commission to discuss the contribution of UNCITRAL to the development of an international commercial arbitration framework in Central Asia (Ulan Bator, 9-10 October 2008); and

(b) A regional conference organized by the Cairo Regional Centre for International Commercial Arbitration to discuss the New York Convention and to present the joint International Bar Association (IBA)/UNCITRAL project on monitoring the legislative implementation of that Convention (Cairo, 10-11 November 2008).

18. The Secretariat collaborated with a number of arbitral institutions and organizations, participating at:

(a) A conference on alternative means for the settlement of investor-State disputes organized by the Secretariat of the United Nations Conference on Trade and Development (UNCTAD) and the Ministry of Justice and the Investment Promotion Agency of Ukraine to discuss the use of the UNCITRAL Conciliation Rules in the field of investor-State dispute settlement (Kiev, 2-3 June);

(b) A conference organized by the Swedish Arbitration Association (SAA) on "Public Policy in International Commercial Arbitration", to deliver a lecture on the UNCITRAL Model Law on International Commercial Arbitration and interpretative guidance regarding public policy as a bar to the recognition and enforcement of arbitral awards (Stockholm, 4-5 September 2008);

(c) The annual Conference of the IBA to present the UNCITRAL/IBA project on monitoring the legislative implementation of the New York Convention (Buenos Aires, 15-18 October 2008);

(d) The conference "International Commercial Arbitration in Russia in light of Global Economic Development" hosted by the Chamber of Commerce and Industry of Russian Federation to present the UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments (Moscow,

17 October 2008);

(e) The conference "International Arbitration involving Parties from the Arab World" hosted by the Arbitration Institute of the Stockholm Chamber of Commerce to present the UNCITRAL Model Law on International Commercial Arbitration (Stockholm, 23 October 2008); and

(f) The international conference "Activating Commercial Arbitration" supported by the Dubai International Arbitration Centre to lecture on the UNCITRAL Model Law on International Commercial Arbitration (Dubai, United Arab Emirates, 11-14 November 2008).

19. The Secretariat also participated at a conference on "The 50th Anniversary of the New York Convention: Challenges to the Judiciary", to address Asian judges on the implementation of the Convention and on the recently published reports, upon invitation of the National Judges College of China and Cheung Kong Centre for Negotiation & Dispute Resolution (Beijing, 10-13 December 2008).

D. Procurement

20. In accordance with requests of Working Group I (Procurement), the Secretariat has established links with other organizations interested in procurement to foster cooperation, particularly with regard to UNCITRAL's work on revising the UNCITRAL Model Law on Procurement of Goods, Construction and Services, as well as undertaking activities to promote knowledge and acceptance of the Model Law.[26] The Secretariat participated in the following activities:

(a) The workshop on the WTO Agreement on Government Procurement organized by the WTO to present the work of UNCITRAL in the area of procurement (Geneva, Switzerland, July 2008);

(b) A meeting of the International Chamber of Commerce, Commission on International Law and Practice, Task Force on Public Procurement, to present a report on the 2008 sessions of the UNCITRAL Working Group I and the progress towards the completion of the revised UNCITRAL Model Law on Procurement (Vienna, 11 November 2008); and

(c) The "International Forum on Public Procurement" held by the Central University of Finance and Economics to discuss public procurement law reform and modernization and the UNCITRAL approach to sustainable procurement under the UNCITRAL Model Law on Procurement of Goods, Construction and Services (Beijing, 26-29 November 2008).

21. The Secretariat provides regular briefings to UNODC country offices staff on the implementation of the procurement-related aspects of the United Nations Convention Against Corruption using the UNCITRAL Model Law on Procurement as implementing legislation.

---

[26] See documents A/CN.9/575, paras. 52 and 67, and A/CN.9/615, para. 14.

E. Security interests

22. The Secretariat participated in a number of activities to disseminate information on the UNCITRAL Legislative Guide on Secured Transactions and the current work of UNCITRAL Working Group VI on security rights in intellectual property. These activities included:

(a) The Global Business Law Conference organized by the American Bar Association (ABA) Section of Business Law to promote the UNCITRAL Legislative Guide on Secured Transactions (Frankfurt, Germany 29-30 May 2008);

(b) The Eight Annual International Insolvency Conference upon invitation of the International Insolvency Institute to discuss the treatment of security interests in intellectual property rights under licence agreements in the case of insolvency (Berlin, 9-10 June 2008); and

(c) The International Conference on Financing Innovation on the occasion of the Fifth Venice Award for Intellectual Property Culture, organized by the European Patent Academy and the Italian Patent and Trademark Office, hosted by the Venice University, to present UNCITRAL's work on security interests in intellectual property rights (Venice, Italy, 26-28 November 2008).

F. Transport

23. The Secretariat participated in the 39th Conference of the Comité Maritime International to present and promote the draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Athens, 14-16 October 2008).

24. The Secretariat, in collaboration with the Arab Society for Commercial and Maritime Law, the Comité Maritime International and the Institut Mediterranéen Maritime contributed to the organization of the 3rd Arab Conference for Commercial and Maritime Law — "The Rotterdam Rules 2009, Uniformity vs. Diversity of the Law of Carriage of Goods by Sea". The Conference was devoted to discussing the Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea and, in particular, whether it meets the needs of Arab countries (Alexandria, Egypt, 18-19 April 2009).

G. Insolvency

25. The Secretariat has promoted the use and adoption of insolvency texts, particularly the Model Law on Cross-Border Insolvency, through participation in various international fora. The activities included:

(a) A conference "Secured transactions and insolvency: reforms at a crossroads" jointly organized by the European Bank of Reconstruction and Development (EBRD), UNCITRAL and the World Bank (Washington, 5-6 May 2008) to bring together key stakeholders in the fields of insolvency and secured transactions in an effort to explore some of the critical issues that arise in the convergence of these two areas, to assess current positions on these issues, and identify areas of agreement and future questions and challenges;

(b) The 14th Annual Global Insolvency and Restructuring Conference sponsored by the International Bar Association (IBA), dealing with insolvency law and intellectual property issues, as well as cross-border insolvency practice and issues arising with implementation of the UNCITRAL Model Law on Cross-Border Insolvency (Stockholm, 19-20 May 2008);

(c) The second Judicial Summer Camp organized by the GRIP 21 initiative for insolvency prevention in cooperation with UNCITRAL, INSOL Europe and the International Insolvency Institute, to discussed current issues in insolvency law, particularly cross-border insolvency. Judges from 15 countries attended the Camp (Paris, 2-4 July 2008);

(d) The Canadian Annual Review of Insolvency Law Conference organized by the National Centre for Business Law, University of British Columbia to present UNCITRAL work on enterprise groups and cross-border insolvency (Banff, Canada, 12-14 February 2009); and

(e) Upon invitation of the Academy of European Law to provide an update on UNCITRAL work on the cross-border treatment of enterprise groups in insolvency in the context of a conference on cross-border insolvency proceedings (Trier, Germany, 25-27 March 2009).

H. Electronic commerce

26. The Secretariat has participated in joint activities with national governments and agencies to promote UNCITRAL legislative texts on electronic commerce, as well as regional activities.

27. At the regional level, this included a High-level Symposium on Building Regional Capacity for Paperless Trade organized by the United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP) and the United Nations Economic Commission for Europe (UNECE) to discuss the enabling legal framework for single window and paperless trade environment (Bangkok, 24-25 March 2009).

28. Other activities included:

(a) The 2008 Annual Meeting of the International Distribution Institute (IDI), to make a presentation on the 2005 UN Convention on the Use on Electronic Communications in International Contracts (Turin, Italy, 6-7 June 2008); and

(b) A workshop on cyber legislation organized by the United Nations Conference on Trade and Development (UNCTAD) in collaboration with the Ministry of Foreign Affairs of El Salvador, and the support of the Spanish government, to present UNCITRAL legislative texts on electronic commerce to officials from CAFTA-DR and GRUCA members States (San Salvador, 23-27 March 2009).

29. *The Secretariat also participated at the “Tercer Taller Internacional de Comercio Electrónico de La Havana” coordinated by the Empresa de Gestión Informática y las Comunicaciones (GESEI) to lecture on UNCITRAL texts on e-commerce and their relevance to developing countries. In the course of the mission, separate meetings with representatives of the judiciary and Government were organized to discuss e-commerce legislation for Cuba and UNCITRAL legislative texts and provide information about the work of the WCO-UNCITRAL

Joint Legal Task Force on Coordinated Border Management incorporating the International Single Window (Havana, 9-16 February 2009).

I. Assistance with legislative drafting

30. In the context of a programme carried out by the World Bank-FIAS (The Investment Climate Advisory Service of the World Bank), comments were provided on a study concerning the Acte Uniforme du 17 Avril 1997 portant organisation des sûretés of the Organization for the Harmonisation of Business Law in Africa (OHADA).

31. Comments were also provided on various draft texts on the topic of arbitration, such as: the draft amendments to the law on arbitration of Mongolia; the draft Federal law on arbitration and the enforcement of arbitration awards of the United Arab Emirates; the draft law on arbitration of Vietnam; the draft law on International Commercial Arbitration Court of Uzbekistan and the draft International Arbitration Bill of Mauritius.

III. Coordination activities

32. In accordance with its mandate,[27] the UNCITRAL Secretariat participates in a number of the working groups and meetings of other organizations active in the field of international trade law to facilitate coordination of the work being undertaken.

1. International Institute for the Unification of Private Law (Unidroit)

33. The Secretariat participated in the following meetings of Unidroit:

(a) The Governing Council of Unidroit (Rome, 21-23 April 2008);

(b) The Working Group on the Unidroit Principles to contribute to the redrafting of the principles (Rome, 25-31 May 2008);

(c) The Diplomatic Conference for the adoption of the draft Unidroit Convention on Substantive Rules Regarding Intermediated Securities (Geneva, Switzerland, 8-12 September 2008); and

(d) The joint session of the Unidroit General Assembly and the Unidroit Committee of Governmental Experts for the finalization and adoption of the draft Model Law on Leasing (Rome, 10-13 November 2008).

2. Hague Conference on Private International Law

34. The Secretariat participated at the following meetings of the Hague Conference:

(a) Legal Liaison Meeting (The Hague, 14-15 May 2008); and

(b) The Council on General Affairs and Policy (31 March-2 April 2009).

---

[27] General Assembly resolution 2205 (XXI), sect. II, para. 8.

3. Other organizations

35. Other coordination activities have included participation and, in some cases, presentations on the work of UNCITRAL at the following meetings:

(a) General

(i) The Meeting of Scientific Committees for the Postgraduate and Masters Programmes of the International Training Centre of the ILO (Turin, Italy, 16 December 2008);

(ii) A conference sponsored by the International Law Association (ILA), British Branch: Does International Law Mean Business? — A Partnership for Progress (London, 15-18 May 2008); and

(iii) The annual International Trade Law Post-Graduate Course, upon invitation of the International Training Centre of the International Labour Organization (ITCILO) and the University Institute of European Studies, to lecture on the work of UNCITRAL (Turin, Italy, 24-25 March 2009).

(b) Dispute resolution

(i) A meeting of the International Chamber of Commerce (ICC), Commission on Arbitration to present the UNCITRAL/IBA project on the legislative implementation of the New York Convention and discuss synergy between the project and the ICC Project, which is aimed at preparing a report for use by practitioners on national rules of procedure for recognition and enforcement of foreign arbitral awards (Paris, 23-25 April 2008); and

(ii) The 2009 Arbitration Conference jointly organized by the Austrian Federal Economic Chamber (VIAC) and UNCITRAL to present the current work of UNCITRAL Working Group II on the revision of the UNCITRAL arbitral rules and the UNCITRAL/IBA project for an effective implementation and harmonized interpretation of the New York Convention (Vienna, 2-3 April 2009).

(c) Procurement

(i) A Consultation Meeting on Stabilization Clauses and Human Rights organized by the Special Representative of the Secretary General on Business and Human Rights, which also considered issues related to the Legislative Guide on Privately Financed Infrastructure Projects, on the UNCITRAL Model Law on Procurement and on future work on investment arbitration (London, 22 May 2008);

(ii) The Asia Anti-Corruption Conference, organized by the National Committee of Integrity and Transparency (NCIT) which touched upon issues relating to the UNCITRAL Model Law on Procurement (Doha, Qatar, 8-11 June 2008); and

(iii) The multi-stakeholder consultation on Stabilization Clauses and Human Rights organized by the Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises at the University of Pretoria (Pretoria, 21 October 2008).

(d) Secured transactions

The World Intellectual Property Organization (WIPO) Conference on

Intellectual Property Financing to present the Legislative Guide on Security Interests and UNCITRAL's work on security interests in intellectual property rights (Geneva, Switzerland, 10-11 March 2009).

(e) Insolvency

(i) A meeting of the World Bank's Insolvency and Creditors Rights Task Force, Working Group on Insolvency and Non-Bank Financial Institutions to discuss the implications for commercial insolvency regimes of recent insolvencies involving non-bank financial institutions and complex financial arrangements and to help improve the capacity of those regimes to address the legal and policy issues (Washington, 12-13 January 2009);

(ii) The World Bank's Finance and Private Sector Development Forum 2009 to discuss insolvency law reform and the interaction of the work by the World Bank and UNCITRAL (Washington, 25 February 2009); and

(iii) The 10th anniversary conference of the Swiss Institute of Comparative Law to participate in a round table with Unidroit, the Hague Conference and the European Union to discuss transnational experience in different areas of private international law; the UNCITRAL topic was insolvency law (Lausanne, Switzerland, 19 March 2009).

(f) Electronic commerce

The first meeting of the WCO-UNCITRAL Joint Legal Task Force on Coordinated Border Management incorporating the International Single Window to study of the legal aspects involved in implementing a cross-border single window facility with a view to formulating a comprehensive international reference document on legal aspects of creating and managing a single window (Brussels, 17-21 November 2008).[28]

---

[28] At its forty-second session, the Commission will have before it a note by the Secretariat (A/CN.9/678) containing an update on the progress of the work of the WCO-UNCITRAL Joint Legal Task Force on Coordinated Border Management incorporating the International Single Window.

(A/CN.9/675 and Add.1) [Original: English]

Note by the Secretariat on technical cooperation and assistance

ADDENDUM

CONTENTS

IV. Dissemination of information

1. A number of publications and documents prepared by UNCITRAL serve as key resources for its technical cooperation and 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. All recent publications are available both in hard copy and electronically.

A. Case Law on UNCITRAL Texts (CLOUT)

2. CLOUT, established for the collection and dissemination of case law on UNCITRAL texts, continues to be an important tool of the technical cooperation and assistance activities undertaken by UNCITRAL. The wide distribution of CLOUT in 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.

3. The system is regularly updated with new abstracts. The full text of the court decisions and arbitral awards are collected, but not published. As at the date of this note, 83 issues of CLOUT had been prepared for publication, dealing with 851 cases, relating mainly to the United Nations Convention on Contracts for the International Sale of Goods (CISG), the UNCITRAL Model Law on International Commercial Arbitration (MAL), the UNCITRAL Model Law on Cross-Border Insolvency (MLCBI) and the UNCITRAL Model Law on Electronic Commerce (MLEC).

4. The revised Digest of Case Law on the CISG was published both in hard copy (English version) and on the UNCITRAL website at the end of 2008. Translation into Spanish is being finalised; the Arabic, Chinese, French and Russian versions of the revised Digest are available on the UNCITRAL website.

5. As of February 2008, a CLOUT Bulletin is published every quarter. The Bulletin is aimed at strengthening the links between the Secretariat, its National Correspondents, its institutional partners and the international legal community. It provides information on the latest CLOUT developments and offers a brief summary of recent UNCITRAL technical assistance activities.

6. A CLOUT information brochure was published and distributed to inform a wide audience about the CLOUT system and, at the same time, promote voluntary contributions to the system to complement those received from the National Correspondents.

The network of National Correspondents

7. As agreed by the Commission at its 21st session in 1988, CLOUT relies on a network of national correspondents designated by Member States that are parties to a Convention or have enacted legislation based on a Model Law (see the User Guide A/CN.9/SER.C/GUIDE/1/Rev.1). The national correspondents, either as individuals or a specific organ or body, are expected to monitor and collect court decisions and arbitral awards and prepare abstracts of those that are considered relevant. Submission of abstracts from the national correspondents is subject to the availability of suitable case law in that country.

8. Currently, there are 88 national correspondents, representing 69 countries; some correspondents were appointed at the early stages of the system.

9. Experience suggests that after a number of years, changes in professional function, career interests and other professional developments may affect the level of involvement of national correspondents. Those appointed as national correspondents may no longer be in position to provide the information required by CLOUT or to actively participate in the CLOUT network. An additional consideration is the increasing interest in CLOUT as a result of the success and continuing expansion of the Willem Vis Moot. Significant numbers of current and former participants have developed an interest and expertise in the CISG and arbitration and have sought to contribute to the collection of cases reported in CLOUT.

10. The Commission might wish to consider how the collection of cases might be regularly sustained over time. This might be achieved, for example, by requesting Member States which have appointed national correspondents to reconfirm this

appointment at a regular interval, e.g. every five years. This option would enable the network to be systematically streamlined, retaining those correspondents who are willing to remain actively involved and at the same offering the opportunity to new experts to join. In considering such a possibility, the Commission may also wish to discuss how and when it might be achieved and, in particular, how it might apply to existing national correspondents.

11. To assist the network of national correspondents with any eventual change in the system administration, the Secretariat might revise and expand the existing guidelines so as to facilitate improved coordination.

12. While the national correspondents network is and should continue to be the principal support of the CLOUT system, there is the need to enhance the speed and completeness of the collection of case law in countries that already participate in the CLOUT system. There is also the need to ensure collection of case law from a wider range of countries, in particular from those that are currently under-represented in the system. For that reason, the Commission might wish to mandate the Secretariat to utilize all available sources of information that might supplement the information provided by the national correspondents. Where a national correspondent has been appointed, the Secretariat would carry out this task in collaboration with that correspondent.

Enhancing CLOUT

13. CLOUT plays an important role in the current global legal-economic context. It provides information in six languages on worldwide case law applying UNCITRAL texts, thus assisting legal practitioners, judges and law professors in their activity. It also provides the basis for the analysis of interpretation trends that is a key part of the case law Digests. Furthermore, the system contributes to the promotion of UNCITRAL legal texts since it demonstrates that the texts are the subject of case law from many different countries and that judges and arbitrators at different latitudes contribute to the refinement of their interpretation.

14. In order for CLOUT to remain a meaningful tool, however, the system requires a regular increase of the abstracts collected and control of their quality, regular maintenance and improvement of the search engine, regular coordination of the network of the national correspondents and monitoring of other sources of information on available case law. CLOUT also needs to be promoted among new potential users, in particular from economies in transition and developing countries. These activities are resource intensive and the Secretariat is currently stretching its available resources to ensure the coordination of the system. Given CLOUT development since its establishment and the expectation that collection and dissemination of case law on UNCITRAL texts will further increase, proper maintenance of the system and its capacity to meet the demands of increased abstract submission becomes key and requires the resources currently available to the Secretariat to be supplemented. The Secretariat is considering possible solutions to respond to this need, which would require funding outside the regular budget of the Division. The Commission might wish to assist the Secretariat by requesting Member States to provide active support in the search for appropriate funding sources at national level so as to ensure proper functioning of the system.

B. Website

15. The website, available in the six official languages of the United Nations, provides access to full-text UNCITRAL documentation and other materials relating to the work of UNCITRAL, such as publications, treaty status information, press releases, latest events, and news. Most official documents are provided via linking to the Official Document System (ODS), whereas some older documents are available directly from the UNCITRAL website. The website is maintained and developed at no additional cost to the Secretariat.

16. During 2008, the UNCITRAL website registered over one million visitors from various parts of the world with an average of 2,857 visits per day. About 55 per cent of visitors are from North America, 15 per cent from Western and Eastern Europe, 8 per cent from Asia, 7 per cent from Oceania and the remaining 15 per cent from South America, Africa and the Middle East. Approximately 45 per cent of the traffic is directed to pages in English, 30 per cent to pages in French and Spanish, and the remaining 25 per cent to pages in Arabic, Chinese and Russian.

17. The content of the website is updated and expanded on an ongoing basis. In particular, UNCITRAL official documents relating to earlier Commission sessions are continuously uploaded in the ODS and made available on the website under a project on digitization of UNCITRAL archives conducted jointly with the UNOV Documents Management Unit in Vienna. In 2008, about 200 additional official documents from 1972-1992 were made available on the UNCITRAL website.

C. Library

18. Since its establishment in 1979, the UNCITRAL Law Library has been serving research needs of Secretariat staff and participants in intergovernmental meetings convened by UNCITRAL. It has also provided research assistance to staff of Permanent Missions, other Vienna-based international organizations, external researchers and law students.

19. The collection of the UNCITRAL Law Library focuses primarily on international trade law and currently holds 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). Particular attention is now being given to expanding the holdings in all of the six United Nations official languages.

20. The UNCITRAL Law Library maintains an online 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. In 2008, the UNBIS Thesaurus and name authorities were integrated into the OPAC with the assistance of the United Nations Dag Hammarskjöld Library in New York and the United Nations Library in Geneva. The integrated bibliographic data helps to streamline the Library's cataloguing practices in accordance with the UNBIS cataloguing standards.

21. The UNCITRAL Law Library staff prepares for the Commission an annual Bibliography of writings related to the work of UNCITRAL. The bibliography includes references to books, articles, and dissertations in a variety of languages, classified according to subject (see document A/CN.9/673). Individual records of the Bibliography are entered into the OPAC, and the full-text collection of all cited materials is maintained in the Library collection. Monthly updates from the date of the latest annual publication are featured in the bibliography section of the website.

D. Publications

22. In addition to official documents, UNCITRAL traditionally maintains two series of publications, which include the texts of all instruments developed by the Commission and the UNCITRAL *Yearbook*. UNCITRAL Yearbooks 2002 through 2004 were published subsequent to the date of the previous note submitted to the Commission at its fortieth session in 2008 (A/CN.9/652 of 8 April 2008). A book on "Promoting confidence in electronic commerce: legal issues on international use of electronic authentication and signature methods" was published in February 2009 (the English version is currently available, the other official UN languages will be published soon). The collection of UNCITRAL legal texts on CD-ROM will be available in 2009.

23. Publications are regularly provided to support technical cooperation and assistance activities undertaken by the Secretariat, as well as by other organizations where the work of UNCITRAL is discussed, and in the context of national law reform efforts.

E. Press releases

24. 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 e-mail and are posted on the UNCITRAL website, as well as on the website of the United Nations Information Service (UNIS) in Vienna.

25. To improve the accuracy and timeliness of information received with respect to adoption of UNCITRAL model laws since such adoption does not require a formal action with the United Nations Secretariat such as is required with respect to treaties, and to facilitate the issue of press releases, the Commission may wish to request Member States to advise the Secretariat when enacting legislation to implement a model law.

F. General enquiries

26. The Secretariat currently addresses approximately 2,000 general inquiries per year concerning, inter alia, technical aspects and availability of UNCITRAL texts, working papers, Commission documents and related matters. Increasingly, these inquiries are answered by reference to the UNCITRAL website.

G. Information lectures in Vienna

27. On request, the Secretariat provides information lectures in-house on the work of UNCITRAL to visiting university students and academics, government officials and others. Since the last report lectures have been given to undergraduate and graduate students from universities and other academies, as well as to members of the legal profession from Germany, Georgia, India, Slovenia and the United States of America.

V. Resources and funding

A. UNCITRAL Trust Fund for symposia

28. In the period under review, contributions were received from Mexico and Singapore, to whom the Commission may wish to express its appreciation.

29. The costs of technical cooperation and assistance activities are not covered by the regular budget. The ability of the Secretariat to implement the technical cooperation and assistance component of the UNCITRAL work programme is therefore contingent upon the availability of extrabudgetary funding.

30. The UNCITRAL Trust Fund for symposia supports technical cooperation and assistance activities for the members of the legal community in developing countries, funding the participation of UNCITRAL staff or other experts at seminars 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.

31. The Commission may wish to note that, in spite of efforts by the Secretariat to solicit new donations, funds remaining in the Trust Fund will be sufficient only for a very small number of technical cooperation and assistance activities. Some funds remain available despite the projected expenditure for 2008 as efforts have been made to organize the requested technical cooperation and assistance activities at the lowest possible cost and with co-funding and cost sharing whenever possible. Once exhausted, requests for technical cooperation and assistance involving the expenditure of funds for travel or to meet other associated costs will have to be declined unless new donations to the Trust Fund are received or other alternative sources of funds can be found.

32. 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 demand for technical cooperation and assistance activities and to develop a more sustained and sustainable technical assistance programme. The Commission may also wish to request Member States to assist the Secretariat to identify sources of funding within their Governments.

B. UNCITRAL Trust Fund to grant travel assistance to developing countries that are members of UNCITRAL

33. In the period under review, a contribution was received from Austria, to whom the Commission may wish to express its appreciation.

34. 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.

35. 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.

36. 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.

VIII. STATUS AND PROMOTIONOF UNCITRAL LEGAL TEXTS

Status of conventions and model laws

(A/CN.9/674) [Original: English]

Not reproduced. The updated list may be obtained from the UNCITRAL secretariat or found on the Internet at www.uncitral.org.

Part Three

ANNEXES

I. SUMMARY RECORDS OF THE MEETINGS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Finalization and adoption of UNCITRAL Notes on cooperation, communication and coordination in cross-border insolvency proceedings

Summary record of the 889th meeting, held at Vienna International Centre, Vienna, on Wednesday, 1 July 2009, at 9.30 a.m.

[A/CN.9/SR.889]

Chairman: Mr. Soogeun Oh (Republic of Korea)

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

Finalization and adoption of UNCITRAL Notes on cooperation, communication and coordination in cross-border insolvency proceedings
(A/CN.9/WG.V/WP.86 and Add.1-3;
A/CN.9/666 and 671)

1. **The Chairperson** drew attention to the draft UNCITRAL Notes on cooperation, communication and coordination in cross-border insolvency proceedings contained in document A/CN.9/WG.V/WP.86, the compilation of comments by Governments contained in the three addenda thereto and the reports of Working Group V (Insolvency Law) on its thirty-fifth and thirty-sixth sessions contained in documents A/CN.9/666 and A/CN.9/671 respectively.

2. **Ms. Clift** (Secretariat) said that the Commission had agreed at its thirty-ninth session in 2006 that initial work to compile practical experience in negotiating and using cross-border insolvency agreements would be undertaken informally through consultations with judges, insolvency practitioners and other experts, and that a preliminary progress report would be submitted to the Commission at its fortieth session in 2007. Following further work and consultations in 2007 and 2008, Working Group V had considered a first draft of the Notes at its thirty-fifth session in November 2008 and decided to circulate them to Governments for comment. The comments had been taken into account in an amended version considered by the Working Group at its thirty-sixth session in May 2009. It had recommended, inter alia, amending the word "Notes" in the title to read "Practice Guide".

3. Since that session cross-border agreements had been adopted in two major cross-border insolvency cases, concerning Bernard Madoff and the Lehman Brothers. Both should, in the Secretariat's view, be included in the draft Notes. The Lehman Brothers agreement involved an enterprise group and the insolvency proceedings concerned members of the group in a number of States. Incorporation of a reference to the cases in the draft Notes would require only minor amendments and the addition of summaries to the annex. There had not been time to prepare and translate an appropriate text, but if the Commission authorized the Secretariat to proceed, it would edit and finalize the draft Notes in the light of the Commission's discussion.

4. The Commission might also wish to discuss a resolution on the draft Notes which had been drafted by the Secretariat.

5. **The Chairperson** invited general comments on the draft UNCITRAL Notes.

6. **Mr. Cooper** (International Association of Restructuring, Insolvency and Bankruptcy Professionals — INSOL International) said that the draft Notes were being adopted at an opportune moment in the light of the global financial crisis. As more cross-border agreements could be expected in the coming months, he encouraged the Secretariat to look into the possibility of maintaining a database of

relevant cases. The updating process should not, however, delay publication.

7. The draft UNCITRAL Notes had been widely welcomed at a Judicial Colloquium held two weeks previously in Vancouver and attended by some 80 judges from over 40 countries. The propriety of communication between judges had always been a matter of concern and the draft Notes sent out an appropriate signal in that regard. In the absence of any internationally accepted best practice, judges had previously relied on recommendations by professional bodies. The draft Notes confirmed that communication between judges was both appropriate and in the best interests of the economies involved.

8. **Mr. Redmond** (United States of America) said that the Working Group and the Secretariat had produced an excellent text providing valuable background information. In view of the ongoing financial crisis, it was also a timely and beneficial instrument. He supported the proposal to change the title to "Practice Guide".

Introduction, part I (Background) and part II (UNCITRAL Model Law on Cross-Border Insolvency: possible forms of cooperation under article 27)
(A/CN.9/WG.V/WP.86)

9. **The Chairperson** invited the Secretariat to introduce parts I and II of the draft Notes.

10. **Ms. Clift** (Secretariat) said that part I provided background information. Section I.A noted the inadequacy of both domestic and international legislative frameworks as a basis for coordination and cooperation in cross-border insolvency and section I.B reviewed various international initiatives in that regard.

11. Part II focused on the UNCITRAL Model Law on Cross-Border Insolvency, particularly the provisions concerning cooperation under article 27. Although the Model Law authorized cross-border cooperation and communication between judges and insolvency representatives, it did not specify how such cooperation and communication might be achieved in practice. Part II sought to provide more detail regarding the types of cooperation outlined in article 27, focusing on possibilities other than cross-border agreements, which were addressed in part III.

12. **Mr. Clark** (United States of America) said that, as an insolvency judge, he had frequently discussed the difficulty of implementing articles 25 to 27 of the Model Law with colleagues from around the world. The "Practice Guide" offered a comprehensive review as to how such communications could be accomplished in a manner compatible with the many different kinds of insolvency laws in force. Its clarity and detail were unsurpassed and it would prove extremely helpful for both judges and the administrators working with them.

13. **Mr. Marca Paco** (Plurinational State of Bolivia), referring to the definition of the term "court" in paragraphs 8 and 13 (f) of the glossary (section B of the introduction to the document), and in subsection III.B.3 entitled "Courts", said that his Government wished to know whether the authorities in all countries involved in a cross-border insolvency case had to be judicial bodies or whether they could also be administrative bodies if the jurisdictional and administrative structure of the country concerned so required. In particular, he asked whether the phrase "other authority competent to control or supervise insolvency proceedings" in paragraph 13 (f) of the glossary was applicable to an administrative body or whether the "other authority" must have judicial status in all cases.

14. **Ms. Clift** (Secretariat) said that the definition of the term "court" had been used since the adoption of the Model Law on Cross-Border Insolvency and it also appeared in the Legislative Guide. She confirmed that it was intended to include judicial and other types of authorities that supervised insolvency proceedings. For instance, the administrative body that supervised insolvency proceedings in Colombia would certainly be covered by the definition.

15. **Mr. Marca Paco** (Plurinational State of Bolivia) explained that a national supervisory body had formerly exercised jurisdiction in his country over the reorganization of companies that were at risk of insolvency. It had also dealt with cross-border issues, notably in a case in which it had ordered the reorganization of a bank to prevent insolvency. As a result of institutional restructuring, however, the new entity that performed the same function operated under the auspices of the Ministry

of Economy and Finance and was thus part of the Executive. He wished to know whether that circumstance might impede his country's ability to conclude cross-border agreements in the future.

16. **Ms. Clift** (Secretariat) said that the definition of the term "court" was intended to cover any body that supervised insolvency issues, whether or not it had judicial status. Cross-border judicial cooperation was only one form of cross-border cooperation in insolvency proceedings. In many jurisdictions, courts did not play a significant role in such cooperation, which was conducted through insolvency representatives.

17. **Mr. Redmond** (United States of America) said that great care had been taken to ensure that the terminology used in the draft Notes was consistent with that used in the Model Law on Cross-Border Insolvency and the Legislative Guide. The definitions in the Model Law and the Legislative Guide covered all kinds of judicial and administrative proceedings.

18. **Mr. Marca Paco** (Plurinational State of Bolivia) said that the assertion in the second sentence of paragraph 8 of the introduction to the draft Notes that an authority which did not have adjudicative functions (*cometido judicialmente resolutorio*) with respect to insolvency proceedings would not be regarded as within the meaning of the term "court" appeared to exclude the type of administrative body to which he had referred. He therefore proposed adding the words "or decision-making administrative functions" after the words "adjudicative functions".

19. **Ms. Fall** (Senegal) said that the first sentence referred to a judicial or other authority competent to control or supervise insolvency proceedings. The second sentence referred to an authority that belonged to a different category. She therefore proposed replacing "An authority" at the beginning of the second sentence with "Any other authority".

20. **Ms. Sanderson** (United Kingdom) expressed support for that proposal. She further proposed amending the definition of a court under "Terms and explanations" in section B.2 to read: "'Court': a judicial or other non-judicial authority, as defined by local law, competent to control or supervise insolvency proceedings".

21. **Mr. Marca Paco** (Plurinational State of Bolivia) said that his problem was with the words "*judicialmente resolutorio*" (adjudicative) in the second sentence of paragraph 8. A non-judicial body could not be described has having such functions.

22. **Mr. Clark** (United States of America) said that it might be helpful to include a definition of the kinds of administrative bodies that were involved in insolvency proceedings in countries such as the Plurinational State of Bolivia.

23. **Mr. Sorieul** (Secretary of the Commission) said that, unlike the French and English texts which referred only to adjudicative functions, the Spanish text referred to judicial decision-making functions. The Spanish text could therefore be amended to align it with the other versions.

24. **Ms. Otunga** (Kenya) expressed support for the Secretary's comment and pointed out that the definition in paragraph 8 had been taken from the UNCITRAL Legislative Guide on Insolvency Law.

25. **Mr. Marca Paco** (Plurinational State of Bolivia) proposed either deleting the phrase "does not have adjudicative functions with respect to these proceedings" or deleting the whole of the second sentence of paragraph 8.

26. **Ms. Sanderson** (United Kingdom) expressed support for the proposal to delete the second sentence.

27. **The Chairperson** said that, if he heard no objection, he would take it that the Commission agreed to delete the whole sentence.

28. *It was so decided.*

29. **The Chairperson** said he took it that the Commission wished to adopt the introduction, part I and part II of the draft Notes.

30. *It was so decided*.

Part III (Cross-border agreements)
(A/CN.9/WG.V/WP.86)

Section A: Preliminary issues

31. **The Chairperson** invited the Secretariat to introduce section III.A.

32. **Ms. Clift** (Secretariat) said that part III described existing practice with respect to the use of

cross-border agreements without suggesting that the practices described should be applicable in all jurisdictions. It did not suggest either that a cross-border agreement could be used to circumvent national law or to change the obligations of the parties under such law.

33. Section III.A identified some of the key issues that arose under cross-border agreements. While the use of such agreements had previously been confined to a relatively small number of countries, they were likely to spread concurrently with the increase in insolvency cases involving a multiplicity of jurisdictions. As each agreement was drafted for a specific case, the decision as to whether one was needed was a matter of judgement. An agreement might be necessary, for instance, in a case where different jurisdictions had ordered different kinds of relief with respect to their own proceedings or where different types of insolvency procedures were taking place in the States concerned, such as reorganization involving the replacement of management by insolvency representatives in one forum and the debtor in possession in the other forum.

34. There was no fixed timing for the negotiation of an agreement, which might take place before the proceedings, at the beginning of the case or during the proceedings as issues arose. Agreements were usually concluded between the insolvency representatives and sometimes also included the debtor or creditors. In some cases the courts were involved in the background to the negotiation of an agreement, but they did not formally appear as parties. The capacity to enter into an agreement depended on the applicable domestic law. In some States the insolvency representative's authority to do so was explicitly or implicitly recognized under insolvency law. In other States the consent of creditors or authorization by a court might be required.

35. There was no standard format for a cross-border agreement. In practice agreements had been reached in both oral and written form. In some jurisdictions written agreements were required for validity and were deemed preferable in order to create a record of what had been agreed. Standard provisions might be used at the beginning of each agreement, but the substance then tended to vary widely. Examples of common provisions included methods of communication between courts and issues such as amendment and termination of the agreement.

36. The legal effect of a cross-border agreement depended in some cases on court approval. The agreement would then constitute a court order and be enforceable as such. Alternatively, it might be regarded as a simple contract between the parties. Safeguard provisions were usually included to clarify that the agreement did not constitute a derogation from applicable law, court authority or public policy.

37. As insolvency proceedings were ongoing, a cross-border agreement needed to be flexible and to allow for amendment and even termination. Alternatively, the parties could first enter into a preliminary agreement and foresee the drafting of a second agreement or even more agreements at a later stage.

38. **Mr. Redmond** (United States of America) said that one of the difficulties in cross-border cases was that the proceedings could be duplicated in different jurisdictions, greatly diminishing the ultimate payment to creditors and companies' ability to reorganize. Insolvency representatives were trying to establish uniform procedures to avoid duplication and to ensure uniform treatment of creditors. The provisions in part III.A offered excellent guidance to practitioners and insolvency representatives seeking uniformity and also provided a tool that would assist the judiciary in determining whether the primary issues had been addressed in an agreement.

39. **Mr. Cooper** (INSOL International), endorsing the previous remarks, said that law reform was usually perceived as the solution when times got rough, but there was often an even greater need to develop institutional capacity to deal with problems. The best practice issues addressed in part III.A would prove extremely useful and the guidance offered would increase the cost-effectiveness of insolvency proceedings with consequent benefits for creditors, employees and other stakeholders.

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

40. **Mr. Bellenger** (France) said that the use of the term "international agreements" (*accords*

internationaux) in some passages of part III.A was unduly general and not very enlightening. He suggested using terms such as "international insolvency agreements" or "insolvency administration contracts" more systematically.

41. **Mr. Clark** (United States of America) said that the draft Notes referred to "cross-border agreements" and used terminology that was as generic as possible in order to anticipate the many different ways in which such agreements might be reached and to allow a measure of flexibility. In some jurisdictions an agreement might be drafted initially by insolvency practitioners and presented to the court for adoption or approval. In other jurisdictions the agreement might take the form of a memorandum of understanding between the administrators of insolvency proceedings, as was the case in Germany. In the recent case of the Lehman Brothers bankruptcy, it had been necessary to draft an agreement that would be acceptable in the many different jurisdictions involved, some applying civil law and some common law, and some with judiciaries that played a more active role than others in the process. By using a generic term, it had been possible to draft an agreement to which the right party in each jurisdiction could accede to the extent that local law permitted.

42. **Ms. Muindi** (Kenya) associated herself with the clarification made by the representative of the United States of America. She drew the attention of the representative of France to paragraph 9 of the introduction to the draft Notes, which further clarified the term "cross-border agreement".

43. **Mr. Bellenger** (France) said that the English term "cross-border agreement" was more specific than its French equivalent "*accord international*", which was extremely generic. He thought that the term "insolvency administration contract" or "cross-border insolvency agreement" should have been used throughout the draft Notes.

44. **The Chairperson** suggested that a more suitable French translation of the English term "cross-border agreement" should be sought.

45. **Ms. Fall** (Senegal) pointed out that the title of the draft Notes referred to "cross-border insolvency proceedings" (*procédures d'insolvabilité internationale*). It was therefore clear that all references to "cross-border agreements" (*accords internationaux*) concerned insolvency.

46. **Mr. Cooper** (INSOL International) said that the terms in question were rarely included in the final court documents on which agreement was reached. Such documents usually listed under a general title the cases and parties involved and then described the specificities of the case. The risk of there being an international agreement that could be deemed to have wider import was negligible.

47. **Mr. Komarov** (Russian Federation) emphasized that the focus should be on "insolvency" rather than on "cross-border". He therefore suggested that all references to "cross-border agreements" should be amended to read "cross-border insolvency agreements".

48. **Mr. Redmond** (United States of America), **Mr. Bellenger** (France) and **Mr. Schoefisch** (Germany) supported the proposal by the representative of the Russian Federation.

49. **Ms. Sanderson** (United Kingdom), supported by **Mr. Gandhi** (India), said that paragraph 13 (i) in the "Glossary" section clearly defined the term "cross-border agreement". It should, in her view, be sufficient to meet the concerns raised by several delegations.

50. **Mr. Sato** (Japan) said that the context in which the term "cross-border agreement" was used in the document was very clear.

51. **Ms. Muindi** (Kenya) asked whether the term "cross-border agreement" had already been defined in the Model Law on Cross-Border Insolvency or the Legislative Guide. If not, she was in favour of amending it in accordance with the proposal made by the representative of the Russian Federation.

52. **Ms. Clift** (Secretariat) said that the term had not been used in the Model Law on Cross-Border Insolvency or the Legislative Guide.

53. **The Chairperson**, proposing a compromise that would not sacrifice clarity to brevity, asked whether it was acceptable to use the term "cross-border insolvency agreement" in all titles and subtitles and "the agreement" in running text. The term would be clearly defined on its first appearance with the comment "hereinafter referred to as 'the agreement'".

54. *It was so decided*.

55. **Mr. Bellenger** (France), referring to paragraph 17 concerning the capacity to enter into a cross-border agreement, queried the statement that civil law courts lacked the judicial discretion available to common law courts. In some circumstances the contrary was the case and judges exercised considerably greater discretionary authority in civil law courts. He therefore proposed that the second sentence of the paragraph should be deleted.

56. **Mr. Schoefisch** (Germany) said that if the phrase "An agreement requiring approval by a court" at the beginning of the first sentence referred to a national law requirement in a civil law jurisdiction, the judge in question would have no problem because the statutory basis for a decision already existed. If it meant that the parties agreed that approval by a court was required, a problem might arise in certain civil law jurisdictions which did not require court approval. He therefore proposed amending the sentence to read: "If parties agree that court approval is necessary, they might face problems in certain civil law jurisdictions, as in these jurisdictions court approval is not regulated by law; in these cases, however, it is highly unlikely that parties will agree on those terms, as they know that they will face problems."

57. **Mr. Clark** (United States of America) expressed support for the proposal by the representative of Germany. However, he felt that it was unnecessary to refer to civil law jurisdictions and proposed the following alternative wording: "The parties to an agreement may desire to have court approval, but there may be difficulties in some jurisdictions in obtaining such approval." The draft Notes should perhaps also reflect the fact that insolvency practitioners were drafting ever more sophisticated agreements with the expectation that they might not require court approval.

58. **Mr. Bellenger** (France) said that there was no need to contrast the civil law and common law traditions in a way that suggested the inferiority of the former. The reason for the conclusion of a large number of cross-border insolvency protocols between common law countries was probably the fact that they had a common language.

59. **Mr. Cooper** (INSOL International) said that he agreed with the suggestion to remove references to civil law jurisdictions. A French court had recently found itself able to acknowledge and agree with practitioners entering into an agreement, although it could not find any basis for the court itself to seal the agreement. The court's action in that instance reflected a pragmatic acceptance that what was happening was in the best interests of the case, but it stopped short of formal "approval". The text to be adopted by the Commission should reflect such an approach.

60. **Mr. Schoefisch** (Germany) said that the rewording suggested by the representative of the United States took care of his delegation's concerns.

61. **The Chairperson** said that the Secretariat would revise the first sentence of paragraph 17 along the lines suggested by the representative of the United States.

62. **Mr. Schoefisch** (Germany) noted that the second sentence of paragraph 18 suggested that some judges might rule improperly because they were afraid of being held personally liable, which was certainly not the case. He therefore proposed replacing the words "in some civil law jurisdictions, judges perhaps might be held personally liable" with the following: "in civil law jurisdictions, judges generally act on the basis of written law. Acting outside the law may result in being personally liable, as is the case in other jurisdictions."

63. **Mr. Bellenger** (France) said that the simplest solution to the problems in paragraphs 17 and 18 would be to eliminate any mention of civil law jurisdictions and to refer instead to "some jurisdictions".

64. **The Chairperson** said he took it that the Commission wished to adopt section III.A (Preliminary issues) as revised to reflect delegations' comments and suggestions.

65. *It was so decided*.

Section B: Comparison of cross-border insolvency agreements

66. **Ms. Clift** (Secretariat), introducing section B, said that the purpose of the section was to promote a greater understanding of the specific content of

cross-border agreements and to show what could be and had been done in using such agreements in practice. The goal was not to devise a standard "one size fits all" agreement, but rather to describe the content and structure of a number of agreements used in recent cross-border cases, showing the different approaches taken to the same topics. As far as possible, an attempt had been made to identify the reasons for including different provisions in particular agreements. Section B covered a range of topics, including recitals, terminology, powers and responsibilities of courts, administration of the proceedings, allocation of responsibilities between the parties to the agreement, communication, amendment, revision and termination of the agreement.

67. Some issues, such as terminology and rules of interpretation, might be less controversial, and agreement might be easier to reach on them. Indeed a degree of standardization already appeared to be evolving with respect to those issues. Other items, such as provisions on courts, administration of the proceedings and allocation of responsibilities between the parties to the agreement might prove to be more difficult to address, as they touched upon weightier issues that might involve the applicable law in the different insolvency proceedings.

68. For example, a provision on the courts might allocate responsibility for specific issues, such as the sale of certain assets, to one court. Alternatively, it might set out the factors to be considered in determining which court should have responsibility for which functions; for instance, each court might be assigned responsibility for approval of transactions involving assets located within its jurisdiction. Some of the provisions affecting the courts might require court approval in order to be effective, although the same result might be achieved by agreement between the parties that did not involve the question of court approval.

69. Part B also contained a number of "sample clauses," which were not intended to be model clauses, nor was it suggested that they would form part of a "model protocol". They were included for illustrative purposes only.

70. The annex to the draft Notes contained a short summary of the cross-border agreements referred to in the body of the text. The purpose of the summaries was to present a basic idea of the case underlying the cross-border agreement and to provide references to agreements that were publicly available.

71. **Mr. Clark** (United States of America) noted that the value of compiling specific examples of cross-border insolvency agreements could not be overestimated. Countries facing cross-border insolvency cases for the first time often looked about for tools they could use, and the compilation in
section B would be an invaluable resource. The fact that it bore the imprimatur of UNCITRAL would enhance its authority in the eyes of users. The Secretariat deserved high commendation for the work it had done.

72. **The Chairperson** said that two very important cross-border insolvency cases had occurred recently — the Madoff and Lehman cases — and the Commission should authorize the Secretariat to update section B by adding information on those cases.

73. **Mr. Redmond** (United States of America) said that the Lehman case was probably one of the most extensive cross-border bankruptcy proceedings in history, while the Madoff case was perhaps the biggest financial fraud ever perpetrated, involving $50 billion and affecting investors in many countries around the world. The two cases provided instructive insights into how the underlying issues could be dealt with and it would be useful to include them in the draft Notes. Otherwise a substantial amount of history and experience would be lost.

74. **The Chairperson** said that, if he heard no objection, he would take it that the Commission wished to authorize the Secretariat to include information on the two recent insolvency cases and that it wished to adopt section III.B (Comparison of cross-border insolvency agreements) of the draft notes as so amended.

75. *It was so decided*.

76. **The Chairperson** said that the Working Group had proposed replacing the word "Notes" in the title with "Practice Guide". As the title was, in his view, too long, he suggested shortening it to "Practice Guide on Cross-Border Insolvency Cooperation"

and providing a full explanation of the title in the body of the text.

77. **Mr. Schoefisch** (Germany) and **Ms. Sanderson** (United Kingdom) supported the Chairperson's suggestion.

78. **Mr. Redmond** (United States of America), supported by **Ms. Fall** (Senegal), said that it would be useful to retain a reference to UNCITRAL in the revised title in order to make clear the origin of the product, given the credibility that UNCITRAL enjoyed in the legal community.

79. **The Chairperson** said he took it that the Commission wished to adopt the amended title "UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation".

80. *It was so decided*.

The meeting rose at 12.30 p.m.

Finalization and adoption of UNCITRAL Notes on cooperation, communication and coordination in cross-border insolvency proceedings *(continued)*

Summary record of the 890th meeting, held at Vienna International Centre, Vienna, on Wednesday, 1 July 2009, at 2 p.m.

[A/CN.9/SR.890]

Chairman: Mr. Soogeun Oh (Republic of Korea)

The meeting was called to order at 2.10 p.m.

Finalization and adoption of UNCITRAL Notes on cooperation, communication and coordination in cross-border insolvency proceedings
(A/CN.9/WG.V/WP.86 and Add.1-3; A/CN.9/666 and 671) (*continued*)

1. **The Chairperson** said that the only remaining issue with respect to the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation which had been adopted at the previous meeting was whether to incorporate the draft decision prepared by the Secretariat in the Guide. As it was available in English only for the time being, he invited the Secretariat to read it out.

2. **Ms. Clift** (Secretariat) read out the following draft decision:

> "*Noting* that increased trade and investment leads to a greater incidence of cases where business is conducted on a global basis and enterprises and individuals have assets and interests in more than one State,
>
> *Noting also* that where the subject of insolvency proceedings is a debtor with assets in more than one State or members of an enterprise group with business operations and assets in more than one State, there is generally an urgent need for cross-border cooperation in and coordination of the supervision and administration of the assets and affairs of those individual debtors and enterprise group members, including, as applicable, multiple parallel insolvency proceedings,
>
> *Considering* that cooperation and coordination in cross-border insolvency cases has the potential to significantly improve the chances for rescuing financially troubled individuals and enterprise groups,
>
> *Acknowledging* that familiarity with cross-border cooperation and coordination and the means by which it might be implemented in practice is not widespread,
>
> *Convinced* that providing readily accessible information on current practice with respect to cross-border coordination and cooperation for reference and use by judges, practitioners and other stakeholders in insolvency proceedings has the potential to facilitate and promote that cooperation and coordination and avoid unnecessary delay and costs,
>
> *Recalling* that the UNCITRAL Model Law on Cross-Border Insolvency provides a legislative framework that facilitates effective cross-border coordination and cooperation,
>
> 1. *Adopts* the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation as contained in working paper A/CN.9/WG.V/WP.86 and authorizes the Secretariat to add further information with respect to recently adopted cross-border agreements and to edit and finalize the text of the Practice Guide in the light of the deliberations of the Commission;
>
> 2. *Requests* the Secretary-General to publish the text of the *Practice Guide* and transmit it to Governments[, judicial institutions, courts] and other interested bodies and ensure that it becomes widely known and available;
>
> 3. *Recommends* that the *Practice Guide* be given due consideration, as appropriate, by judges, insolvency practitioners and other stakeholders involved in cross-border insolvency proceedings;
>
> 4. *Recommends* that all States continue to consider implementation of the

UNCITRAL Model Law on Cross-Border Insolvency."

3. **Mr. Marca Paco** (Plurinational State of Bolivia), referring to paragraph 2 of the draft decision, said that it was important, when describing the entities to which the Guide would be transmitted, to include decision-making bodies other than courts in order to make the scope of the Guide clear. Although he knew that the term "court" referred not only to a judicial court but also to an administrative court or other decision-making body, depending on the national legislation of the country concerned, he proposed inserting the words "and other decision-making bodies" after "courts" to make it clear that the paragraph encompassed the entire range of institutions linked to cross-border insolvency issues.

4. **Mr. Schoefisch** (Germany) said that his delegation fully supported the draft decision. With regard to paragraph 2, he proposed making it clear that Governments were requested to transmit the Practice Guide to interested parties. Moreover, if the square brackets in the paragraph were deleted, it would be helpful if the Secretariat could let his delegation know which institutions in Germany would be receiving a copy of the Guide.

5. **Mr. Redmond** (United States of America) proposed inserting the words "and to make the same available to judicial institutions, courts and other interested bodies" after "Governments" in paragraph 2.

6. **Ms. Clift** (Secretariat) suggested amending the text to read: "and transmit it to Governments with the request that it be made widely available to judicial institutions, courts and other interested bodies". There appeared to be agreement that the intention was to distribute the Guide as widely as possible.

7. **Ms. Sanderson** (United Kingdom) said that it was her understanding that the Guide would be made available on the UNCITRAL website, in which case it would simply be a matter of publicizing its availability. There would be no need to transmit the Guide but only to inform Governments and other interested parties of its availability.

8. **Ms. Downing** (Australia), endorsing the draft decision, said that the Practice Guide was an extremely useful resource that had the potential to be of great assistance to practitioners and other stakeholders.

9. **Ms. Muindi** (Kenya) also commended the high quality of the Practice Guide. Referring to the draft decision, she proposed that the short form of the title of the Guide be included in brackets immediately after the full title in paragraph 1 to ensure that whenever the title "Practice Guide" appeared it would be understood to refer to the "UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation".

10. **Mr. Gandhi** (India), commending the Practice Guide as an outstanding achievement, seconded the view that it should be made available in the public domain and hence widely accessible. As the task of transmitting the Guide would be difficult, he proposed replacing the phrase "and ensure that it becomes widely known and available" in paragraph 2 with "so that it becomes widely known and available".

11. **Ms. Clift** (Secretariat) suggested amending paragraph 2 to read: "*Requests* the Secretary-General to publish the text of the Practice Guide, including electronically, and to transmit it to Governments and other interested bodies so that it becomes widely known and available."

12. **Mr. Marca Paco** (Plurinational State of Bolivia) said that the Practice Guide could either be formally transmitted to Governments or simply published on the Commission's website so that it was widely accessible. If it was formally transmitted to Governments, the Secretariat could either attach an exhaustive list of bodies to which it should be made available or leave that decision up to Governments themselves.

13. **Ms. Clift** (Secretariat) clarified that it was standard practice for UNCITRAL texts to be formally transmitted to Governments, published on the UNCITRAL website and made available through United Nations publication outlets. She suggested amending paragraph 2 once more to read:

> "*Requests* the Secretary-General to publish the text of the *Practice Guide*, including electronically, and to transmit it to Governments with the request that the text be made available to relevant authorities so that it becomes widely known and available."

14. **The Chairperson** said he took it that the Commission wished to adopted the paragraph as so amended.

15. *It was so decided.*

16. **Ms. Sanderson** (United Kingdom) suggested

that in view of the fast-changing nature of insolvency law, as reflected in the fact that the Commission had been asked to incorporate the Madoff and Lehman cases in the Guide, the word "edit" in paragraph 1 of the draft decision should be replaced with the word "update". Other similar cases of major relevance could then be reflected in the text without the need for a full formal review.

17. **The Chairperson** said he took it that the Commission wished to adopted the proposed amendment to paragraph 1 and to incorporate the draft decision, as amended, in the Practice Guide.

18. *It was so decided.*

Reports of Working Group V on the work of its thirty-fifth and thirty-sixth sessions (A/CN.9/666 and 671)

19. **Ms. Clift** (Secretariat), introducing the reports of Working Group V on the work of its thirty-fifth and thirty-sixth sessions (A/CN.9/666 and 671), said that the report on the thirty-sixth session in May 2009 reviewed progress made with respect to the development of a text on the treatment of enterprise groups in insolvency. The Working Group had agreed that the work should constitute part three of the Legislative Guide on Insolvency Law, addressing both the domestic and international aspects of enterprise groups. The format of the other parts of the Guide, i.e. commentary and recommendations, would be maintained.

20. With respect to domestic issues, substantial agreement had been reached on some 40 recommendations addressing the domestic treatment of groups, which would constitute recommendations 199 to 239 of the Legislative Guide. Some of the purpose clauses needed to be revised and the draft recommendations on post-commencement finance required further consideration. A substantial part of the commentary had been prepared but not yet discussed. The Secretariat intended to revise the existing version to take account of the deliberations of the Working Group and the development of the recommendations and to submit the revised commentary to the Working Group at its thirty-seventh session.

21. Turning to international issues, she said that the Working Group had considered some 12 draft recommendations on the international treatment of groups at its thirty-sixth session. The draft recommendations were largely based on the articles of the UNCITRAL Model Law on Cross-Border Insolvency, specifically articles 25 to 27. They fleshed out the notions of cooperation and communication among courts, between courts and insolvency representatives, and among insolvency representatives, and indicated how such cooperation might be undertaken. They addressed topics such as coordination of hearings, use of cross-border agreements and appointment of the same insolvency representative in multiple proceedings, building on one of the domestic recommendations. A commentary to accompany the draft recommendations on international issues would be prepared and submitted to the Working Group for consideration at its thirty-seventh session.

22. Accordingly, the Working Group would have before it the revised recommendations on both domestic and international issues and the accompanying commentary. If the substance of that material was generally acceptable to the Working Group, it might be possible to circulate it to Governments for comment at the end of 2009 with a view to having it ready for finalization and adoption by the Commission at its forty-third session in 2010.

23. She noted that the treatment of enterprise groups in insolvency was currently of considerable interest in the context of the global financial crisis, and that other organizations were likely to be considering the topic in the near future as they reviewed their insolvency laws. In particular, the European Union might do so in the context of reviewing European Council Regulation No. 1346/2000.

24. **Mr. Sorieul** (Secretary of the Commission) drew the Commission's attention to the need to discuss the possibility of establishing priorities for its forty-third session, since a number of Working Groups hoped to conclude their work during 2009 so that the results would be ready for adoption by the Commission in 2010. If the Commission were to consider final products in the areas of insolvency, arbitration and public tendering and, in addition, a legislative guide on securities in 2010, the agenda would be extremely full and would require a four-week session. It was not certain whether a meeting room at the United Nations Secretariat in New York could be reserved for four weeks.

25. **Mr. Burman** (United States of America) said that it would be inappropriate to establish priorities at the current session. The Secretariat should first ascertain how much time would be available to the Commission at its next session and then, following the respective meetings of the Working Groups later in 2009, determine which texts were ready for final

approval and how much work was likely to be needed at the plenary itself. On that basis it would be possible to take a reasoned decision as to how much work could be accommodated.

26. **Mr. Bellenger** (France) said that while the Working Group was to be commended for its excellent work, the issue of post-commencement finance continued to give rise to serious problems. In particular, the provision of post-commencement finance by one group member subject to insolvency proceedings to another group member subject to similar proceedings was a dangerous possibility, since it was potentially prejudicial to the interests of creditors. The French delegation had on several occasions expressed reservations in that regard. As there appeared to be no consensus on the matter in the Working Group, further discussion was required.

27. It appeared that the idea of identifying a coordination centre in an enterprise group had been set aside. He requested clarification as to whether there would any further discussions of the issue.

28. Coordination was required as a matter of urgency between Working Group V and Working Group VI, particularly with regard to the issue of the impact of insolvency on a security right in intellectual property. It was important to ensure that the work was concluded before the Commission's forty-third session.

29. **Ms. Clift** (Secretariat) said that the Working Group had decided not to proceed with the coordination centre issue, primarily because, while it would be valuable to have one entity within an enterprise group leading the restructuring of the whole group, it had proved too difficult to reach agreement on the concept. It would also be too difficult to determine how a unilateral decision to designate a coordination centre could be made binding on any other jurisdiction by way of a recommendation. If it was not binding, no legal consequences flowed from making the determination.

30. With regard to intellectual property, at the request of Working Group VI, Working Group V had considered and approved at its thirty-sixth session a commentary drafted by Working Group VI that addressed a number of issues previously considered by Working Group V. It was her understanding that all issues relating to insolvency and intellectual property had thus been addressed.

31. **Mr. Redmond** (United States of America) said that when the project on enterprise groups was launched, a colloquium had been held to determine the scope of the work to be accomplished. Although there had been clear support for a project that was complementary to work on the UNICTRAL Legislative Guide on Insolvency Law, there had also been considerable uncertainty as to how much could be accomplished, given the complexity of many of the issues involved. However, the financial issues facing countries worldwide had highlighted the urgency of the work and a great deal of progress had since been achieved. Complex issues such as substantive consolidation had been fully defined and resolved through consensus among Member States and observers, and extensive discussions on the issue of post-petition financing at the Working Group's thirty-sixth session had resulted in considerable clarification and refinement. While several issues were pending and further refinements were required, the product was mature and should be ready for consideration by the Commission at its forty-third session.

32. **The Chairperson** said he took it that the Commission wished to take note of the reports of Working Group V as contained in documents A/CN.9/666 and 671.

33. *It was so decided.*

Possible future work of Working Group V

34. **Mr. Burman** (United States of America) said that the growing demand for work by UNCITRAL through Working Group V reflected the current economic circumstances, which had given States the incentive to contemplate drafting a model law based on the Legislative Guide and the Commission's other work. That task might have been regarded as too difficult some three years previously, but consultations over the past six months had led to the conclusion that it could now be achieved. His delegation therefore proposed that it should be the focus of the Working Group's future work.

35. **Mr. Redmond** (United States of America) said that the Legislative Guide formed an excellent basis for moving forward in the development of a new model law. Together with the World Bank Principles for Effective Insolvency and Creditor Rights Systems, the Guide was now recognized as the international standard for insolvency reform. Given the current global financial difficulties, many countries would be seeking to review and reform their insolvency laws, and the European Union would be reviewing European Council Regulation No. 1346/2000 in 2010. The new model law could

complement that process, since the issue of the centre of main interests (COMI) and its application in different areas of the world had created a certain degree of unpredictability. The project could be conducted along the same lines as the Legislative Guide and in close coordination with various international organizations. He suggested that it would be an appropriate time for the Secretariat to prepare a study note or conduct an evaluation of the project which could be discussed by Working Group V at its thirty-seventh session.

36. **Ms. Blanchard** (Canada) said that the proposal made by the United States delegation, while interesting, would involve an enormous amount of work. Nonetheless, the possibility should be explored. However, her delegation would have to consult the Canadian authorities to determine whether there was sufficient interest in and advantage to be drawn from pursuing the idea further. Canada had recently undertaken comprehensive reform of its insolvency legislation. A new law, which had taken several years to draft, had been adopted but had not yet entered into force.

37. **Mr. Cooper** (International Association of Restructuring, Insolvency and Bankruptcy Professionals — INSOL International), welcoming the United States proposal, said that there was a great deal of benefit to be gained from converting the Legislative Guide into a model law. INSOL International had recently reviewed the insolvency laws of about 40 States worldwide and had found some legislation so deficient that the demand for insolvency law reform was probably greater than at any time since UNCITRAL had begun its work on the Model Law on Cross-Border Insolvency in 1993. A number of countries had enacted legislation that showed a high degree of conformity with the Model Law and it was fairly easy to identify the small number of areas in which they had found it desirable to adopt a different approach. There was now a tremendous need for a model law on the basis of which countries could develop their own insolvency legislation.

38. There was also a global need for greater clarity as to the impact of insolvency on financial instruments. He further suggested undertaking a study of financial derivatives and the insolvency of financial institutions, with respect to which existing insolvency legislation was inadequate.

Eighth Judicial Colloquium

39. **Ms. Clift** (Secretariat) said that UNCITRAL had held the eighth Judicial Colloquium in Vancouver on 20 and 21 June 2009 in conjunction with the World Bank and INSOL International. Some 80 judges from around 40 States had attended the Colloquium, which had focused on cross-border insolvency coordination and cooperation. A key issue was cross-border judicial communication, how it could be achieved, the kind of legislative authority that was required, whether communication should be limited to procedural matters or whether substantive issues could be addressed, the safeguards that would be needed to protect the interests of parties and ensure the independence of judges, and how to deal with differences in language and in the understanding of legal concepts. There had been broad agreement that judges needed to be familiar with those issues and that such forums provided an excellent opportunity to discuss them. The Colloquium had also considered how cross-border proceedings might be coordinated in practice and how they might be approached in specific jurisdictions.

40. The adoption of the UNCITRAL Model Law on Cross-Border Insolvency had also been discussed. The participants included judges both from States that had adopted the Model Law and from States that had not. They heard that Uganda was in the process of adopting the Model Law and that Mauritius had adopted it recently. The purpose of the Model Law had been discussed as well as its relationship to European Council Regulation 1346/2000. Concern had been expressed among some judges regarding cases involving hedge funds and the recognition of cases on a basis other than that provided for in the Model Law, for instance insolvency proceedings that originated in a jurisdiction that was neither the debtor's centre of main interests (COMI) nor a jurisdiction where the debtor had an establishment. The participants had emphasized the need to ensure consistency of interpretation of the Model Law, especially with respect to COMI and the investigations that a court might be required to conduct when confronted with an application made on that basis.

41. The judges had proposed a number of topics for future colloquia, for instance insolvency law in general and more detailed consideration of the Model Law. They had also expressed an interest in discussing hypothetical cases in small groups of judges to identify possible solutions, including those available in their respective jurisdictions.

42. The Secretariat was preparing a short report on the Colloquium that would be posted on the

websites of UNCITRAL, the World Bank and INSOL International.

43. **Mr. Clark** (United States of America) expressed appreciation of UNCITRAL's role in bringing judges together for the Colloquium. Speaking as a judge, he said that the opportunity to meet colleagues from around the world and to work with them was of inestimable value. Greater acquaintance and contact encouraged judges to be less obstructive and more willing to find solutions when they were working on a case that involved cooperation with another jurisdiction.

44. **The Chairperson** thanked Working Group V and the Secretariat for their hard work on cross-border insolvency issues, and expressed the hope that further substantial progress would be made before the Commission's next session.

The meeting rose at 3.30 p.m.

Draft UNCITRAL Model Law on Public Procurement

Summary record of the 891st meeting, held at Vienna International Centre, Vienna, on Thursday, 2 July 2009, at 9.30 a.m.

[A/CN.9/SR.891]

Chairman: Mr. Soogeun Oh (Republic of Korea)

The meeting was called to order at 10.15 a.m.

Draft UNCITRAL Model Law on Public Procurement (A/CN.9/664, 668 and 672; A/CN.9/WG.I/WP.68 and Add.1; A/CN.9/WG.I/WP.69 and Add.1-5; A/CN.9/XLII/CRP.2 and A/CN.9/WG.I/XV/CRP.2)

1. **The Chairperson** invited the Secretariat to review the work undertaken by Working Group I (Procurement) on the updating of the UNCITRAL Model Law on Procurement of Goods, Construction and Services (the Model Law) since its thirty-seventh session in 2004.

2. **Ms. Nicholas** (Secretariat) said that the Working Group's mandate was to update the Model Law to reflect new practices, in particular those resulting 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. An important aspect of the mandate was that the review should not depart from the basic principles of the Model Law. A draft revised text of the Model Law was being presented to the Commission at its current session (A/CN.9/WG.1/WP.69 and Add.1-5).

3. Following the entry into force of the United Nations Convention against Corruption (UNCAC) in December 2005, the Commission had requested the Working Group to consider the consistency of the Model Law with the provisions of the Convention. In particular, it was asked to take up the question of conflicts of interest and declarations of interest, which had not been addressed in the Model Law. The Working Group had also considered defence procurement and the broad use of socioeconomic criteria in procurement in its deliberations. While the main parameters of most of the issues had been settled, further debate on some aspects was required.

4. The Working Group had begun to discuss possible revisions to the Model Law at its sixth session on 30 August 2004 and had continued its work at ten subsequent sessions. The early sessions had focused on three key subjects in respect of which the Working Group was recommending entirely new provisions or substantial amendments: the use of electronic communications in public procurement, electronic reverse auctions and framework agreements. While it had reached agreement in principle on most of those provisions, some drafting issues were outstanding. Later sessions had focused on procurement of services, alternative procurement methods and simplification and standardization of the Model Law, and new provisions and substantial amendments were being considered.

5. She proposed to review progress on the various issues that the Working Group had identified, beginning with electronic communications. The Working Group had recommended new provisions to allow for the use of electronic communications in the procurement process in a new article 8 of the draft revised Model Law, which would address the form and means of communications together, replacing article 9 of the 1994 text which addressed only form. Article 8 had been drafted to provide certainty as regards the form and means of communications that could be used. It would not distinguish between paper-based and electronic means of communication and would not refer to any particular medium. All means of communication would operate on the basis of functional equivalence. Hence, information should be in a form that provided a record of its content and was accessible for subsequent reference. In other words, communications recorded in writing might be required, but whether the writing was on paper or on screen was not prescribed. Draft article 8 allowed

for electronic tendering, and it would also ensure equality for electronic and traditional publication of procurement notices.

6. To address possible concerns regarding the use of electronic commerce techniques, safeguards addressing confidentiality, traceability and integrity had been included. Most importantly, the standards that had previously been applicable to paper-based communications were equally applicable to electronic communications under the draft revised Model Law. In particular, no means or form of communication should be used to restrict access to procurement. The provisions would also ensure transparency and predictability by requiring the procuring entity to specify any particular requirements as to the form of communications and the means to be used at the beginning of the procurement proceedings.

7. Electronic reverse auctions (ERAs) involved online, real-time competition between the procuring entity and a number of suppliers. The term "reverse" referred to the fact that the suppliers bid prices downwards to win the procuring entity's contract. In view of the enormous potential benefits in terms of price savings, the Working Group was recommending that provision for such auctions in electronic form should be included in the draft revised Model Law. Auctions in a non-electronic form, on the other hand, presented risks of collusion. The use of ERAs would be subject to certain conditions, and procedural rules would be applicable both to those that were a phase in other procurement methods and to those that were a stand-alone procurement method. The Working Group's recommendations were applicable only to the type of auction in which the best bid according to the award criteria was identified automatically at the end of the auction process. Other types that required subsequent assessment were deemed to involve unacceptable risks. The system operating the electronic reverse auction was thus required to provide for automatic re-evaluation of bids as they were revised during the auction, so that bidders knew at all times whether or not their bid was the winning one. With regard to non-price factors, the Working Group had concluded that they might complicate the process, make it less reflective of costs and render it less transparent.

8. Studies of electronic reverse auctions had shown that ERAs might induce bids at prices that were unsustainably low, entailing a performance risk. The Working Group had concluded, however, that the risk could arise in any procurement procedure and was probably no greater in electronic reverse auctions than in any other procurement procedure, at least in the long term. It was therefore recommending provisions in the draft revised Model Law that would require the procuring entity to examine the risk of an abnormally low submission, both when evaluating the submission and when examining the qualifications of suppliers. Only if there had been such an investigation, and the procuring entity had indeed concluded that the submission was abnormally low and that there was a performance risk, could the procuring entity reject the submission on that ground. It constituted a very limited and rigorous exemption from the general principle that individual bids or other offers could not be rejected because of the risk of corruption that such rejection might entail.

9. The Working Group had also considered framework agreements in great detail. They were two-stage procurements in which one or more suppliers concluded a framework agreement with the procuring entity at the first stage and procurement contracts in the form of orders at the second stage. Framework agreements had not been addressed in the 1994 Model Law but they were now widely used in practice and had several advantages, such as reductions in administrative and transaction costs and transaction times because certain steps in the procurement process were conducted once for what would otherwise be a series of procurements, and security of supply.

10. The Working Group was recommending provisions in the draft revised Model Law for three types of framework agreement. The first was a "closed" framework agreement, in which the specification and all terms and conditions of the procurement were set out in the framework and there was no further opening of competition between the suppliers at the second stage. It might be concluded with one or more suppliers. The second was a "closed" framework agreement, which set out the specification and the main terms and conditions of the procurement but involved a further competition among the supplier-parties to the

framework agreement before the procuring entity awarded procurement contracts. It was always concluded with more than one supplier. The third was an "open" framework agreement, which was a framework agreement concluded with more than one supplier and involving a second-stage competition between all the supplier-parties. It was envisaged that the open framework agreement would be operated electronically and would be used for simple procurement. As in the case of ERAs, framework agreements would be subject to general conditions, and specific procedures would be applicable to each type. Some issues in that regard had not yet been resolved.

11. Certain risks arose in framework agreements, particularly those that were concluded between a defined group of suppliers and the procuring entity. As the market was effectively closed for the duration of the agreement, effective competition might be undermined. There was also some risk of collusion between suppliers during the currency of a framework agreement and it could be difficult to ensure effective monitoring of agreements. The Working Group therefore recommended that States should be required to impose a maximum duration for closed frameworks so that they could not be used to exclude suppliers from competition for long periods. The Working Group had also given careful attention to ensuring transparency by requiring a series of public notices throughout the process.

12. An alternative to framework agreements was suppliers' lists. The Working Group had initially agreed that, whether or not they were viewed as consistent with the basic principles, aims and objectives of the Model Law, such lists were used in practice and their operation should therefore be subject to minimum standards. However, the Working Group had later concluded that the topic need not be addressed in the draft revised Model Law because the flexible provisions addressing framework agreements (particularly open framework agreements) would be sufficient to allow for the benefits that suppliers' lists were reputed to provide and would avert some of the risks. As that point was not universally accepted in the procurement community, the reasons for the Working Group's conclusion would be set out in some detail in the Guide to Enactment, which would also address the well-documented concerns associated with lists, such as their use in a non-transparent and sometimes inappropriate way to restrict market access, even where controls such as permanently open lists and simple registration procedures had been put in place, and even where lists were intended to be optional.

13. The Working Group had agreed at its sixth session that the draft revised Model Law should retain the various options for the procurement of services but that the Guide to Enactment should be more expansive in addressing the type of services and relevant circumstances in which the different methods should be used. The Working Group had also agreed to reconsider the use of alternative methods, the conditions governing their use and whether the whole set of methods should be retained. An overall review of such procurement methods had therefore become a core element of the simplification and standardization exercise.

14. The Working Group had noted some overlap between two of the services selection procedures and the request for proposals procedure in the Model Law. Moreover, all of the procedures that could be used for goods and construction could also be used for services, so that separate provisions might be superfluous. The common features were: there could be open solicitation starting with a public advertisement or direct solicitation starting with suppliers; proposals were submitted against a single set of specifications that could not be changed; evaluation criteria could concern the relative managerial and technical competence of the supplier or contractor; and price was considered separately and after completion of the technical evaluation. The only procedure that was distinct from the others in the Model Law was the services selection procedure with consecutive negotiations.

15. Some delegations had accordingly proposed a single negotiated procurement method for any type of procurement, to be called a "Request for proposals with competitive dialogue", which had been considered in detail at the Working Group's fifteenth and sixteenth sessions. The outcome was presented to the Commission as a new procurement method in document A/CN.9/XLII/CRP.2. The main challenges in negotiated procurement consisted in: striking a balance between discretion or flexibility (designed to achieve the best value for money) and

regulated procedures aimed at preventing abuse of the discretion conferred; ensuring sufficient transparency (disclosing the rules of the game in advance) while leaving scope for negotiation; and allowing the procuring entity some measure of control over the number of suppliers with which it negotiated. The latter aim could be achieved through pre-qualification, pre-selection, assessment of responsiveness or exclusion of technical solutions. Another issue was which aspects of the potential procurement were to be negotiated during the dialogue phase.

16. Although the proponents of the negotiated procurement method had intended that it should replace other methods involving negotiations, a number of delegations were in favour of retaining the other methods (including competitive negotiations, two-stage tendering and perhaps consecutive negotiations) for specific circumstances such as urgent procurement following a catastrophe. As the introduction of additional procurement methods was contrary to the principle of simplification and standardization, the Working Group had left it to the Commission to determine which methods should be retained.

17. The conditions governing the use of alternative methods had been reconsidered. Under the 1994 text, two-stage tendering, requests for proposals and competitive negotiation could be used under the same conditions. Restricted tendering or direct solicitation in the case of services could be used when the goods, construction or services were available from only a limited number of suppliers or contractors. The transparency provisions applicable to those methods were not fully consistent or practicable. Some of the conditions in question could also justify the use of single-source procurement, which was the least beneficial method as it completely eliminated competition. The Working Group had decided to reformulate the provisions to require the procuring entity to use the most competitive method available so that single-source procurement would be permissible only in an emergency. Open international solicitation should thus take place by default unless restricted or domestic tendering was justified. The reformulated provisions would need to be finally settled once the various procurement methods and their normal uses had been finalized.

18. Although the Working Group had agreed to simplify and streamline the Model Law by removing repetitions, inconsistencies and unnecessarily detailed provisions, current indications were that there might be more methods than previously, and the Commission was invited to consider how to deal with that situation.

19. To promote simplification and a harmonized legal regime under the Model Law, the Working Group had agreed to remove the defence and national security blanket exemptions because not all procurement in those sectors was sensitive. As some defence procurement could be highly sensitive, however, it might be necessary to allow for the preservation of confidentiality through the suspension of some transparency requirements.

20. Tendering proceedings had been addressed in the 1994 text in far greater detail than other procurement methods. As many of the rules addressing tendering proceedings were of general application, the Working Group had combined all such principles and procedures in chapter I of the revised Model Law. They included: standard rules governing the choice of procurement method and open or direct solicitation; description of procurement; evaluation criteria; optional recourse to tender securities in all procurement methods; pre-qualification proceedings; confidentiality; and acceptance of tender and entry into force of the procurement contract.

21. The Commission was invited to consider whether chapter I should include other provisions relating, for example, to requests for expression of interest and general rules governing clarifications and modifications during the procurement process.

22. The draft revised Model Law no longer distinguished between procurement methods pertaining to goods or construction, on the one hand, and services, on the other. The focus was now on complexity and the ease or otherwise of identifying and evaluating what needed to be procured. If detailed specifications or characteristics could be formulated at the outset and evaluated through quantifiable and transparent criteria, the procurement would not need to involve negotiations. In addition to the normal tendering method, the relevant methods were open or restricted tendering (one-envelope system), open or restricted request

for proposals without negotiation (two-envelope system), a request for quotations or an ERA procedure. At the other end of the spectrum, where specifications or characteristics could not be evaluated through quantifiable criteria, the procurement methods would involve negotiations such as competitive dialogue. While a slightly different approach was being adopted to the identification of procurement methods, the basic principles from 1994 would not change, with tendering remaining the default method and with the conditions governing the use of single-source procurement remaining robust.

23. The Working Group had also formulated a single set of criteria for the evaluation and comparison of tenders. Draft article 12 required such criteria to be relevant to the subject matter of the procurement and, as far as possible, to be objective and quantifiable. They were to be disclosed at the outset of the procurement together with any margins of preference, relative weights, thresholds and the manner in which the latter would be applied. The principles had been agreed by the Working Group but the details had not yet been finalized.

24. The Working Group had indicated that it would review the manner in which the use of procurement to promote industrial, social and environmental policies was addressed in the Model Law, for example by formulating additional guidance as to how transparency and objectivity might be enhanced. The issues were set out in document A/CN.9/WG.I/XV/CRP.2. As the aim in many cases was to allow the enacting State to protect its domestic economy, non-objective factors could be taken into account by the procuring entity in determining the successful tender. The Commission would be invited to consider merging some of the provisions of the Model Law. A particularly important question was whether all socioeconomic factors should be treated as evaluation criteria.

25. Some systems, such as the Government Procurement Agreement of the World Trade Organization, addressed socioeconomic criteria as qualification issues, i.e. as eligibility conditions for participation. Informal consultations had revealed that there was little support for the idea, particularly in the context of a provision under the draft revised Model Law that would allow the exclusion of foreign competition from domestic procurement in some circumstances. Some national systems included set-asides for minorities which might have an impact on competition.

26. The United Nations Convention against Corruption required procurement systems to have an effective system of domestic review to ensure the availability of remedies. The provisions regarding review under the 1994 Model Law were optional, administrative and limited, and made no provision for the independence of the review. The Working Group considered that the provisions were insufficiently robust to comply with UNCAC, and recommended, inter alia, that they be made mandatory, that the list of exceptions be deleted, and that any decision regarding the procurement method should be open to challenge. The Working Group also recommended the introduction of a standstill period before a procurement contract came into force to provide a window for an effective review procedure. The extent of the relief that might be granted where a problem arose had not been finalized, and the provisions on relief in the Government Procurement Agreement appeared to differ from those in the 1994 text of the Model Law.

27. The issues raised by community participation in procurement related primarily to the planning and implementation phases of a project. Given the growing importance of such participation and the possible need for enabling legislation, the provisions of the Model Law had been reviewed to ensure that they presented no impediment to the inclusion of a community participation requirement in project-related procurement. The Guide to Enactment would provide further guidance.

28. The Model Law permitted procuring entities to call for the legalization of documents from all participants, which could be time-consuming and expensive for suppliers. In addition to the deterrent effect, all or part of the increased overheads for suppliers might be passed on to procuring entities. The Working Group therefore recommended amending the provisions of the Model Law to allow the procuring entity to require legalization of documentation from a successful supplier alone.

29. Finally, with regard to conflicts of interest, UNCAC required enacting States to provide, where appropriate, for measures to regulate matters regarding personnel responsible for procurement, such as a declaration of interest in particular public procurements, screening procedures and training requirements. There were no equivalent provisions in the 1994 Model Law and the Working Group considered that the revised text should include an appropriate reference thereto.

30. It was the Secretariat's understanding that the Commission might wish to consider setting up a committee of the whole to consider the revised text in detail.

31. **Mr. Marca Paco** (Plurinational State of Bolivia) asked whether the provisions of the draft revised Model Law would allow for single-source procurement by a Government as a means of expanding public investment and promoting growth and efficiency in specific economic sectors, such as municipalities and local communities. While the monetary value of such procurement was not very great in absolute terms, the economic opportunities provided were of great importance to the sectors concerned. Where the aim was to provide immediate benefit in a given sector, standard procurement procedures were too time-consuming. His delegation hoped that such considerations could be reflected in the draft revised Model Law, so that certain categories of suppliers could be used more intensively as a means of pursuing specific social policy objectives.

32. **Ms. Nicholas** (Secretariat) said that draft article 7 set out the conditions to be met if a procuring entity wished to resort to single-source procurement. Subject to the conditions laid down in that article, a relevant condition being that the procuring entity should give public notice and adequate opportunity for comment, single-source procurement could be used to promote the socioeconomic policies referred to elsewhere in the draft revised Model Law. In theory, therefore, a socioeconomic goal such as public investment would be covered. The matter could be discussed in greater detail when the committee of the whole took up document A/CN.9/WG.I/XV/CRP.2.

The meeting was suspended at 11 a.m. and resumed at 11.40 a.m.

33. **The Chairperson** invited the Commission to comment on the proposal to extend the mandate of Working Group I to include socioeconomic considerations and the defence industry exemption.

34. **Mr. Frühmann** (Austria) said that his delegation supported the proposal.

35. **Mr. Ekedede** (Nigeria) said that his delegation supported the inclusion of socioeconomic issues in the Working Group's mandate. He took it that such issues encompassed the concepts of best value for money, transparency, flexibility and accountability. The procurement of goods, construction and services was of primary importance for developing countries, where it often accounted for more than 50 per cent of the budget. It was also an area that was riddled with unconventional practices, not to say corruption. The Model Law was intended to guide developing countries and encourage best practices. Its provisions should empower domestic suppliers in developing countries by protecting them from undue competition.

36. **The Chairperson** said that, if he heard no objection he would take it that the Commission endorsed the inclusion of socioeconomic considerations and the defence industry exemption in the Working Group's mandate.

37. *It was so decided.*

38. **The Chairperson** said that, if he heard no objections, he would take it that the Commission wished to establish a committee of the whole to carry out a second reading of the draft revised Model Law on procurement.

39. *It was so decided.*

40. **The Chairperson** invited the Commission to proceed to the election of a Chairperson of the Committee of the Whole.

41. **Mr. Frühmann** (Austria) nominated Ms. Blanchard (Canada) for the office of Chairperson of the Committee of the Whole.

42. **Mr. Denison Cross** (United Kingdom) and **Ms. Smejkalová** (Czech Republic) seconded the nomination.

43. *Ms. Blanchard (Canada) was elected Chairperson by acclamation.*

44. **The Chairperson** said that the Committee of the Whole would convene immediately after the adjournment of the Commission's meeting in order to begin the second reading of the revised text of the Model Law.

The meeting rose at 11.50 a.m.

Adoption of the report of the Commission

Summary record of the 892nd meeting, held at Vienna International Centre, Vienna, on Friday, 10 July 2009, at 4.05 p.m.

[A/CN.9/SR.892]

Chairman: Mr. Soogeun Oh (Republic of Korea)

The meeting was called to order at 4.05 p.m.

Adoption of the report of the Commission

Report of the Committee of the Whole to the Commission on its consideration of a draft UNCITRAL Model Law on Public Procurement (A/CN.9/XLII/CRP.1 and Add.3-9; A/CN.9/664, 668 and 672)

1. **Ms. Blanchard** (Canada), Chairperson of the Committee of the Whole, thanked the Secretariat for its support to her in her role as Chairperson of the Committee during its seven days of meetings and for the quality of the documents it had prepared. The Committee's deliberations had been highly productive, but it did not feel that the revised text of the Model Law was ready for adoption by the Commission at its current session. The Committee had almost completed a second reading of chapter I, with respect to which only a few issues were outstanding, but it had not been able to take up the other chapters. It recommended that work on the draft revised Model Law should be continued, focusing on the unresolved issues. She understood that the Secretariat intended to engage in wide informal consultations before the next session of Working Group I (Procurement) on issues which the Committee of the Whole had not yet reviewed. The objective was for the Secretariat to provide a new set of working papers for the Working Group's consideration. The Committee recommended that the Commission should adopt its report, contained in documents A/CN.9/XLII/CRP.1 and addenda 3 to 9, as the section of the Commission's own report on its forty-second session pertaining to agenda item 5: Draft UNCITRAL Model Law on Public Procurement.

2. **The Chairperson** said that, if he heard no objection, he would take it that the Commission wished to adopt the report of the Committee of the Whole, which would form part of the Commission's report on the forty-second session.

3. *It was so decided*.

4. **Ms. Nicholas** (Secretariat) drew attention to the reports of Working Group I on its fourteenth, fifteenth and sixteenth sessions, contained in documents A/CN.9/664, 668 and 672 respectively. Each report set forth the detailed issues addressed by the Working Group and the conclusions it had reached. The main issues related to framework agreements, chapter I of the draft revised Model Law and proposals for negotiated procurement under chapter IV. In all cases the Working Group had considered proposals for amendments, presented its commentary and given instructions to the Secretariat for revision of the text.

5. **The Chairperson** said he took it that the Commission wished to take note of the three reports and to mandate the Working Group to continue its work on the draft revised Model Law on Public Procurement.

6. *It was so decided*.

7. **Ms. Otunga** (Kenya) said that her delegation was greatly interested in the emerging issues in the area of public procurement that were dealt with in the draft revised Model Law and had hoped that the Commission would conclude its work on the project at the current session. Her country was contemplating the enactment of legislation dealing with topics such as electronic reverse auctions and framework agreements and had hoped to have an approved UNCITRAL Model Law as guidance for the relevant provisions. She expressed the hope that the Working Group would be able to complete its work on the draft revised Model Law by the end of the year. Otherwise countries might adopt provisions

that were not in line with those eventually included in the Model Law.

8. **Mr. Ekedede** (Nigeria) said that the mandate of UNCITRAL to develop and harmonize international trade law did not consist solely in the production of legal texts. There was a need for a more proactive approach to promote the use of UNCITRAL products, especially in developing countries. In that connection, the approach taken by the United Nations Office on Drugs and Crime (UNODC) was instructive. UNODC had a network of regional and country offices which it used to promote partnerships with Member States and other stakeholders to promote its policies, and it had been authorized to seek extrabudgetary resources for that purpose. The time had come to seek solutions to the constraints that UNCITRAL faced in promoting wider use of its excellent products.

9. **Mr. Sorieul** (Secretariat) said that the Commission would be taking up the issue raised by the representative of Nigeria the following week under agenda item 13 (Technical assistance to law reform) and agenda item 14 (Status and promotion of UNCITRAL legal texts). He welcomed the enthusiasm that the representative of Nigeria had expressed for UNCITRAL's mission and products. The Secretariat was well aware of the demand for cooperation that existed in developing countries, but UNCITRAL was hampered by staffing constraints in carrying out its mandate in the areas of technical cooperation and outreach. Thus, the number of posts available to the UNCITRAL Secretariat was more or less the same as in the 1960s. If UNCITRAL was to be able to interact effectively with States and other stakeholders in an era of increasing globalization, additional resources would be needed. In seeking to mobilize extrabudgetary resources, the Secretariat was also handicapped by a lack of capacity to develop programmes that might attract financial support from the private sector and other sources of funding. While the issue would be discussed in greater detail during the final week of the session, he was grateful to the representative of Nigeria for raising it in the context of the draft Model Law.

10. **Mr. Boutaqbout** (Morocco) said that, although UNCITRAL might not be able to have a physical presence in the field, it could publicize and promote its legal texts by organizing regional workshops, seminars and other events for the different stakeholders in Member States, including potential donors.

The meeting rose at 4.40 p.m.

Adoption of the report of the Commission *(continued)*

Summary record of the 899th meeting, held at the Vienna International Centre, Vienna, on Friday, 17 July 2009, at 9.30 a.m

[A/CN.9/SR.899]

Chairperson: Mr. Soogeun Oh (Republic of Korea)

The meeting was called to order at 9.45 a.m.

Adoption of the report of the Commission (*continued*) (A/CN.9/XLII/CRP.1/Add.1-9)

1. **The Chairperson** thanked the representative of Chile, **Mr. Sandoval López**, for serving as Rapporteur of the Commission at its forty-second session.

2. He noted that the Committee of the Whole, following seven days of deliberations on public procurement, had prepared a report, contained in documents A/CN.9/XLII/CRP.1/Add. 3 to 9, which the Commission had adopted at its 892nd meeting immediately after the final meeting of the Committee of the Whole.

Finalization and adoption of UNCITRAL Notes on cooperation, communication and coordination in cross-border insolvency proceedings (A/CN.9/XLII/CRP.1/Add.1/Rev. 1)

3. **The Chairperson** drew attention to document A/CN.9/XLII/CRP.1/Add.1/Rev.1. He noted that the Commission had decided to change the title of the UNICTRAL Notes to "UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation".

4. He took it that the Commission wished to adopt the part of its report contained in document A/CN.9/XLII/CRP.1/Add.1/Rev.1.

5. *It was so decided*.

Insolvency law: progress report of Working Group V (A/CN.9/XLII/CRP.1/Add. 2)

6. **The Chairperson** drew attention to document A/CN.9/XLII/CRP.1/Add.2 concerning the progress report of Working Group V (Insolvency law) and its future work, and on the Judicial Colloquium. He took it that the Commission wished to adopt the part of its report contained therein.

7. *It was so decided*.

The discussion covered in the summary record ended at 9.55 a.m.

II. BIBLIOGRAPHY OF RECENT WRITINGS RELATED TO THE WORK OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW — NOTE BY THE SECRETARIAT

(A/CN.9/673)

CONTENTS

I. General

Berlingieri, F. Unification and harmonisation of maritime law revisited. *Revue hellénique de droit international* (Athènes) 59:2:603-626, 2006.

Boss, A. H. The future of the Uniform Commercial Code process in an increasingly international world. *Ohio State law journal* (Columbus, Ohio) 68:1:349-402, 2007.

Castellani, L. Economic development and the rule of law: uniform trade law and Africa-China relations. *In* China outside China: China in Africa. Castellani, L., P. Zhongying *and* I. Taylor, *eds*. Torino, Italy, Quaderni del CASCC, 2007. p. 75-90.

_____. International trade law reform in Africa. *Yearbook of private international law* (The Hague) 10:547-563, 2008.

La CNUDCI. Trois questions à Valéry Turcey. *Recueil Dalloz* (Paris) 184:20:1392, 2008.

Dundas, H. R. The Willem C. Vis International Commercial Arbitration Moot. *Stockholm international arbitration review* (Huntington, N.Y.) 1:157-171, 2008.

Gross, C. Bericht über die 40. Sitzung der Kommission der Vereinten Nationen zum Internationalen Handelsrecht (UNCITRAL). *IPRax* (Bielefeld, Germany) 28:2:189-191, 2008.

In German. Translation of title: Overview of the 40th session of the United Nations Commission on International Trade Law (UNCITRAL).

_____. News from the United Nations Commission on International Trade Law (UNCITRAL). *Uniform law review = Revue de droit uniforme* (Roma) 13:3:792-799, 2008.

Kelly, C. R. Institutional alliances and derivative legitimacy. *Michigan journal of international law* (Ann Arbor, Mich.) 29:4:605-664, 2008.

Also available online at http://students.law.umich.edu/mjil/article-pdfs/v29n4-kelly.pdf.

Koziol, G. Sprachliche Aspekte der Auslegung von internationalen Rechtstexten: am Beispiel der Principles of European Tort Law. *Juristische Blätter* (Wien) 130:230-241, 2008.

In German. Translation of title: Linguistic aspects of the interpretation of international legal documents: using the example of Principles of European Tort Law.

Kwatra, G. K. United Nations and international arbitration institutions. UNCITRAL. *In* Arbitration and conciliation law of India: with case law on UNCITRAL Model Law on Arbitration and Sale of Goods. 7th *ed*. New Delhi, Indian Council of Arbitration, 2008. Ch. 4. p. 66-75.

Nicholas, C. The New Rome I Regulation on the law applicable to contractual obligations: relationships with international conventions of UNCITRAL, the Hague Conference and UNIDROIT. *In* Le nouveau règlement européen "Rome I" relatif à la loi applicable aux obligations contractuelles. Ritaine, C. E. *and* A. Bonomi, *éds*. Genève, Schulthess, 2008. p. 49-60.

Pamboukis, Ch. P. L'évolution du droit uniforme privé: la polycentricité du droit uniforme. Ch. 3. *Recueil des cours: Académie de droit international = Collected courses of the Hague Academy of International Law* (Leiden, The Netherlands) 330:104-155, 2007.

Perales Viscasillas, M. P. La competitividad internacional de la enseñanza del derecho mercantil en España: el triunfo en el concurso de arbitraje comercial "Willem C. Vis". *Derecho de los negocios* (Madrid) 19:212:19-23, mayo 2008.

Pissoort, W. *and* P. Saerens. Initiation au droit commercial international. Bruxelles, De Boeck Universitei, 2004. 357 p.

UNCITRAL Secretariat. News from the United Nations Commission on International Trade Law (UNCITRAL). *Uniform law review = Revue de droit uniforme* (Roma) 12:4:810-817, 2007.

United Nations Commission on International Trade Law Secretariat. The UNCITRAL guide: basic facts about the United Nations Commission on International Trade Law. Vienna, United Nations, 2007. iv, 48 p.

United Nations publication, Sales No. E.07.V.12. Available in Arabic, Chinese, English, French, Spanish and Russian.

United Nations Commission on International Trade Law Secretariat. UNCITRAL Yearbook, 2004. Vienna, United Nations, 2008. Vol. 35.

United Nations publication, Sales No. E.08.V.8.

CD-ROM.

Zumbansen, P. *and* M. Panezi. United Nations Commission on International Trade Law (UNCITRAL). *Max Planc Encyclopedia of public international law*, June 2007.

Fee-based electronic resource, available via www.mpepil.com/.

II. International sale of goods

Academic conference ‘‘The Spirit and Interpretation of the CISG’’, November 16, 2008. Organized by the Steering Committee for the CISG Tokyo Congress & the Institute of International Commercial Law of the Pace University School of Law. University of Tokyo, Sanjokaikan. Tokyo, 2008.

Proceedings of the conference: Article 7 and uniform interpretation of the CISG / P. Viscasillas, p. 1-12 -- Researching the CISG / A. Kritzer, p. 13-23 -- Conformity of goods under the CISG / L. Mistelis, p. 24-35 -- The right to avoid the contract / I. Schwenzer, p. 36-43 -- Calculating damages under the United Nations Convention on the International Sale of Goods / J. Y. Gotanda, p. 44-54 -- Exemption of damages under article 79 CISG / A. Garro, p. 56-57.

Accompanied by the proceedings of the Practitioner’s seminar “Practical implications of the CISG”, November 17, 2008.

Atamer, Y. M. Milletlerarasi satim hukuku milletlerarasi mal satimina ilişkin sözleşmeler hakkinda birleşmiş milletler antlaşmasi (CISG). Istanbul, XII Levha, 2008. xxiv, 374 p.

In Turkish. Translation of title: International sales law: United Nations Sales Convention (1980).

Reproduces the United Nations Sales Convention (1980) in Turkish, p. 311-340 and in English, p. 341-371.

Benedick, G. Die Informationspflichten im UN-Kaufrecht (CISG) und ihre Verletzung: unter Berücksichtigung des Zusammenspiels mit dem nationalen schweizerischen Recht. München, Sellier; Bern, Stämpfli Verlag AG, 2008. xliii, 366 p. (Beiträge zum internationalen Wirtschaftsrecht, Bd. 9 = Contributions on international commercial law, vol. 9)

In German, with summary in English.

Translation of title: The duties to inform under the United Nations Sales Convention (1980) and its violation: considering the interplay with domestic Swiss law.

Includes bibliographical references, p. xxi-xxxv.

Borges, R. S. The United Kingdom and the UN Convention on Contracts for the International Sale of Goods (CISG): to ratify or not to ratify? *Journal of international maritime law* (Witney, UK) 14:4:331-338, 2008.

Bridge, M. A law on international sale of goods. *Hong Kong law journal* (Hong Kong) 37:1:17-40, 2007.

Brödermann, E. Cornerstones of the newly created Chinese European Arbitration Centre ("CEAC"): a modern approach to international arbitration. *In* Business Law. E. Brödermann. 8th *ed*. Hamburg, Brödermann & Jahn, 2009. Ch. 2. p. 45-60.

Also available in Chinese, p. 61-73.

Carette, N. Direct contractual claim of the sub-buyer and international sale of goods: applicable law and applicability of the CISG. *European review of private law* (Alphen aan den Rijn, The Netherlands) 16:4:583-605, 2008.

Castellani, L. Assurer l'harmonisation du droit des contrats aux niveaux régional et mondial: la Convention des Nations Unies sur les contrats de vente internationale de marchandises et le rôle de la CNUDCI. *Uniform law review = Revue de droit uniforme* (Roma) 13:1/2:101-113, 2008.

_____. Considerations on the uniform interpretation of the CISG in China. *International law review of Wuhan University* (Wuhan, China) 8:1-6, 2008.

In Chinese. Title as appears in the article:
《联合国国际货物销售合同公约》在中国统一解释之考量.

_____. Ensuring harmonization of contract law at regional and global level: the United Nations Convention on Contracts for the International Sale of Goods and the role of UNCITRAL. *Uniform law review = Revue de droit uniforme* (Roma) 13:1/2:115-126, 2008.

Chen, Lihu *and* Zhu Ping. Specific performance under the CISG: with comments on article 107 of the contract law of the People's Republic of China. *International law review of Wuhan University* (Wuhan, China) 8:289-306, 2008.

In Chinese. Title as appears in the article:
CISG 之下的实际履行制度研究 - 兼评中国《合同法》第107条.

Diener, K. W. Recovering attorneys' fees under CISG: an interpretation of article 74. *Nordic journal of commercial law* (Turku, Finland) 1:2008.

Electronic resource, available at www.njcl.fi/1_2008/article3.pdf.

DiMatteo, L. A. International sales law: Convention on Contracts for the International Sale of Goods. *In* The law of international contracting. Alphen aan den Rijn, The Netherlands, Wolters Kluwer, 2009. Ch. 6. p. 183-267.

The publication reproduces the texts of the United Nations Sales Convention (1980), p. 451-478, the Limitation Convention (1974/1980), p. 479-487, and the United Nations Convention on Electronic Contracting (2005), p. 559-571.

Djokić, D. Merodajno pravo pri mednarodni prodaji blaga. *Mednarodno poslovno pravo* (Ljubljana) 19:212:23-26, 2008.

In Slovenian. Translation of title: The law applicable to international sale of goods.

Dodge, W. S. Teaching the CISG in contracts. *Journal of legal education* (Washington, D.C.) 50:72-94, 2000.

Also available online at http://w3.uchastings.edu/dodge_01/CISG.pdf.

Droz, J. La livraison d'un aliud est-elle une contravention essentielle au sens de l'article 25 de la Convention de Vienne sur la vente internationale de marchandises? *In* L'harmonisation internationale du droit. Chappuis, C., B. Foëx *and* T. K. Graziano, *éds*. Genève, Schulthess, 2007. p. 209-221.

Ferrari, F., *ed*. The CISG and its impact on national legal systems. Munich, Sellier, 2008. vii, 489 p.

Contents of this issue devoted entirely to the United Nations Sales Convention (1980): Country reports, p. 3-343 -- The CISG impact on EU legislation / S. Troiano, p. 345-411 -- The CISG and its impact on national legal systems: general report / F. Ferrari, p. 413-480.

Ferrari, F. The interaction between the United Nations Convention on Contracts for the International Sale of Goods and domestic remedies. *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (Tübingen, Germany) 71:1:52-80, 2007.

_____. La vendita internazionale: applicabilità ed applicazioni della Convenzione delle Nazioni unite sui contratti di vendita internazionale di beni mobile. 2. *ed*. Padova, Italy, CEDAM, 2006. xi, 434 p. (Trattato di diritto commerciale e di diritto pubblico dell'economia, vol. 21)

In Italian. Translation of title: International sales: applicability and application of the United Nations Sales Convention (1980).

Flechtner, H. M. Conformity of goods, third party claims, and buyer's notice of breach under the United Nations Convention ("CISG"), with comments on the "Mussles case," the "Stolen automobile case," and the "Ugandan used shoes case". University of Pittsburgh School of Law, 2007. (University of Pittsburgh School of Law working paper series, paper 64)

Also available online at http://law.bepress.com/pittlwps/papers/art64.

_____, R. A. Brand *and* M. S. Walter, *eds*. Drafting contracts under the CISG. New York, Oxford University Press, 2007. xxxi, 597 p. (CILE studies, vol. 4)

Friehe, H. A. *and* W. Huck. Das UN-Kaufrecht in sieben Sprachen. *Internationales Handelsrecht* (Hamburg) 8:1:14-26, 2008.

In German. Translation of title: The United Nations Sales Convention (1980) in seven languages.

Garro, A. M. CISG Advisory Council Opinion No. 7, exemption of liability for damages under article 79 of the CISG. *Internationales Handelsrecht* (Hamburg) 8:3:122-132, 2008.

Gauci, C. Australia: dealing with the unknown - which law really applies to your international contract? *Mondaq*, 2008.

Electronic resource, available at www.mondaq.com/article.asp?articleid=62472.

Gichangi, E. The United Nations Convention on Contracts for the International Sale of Goods: a case for ratification by Kenya. *Kenya law review* (Nairobi) 1:305-322, 2007.

Gruber, P. U. The Convention on the International Sale of Goods (CISG) in arbitration = La Convention des Nations Unies sur les contrats de vente internationale de marchandises (CVIM) et l'arbitrage. *Revue de droit des affaires internationales = International business law journal* (Paris) 1:15-34, 2009.

In French and English.

Guo, Yujun *and* Jin Ting. Summary of the 2007 International seminar on the application and interpretation of the CISG in Member States. *International law review of Wuhan University* (Wuhan, China) 8:330-337, 2008.

In Chinese. Title as appears in the article:
1980年CISG在成员国的适用与解释国际研讨会综述.

Han, Jian. The application of CISG in international arbitration: the Chinese experience. *International law review of Wuhan University* (Wuhan, China) 8:272-279, 2008.

In Chinese. Title as appears in the article:
四、专题二: CISG在成员国的适用与解释 国际研讨会.

Heutger, V. Ein gemeineuropäisches Kaufrecht: Vision oder nahe Zukunft? Frankfurt am Main, P. Lang, 2007. 258 p. (Salzburger Studien zum europäischen Privatrecht, Bd. 22)

In German. Translation of title: Uniform sales law: vision or near future?

Includes bibliographical references, p. 244-258.

Hondius, E. CISG and a European Civil Code: some reflections. *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (Tübingen, Germany) 71:1:99-114, 2007.

_____ *and others*. Sales (PEL S). Munich, Sellier, 2008. xl, 485 p. (Principles of European law, vol. 6)

Huber, P. *and* A. Mullis. The CISG: a new textbook for students and practitioners. München, Sellier, 2007. xxiii, 408 p.

International conference on "Institutional arbitration in infrastructure and construction". UNCITRAL-CIAC Conference, October 16-18, 2008. New Delhi, India. Conference papers. 143 p.

Conference papers discussing the United Nations Sales Convention (1980): Judicial approaches to the interpretation of CISG / P. Landolt, p. 31-41 -- CISG and the Indian law: a comparative analysis / S. Dholakia, p. 43-50.

Kannowski, B., L. Gerling *and* G. Burret. Zum internationalen Gerichtsstand der Kaufpreisklage im Wechselspiel von EuGVVO und UN-Kaufrecht. *Internationales Handelsrecht* (Hamburg) 8:1:2-8, 2008.

In German. Translation of title: The international place of jurisdiction for the claims on sales price in the interplay between the EEC regulation no. 44/2001 and the United Nations Sales Convention (1980).

Kato, R. Clausula rebus sic stantibus under the Vienna Sales Convention on article 79 of the CISG. *Kokusai Shōji Hōmu* (Tokyo) 37:1:5-14, 2009.

In Japanese. English title as appears in the table of contents.

_____. The principle of good faith in international trade: under the UN Convention on Contracts for the International Sale of Goods (CISG). *Kokusai Shōji Hōmu* (Tokyo) 36:12:1595-1610, 2008.

In Japanese. English title as appears in the table of contents.

Klotz, J. M., P. J. Mazzacano *and* A. I. Pribetic. All quiet on the CISG front: Guiliani v. Invar Manufacturing, the battle of the forms, and the elusive concept of terminus fixus. *Canadian business law journal = Revue canadienne du droit de commerce* (Aurora, Ont.) 46:3:430-442, 2008.

Klotz, J. M. International sales agreements: an annotated drafting and negotiating guide. 2nd *ed*. Alphen aan den Rijn, The Netherlands, Kluwer, 2008. xxvi, 434 p.

Koehler, M. F. *and* G. Yujun. The acceptance of the unified sales law (CISG) in different legal systems: an international comparison of three surveys on the exclusion of the CISG's application conducted in the United States, Germany and China. *Pace international law review* (White Plains, N.Y.) 20:45-[52], spring 2008.

Kokusaibijinesuhouforum 2007nen9gatsu18nichi. *JCA journal* (Tokyo) 55:3:24-45, 2008.

In Japanese. Translation of title: (Transcript from) International Business Law Forum 18.09.2007 (Continued from February issue).

This article covers the following presentations: Introduction to the Vienna Convention (CISG) for professionals dealing with contracts" / Akira Saito and Nao Takasugi, p. 24 -- The Vienna Convention (CISG) in the context of international commercial arbitration / Masaharu Otsuki, p. 34 -- Application of the Vienna Convention (CISG) in foreign judgements / Noboru Kashiwagi, p. 37.

Комаров, А. С. Венская конвенция о договорах международной купли-продажи товаров: практика применения в России и за рубежом. Москва, Волтерс Клувер, 2007. xviii, 267 p.

Коржов, Е. Н. Юридико-экономический анализ эффективности реализации исполнения в натуре на основе применения Конвенции ООН о договорах международной купли-продажи товаров 1980 года. *Московский журнал международного права* (Москва) 70:2:120-138, 2008.

Krätzschmar, T. Öffentlichrechtliche Beschaffenheitsvorgaben und Vertragsmässigkeit der Ware in UN-Kaufrecht (CISG). München, Sellier, 2008. xxi, 202 p. (Beiträge zum internationalen Wirtschaftsrecht, Bd. 10 = Contributions on international commercial law, vol. 10)

In German, with summary in English.

Translation of title: Conformity of goods in accordance with public law and contract requirements in the United Nations Sales Convention (1980).

Includes bibliographical references, p. 185-198.

Kwatra, G. K. Arbitration and conciliation law of India: with case law on UNCITRAL Model Law on Arbitration and Sale of Goods. 7th *ed*. New Delhi, Indian Council of Arbitration, 2008. xxiii, 1018 p.

Linne, A. L. Burden of proof under article 35 CISG. *Pace international law review* (White Plains, N.Y.) 20:31-[42], spring 2008.

Lookofsky, J. Understanding the CISG: a compact guide to the 1980 United Nations Convention on Contracts for the International Sales of Goods. 3rd *ed*. Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2008. xii, 243 p.

_____ *and* H. Flechtner. Zapata retold: attorneys' fees are (still) not governed by the CISG. *Journal of law and commerce* (Pittsburgh, Pa.) 26:1-2:1-9, 2006-2007.

Mainz, P. H. CISG - the structure of remedies. *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (Tübingen, Germany) 71:1:13-34, 2007.

Mak, V. Book review of: CISG and the unification of international trade law / by B. Zeller. London, Routledge-Cavendish, 2007. *Lloyd's maritime and commercial law quarterly* (London) 4:578-580, November 2008.

_____. Performance-oriented remedies in European sale of goods law. Oxford, England; Portland, Or., Hart Pub., 2009. xxii, 222 p.

Includes bibliographical references, p. [211]-218, table of cases and index.

Marguénaud, J.-P. *et* P. Remy-Corlay. Hong Kong n'est pas partie à la Convention de Vienne. *Revue trimestrielle de droit civil* (Paris) 2:264-267, avril/juin 2008.

Martin, C. H. The Electronic Contracts Convention, the CISG and new sources of e-commerce law. *Tulane journal of international and comparative law* (Tulane, La.) 16:467, 2008.

Mazzacano, P. J. Harmonizing values, not laws: the CISG and the benefits of a neo-realist perspective. *Nordic journal of commercial law* (Turku, Finland) 1:2008.

Electronic resource, available at www.njcl.fi/1_2008/article1.pdf.

Meyer, O. Die privatautonome Abbedingung der vorvertraglichen Abreden: Intergrationsklauseln im internationalen Wirtschaftsverkehr. *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (Tübingen, Germany) 72:3:562-600, 2008.

In German. Title in English from table of contents: Private autonomy and the exclusion of pre-contractual negotiations: integration clauses in international commerce.

Mistelis, L. 2006 in retrospect. *Global arbitration review* (London) 2:1:23-26, 2007.

Mullis, A. Twenty-five years on - the United Kingdom, damages and the Vienna Sales Convention. *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (Tübingen, Germany) 71:1:35-51, 2007.

Niibori, Satoshi. Gulobalu Shoutorihikihoukakuron: Wien baibaijyouyaku to boueki jitsumu (18/Kan). *JCA journal* (Tokyo) 55:8:28-33, 2008.

In Japanese. Translation of title: Global trade law overview: United Nations Sales Convention (1980) and trade practices (18th, final).

_____. Gurobaru Shotorihikiho Kakuron, Wien Baibai Joyaku go no Kokusai Shotorihiki-ho Toitsu no Yukue, Joyaku kara Restatement he. *JCA journal* (Tokyo)

Pt. 1 *in* 55:9:40-45, 2008;
Pt. 2 *in* 55:10:53-55, 2008;
Pt. 3 *in* 55:11:38-42, 2008;
Pt. 4 *in* 56:2:56-61, 2009.

In Japanese. Translation of title: Topics of global commercial law, harmonization of international trade law after the United Nations Sales Convention (1980): from treaty to restatement.

Nishiguchi, Hiroyuki. Wien Baibai Joyaku to Junkyo-ho Sentaku Joko, -Do-joyaku 95 Jo Ryuho Kahi Mondai to Kongo no Jitsumu-men no Taiou. *JCA journal* (Tokyo) 55:11:10-16, 2008.

In Japanese. Translation of title: Applicable law clause under the United Nations Sales Convention (1980) - issue of the availability of reservation under article 95 and future practices.

Nottage, L. Who's afraid of the Vienna Sales Convention (CISG)?: a New Zealander's view from Australia and Japan. *Victoria University of Wellington law review* (Wellington) 36:4:815-845, 2005.

Also available online at
www.austlii.edu.au/nz/journals/VUWLRev/2005/39.html.

Pejovic, C. Stoppage in transit and right of control: "conflict of rules"? *Pace international law review* (White Plains, N.Y.) 20:129-[149], spring 2008.

Perea, T. Treibacher Industrie, A.G. v. Allegheny Technologies, Inc.: a perspective on the Lackluster implementation of the CISG by American courts. *Pace international law review* (White Plains, N.Y.) 20:191-213, spring 2008.

Raczynska, M. Recoverability of the buyer's lost resale profit under CISG. *Nordic journal of commercial law* (Turku, Finland) 2:2007.

Electronic resource, available at www.njcl.fi/2_2007/article2.pdf.

Reimann, M. The CISG in the United States: why it has been neglected and why Europeans should care. *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (Tübingen, Germany) 71:1:115-129, 2007.

Rösler, V. H. Book review of: Gesetzesauslegung in den USA and in Deutschland. Historische Entwicklung, moderne Methodendiskussion und die Auswirkungen von Divergenzen für das internationale Einheitskaufrecht (CISG) (Zugl.: Bonn, Univ., Diss., 2003) / by P. Melin. Tübingen, Germany, Mohr Siebeck, 2005. xvii, 598 p. *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (Tübingen, Germany) 72:1:186-191, 2008.

In German. Translation of title of the book reviewed: The interpretation of law in the USA and in Germany. Historical development, discussion of modern

methods and the effects of divergences for the United Nations Sales Convention (1980).

_____. Siebzig Jahre Recht des Warenkaufs von Ernst Rabel. Werk- und Wirkgeschichte. *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (Tübingen, Germany) 70:4:793-805, 2006.

In German. Translation of title: Seventy years of law on the sales of goods by Ernst Rabel. History of the work and effectiveness.

Saidov, D. *and* R. Cunnington. Contract damages: domestic and international perspectives. Oxford; Portland, Or., Hart Pub., 2008. xxxiii, 495 p.

Saidov, D. The law of damages in international sales: the CISG and other international instruments. Oxford, England; Portland, Or., Hart Pub., 2008. xxvii, 294 p.

Includes bibliographical references, p. [267]-280, table of cases and index.

Sambugaro, G. Incorporation of standard contract terms and the "battle of forms" under the 1980 Vienna Sales Convention (CISG). *Revue de droit des affaires internationales = International business law journal* (Paris) 1:69-79, 2009.

Sandvik, B. Kolliderande standardavtal - ett slag för knock-out. *Tidskrift utgiven av Juridiska föreningen i Finland* (Helsingfors) 2:115-136, 2008.

In Finnish.

Scheffler, G. Book review of: Der Nacherfüllungsanspruch nach UN-Kaufrecht im Lichte der deutschen, spanisch-mexikanischen und US-amerikanischen Rechtswissenschaft / by E. M. Ratz. Bd. 127. Frankfurt am Main, P. Lang Europäischer Verlag der Wissenschaften, 2006. 330 p. *Verfassung und Recht in Übersee* (Hamburg) 41:2:262-263, 2008.

In German. Translation of title of the book reviewed: The supplementary performance claim according to the United Nations Sales Convention (1980) in light of the German, Spanish-Mexican and US-American jurisprudence.

Schlechtriem, P. *et* C. Witz. Convention de Vienne sur les contrats de vente internationales de marchandises: champ d'application formation du contrat effets de la vente droits et obligations des parties inexécution et moyens. Paris, Dalloz, 2008. xviii, 349 p.

Schlechtriem, P. Legal costs as damages in the application of UN Sales Law. *Journal of law and commerce* (Pittsburgh, Pa.) 26:1-2:71-80, 2006-2007.

Schmidt-Kessel, M. *and* L. Meyer. Allgemeine Geschäftsbedingungen und UN-Kaufrecht. *Internationales Handelsrecht* (Hamburg) 8:5:177-220, 2008.

In German. Translation of title: General terms and conditions and the United Nations Sales Convention (1980).

Schneider, M. UNCITRAL rejects confidentiality rule. *Global arbitration review* (London) 2:1:3, 2007.

Schwenser, I. *and* C. Fountoulakis, *eds*. International sales law. Abingdon, UK; New York, Routledge-Cavendish, 2006. xxxix, 617 p.

Sheaffer, C. The failure of the United Nations Convention on Contracts for the International Sale of Goods and a proposal for a new uniform global code in

international sales law. *Cardozo journal of international and comparative law* (New York) 15:2:461-495, 2007.

Song, L. Award of interest in arbitration under article 78 CISG. *Uniform law review = Revue de droit uniforme* (Roma) 12:4:719-731, 2007.

Spagnolo, L. Opening Pandora's box: good faith and precontractual liability in the CISG. *Temple international and comparative law journal* (Philadelphia, Pa.) 21:261-310, 2007.

Troiano, S. The CISG's impact of EU legislation. *Internationales Handelsrecht* (Hamburg) 8:6:221-264, 2008.

United Nations Commission on International Trade Law Secretariat. UNCITRAL Digest of case law on the United Nations Convention on the International Sale of Goods. New York, United Nations, 2008. xv, 403 p.

United Nations publication, Sales No. E.08.V.15.

Викторова, Н. Н. Особенности установления дополнительного срока для исполнения обязательств по договору международной купли-продажи товаров. *Журнал международного частного права* (Москва) 55:1, 2007.

Weizuo, C. The conflict of laws in the context of the CISG: a Chinese perspective. *Pace international law review* (White Plains, N.Y.) 20:115-[123], spring 2008.

Whittington, N. Reconsidering domestic sale of goods remedies in light of the CISG. *Victoria University of Wellington law review* (Wellington) 37:421-449, 2006.

Wien Baibaijyouyaku wo meguru Kokusaikeiyakunoshinjidai (Kokusaibijinesuhouforum zenkiroku). *JCA journal* (Tokyo) 55:2:62-72, 2008.

In Japanese. Translation of title: New era of international contracts involving the United Nations Sales Convention (1980). (Complete recordings of the International Business Law Forum).

This article includes presentations on the global development of the unification of international private law by Kazuaki Sono and a discussion on accession to the United Nations Sales Convention (1980) and its future prospects by Hiroo Sono.

Wildner, K. Art. 19 CISG: the German approach to the battle of the forms in international contract law: the decision of the Federal Supreme Court of Germany of 9 January 2002. *Pace international law review* (White Plains, N.Y.) 20:1-[18], spring 2008.

Witz, C. Droit uniforme de la vente internationale de marchandises: juillet 2006-décembre 2007. *Recueil Dalloz* (Paris) 184:37:2620-2630, 2008.

Yang, Fan. PRC's two reservations and the application of the CISG in CIETAC arbitration. *International law review of Wuhan University* (Wuhan, China) 8:307-329, 2008.

In Chinese. Title as appears in the article:
中国对CISG的保留及该公约在CIETAC仲裁中的适用.

Yongping, X. *and* L. Weidi. Selected topics on the application of the CISG in China. *Pace international law review* (White Plains, N.Y.) 20:61-[92], spring 2008.

Zeller, B. CISG and the unification of international trade law. Abingdon, England, Routledge-Cavendish, 2007. xi, 116 p.

Zheng, Xinjian. The application of CISG in the domestic courts in Guangdong Province of China. *International law review of Wuhan University* (Wuhan, China) 8:280-288, 2008.

In Chinese. Title as appears in the article:
CISG在中国广东涉外商事审判中的适用.

Zimmerman, R. Symposium: CISG - the 25th anniversary: its impact in the past and its role in the future. *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (Tübingen, Germany) 71:1:9-12, 2007.

Zoll, F. The impact of the Vienna Convention on the International Sale of Goods on Polish law, with some references to other Central and Eastern European countries. *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (Tübingen, Germany) 71:1:81-98, 2007.

2007 International seminar: the application and interpretation of the CISG in Member States: seminar papers. Wuhan, China, Wuhan University Institute of International Law, 2007. 379 p.

In Chinese and English.

Title in Chinese as appears on cover page:
1980年《联合国国际货物销售合同公约》(CISG)在成员国的活用与解释
国际研讨会论文集.

III. International commercial arbitration and conciliation

Aa, de Fina. The New York Convention - 50 years on. *Indonesia arbitration quarterly newsletter* (Jakarta) 4:2-10, 2008.

Abdel Wahab, M. S. Challenging arbitrators and the Egyptian Constitutional Court. *International Law Office newsletters*, 1 May 2008.

Electronic resource, available via www.internationallawoffice.com/.

Al-Emadi, T. Qatar arbitration law: some central issues. *International arbitration law review* (London) 11:2:69-83, 2008.

Allsop, J. International maritime arbitration: legal and policy issues. *Journal of international maritime law* (Witney, UK) 13:6:398-415, 2007.

Al Naddaf, H. Arbitration in Qatar: a call for reform. *Al Tamimi law update* (Dubai) 205:30-33, 2008.

Al Tamimi, E. *and* E. Van Son. The DIAC rules and the new U.A.E. arbitration law. *Journal of international arbitration* (The Netherlands) 25:2:211-217, 2008.

Al Zeid, N. G. Settlement of disputes in BOT contracts = Règlement des litiges dans les contrats BOT. *Lebanese review of Arab and international arbitration = Revue libanaise de l'arbitrage arabe et international* (Beirut) 44:6-13, 2007.

In Arabic. Title as appears in the article:
البوت نظام عقد في المنازعات تسوية

Amrallah, B. Les tendances de la jurisprudence égyptienne en matière d'exécution des sentences arbitrales étrangères à la lumière de la Convention de New York = Execution of foreign arbitral awards and the New York Convention in the Egyptian Case Law. *Revue libanaise de l'arbitrage arabe et international = Lebanese review of Arab and international arbitration* (Beirut) 44:20-25, 2007.

Anderson, R.N.M. International commercial arbitrations in the United Kingdom: the Scottish dimension. *Construction law journal* (London) 24:5:410-414, 2008.

Asouzu, Amazu A. Some fundamental concerns and issues about international arbitration in Africa. *Law for development review* (Tunis) 1:81-98, 2006.

Atteritano, A. La «jurisdiction» del giudice statale nei procedimenti di «enforcement» dei lodi arbitrali stranieri disciplinati della Convenzione di New York del 1958. *Rivista di diritto internazionale privato e processuale* (Padova, Italy) 1:115-136, 2007.

In Italian. Translation of title: The jurisdiction of national courts to enforce foreign arbitral awards under the New York Convention (1958).

Berg, A. van den. New York Convention of 1958: refusals of enforcement. *ICC International Court of Arbitration bulletin* (Paris) 18:2:15-49, 2007.

Berger, K. P. Private dispute resolution in international business: negotiation, mediation, arbitration. The Hague, Kluwer, 2006. Vol. 2. xxxiii, 637 p.

_____. The settlement privilege: a general principle of international ADR law. *Arbitration international* (London) 24:2:265-276, 2008.

Berkowitz, D., J. Moenius *and* K. Pistor. Legal institutions and international trade flows. *Michigan journal of international law* (Ann Arbor, Mich.) 26:1:163, 2004.

Binder, P. M. Comments on the draft Georgian Arbitration Law. *Georgian law review* (Tbilisi) 10:2/3:182-203, 2007.

In English and Georgian on facing pages.

Bjorklund, A. K. Mandatory rules of law and investment arbitration. *American review of international arbitration* (New York) 18:1-2:175-204, 2008.

Böckstiegel, K.-H., S. M. Kröll *and* P. Nacimiento, *eds*. Arbitration law in Germany: the Model Law in practice. Leiden, The Netherlands, Kluwer Law International, 2007. xxxvii, 1223 p.

Bonnell, M. When is an arbitration agreement "inoperative". *International arbitration law review* (London) 11:3:111-117, 2008.

Bridgeman, J. The arbitrability of competition law disputes. *European business law review* (Paris) 19:1:147-174, 2008.

Brödermann, E. Cornerstones of the newly created Chinese European Arbitration Centre ("CEAC"): a modern approach to international arbitration. *In* Business law. Brödermann E. 8th *ed*. Hamburg, Brödermann & Jahn, 2009. Ch. 2. p. 45-60.

Also available in Chinese, p. 61-73.

Brower, C. N. W(h)ither international commercial arbitration?: The Goff lecture

2007. *Arbitration international* (London) 24:2:181-197, 2008.

Bukar, B. A. The role of Nigerian courts in facilitating domestic and international commercial arbitration. *Vindobona journal of international commercial law and arbitration* (Vienna) 12:2:177-194, 2008.

Cambridge, J. L. Privatization of public services: UNCITRAL and transparency. *World arbitration and mediation review* (Huntington, N.Y.) 1:6:1-6, 2007.

Caron, D. D., L. M. Caplan *and* M. Pellonpää. The UNCITRAL arbitration rules: a commentary. New York, Oxford University Press, 2006. xiii, 1066 p.

Provides a commentary on the UNCITRAL Arbitration Rules (1976) based on their drafting history, the Iran-US Claims Tribunal practice, the practice of NAFTA Chapter Eleven tribunals and other tribunals established pursuant to the UNCITRAL Arbitration Rules (1976). Reproduces the texts of UNCITRAL Arbitration Rules (1976), p. 1011-1025 and the UNCITRAL Arbitral Proceedings Notes (1996), p. 1027-1048.

Carrara, C. Remedies against awards in international arbitration - setting aside of awards under Italian law. *International arbitration law review* (London) 10:1:7-12, 2007.

Castello, J. E. Report on the UNCITRAL Arbitration Working Group. *Dispute resolution journal* (New York) 63:2:7-8, May-July 2008.

Čerka, P. Arbitražinės išlygos galiojimo klausimai lietuvos teismų jurisprudencijoje. *International journal of Baltic law* (Jacksonville, Fla.) 3:4:92-105, 2007.

In Lithuanian with abstract in English.

Translation of title: Issues of the validity of arbitration clause in the jurisprudence of Lithuanian courts.

Changaroth, A. International arbitration - a consensus on public policy defences? *Asian international arbitration law journal* (Singapore) 4:2:143-174, 2008.

Chapaev, R. *and* V. Bradautanu. International commercial arbitration in the CIS and Mongolia. *American review of international arbitration* (New York) 17:3:411-467, 2006.

Chedly, L. L'arbitrage international en droit tunisien. Quatorze ans après le Code. *Journal du droit international* (Paris) 135:2:389-440, 2008.

Chokheli, N. Book review of: International commercial arbitration and conciliation in UNCITRAL Model Law jurisdictions / by P. Binder. London, Sweet & Maxwell, 2005. *Georgian law review* (Tbilisi) 10:1:172-175, 2007.

In English and Georgian on facing pages.

Chovancova, K. Enforcement of arbitral awards in the new countries of the European Union. *European review of private law = Europäische Zeitschrift für Privatrecht = Revue européenne de droit privé* (The Hague) 16:6:995-1007, 2008.

In English with abstract in French, English and German.

Clay, T. La Convention de New York vue par la doctrine française. *ASA bulletin* (Alphen aan den Rijn, The Netherlands) 26:3:467-478, 2008.

Croft, C. Proposed changes to the UNCITRAL Arbitration Rules. *Arbitrator & mediator* (Melbourne) 27:2:57-70, December 2008.

Daly, B. W. The Permanent Court of Arbitration in Indian treaties: its role, potential procedural problems, and drafting solutions. *Indian journal of international law* (New Delhi) 47:3:359-376, 2007.

Dammann, A. Vacating arbitration awards for mistakes of fact. *Review of litigation* (Austin, Tex.) 27:3:442-514, 2008.

Danov, M. The law governing arbitrability under the Arbitration Act 1996. *Lloyd's maritime and commercial law quarterly* (London) 4:536-546, November 2008.

Davidson, F. Some thoughts on the Scottish Arbitration Code. *Arbitration: the international journal of arbitration, mediation and dispute management* (London) 74:4:348-359, 2008.

_____. Some thoughts on the Scottish Arbitration Code. *Journal of business law* (London) 1:44-67, 2009.

Davies, M. Court-ordered interim measures in aid of international commercial arbitration. *American review of international arbitration* (New York) 17:3:299-334, 2006.

De Germiny, L. Arbitration law reform in Hong Kong: furthering the UNCITRAL Model Law. *Asian dispute review* (Hong Kong) 73-78, July 2008.

Đorđević, M. International (cross-border) insolvency. *In* Zakonodavstvo i praksa: zbornik radova sa regionalne konferencije o stečaju, Banja Luka 14. i 15. februar 2008 = Legislation and practice: collection of reports presented at the regional conference on insolvency, Banja Luka, 14th and 15th of February 2008. Beograd, Jugoslovenski pregled, 2008. p. 231-237, p. 487-492.

In English and Serbian.

Dubai enacts new arbitration law. *In* 2008 International arbitration report. Fulbright & Jaworski L.L.P. No. 2, p. 19-21.

El Hakim, J. La nouvelle loi sur l'arbitrage en Syrie du 25 mars 2008. *Revue de l'arbitrage* (Paris) 4:659-676, octobre/décembre 2008.

Ellig, A. *and* R. Lanctot. A decision looms: how passage of the United States Arbitration Fairness Act of 2007 would contradict principles underlying the New York Convention and affect the United States' role in international commerce. *Vindobona journal of international commercial law and arbitration* (Vienna) 12:2:249-270, 2008.

Esplugues Mota, C. Arbitraje marítimo internacional. 2nd *ed*. Madrid, Thomson/Civitas, 2007. 824 p. (Estudios sobre arbitraje)

Fauvarque-Cosson, B. *et* A. Wald, *dir*. L'arbitrage en France et en Amérique latine à l'aube du XXIe siècle: aspects de droit comparé. Paris, Société de législation comparée, 2008. 422 p.

Favre-Bulle, X. 50 years of the New York Convention on Enforcement of Awards: conventional wisdom and recent developments. *In* New developments in international commercial arbitration. Geneva, Schulthess, 2008. p. 61-79.

Fernyhough, R. A world of choice: the competition for international arbitration work (pt. 2). *Asian dispute review* (Hong Kong) 79-82, July 2008.

Pt. 1 of this article may be found in the *Asian dispute review*, April 2008, p. 44-47.

Fohlin, P. A case for a right of appeal from negative jurisdictional rulings in international arbitrations governed by the UNCITRAL Model Law. *Asian dispute review* (Hong Kong) 113-117, October 2008.

Foster, K. G. Collecting from sovereigns: the current legal framework for enforcing arbitral awards and court judgments against States and their instrumentalities, and some proposals for its reform. *Arizona journal of international and comparative law* (Tucson, Ariz.) 25:3:665-731, 2008.

Garnett, R. *and* K. Steele. In search of an appropriate standard for reasons in arbitral awards. *International arbitration law review* (London) 10:4:111-116, 2007.

Georgiev, G. S. The award in Saluka investments v. Czech Republic. *In* The reasons requirement in international investment arbitration: critical case studies. Alvarez, G. A. *and* W. M. Reisman, *eds*. Leiden, The Netherlands, Martinus Nijhoff Publishers, 2008. Ch. 5. p. 149-190.

Girsberger, D. *and* N. Voser. International arbitration in Switzerland. Geneva, Schulthess, 2008. xli, 375 p.

Godwin, P. Japanese arbitration in the wake of the 2004 reforms: time to recognize the end of the Ragan myth. *JCAA newsletter* (Tokyo) 21:1-4, November 2008.

Gruber, P. U. The Convention on the International Sale of Goods (CISG) in arbitration = La Convention des Nations Unies sur les contrats de vente internationale de marchandises (CVIM) et l'arbitrage. *Revue de droit des affaires internationales = International business law journal* (Paris) 1:15-34, 2009.

In French and English.

Gunter, P.-Y. Transnational rules on the taking of evidence. *In* Towards a uniform international arbitration law? Gaillard E. P., *ed*. New York, Juris Pub., 2005. p. 129-148.

Haloush, H. A. The authenticity of online alternative dispute resolution proceedings. *Journal of international arbitration* (Alphen aan den Rijn, The Netherlands) 25:3:355-364, 2008.

Harmathy, A. New experiences of international arbitration: with special emphasis on legal debates between parties from Western Europe and Central and Eastern Europe. *Electronic journal of comparative law* 11.3:1-15, 2007.

Electronic resource, available at www.ejcl.org/113/article113-11.pdf.

Hasan, M. Enforcement of foreign arbitration awards in Indonesia's court. *Indonesia arbitration quarterly newsletter* (Jakarta) 4:17-19, 2008.

Heilbron, H. A practical guide to international arbitration in London. London, Informa, 2008. xxiv, 356 p. (Dispute resolution guides)

Contains: Appendix B.1: index to comparison of the rules of the LCIA, ICC, ICDR and UNCITRAL, p. 191-195 -- Appendix B.2: index of the LCIA, ICC,

ICDR and UNCITRAL Rules in numerical order, p. 196-199 -- Appendix B.3: comparison of the Rules of the LCIA, ICC, ICDR and UNCITRAL, p. 200-268.

Hiber, D. *and* V. Pavić. Arbitration and crime. *Journal of international arbitration* (Alphen aan den Rijn, The Netherlands) 25:4:461-478, 2008.

Hickie, K. R. The enforceability of interim measures of protection granted by arbitral tribunals outside the seat of arbitration: a new approach. *Vindobona journal of international commercial law and arbitration* (Vienna) 12:2:221-248, 2008.

Hilmer, S. E. Did arbitration fail India or did India fail arbitration. *International arbitration law review* (London) 10:2:33-37, 2007.

_____. Hong Kong: expected legislative arbitration amendments. *International arbitration law review* (London) 10:5:N61-N63, 2007.

Ho, Jean. Decoding Singapore's International Arbitration Act, Section 12 (7). *Arbitration international* (London) 24:4:609-614, 2008.

Horn, N. Current use of the UNCITRAL Arbitration Rules in the context of investment arbitration. *Arbitration international* (London) 24:4:587-601, 2008.

Hulbert, R. W. Institutional rules and arbitral jurisdiction: when party intent is not "clear and unmistakable". *American review of international arbitration* (Huntington, N.Y.) 17:4:545-574, 2008.

Hwang, M. *and* F. Lee Cheng. Relevant considerations in choosing the place of arbitration. *Asian international arbitration law journal* (Singapore) 4:2:195-220, 2008.

Imhoos, C., D. Rooz *and* C. Séraglini. Arbitrage international et autres modes de règlement des conflits = International arbitration and alternative dispute resolution. *Revue de droit des affaires internationales = International business law journal* (Paris) 5:718-734, 2008.

In English and French.

International conference on "Institutional arbitration in infrastructure and construction". UNCITRAL-CIAC Conference, October 16-18, 2008. New Delhi, India. Conference papers. 143 p.

Conference papers discussing UNCITRAL's texts on arbitration and conciliation: The effect of gradual liberalization of the definition of "an agreement in writing" / T. Kennedy, p. 1-17 -- The application of the doctrine of "forum non convenies" to enforcement proceedings / C. Croft, p. 19-30 -- Arbitral awards - challenges and enforcement / P. H. Parekh, p. 65-70.

Jacquet, J.-M. *et* E. Jolivet, *dir*. Les mesures provisoires dans l'arbitrage commercial international - évolutions et innovations. Paris, LexisNexis, 2007. x, 144 p.

See, in particular, ch. 3 dealing with UNCITRAL work in arbitration, p. 61-144.

Jamil, S. Pakistan's implementation of the New York Convention. *Arbitration: the international journal of arbitration, mediation and dispute management* (London) 74:2:170-180, 2008.

Jenkins, J. *and* S. Stebbings. International construction arbitration law. Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2006. xx, 442 p.

Jianqiang, Li. Development of mutual enforcement of arbitration awards in Mainland and Hong Kong — from the prespective of enforcement of Mainland award in HK Court. *International law review of Wuhan University* (Wuhan, China) 5:344-358, 2006.

In Chinese with an abstract in English, p. 358.

Title in Chinese from table of contents:
香港与内地相互执行仲裁裁决制度之发展-
以内地仲裁裁决在香港法院的执行为视角.

Joint report of the International Commercial Disputes Committee and the Committee on Arbitration of the New York City Bar Association. Secretaries to International Arbitral Tribunals. *American review of international arbitration* (Huntington, N.Y.) 17:4:575-596, 2008.

Kachwaha, S. Enforcement of arbitration awards in India. *Asian international arbitration journal* (Singapore) 4:1:64-82, 2008.

Karabelnikov, B. *and* D. Pellew. Enforcement of international arbitral awards in Russia - still a mixed picture. *ICC International Court of Arbitration bulletin* (Paris) 19:1:65-85, 2008.

Karrer, P. A. The civil law and common law divide: an international arbitrator tells it like he sees it. *Dispute resolution journal* (New York) 63:1:72-81, February-April 2008.

Kawharu, Amokura. New Zealand's Arbitration Law received a tune-up: a review to recent amendments to the New Zealand Arbitration Act 1996. *Arbitration International* (London) 24:3:405-421, 2008.

Kee, C. International arbitration and security for costs - a brief report on two developments. *American review of international arbitration* (New York) 17:2:273-280, 2006.

Kennedy-Grant, T. The New Zealand experience of the UNCITRAL Model Law: a review of the position as at 31 December 2007. *Asian international arbitration journal* (Singapore) 4:1:1-63, 2008.

Khin, E. E. Judicial supervision on commercial arbitration under the UNCITRAL Model Law and arbitration laws of the United Kingdom, the United States and Singapore. *Gendai Shakai Bunka Kenkyu* (Niigata, Japan) 40:235-261, 2007.

In English. Journal title in English: The journal of the study of modern society and culture.

Knahr, C. *and* A. Reinisch. Transparency versus confidentiality in international investment arbitration - The Biwater Gauff Compromise. *Law and practice of international courts and tribunal*s (Leiden, The Netherlands) 6:97-118, 2007.

Книпер, Р. *и другие*. Сборник материалов по международному коммерческому арбитражу. Проект по международному коммерческому арбитражу в Туркменистане. Ашгабат, ТАСИС, 2008. 751 с.

Also available online at http://science.gov.tm/files/projects/Reader_on_Arbitration_(rus_17Apr2008).pdf.

Koichi, Miki. Chusai no genzai to shorai (1). *JCA journal* (Tokyo) 55:5:2-11, 2008.

In Japanese. Translation of title: The present and future of arbitration (pt. 1 of 2).

Комаров, А. С., С. Н. Лебедев *и* В. А. Мусин. Международный коммерческий арбитраж. Комментарий законодательства: постатейный научно-практический комментарий к Закону РФ "О международном коммерческом арбитраже". *Вып*. 2. Санкт-Петербург, Журнал «Третейский суд», 2007. 416 p.

Комаров, А. С. Международный коммерческий арбитраж: современные проблемы и решения. Москва, Статут, 2007. 523 p.

Kwatra, G. K. Arbitration and alternative dispute resolution: how to settle international business disputes: with supplement on Indian arbitration law. Geneva, ITC; New Delhi, Indian Council of Arbitration, 2008. xix, 420 p.

_____. Arbitration and conciliation law of India: with case law on UNCITRAL Model Law on Arbitration and Sale of Goods. 7th *ed*. New Delhi, Indian Council of Arbitration, 2008. xxiii, 1018 p.

Lamm, C. B., E. R. Hellbeck *and* C. Giorgetti. The new frontier of investor-state arbitration: annulment of NAFTA awards. *International arbitration law review* (London) 11:1:58-68, 2008.

Lanfang, F. Implementation of the New York Convention in China: a case study. *Asian international arbitration law journal* (Singapore) 4:2:123-136, 2008.

Lazic, V. Arbitration law reform in the Netherlands: formal and substantive validity of an arbitration agreement. *Electronic journal of comparative law* 11:1:1-17, 2007.

Electronic resource, available at www.ejcl.org/111/art111-16.pdf.

Lin, Mark. An introduction to the Administered Arbitration Rules of the Hong Kong International Arbitration Centre. *Asian dispute review* (Hong Kong) 9-11, January 2009.

Livingstone, M. L. Party autonomy in international commercial arbitration: popular fallacy or proven fact? *Journal of international arbitration* (Alphen aan den Rijn, The Netherlands) 25:5:529-535, 2008.

Locquin, E. *and others*. Sources informelles du droit du commerce international = Chronicle of informal sources of international commercial law. *Revue de droit des affaires internationales = International business law journal* (Paris) 1:92-116, 2008.

In English and French.

Lord, S. *and* R. Baker. A comparison of the UNCITRAL Model Law and the Arbitration Rules of the Stockholm Chamber of Commerce. *Vindobona journal of international commercial law and arbitration* (Vienna) 12:2:203-220, 2008.

Luttrell, S. R. Lex arbitri Indonesia: the law, practice and place of commercial arbitration in Indonesia today. *International arbitration law review* (London) 10:6:190-205, 2007.

Magal, M. *and* I. Kisely. Overview (May 2008). Arbitration - Slovakia. *International Law Office newsletters*, 29 May 2008.

Electronic resource, available via www.internationallawoffice.com/.

Mainwaring-Taylor, C. *and* J. Sullivan. Litigating in the shadow of the New York Convention. *Arbitration: the international journal of arbitration, mediation and dispute management* (London) 74:2:133-138, 2008.

Mangan, M. With the globalization of arbitral disputes, is it time for a new Convention. *International arbitration law review* (London) 11:4:133-142, 2008.

Manjiao, C. Is the Chinese Arbitration Act truly arbitration-friendly: determining the validity of arbitration agreement under Chinese Law. *Asian international arbitration journal* (Singapore) 4:1:104-120, 2008.

Mantakou, A. General principles of law and international arbitration. *Revue hellénique de droit international* (Athènes) 58:2:419-434, 2005.

Mantilla-Serrano, F. Book review of: International commercial arbitration in Latin America. Regulation and practice in the MERCOSUR and the associated countries / by D. Ferry. New York, Oceana, 2005. xxx, 691 p. *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (Tübingen, Germany) 72:1:184-186, 2008.

_____. Towards a transnational procedural public policy. *In* Towards a uniform international arbitration law? Gaillard E. P., *ed*. New York, Juris Pub., 2005. p. 163-198.

Marmazov, V. Y. *and* P. V. Pushkar. Settling international commercial disputes in Ukraine: participants, legal framework, arbitration: practice and enforcement of awards. *Arbitration: the international journal of arbitration, mediation and dispute management* (London) 74:3:237-246, 2008.

Marshall, F. UNCITRAL commences revision of its Arbitration Rules: what implications for investor-State disputes? *Asian dispute review* (Hong Kong) 26-28, January 2008.

Martel, D. La nullité de la sentence arbitrale. Lecture croisée franco-espagnole. *Revue internationale de droit comparé* (Paris) 60:2:487-513, 2008.

Merkin, R. *and* L. Flannery. Arbitration Act 1996. 4th *ed*. London, Informa, 2008. xxxiii, 376 p.

Reproduces the New York Convention (1958), p. 231-234, and the UNCITRAL Arbitration Model Law (as amended in 2006), p. 253-264.

Mistelis, L. Reality test: current state of affairs in theory and practice relating to "lex arbitri". *American review of international arbitration* (New York) 17:2:155-181, 2006.

Mohtashami, R. Recent arbitration-related developments in the UAE. *Journal of international arbitration* (Alphen aan den Rijn, The Netherlands) 25:5:631-639, 2008.

Монастырский, Ю. Э. Дерогационный эффект арбитражной оговорки = Derogation effect of arbitration clause. *Московский журнал международного права* (Москва) 72:4:218-229, 2008.

In Russian and English.

Montineri, C. Legislative implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958). *Vindobona journal of international commercial law and arbitration* (Vienna) 12:2:139-152, 2008.

Moses, M. L. The principles and practice of international commercial arbitration. Cambridge, Cambridge University Press, 2008. xviii, 340 p.

Moss, G. C. Arbitration and private international law. *International arbitration law review* (London) 11:4:153-164, 2008.

_____. Form of arbitration agreements: current developments within UNCITRAL and the writing requirement of the New York Convention. *ICC International Court of Arbitration bulletin* (Paris) 18:2:51-63, 2007.

Nakamura, T. Final settlement of disputes on existence and effect of arbitration agreements under the UNCITRAL Model Law. *Mealey's international arbitration report* (King of Prussia, Pa.) 23:8:25-33, 2008.

Nanshen, Sun. Conflict of jurisdictions over civil and commercial cases with foreign elements and judicial review. *International law review of Wuhan University* (Wuhan, China) 4:89-105, 2006.

In Chinese with an abstract in English, p. 104-105.

Title in Chinese from table of contents:
涉外民商事案件的管辖冲突与司法审查.

Onuki, Masaharu. Chugoku, Hong Kong, Singapore, Oubei ni okeru Kokusai Shoji Chusai no Jittai. *JCA journal* (Tokyo) 55:12:46-51, 2008.

In Japanese. Translation of title: Facts about international commercial arbitration in China, Hong Kong, Singapore, Europe and the US.

Ouerfelli, A. Al-tahkim al-dowli fi al-khanun al-tunisi va al-khanun al-mukaran. Tunis, Majma' al-atrashe Inashr wa tozi' al-kitab al-maktas, 2006. iv, 912 p.

In Arabic.

Title as appears on the cover: التحكيم الدولي في القانون التونسي والقانون المقارن.

Translation of title: International arbitration in Tunisian and domestic legislation.

_____. Enforcement of foreign arbitral awards in Maghreb countries. *Journal of international arbitration* (Alphen aan den Rijn, The Netherlands) 25:2:241-256, 2008.

_____. Majalet al-tahkim. Moalak alayha. Al-tahkim al-dakhili. Tunis, Manshurat markaz al-darasat al-Kanuniya wa al-Kazayia, 2006. 464 p.

In Arabic. Titles in Arabic, French and English from cover:
مجلة التحكيم. معلق عليها. التحكيم الداخلي = Code de l'Arbitrage. L'arbitrage interne. Annoté. = Arbitration Code. Domestic arbitration.

Paal, B. P. Book review of: Internationale Handelsschiedsgerichtsbarkeit. Kommentar zu den Schiedsverfahrensordnungen ICC - DIS - Wiener Regeln - UNCITRAL - LCIA / by Aden M. München, Beck, 2003. xxxi, 783 p. *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (Tübingen, Germany) 70:3:637-640, 2006.

In German. Translation of title of the book reviewed: International commercial arbitration. Commentary.

Parikh, S. Indo no Shoji-funso Kaiketsu Gaisetsu (1). *JCA journal* (Tokyo) 55:7:2-9, 2008.

In Japanese. Translation of title: Overview of the resolution of commercial disputes in India (pt. 1).

Park, W. W. Respecting the New York Convention. *ICC International Court of Arbitration bulletin* (Paris) 18:2:65-77, 2007.

Parra, A. R. Applicable law in investor-State arbitration. *In* Contemporary issues in international arbitration and mediation. A. W. Rovine, *eds*. Leiden, The Netherlands, M. Nijhoff Publishers, 2008. p. 3-12. (Fordham papers)

Patocchi, P. M. UNCITRAL-Schiedsgerichtsordnung ("UncitralO"). *In* Institutionelle Schiedsgerichtsbarkeit: Kommentar. R. A. Schütze, *eds*. Köln, Carl Heymanns Verlag, 2006. Kapitel 12. p. 665-798.

In German. Translation of title: UNCITRAL Arbitration Rules (1976).

Petsche, M. L'autonomie de l'arbitrage commercial international et le contrôle de conformité des sentences arbitrales à l'ordre public. *Gazette du palais* (Paris) 126:347-348:11-15. (Les cahiers de l'arbitrage no. 2006/3)

Petsimeris, C. The scope of the doctrine of arbitrability and the law under which it is determined in the context of international commercial arbitration. *Revue hellénique de droit international* (Athènes) 58:2:435-451, 2005.

Plant, D. W. We must talk because we can: mediating international intellectual property disputes. Paris, ICC Services, 2008. 188 p.

See, in particular, appendices C and D.

Poudret, J.-F. *and* S. Besson. Comparative law of international arbitration. 2nd *ed*. London, Sweet & Maxwell, 2007. xxxix, 952 p.

Contains analysis and comparison of the main international treaties in the field of arbitration, the UNCITRAL Arbitration Model Law (1985), the UNCITRAL Arbitration Rules (1976) and the laws of seven European countries.

Punwar, P. Draft arbitration laws published by Ministry of Economy and DIFC. *Al Tamimi law update* (Dubai) 204:5-6, 2008.

Raeschke-Kessler, H. Die Unparteilichkeit und Unabhängigkeit des Schiedsrichters - ein transnationales Rechtsproblem? *ASA bulletin* (Alphen aan den Rijn, The Netherlands) 26:1:3-17, 2008.

In German with brief summary in English, p. 17.

Translation of title: The impartiality and independence of arbitrators - a transnational problem?

Rhoades, R., D. M. Kolkey *and* R. Chernick, *eds*. Practitioner's handbook on international arbitration and mediation. 2nd *ed*. Huntington, N.Y., JurisNet, 2007. 1000 p.

Robin, G. Mesures conservatoires et provisoires en matière d'arbitrage international: le rôle du juge d'appui = Conservatory and provisional measures in international arbitration: the role of State courts. *Revue de droit des affaires internationales = International business law journal* (Paris) 3:319-364, 2008.

In French and English.

Rodríguez, J. M. Control de plazos en el procedimiento arbitral. *In* Temas de contratación internacional, inversiones y arbitraje. Asunción, CEDEP, 2006. p. 297-317.

Sadah, M. A. The application of UNCITRAL Model Law principles in the Middle East region. *Arab law quarterly* (Leiden, The Netherlands) 22:3:219-269, 2008.

Savola, M. Välityslausekkeen laadinnasta kansainvälis-luontoisissa sopimuksissa I. *Defensor legis* (Helsinki) 1:13-52, 2008.

In Finnish.

Schwartz, I. M. Interim and emergency relief in arbitration proceedings. *Dispute resolution journal* (New York) 63:1:57-62, February-April 2008.

Seifi, J. The new International Commercial Arbitration Act of Iran: towards harmony with the UNCITRAL Model Law. Arbitration Center of Iran Chamber, Tehran [2008].

Available online at www.arbitration.ir/english/arbitration_jurisprudence.aspx?t=2.

Shany, Y. Similarity in the eye of the beholder: revisiting the application of rules concerning jurisdictional conflicts in the Lauder/CME cases. *In* Contemporary issues in international arbitration and mediation. A. W. Rovine, *eds*. Leiden, The Netherlands, M. Nijhoff Publishers, 2008. p. 119-138. (Fordham papers)

Shine, P. Establishing jurisdiction in commercial disputes: arbitral autonomy and the principle of kompetenz-kompetenz. *Journal of business law* (London) 3:202-225, 2008.

Sibanda, O. S. National Court intervention in international commercial arbitration in South Africa. *Vindobona journal of international commercial law and arbitration* (Vienna) 12:2:153-168, 2008.

Sikri, S. Reference of dispute to arbitration: role of court under the UNCITRAL Model Law. *Indian Council of Arbitration quarterly* (New Delhi) 42:2:7-12, July-September 2008.

Singh, V. Legislative intent and judicial interpretation of conciliation proceedings' under the Arbitration and Conciliation Act of India. *Vindobona journal of international commercial law and arbitration* (Vienna) 12:1:103-112, 2008.

Slipachuk, T. *and* P. Runeland. New rules for international arbitration in Ukraine:

improved structure, changes in procedure and substance. *Stockholm international arbitration review* (Huntington, N.Y.) 1:173-188, 2008.

Special New York Convention number. *Journal of international arbitration* (Alphen aan den Rijn, The Netherlands) 25:6:647-915, 2008.

Contents of this issue devoted entirely to the New York Convention (1958) and include the following articles: Narrow exceptions: a review of recent U.S. precedent regarding the due process and public policy defenses of the New York Convention / L. F. Reed *and* J. Freda, p. 649-656 -- Enforcing foreign arbitral awards in the United States: the non-arbitrable subject matter defense / A. C. Smutny *and* H. T. Pham, p. 657-668 -- The implementation of the New York Convention in Canada / H. C. Alvarez, p. 669-679 -- Application of the New York Convention: a report from Denmark, Finland, Norway, and Sweden / A. Magnusson, p. 681-690 -- Implementing the New York Convention in Switzerland / E. Geisinger, p. 691-706 -- New York Convention of June 10, 1958: the application of article V by the courts in Italy / P. Bernardini *and* M. Perrini, p. 707-719 - Arbitrability, due process, and public policy under article V of the New York Convention: Belgian and French perspectives / B. Hanotiau *and* O. Caprasse, p. 721-741 -- Current issues on the application of the New York Convention: a German perspective / W. Kühn, p. 743-757 -- Application of article V of the New York Convention in the Netherlands / B. King *and* A. Schluep, p. 759-770 - Application of the New York Convention in Austria and Eastern Europe / C. Liebscher, p. 771-786 -- Interpretation of article V of the New York Convention by Russian Courts: due process, arbitrability, and public policy grounds for non-enforcement / I. Nikiforov, p. 787-808 -- Application of article V of the New York Convention: a Central Asian perspective / N. Rubins *and* G. Sur, p. 809-819 -- The influence of the New York Convention on the development of international arbitration in Nigeria / D. Ufot, p. 821-836 -- Recognition and enforcement of awards under the New York Convention: China and Hong Kong perspectives / N. Darwazeh *and* F. Yeoh, p. 837-856 -- Japanese court decisions on article V of the New York Convention / Yasuhei Taniguchi *and* Tatsuya Nakamura, p. 857-863 -- Article V of the New York Convention and Korea / Seung Wha Chang, p. 865-871 -- Survey of South East Asian Nations on the application of the New York Convention / Michael Hwang S. C. *and* Shaun Lee, p. 873-892 -- Application of the New York Convention in India / F. S. Nariman, p. 893-898 -- Recognition and enforcement of foreign awards under the New York Convention in Australia and New Zealand / R. Garnett *and* M. Pryles, p. 899-912.

Steinbrück, B. Die Vollstreckbarkeit ausländischer Schiedssprüche nach ihrer Aufhebung im Ursprungsstaat. *Internationales Handelsrecht* (Hamburg) 8:4:152-157, 2008.

In German. Translation of title: The enforceability of foreign arbitral awards after its setting aside in the state of origin.

Steindl, B. Watch out and act!: recent case law on due process in light of Austrian law and the 1958 New York Convention. *Journal of international arbitration* (Alphen aan den Rijn, The Netherlands) 25:4:513-520, 2008.

Sutcliffe, J. *and* A. Sabater. UNCITRAL arbitration: new rules on transparency? *Mealey's international arbitration report* (King of Prussia, Pa.) 23:5:32-36, 2008.

Tannock, Q. Public policy as a ground for setting aside an award: is Zimbabwe out of Step? *Arbitration: the international journal of arbitration, mediation and dispute management* (London) 74:1:72-81, 2008.

Tiyagi, V. *and* A. Singh. Enforceability of foreign arbitral awards in India. *Vindobona journal of international commercial law and arbitration* (Vienna) 12:1:91-102, 2008.

Umar, H. Court interventions in international arbitration - Indonesia experience. *Indonesia arbitration quarterly newsletter* (Jakarta) 4:11-16, 2008.

United Nations. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) = Convention pour la reconnaissance et l'exécution des sentences arbitrales étrangères (New York, 1958) = Convención sobre el Reconocimiento y la Ejecución de las Sentencias Arbitrales Extranjeras (Nueva York, 1958) = 承认和执行外国仲裁裁决公约 (1958年, 纽约)= Конвенция о признании и приведении в исполнение иностранных арбитражных решений = اتفاقية الاعتراف بقرارات التحكيم الأجنبية وانفاذها (نيويورك، ١٩٥٨). New York, United Nations, 2008. viii, [140] p.

United Nations publication, Sales No. M.08.V.5. Multilingual edition.

Contains: Pt. 1: United Nations Conference on International Commercial Arbitration, New York, 20 May-10 June 1958 -- Pt. 2: 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 -- Pt. 3: Status of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards as at 1 January 2008.

Utama, M. Law governing arbitration proceedings. *Indonesia arbitration quarterly newsletter* (Jakarta) 4:20-27 2008.

Ventsch, V. *and* C. Krauskopf. Vollstreckung eines ausländischen Schiedsspruchs bei Rechtsnachfolge. *Internationales Handelsrecht* (Hamburg) 8:1:9-14, 2008.

In German with brief summary in English, p. 13-14.

Translation of title: The enforceability of foreign arbitral awards by a legal succession.

Viswanathan, T. K. Hand book on arbitration, mediation and other ADR techniques: a collection of keynote addresses, articles and cases. New Delhi, The International Centre for Alternative Dispute Resolution, 2008. xxxiv, 1119 p.

Reproduces the text of the 1996 Arbitration and Conciliation Act of India (Act No. 26 of 1996, 16 August 1996) based on the UNCITRAL Arbitration Model Law (1985) and the UNCITRAL Conciliation Rules (1980), p. 1066-1115.

Voigt, S. Outline of international commercial arbitration regime: arbitration - South Africa. *International Law Office newsletters*, 7 February 2008.

Electronic resource, available via www.internationallawoffice.com/.

Vucurovic, T. B. 50th anniversary of the New York Convention: any progress in recognition and enforcement of foreign arbitral awards in Ukraine. *International arbitration law review* (London) 11:5:165-176, 2008.

Wach, K. *and* F. Meckes, *eds*. Tactics in M&A arbitration. Frankfurt am Main,

German Law Publishers, 2008. x, 478 p.

The book also reproduces the New York Convention (1958) and the status of its ratification, p. 322-331.

Wald, A., *coord.* Caderno especial dedicado à Convenção de Nova Iorque. *Revista de arbitragem e mediação* (São Paulo, Brazil) 5:18:5-396, julio/setembro de 2008.

In Portuguese. Translation of title: Special issue dedicated to the New York Convention (1958).

Winkler, M. L'apprezzamento dell'efficacia della clausola arbitrale da parte del giudice statale: un conflitto tra Italia e Francia. *Diritto del commercio internazionale* (Milano) 21.4:789-807, 2007.

In Italian. Translation of title: The evaluation of the validity of the arbitration clause by State courts: a conflict between Italy and France.

Wolff, R. Party autonomy to agree on non-final arbitration? *ASA Bulletin* (Alphen aan den Rijn, The Netherlands) 26:3:626-641, 2008.

Wren, T. The Minister for Finance's New Public Works Arbitration Rules: a clash with the Bunreacht in the waiting? *Arbitration: the international journal of arbitration, mediation and dispute management* (London) 74:3:298-305, 2008.

Youssef, K. A. International commercial arbitration: UNCITRAL rules and Islamic Sharia' = L'arbitrage commercial international selon les règles de la CNUDCI et de la Charia' islamique. *Lebanese review of Arab and international arbitration = Revue libanaise de l'arbitrage arabe et international* (Beirut) 43:5-45, 2007.

In Arabic. Title as appears in the article:
الشريعة وقواعد اليونسيترال المتحدة للأمم النموذجي القانون مبادئ ضوء في الدولي التجاري التحكيم الإسلامية

Zadkovich, J. Divergence and comity among the doctrines of separability and competence-competence. *Vindobona journal of international commercial law and arbitration* (Vienna) 12:1:1-32, 2008.

IV. International transport

Allsop, J. International maritime arbitration: legal and policy issues. *Journal of international maritime law* (Witney, UK) 13:6:398-415, 2007.

And then there were the Rotterdam Rules. *Journal of international maritime law* (Witney, UK) 14:3:189-190, 2008.

Discusses the history of international conventions regulating the international carriage of goods by sea, including, *inter alia*, the Hamburg Rules (1978) and the Rotterdam Rules (2008).

Asariotis, R. What future for the bill of lading as a document of title? *Journal of international maritime law* (Witney, UK) 14:2:75-77, 2008.

Brunner, R. Electronic transport documents and shipping practice not yet a married couple. *European transport law* (Antwerpen, Belgium) 43:2:123-168, 2008.

Delebecque, P. Les «autoroutes de la mer»: pour un régime entièrement (ou partiellement) maritime. *Droit maritime français* (Paris) 60:692:403-407, 2008.

_____. La Convention sur le contrat de transport international entièrement ou partiellement par mer: dernières précisions. *Droit maritime français* (Paris) 60:696:787-790, 2008.

_____. Le projet CNUDCI, suite et fin: la "Convention des Nations Unies sur le contrat de transport international de marchandises entièrement ou partiellement par mer". *Droit maritime françai*s (Paris) 60:690:211-215, 2008.

_____. La responsabilité du chargeur dans ses relations avec le transporteur. Le point de vue français. *Droit maritime français* (Paris) 60:689:112-117, 2008.

_____. Transport maritime: Convention CNUDCI: Règles de Rotterdam: adoption. *Revue trimestrielle de droit commercial et de droit économique* (Paris) 4:901-902, octobre/décembre 2008.

Diamond, A. The next sea carriage convention? *Lloyd's maritime and commercial law quarterly* (London) 2:135-187, May 2008.

Enríquez, D. UNCITRAL y las oscilaciones del régimen jurídico del transporte marítimo internacional de mercancías. Advertencias en torno a la búsqueda de una tercera vía. *Anuario mexicano de derecho internacional* (México, D.F.) 7:79-142, 2008.

With abstract in English.

Also available online at www.bibliojuridica.org/estrev/pdf/derint/cont/8/art/art3.pdf.

Esplugues Mota, C. Arbitraje marítimo internacional. Madrid, Thomson/Civitas, 2007. 824 p. (Estudios sobre arbitraje)

Fabre-Teste, P. Le projet de Convention de la CNUDCI sur le transport transmaritime multimodal. Faculté de droit et de sciences politiques aix Marseille III, année universitaire 2005-2006. Centre de droit maritime et des transports. 52 p.

Thesis (PhD). Also available online at www.cdmt.droit.u-3mrs.fr/.

Fedi, P. L. Le cadre juridique international de l'exploitation des installations portuaires ou comment passer d'une législation atomisée spécifique à un régime universel reconnu. *Droit maritime français* (Paris) 60:694:645-655, 2008.

Goldby, M. The CMI rules for electronic bills of lading reassessed in the light of current practices. *Lloyd's maritime and commercial law quarterly* (London) 1:56-70, February 2008.

Hoeks, Lim M. Multimodal carriage with a pinch of sea salt: door-to-door under the UNCITRAL draft instrument. *European transport law* (Antwerpen, Belgium) 43:3:257-280, 2008.

Katsivela, M. International carriage of goods: ocean carrier liability and the European Union. *European transport law* (Antwerpen, Belgium) 43:1:3-15, 2008.

Margetson, N. J. Liability of the carrier under the Hague (Visby) Rules for cargo damage caused by unseaworthiness of its containers. *Journal of international maritime law* (Witney, UK) 14:2:153-161, 2008.

Ng, Jim-mi Jimmy. UNCITRAL Model Law on Electronic Commerce in relation to maritime operations in the Pearl River Delta, China: national report. *Journal of international maritime law* (Witney, UK) 14:4:346-363, 2008.

Pejovic, C. Stoppage in transit and right of control: "conflict of rules"? *Pace international law review* (White Plains, N.Y.) 20:129-[149], spring 2008.

Proyecto de "Convenio de las Naciones Unidas sobre el Contrato de Transporte Internacional de Mercancías Total o Parcialmente Marítimo". *Derecho de los negocios* (Madrid) 19:210:19-22, 2008.

United Nations Commission on International Trade Law (UNCITRAL): 41st session, New York, 16 June-3 July 2008. *Bulletin des transports internationaux ferroviaires = Zeitschrift für den internationalen Eisenbahnverkehr = Bulletin of international carriage by rail* (Berne) 116:3:33-34, 2008.

Also in French and in German.

Discusses drafting details of the Rotterdam Rules (2008) based on the UNCITRAL Report of the 41st session (A/63/17).

V. International payments (including independent guarantees and standby letters of credit)

Bollen, R. Harmonization of international payment law: a survey of the UNCITRAL Model Law on Credit Transfers (pt. 2). *Journal of international banking law and regulation* (London) 23:3:105-124, 2008.

Also appeared in *Journal of banking and finance law and practice* (North Ryde, N.S.W., Australia) 19:4:249, December 2008.

Reviews the United States' model law on funds transfers, analyzes art. 4A of the Uniform Commercial Code and compares it to the UNCITRAL Credit Transfer Model Law (1992).

Costa Gomes, M. J. da. Sobre a circulabilidade do crédito emergente de garantia bancária autónoma ao primeiro pedido. *Revista da banca* (Lisboa) 64:37-82, 2007.

In Portuguese. Translation of title: About the flow of credit emerging from performance bonds.

Discusses the Portuguese law on independent guarantees in light of international standards, including, *inter alia*, the United Nations Guarantee and Standby Convention (1995).

Mavromati, D. The law of payment services in the EU: the EC Directive on payment services in the internal market. Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2008. xix, 308 p. (European monographs, no. 60)

VI. Electronic commerce

Blythe, S. E. China's new electronic signature law and certification authority regulations: a catalyst for dramatic future growth of e-commerce. *Chicago-Kent journal of intellectual property* (Chicago, Ill.) 7:1:1-32, 2007.

Boss, A. H. *and* W. Kilian. The United Nations Convention on the Use of Electronic Communications in International Contracts: an in-depth guide and sourcebook. Alphen aan den Rijn, The Netherlands, Wolters Kluwer, 2008. xxviii, 514 p.

Reproduces the texts of the United Nations Convention on Electronic Contracting (2005), p. 453-463 and the UNCITRAL Model Law on Electronic Commerce (1996), p. 483-491.

Brunner, R. Electronic transport documents and shipping practice not yet a married couple. *European transport law* (Antwerpen, Belgium) 43:2:123-168, 2008.

Caprioli, E. A. Droit matériel international du commerce électronique. *In* Droit international de l'économie numérique. 2. *éd*. Paris, Lexis Nexis, 2007. Ch. 2. p. 81-98.

DiMatteo, Larry A. Electronic contracting. *In* The law of international contracting. Alphen aan den Rijn, The Netherlands, Wolters Kluwer, 2009. Ch. 12. p. 415-445.

The publication reproduces the texts of the United Nations Sales Convention (1980), p. 451-478, the Limitation Convention (1974/1980), p. 479-487, and the United Nations Convention on Electronic Contracting (2005), p. 559-571.

Должич, А. А. Электронная подпись в коммерческом обороте: российское, зарубежное и международное регулирование. *Московский журнал международного права = Moscow journal of international law* (Москва) 71:3:193-213, 2008.

In Russian with abstract in English.

Estrella Faria, J. A. The United Nations Convention on the Use of Electronic Communications in International Contracts: an introductory note. *International law review of Wuhan University* (Wuhan, China) 8:7-11, 2008.

In Chinese. Title as appears in the article:
《联合国国际合同使用电子通信公约》简述.

Gutierrez, M. C. Desarrollos en regulación en comercio electrónico en los países de la Región Andina. *Revista de derecho informático* 121, agosto del 2008.

Electronic resource, available online at
www.alfa-redi.org/rdi-articulo.shtml?x=10731.

Haloush, H. A. The authenticity of online alternative dispute resolution proceedings. *Journal of international arbitration* (Alphen aan den Rijn, The Netherlands) 25:3:355-364, 2008.

Illescas Ortíz, R. La continuada - y, a veces, desaparecida - electronificación del derecho de sociedades mercantiles. *Revista de derecho y tecnología* (San Cristóbal, Venezuela) 8:117-159, 2006.

Ch. 5.3 discusses article 17.5 of UNCITRAL Model Law on Electronic

Commerce (1996) in relation to the replacement of data messages by paper documents.

Lewis, D. *and* J. Peng. Implementation of international trade rules governing software protection and development in four Asian jurisdictions (pt. 1). *Computer and telecommunications law review* (London) 14:7:191-197, 2008.

Loza, E. *and* S. Kilminster-Hadley. The law of electronic contracts: the new United Nations Convention. *Advocate* (Boise, Idaho) 50:8/9:40-43, 2007.

Luddy, W. J. *and* P. W. Schroth. The new UNCITRAL e-commerce convention in the mosaic of developing global legal infrastructure. Academy of legal studies in business national proceedings. St. Petersburg, Fla., 81st ALSB Annual Conference, 2006.

Also available online at www.alsb.org/Proceedings%20Files/2006/Luddy-Schroth.pdf.

Martin, C. H. The Electronic Contracts Convention, the CISG and new sources of e-commerce law. *Tulane journal of international and comparative law* (New Orleans, La.) 16:2:467, spring 2008.

Mason, S. Electronic signatures in law. 2nd *ed*. West Sussex, Tottel Pub., 2007. liii, 674 p.

See, in particular, ch. 3 (p. 119-137) and ch. 9 (p. 245-246) for discussion of UNCITRAL Model Law on Electronic Commerce (1996) and UNCITRAL Model Law on Electronic Signatures (2001).

_____. Electronic signatures in practice. *Journal of high technology law* (Boston, Mass.) 6:2:148:164, 2006.

Ng, Jim-mi Jimmy. UNCITRAL Model Law on Electronic Commerce in relation to maritime operations in the Pearl River Delta, China: national report. *Journal of international maritime law* (Witney, UK) 14:4:346-363, 2008.

Polanski, P. P. International electronic contracting in the newest UN Convention. *Journal of international commercial law and technology* ([Hellerup], Denmark) 2:3:112-120, 2007.

Prins, C. E-government: a comparative study of the multiple dimensions of required regulatory change. *Electronic journal of comparative law* 11:3:1-23, 2007.

Electronic resource, available at www.ejcl.org/113/article113-35.pdf.

Raymond, A. H. Electronic commerce and the new UNCITRAL draft Convention. *International law practicum* (New York) 19:1:66, 2006.

Schroth, P. W. *and* W. J. Luddy. On the particular value to Africa and the developing world of the UN Convention on the Use of Electronic Communications in International Contracts. *International Academy of African Business and Development* (Athabasca, Canada) 7:136-143, 2006.

Seng, D. The Singapore Electronic Transactions Act and the Hong Kong Electronic Transactions Ordinance. *Digital evidence and electronic signature law review* (Bedfordshire, UK) 5:7-20, 2008.

Smedinghoff, T. J. The legal challenges of implementing electronic transactions. *Uniform Commercial Code law journal* (New York) 41:3:3-34, 2008.

Also available online at
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1275108.

Snail, S. Electronic contracts in South Africa - a comparative analysis. *Journal of information, law and technology* 2:2008.

Electronic resource, available at
www2.warwick.ac.uk/fac/soc/law/elj/jilt/2008_2/snail/.

United Nations Commission on International Trade Law Secretariat. Promoting confidence in electronic commerce: legal issues on international use of electronic authentication and signature methods. Vienna, United Nations, 2009. v, 103 p.

United Nations publication, Sales No. E.09.V.4.

Winn, J. K. *and* S. Yuping. Can China promote electronic commerce through law reform?: some preliminary case study evidence. *Columbia journal of Asian law* (New York) 20:2:415-450, 2007.

Winn, J. K *and* M. C. Silveira. Secured transactions and electronic commerce law: diverging perspectives in North and South America. *Michigan state journal of international law* (East Lansing, Mich.) 16:30:577-607, 2007.

VII. Security interests (including receivables financing)

Bazinas, S. V. Key objectives and fundamental principles of the UNCITRAL Legislative Guide on Secured Transactions. *Insolvency and restructuring international* (London) 2:1:42-48, 2008.

_____. UNCITRAL adopts the UNCITRAL Legislative Guide on Secured Transactions. *INSOL world* (London) 1:23-24, 2008.

_____. UNCITRAL. *In* Security over receivables: an international handbook. W. Johnston, *ed*. New York, Oxford University Press, 2008. p. 601-623.

Brennan, L. Les défis du financement de la propriété intellectuelle. *Magazine de l'OMPI* (Genève) 5:9-11, septembre 2008.

Also available online at
www.wipo.int/wipo_magazine/fr/2008/05/article_0004.html.

Di Luigi, C. M. Divergences of security and property law in the European Union: the need for action. *Journal of business law* (London) 6:526-549, 2008.

Goodger, B. Les incidences du processus de la CNUDCI. *Magazine de l'OMPI* (Genève) 5:7-8, septembre 2008.

Also available online at
www.wipo.int/wipo_magazine/fr/2008/05/article_0003.html.

Hishinuma, T. Chiteki Zaisan Tanpo wo Meguru Kokusai Kihan Keisei no Doko to Kongo no Tenbo. *Intellectual property management* (Tokyo) 58:10:1249-1256, 2008.

In Japanese. Translation of title: Trends surrounding international norm setting for IP security interests and future perspectives - Working Group VI of UNCITRAL.

Kohn, R. M. Revolver. *Secured lender* (New York) 64:4:84, July/August 2008.

Perkins, J. A question of priorities: choice of law and proprietary aspects of the assignment of debts. *Law and financial markets review* (Oxford, UK) 2:3:238-243, 2008.

Prusko, W. "The future of secured credit in Europe": ein Konferenzbericht. *IPRax* (Bielefeld, Germany) 28:5:465-467, 2008.

In German. Translation of title: "The future of secured credit in Europe": a conference report.

Scott, S. A step towards a more sympathetic credit security dispensation in South Africa. *Journal of contemporary Roman-Dutch law = Tydskrif Vir Hedendaagse Romein-Hollandse Reg* (Durban, South Africa) 71:3:473-482, 2008.

Discusses credit security law in South Africa and compares enforcement of creditors' rights in South Africa with international standards, including, *inter alia*, the UNCITRAL Secured Transactions Guide (2007).

Sigman, H. C. *and* E.-M. Kieninger. Introduction. *In* Cross-border security over tangibles. München, Sellier, 2007. p. 1-56.

Umarji, M. R. Role of secured transactions to mobilize credit and need for modernizing the law. *In* Thoughts on banking sector reforms. Mumbai, Indian Banks' Association, 2008. Ch. 9. p. 177-186.

VIII. Procurement

Gordon, D. I. Constructing a bid protest process: the choices that every procurement challenge system must make. *Public contract law journal* (Washington, D.C.) 35:427-447, 2006.

Guimaraes De Lima e Silva, V. The revision of the WTO Agreement on Government Procurement: to what extent might it contribute to the expansion of current membership. *Public procurement law review* (London) 17:2:61-98, 2008.

Krüger, K. On access to public administrative procurement records (tender openings, protocols, reports). *In* Enhancing best practices in public procurement: proceedings of the 3rd International Public Procurement Conference, 28-30 August 2008. Amsterdam, The Netherlands. p. 205-222.

Available online at www.ippa.ws/IPPC3/Proceedings/Chaper%2015.pdf.

_____. Urgent needs - derogatory procurement law scenarios: reflections over *ius necessitatis* in the area of public contracting - *à propos* the EC Directive 2007/66, amending Directive 89/655/EC on remedies in public contracting. *In* Enhancing best practices in public procurement: proceedings of the 3rd International Public Procurement Conference, 28-30 August 2008. Amsterdam, The Netherlands. p. 165-190.

Available online at www.ippa.ws/IPPC3/Proceedings/Chaper%2013.pdf.

Lalonde, P. M. *and others*. ABA SIL International Procurement Committee Year in Review 2007. *International lawyer* (Chicago, Ill.) 42:2:479-[489], summer 2008.

Nicholas, C. Framework agreements and the UNCITRAL Model Law on Procurement. *Public procurement law review* (London) 17:5:NA220-NA230, 2008.

_____. The UNCITRAL Model Law on Procurement of Goods, Construction and Services - fundamentals and reform. *In* The Fourth China Financial & Economic Law Forum: International Forum on Public Procurement 2008: agenda: collection of essays. Beijing, November 2008. p. 348-361.

Parallel title of publication in Chinese: 第四届中国财经法律论坛: 公共采购国际论坛 2008 -议程--论文集.

_____. The United Nations Convention against Corruption and its impact on procurement regulation - the UNCITRAL perspective. *Public procurement law review* (London) 17:2:NA64-NA74, 2008.

Sabbatini, M. S. La Direttiva 2007/66/CE sulle procedure di recorso in materia di appalti pubblici: la transparenza é anche una questione di termini. *Diritto del commercio internazionale* (Genova, Italy) 22.1:131-162, 2008.

In Italian. Translation of title: Directive 2007/66/EC with regard to improving the effectiveness of review procedures concerning the award of public contracts: transparency is also a matter of terms.

Trepte, P.-A. Contract award procedures. *In* Public procurement in the EU: a practitioner's guide. Oxford, Oxford University Press, 2007. Ch. 7. p. 373-480.

See, in particular, discussion in regard to regulation of restricted tendering in the UNCITRAL Procurement Model Law (1994), p. 378-380.

Troff, E. A. The United States agency-level bid protest mechanism: a model for bid challenge procedures in developing nations. *Air force law review* (Washington, D.C.) 57:113-154, winter 2005.

Available online at www.afjag.af.mil/shared/media/document/AFD-081009-010.pdf.

Yukins, C. R. Addressing conflicts of interest in procurement: first steps on the world stage, following the UN Convention against Corruption. *In* Enhancing best practices in public procurement: proceedings of the 3rd International Public Procurement Conference, 28-30 August 2008. Amsterdam, The Netherlands. p. 1169-1203.

Available online at www.ippa.ws/IPPC3/Proceedings/Chaper%2061.pdf.

IX. Insolvency

Arsenault, S. J. The westernization of Chinese bankruptcy: an examination of China's new Corporate Bankruptcy Law through the lens of the UNCITRAL Legislative Guide to Insolvency Law. *Penn State international law review* (Carlisle, Pa.) 27:45-[94], 2008.

Beckering, K. J. United States cross-border corporate insolvency: the impact of Chapter 15 on Comity and the new legal environment. *Law and business review of the Americas* (Dallas, Tex.) 14:281-311, spring 2008.

Bomhof, S. A. *and* A. M. Slavens. Shifting gears in cross-border insolvencies: from comity to COMI. *Banking and finance law review* (Toronto) 24:31-[51], September 2008.

Clift, J. Update on Enterprise Groups' Project: United Nations Commission on International Trade Law. *INSOL world* (London) 1:22, 2008.

Cooper, N. The Bear Stearns conundrum. *INSOL world* (London) 3rd quarter 2008. p. 18-19.

_____. The changing role of shareholders in restructuring. *International corporate rescue* (Hertfordshire, UK) 5:6:327-329, 2008.

Dessain, A. Bear Stearns and COMI - a worried reaction from Jersey. *INSOL world* (London) 3rd quarter 2008. p. 25-26.

Di Sano, S. COMI: the sun around which cross-border insolvency proceedings revolve (pt.1). *Journal of international banking law and regulation* (London) 24:2:88-101, 2009.

Fildman, J. N. *and others*. Panel discussion of Canadian Bankruptcy and Insolvency Law: Bill C-55 Statute c. 47 and beyond. *Canadian business law journal = Revue canadienne du droit de commerce* (Aurora, Ont.) 46:3:321-342, 2008.

Flessner, A. Europäisches und internationales Insolvenzrecht: eine Einführung. *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (Tübingen, Germany) 70:3:453-457, 2006.

In German. Translation of title: European and international insolvency law: an introduction.

Galen, R. J. van. Insolvency and restructuring: latest developments in proposed bill for cross-border insolvencies. *International Law Office newsletters*, 1 May 2008.

Electronic resource, available via www.internationallawoffice.com/.

Galip, B. A proper approach to cooperation in cross-border insolvency. *International corporate rescue* (Arkley, UK) 4:1:24-30, 2007.

Girsberger, D. Die Stellung der gesicherten Gläubiger in der internationalen Insolvenz. *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (Tübingen, Germany) 70:3:505-537, 2006.

In German. Translation of title: The status of secured creditors in international insolvency proceedings.

Glosband, D. M. *and others*. The American Bankruptcy Institute guide to cross-border insolvency in the United States. Alexandria, Va., American Bankruptcy Institute, 2008. xii, 70 p.

In particular, see p. 11-16 for discussion on history of the UNCITRAL Insolvency Model Law (1997).

Glosband, D. M. Bear Stearns appeal decision. *INSOL world* (London) 3rd quarter 2008. p. 14-17.

Good, M. D. Cross-border bankruptcy reform in NAFTA jurisdictions: has seizing control of troubled, closely-held corporations gotten easier? *International corporate rescue* (Hertfordshire, UK) 5:4:224-228, 2008.

Hammer, A. L. *and* M. E. McClintock. Understanding Chapter 15 of the United States Bankruptcy Code: everything you need to know about cross-border legislation in the United States. *Law and business review of the Americas* (Dallas, Tex.) 14:257-280, spring 2008.

Harrison, L. Chapter 15: a limited resort for the Caymans so far. *INSOL world* (London) 3rd quarter 2008. p. 17-19.

Kersey, M. UNCITRAL Model Law gathers momentum in Australia. *International corporate rescue* (Arkley, UK) 5:1:8-11, 2008.

Koppen, F. A critical examination of the Preliminary Bill for a new Dutch Insolvency Act. *International corporate rescue* (Hertfordshire, UK) 5:6:337-343, 2008.

Lifland, B. Chapter 15 of the United States Bankruptcy Code: an annotated section-by-section analysis (1). *In* Faillite internationale et conflit de juridiction: regards croisés transatlantiques = Cross-border insolvency and conflict of jurisdictions: a US-EU experience. Affaki, G, *ed*. Paris, Forum Européen de la communication; Bruxelles, Bruylant, 2007. p. 31-72.

Locatelli, F. International trade and insolvency law: is the UNCITRAL Model Law on Cross-Border Insolvency an answer for Brazil?: an economic analysis of its benefits on international trade. *Law and business review of the Americas* (Dallas, Tex.) 14:2:313-345, spring 2008.

Locke, G. What are we achieving through the UNCITRAL Model Law?: Chapter 15 non-cooperation and non-coordination. *INSOL world* (London) 2:20-21, 2008.

Marshall, A. *and* C. Pardiwala. Changing COMI prior to insolvency is fair game! *International corporate rescue* (Arkley, UK) 4:6:318-322, 2007.

Matousekova, M. Private international law answers to the insolvency of cross border groups: comparative analysis of French and English case law. *Revue de droit des affaires internationales = International business law journal* (Paris) 2:141-163, 2008.

In English and French.

Mevorach, I. The 'home country' of a multinational enterprise group facing insolvency. *International and comparative law quarterly* (London) 57:2:427-448, April 2008.

Morán Bovio, D. El régimen de la insolvencia en UNCITRAL: apertura de una nueva fase. *In* Estudios de derecho de sociedades y derecho concursal. Libro homenaje al profesor Rafael García Villaverde. Sánchez, G. J., M. Menéndez *and* A. Otros, *eds*. Madrid, Marcial Pons, 2007. Vol. 3. 2235 p.

Moss, G. Bear necessities: Chapter 15 goes on appeal. *Insolvency intelligence* (London) 21:2:27-30, 2008.

_____. Refusal of recognition and Bear Stearns: is the US denying to others that which it expects for itself? *INSOL world* (London) 3rd quarter 2008. p. 14-16.

Newman, S. The UNCITRAL Model Law on Cross-Border Insolvency: an Australian perspective on recent developments in the USA. *INSOL world* (London) 3rd quarter 2008. p. 19-20.

Paulus, C. G. Die ersten Jahre mit der Europäischen Insolvenzverordnung. *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (Tübingen, Germany) 70:3:458-473, 2006.

In German. Translation of title: The first years of the European Regulation on Insolvency Proceedings.

Pogacar, B. Grenzüberschreitende Insolvenzverfahren. *ZfRV* (Wien) 05/06:258-264, Oktober/Dezember 2008.

In German. Translation of title: Cross-border insolvency.

Proskurchenko, K. V. Chapter 15 cross-border insolvency: is it true to its universalism aspirations? *Rutgers business law journal* (Newark, N.J.) 5:96-114, spring 2008.

Also available online at http://businesslaw.newark.rutgers.edu/RBLJ_vol5_no1_proskurchenko.pdf.

Sarra, J. Corporate group insolvencies: seeing the forest and the trees. *Banking and finance law review* (Toronto) 24:63-[89], September 2008.

_____. Maidum's challenge, legal and governance issues in dealing with cross-border business enterprise group insolvencies. *International insolvency review* (Chichester, UK) 17:2:73-122, 2008.

Smart, P. Cross-border restructurings and English debts. *International corporate rescue* (Arkley, UK) 6:1:4-13, 2009.

Spigelman, J. J. International commercial litigation: an Asian perspective. *Australian business law review* (Australia) 35:318-337, 2007.

Takagi, S. Japanese cross-border insolvency law. *International corporate rescue* (Arkley, UK) 4:2:61-62, 2007.

Tomasic, R. Creditor participation in insolvency proceedings - towards the adoption of international standards. *Insolvency law journal* ([Rozelle], Australia) 14:3:173-187, 2006.

Discusses various multilateral standards in creditor participation, including, *inter alia*, the UNCITRAL Insolvency Guide (2004).

Trunk, A. Entwicklungslinien des Insolvenzrechts in den Transformationsländern. *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (Tübingen, Germany) 70:3:563-578, 2006.

In German. Translation of title: Developments of insolvency law in the transformation countries.

Uzal, Elsa M. Procesos de insolvencia en el derecho internacional privado. Buenos Aires, La Ley, 2008. xxx, 776 p.

See, in particular, ch. 7.

Vallender, H. Gerichtliche Kommunikation und Kooperation bei grenz-überschreitenden Insolvenzverfahren im Anwendungsbereich der EuIns VO - eine Herausforderung für Insolvenzgerichte. *Zeitschrift für Insolvenzrecht* (Köln) 69:1:59-78, 2008.

In German. Translation of title: Court-to-court communication and cooperation in cross-border insolvencies within the scope of the European Insolvency Regulation.

Walker, I. *and* N. Toholka. Australia adopts UNCITRAL Model Law on Cross-Border Insolvency. *International Law Office newsletters*, 20 June 2008.

Electronic resource, available via www.internationallawoffice.com/.

X. International construction contracts

[*No publications recorded under this heading.*]

XI. International countertrade

[*No publications recorded under this heading.*]

XII. Privately financed infrastructure projects

[*No publications recorded under this heading.*]

Annex

Checklist of short titles of UNCITRAL legal texts as cited in this bibliography and their equivalents in full

Short title	*Full title*
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]
New York Convention (1958)	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York) [d,e]
Rotterdam Rules (2008)	United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, 2008 (New York)[f]
UNCITRAL Arbitral Proceedings Notes (1996)	UNCITRAL Notes on Organizing Arbitral Proceedings (1996)[g]
UNCITRAL Arbitration Model Law (1985)	UNCITRAL Model Law on International Commercial Arbitration (1985)[h]
UNCITRAL Arbitration Model Law (as amended in 2006)	UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006[i]
UNCITRAL Arbitration Rules (1976)	UNCITRAL Arbitration Rules (1976)[j]
UNCITRAL Conciliation Rules (1980)	UNCITRAL Conciliation Rules (1980)[k]
UNCITRAL Credit Transfer Model Law (1992)	UNCITRAL Model Law on International Credit Transfers (1992)[l]
UNCITRAL Insolvency Guide (2004)	UNCITRAL Legislative Guide on Insolvency Law (2004)[m]
UNCITRAL Insolvency Model Law (1997)	UNCITRAL Model Law on Cross-Border Insolvency (1997)[n]
UNCITRAL Model Law on Electronic Commerce (1996)	UNCITRAL Model Law on Electronic Commerce (1996)[o]
UNCITRAL Model Law on Electronic Signatures (2001)	UNCITRAL Model Law on Electronic Signatures (2001)[p]
UNCITRAL Procurement Model Law (1994)	UNCITRAL Model Law on Procurement of Goods, Construction and Services (1994)[q]
UNCITRAL Secured Transactions Guide (2007)	UNCITRAL Legislative Guide on Secured Transactions (2007)[r]
United Nations Convention on Electronic Contracting (2005)	United Nations Convention on the Use of Electronic Communications in International Contracts (2005)[s]
United Nations Guarantee and Standby Convention (1995)	United Nations Convention on Independent Guarantees and Standby Letters of Credit (1995)[t]
United Nations Sales Convention (1980)	United Nations Convention on Contracts for the International Sale of Goods (1980)[u]

[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.

[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.

[d] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York) was adopted prior to the establishment of the Commission, and the Commission is entrusted with the promotion and related activities regarding the Convention.

[e] United Nations publication, Sales No. M.08.V.5.

[f] Adopted by the United Nations General Assembly Resolution (A/RES/63/122) on 11 December 2008. Signing ceremony to be held on 23 September 2009 in Rotterdam, the Netherlands.

[g] Official Records of the General Assembly, Fifty-first Session, Supplement No. 17 (A/51/17), part II.

[h] United Nations publication, Sales No. E.95.V.18.

[i] United Nations publication, Sales No. E.08.V.4

[j] United Nations publication, Sales No. E.93.V.6.

[k] United Nations publication, Sales No. E.81.V.6.

[l] United Nations publication, Sales No. E.99.V.11.

[m] United Nations publication, Sales No. E.05.V.10.

[n] United Nations publication, Sales No. E.99.V.3.

[o] United Nations publication, Sales No. E.99.V.4.

[p] United Nations publication, Sales No. E.02.V.8.

[q] United Nations publication, Sales No. E.98.V.13.

[r] Official Records of the General Assembly, Sixty-second session, Supplement No. 17 (A/62/17), part II.

[s] United Nations publication, Sales No. E.07.V.02.

[t] United Nations publication, Sales No. E.97.V.12.

[u] United Nations publication, Sales No. E.95.V.12.

III. CHECK-LIST OF DOCUMENTS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Document Symbol	*Title or description*	*Location in Present volume*
A. List of documents before the Commission at its forty-second session		
	1. General series	
A/CN.9/663	Provisional agenda, annotations thereto and scheduling of meetings of the forty-second session	Not reproduced
A/CN.9/664	Report of the Working Group on Procurement on the work of its fourteenth session (Vienna, 8-12 September 2008)	Part two, chap. I, A
A/CN.9/665	Report of the Working Group on Arbitration on the work of its forty-ninth session (Vienna, 15-19 September 2008)	Part two, chap. II, A
A/CN.9/666	Report of the Working Group on Insolvency Law on the work of its thirty-third session (Vienna, 5-9 November 2007)	Part two, chap. III, A
A/CN.9/667	Report of the Working Group on Security Interests on the work of its fourteenth session (Vienna, 20-24 October 2008)	Part two, chap. IV, A
A/CN.9/668	Report of the Working Group on Procurement on the work of its fifteenth session (New York, 2-6 February 2009)	Part two, chap. I, F
A/CN.9/669	Report of the Working Group on Arbitration on the work of its fiftieth session (New York, 9-13 February 2009)	Part two, chap. II, D
A/CN.9/670	Report of the Working Group on Security Interests on the work of its fifteenth session (New York, 27 April-01 May 2009)	Part two, chap. IV, C
A/CN.9/671	Report of the Working Group on Insolvency Law on the work of its thirty-sixth session (New York, 18-22 May 2009)	Part two, chap. III, D
A/CN.9/672	Report of the Working Group on Procurement on the work of its sixteenth session (Vienna, 26-29 May 2009)	Part two, chap. I, H
A/CN.9/673	Note by the Secretariat on a bibliography of recent writings related to the work of UNCITRAL	Part three, chap. II

Document Symbol	*Title or description*	*Location in Present volume*
A/CN.9/674	Note by the Secretariat on the status of conventions and model laws	Part two, chap. VIII
A/CN.9/675/Add.1	Note by the Secretariat on Technical cooperation and assistance	Part two, chap. VII
A/CN.9/676 and Add.1-9	Note by the Secretariat on UNCITRAL rules of procedure and methods of work	Not reproduced
A/CN.9/677	Note by the Secretariat on UNCITRAL Arbitration Rules: Designating and appointing authorities under the UNCITRAL Arbitration Rules	Not reproduced
A/CN.9/678	Note by the Secretariat on possible future work in the area of electronic commerce	Part two, chap. V, A
A/CN.9/679	Note by the Secretariat on possible future work in the area of transport law: commentary on the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea	Part two, chap. V, D
A/CN.9/680	Note by the Secretariat UNCITRAL rules of procedure and methods of work — Proposal by France	Not reproduced
A/CN.9/681 and Add.1-2	Note by the Secretariat possible future work in the area of electronic commerce — Recommendations for future work of Working Group IV (Electronic Commerce) submitted by the United States of America	Part two, chap. V, B
A/CN.9/682	Note by the Secretariat on a proposal of the Delegation of Spain Concerning the Future Work of Working Group IV	Part two, chap. V, C
	2. Restricted series	
A/CN.9/XLII/CRP.1 and Add.1-25	Draft report of the United Nations Commission on International Trade Law on the work of its forty-second session	Not reproduced
A/CN.9/XLII/CRP.2	Draft UNCITRAL Model Law on Public Procurement	Not reproduced
A/CN.9/XLII/CRP.3	Working methods of UNCITRAL — Summary of informal consultations on working methods of UNCITRAL, held on 29-30 June 2009, prepared by the Secretariat	Not reproduced

Document Symbol	*Title or description*	*Location in Present volume*
A/CN.9/XLII/CRP.4	Working methods of UNCITRAL — Possible redraft of paragraphs 11, 12, 14, 37, 39, 41 and 43 of the "Draft guidelines for the preparation and conduct of UNCITRAL meetings, based on the established practice of UNCITRAL" (A/CN.9/676), prepared by the Secretariat to reflect the informal consultations on the working methods of UNCITRAL, held on 29-30 June 2009	Not reproduced
	3. Information series	
A/CN.9/XLII/INF.1	List of participants	Not reproduced
	B. List of documents before the Working Group on Procurement at its fourteenth session	
	1. Working papers	
A/CN.9/WG.I/WP.60	Annotated provisional agenda	Not reproduced
A/CN.9/WG.I/WP.61	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, publication of procurement-related information, electronic reverse auctions and abnormally low tenders, submitted to the Working Group on Procurement at its fourteenth session	Part two, chap. I, B
A/CN.9/WG.I/WP.62	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 framework agreements in public procurement, submitted to the Working Group on Procurement at its fourteenth session	Part two, chap. I,C
A/CN.9/WG.I/WP.63	Note by the Secretariat on possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services — Guide to Enactment text addressing the use of framework agreements in public procurement, submitted to the Working Group on Procurement at its fourteenth session	Part two, chap. I,D

Document Symbol	*Title or description*	*Location in Present volume*
A/CN.9/WG.I/WP.64	Note by the Secretariat on possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services — Remedies, conflicts of interest and services procurement in the Model Law, submitted to the Working Group on Procurement at its fourteenth session	Part two, chap. I,E
	2. Restricted series	
A/CN.9/WG.I/XIV/CRP.1 and Add.1-4	Draft report of Working Group I (Procurement) on the work of its fourteenth session	Not reproduced
	3. Information series	
A/CN.9/WG.I/XIV/INF.1	List of participants	Not reproduced
	C. List of documents before the Working Group on Procurement at its fifteenth session	
	1. Working papers	
A/CN.9/WG.I /WP.65	Annotated provisional agenda	Not reproduced
A/CN.9/WG.I /WP.65 and Add.1-5	Note by the Secretariat on possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services — a revised text of the Model Law, submitted to the Working Group on Procurement at its fifteenth session	Part two, chap. I,G
	2. Restricted series	
A/CN.9/WG.I/XV/CRP.1 and Add.1-4	Draft report of Working Group I (Procurement) on the work of its fifteenth session	Not reproduced
A/CN.9/WG.I/XV/CRP.2	Evaluation and comparison of tenders and the use of procurement to promote industrial, social and environmental policies	Not reproduced
	3. Information series	
A/CN.9/WG.I/XV/INF.1	List of participants	Not reproduced
	D. List of documents before the Working Group on Procurement at its sixteenth session	
	1. Working papers	
A/CN.9/WG.I/WP.67	Annotated provisional agenda	Not reproduced

Document Symbol	*Title or description*	*Location in Present volume*
A/CN.9/WG.I/WP.68 and Add.1	Note by the Secretariat on possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services — drafting history of some provisions of the 1994 Model Law and the treatment of the issues raised by some of those provisions in international instruments regulating public procurement, submitted to the Working Group on Procurement at its sixteenth session	Part two, chap. II, I
A/CN.9/WG.I/WP.69 and Add. 1-5	Note by the Secretariat on possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services — a revised text of the Model Law, submitted to the Working Group on Procurement at its sixteenth session	Part two, chap. II, J
	2. Restricted series	
A/CN.9/WG.I/XVI/CRP.1 and Add. 1-3	Draft report of theWorking Group on Procurement at its sixteenth session.	Not reproduced
A/CN.9/WG.I/XVI/CRP.2	Proposed Article 40: Competitive negotiations — Proposal submitted by Austria, the United Kingdom and the United States	Not reproduced
	3. Information series	
A/CN.9/WG.I/XVI/INF.1	List of participants	Not reproduced

E. List of documents before the Working Group on International Commercial Arbitration and Conciliation at its forty-ninth session

	1. Working papers	
A/CN.9/WG.II/WP.150	Annotated provisional agenda	Not reproduced
A/CN.9/WG.II/WP.151 and Add.1	Note by the Secretariat on settlement of commercial disputes: Revision of the UNCITRAL Arbitration Rules, submitted to the Working Group on Arbitration at its forty-ninth session	Part two, chap. II, B
A/CN.9/WG.II/WP.152	Note by the Secretariat on settlement of commercial disputes: Revision of the UNCITRAL Arbitration Rules — Proposal by the Government of Switzerland, submitted to the Working Group on Arbitration at its forty-ninth session	Part two, chap. II, C

Document Symbol	*Title or description*	*Location in Present volume*
	2. Restricted series	
A/CN.9/WGII/XLIX/ CRP.1 and Add.1-4	Draft report of the Working Group on Arbitration and Conciliation on the work of its forty-ninth session	Not reproduced
	3. Information series	
A/CN.9/WG.II/XLIX /INF.1/	List of participants	Not reproduced
	F. List of documents before the Working Group on International Commercial Arbitration and Conciliation at its fiftieth session	
	1. Working papers	
A/CN.9/WG.II/WP.153	Annotated provisional agenda	Not reproduced
A/CN.9/WG.II/WP.154	Note by the Secretariat on settlement of commercial disputes: Revision of the UNCITRAL Arbitration Rules, submitted to the Working Group on Arbitration at its fiftieth session	Part two, chap. II, E
	2. Restricted series	
A/CN.9/WG.II/L/CRP.1 and Add.1-4	Draft report of the Working Group on Arbitration and Conciliation on the work of its fiftieth session	Not reproduced
	3. Information series	
A/CN.9/WG.II/L/INF.1	List of participants	Not reproduced
	G. List of documents before the Working Group on Insolvency Law at its thirty-fifth session	
	1. Working papers	
A/CN.9/WG.V/WP.81	Annotated provisional agenda	Not reproduced
A/CN.9/WG.V/WP.82 and Add.1-4	Note by the Secretariat on the treatment of enterprise groups in insolvency, submitted to the Working Group on Insolvency Law at its thirty-fifth session	Part two, chap. III, B
A/CN.9/WG.V/WP.83	Note by the Secretariat on draft UNCITRAL Notes on cooperation, communication and coordination in cross-border insolvency proceedings, submitted to the Working Group on Insolvency Law at its thirty-fifth session	Part two, chap. III, C

Document Symbol	*Title or description*	*Location in Present volume*
	2. Restricted series	
A/CN.9/WG.V/XXXV/ CRP.1 and Add.1-4	Draft report of Working Group V (Insolvency Law) on the work of its thirty-fifth session	Not reproduced
A/CN.9/WG.V/XXXV/ CRP.2	The impact of insolvency on a security right in intellectual property	Not reproduced
	3. Information series	
A/CN.9/WG.V/XXXV/ INF.1	List of participants	Not reproduced
	H. List of documents before the Working Group on Insolvency Law at its thirty-sixth session	
	1. Working papers	
A/CN.9/WG.V/WP.84	Annotated provisional agenda	Not reproduced
A/CN.9/WG.V/WP.85 and Add.1	Note by the Secretariat on the treatment of enterprise groups in insolvency, submitted to the Working Group on Insolvency Law at its thirty-sixth session	Part two, chap. III, E
A/CN.9/WG.V/WP.86 and Add.1-3	Note by the Secretariat on draft UNCITRAL Notes on cooperation, communication and coordination in cross-border insolvency proceedings, submitted to the Working Group on Insolvency Law at its thirty-sixth session	Part two, chap. III, F
A/CN.9/WG.V/WP.87	Note by the Secretariat on the discussion of intellectual property in the Legislative Guide on Insolvency Law, submitted to the Working Group on Insolvency Law at its thirty-sixth session	Part two, chap. III, G
A/CN.9/WG.V/WP.88	Note by the Secretariat on the Treatment of enterprise groups in insolvency: Proposal by the United States of America on post-application finance, submitted to the Working Group on Insolvency Law at its thirty-sixth session	Part two, chap. III, H
	2. Restricted series	
A/CN.9/WG.V/XXXVI/ CRP.1 and Add. 1-4	Draft report of Working Group V (Insolvency Law) on the work of its thirty-sixth session	Not reproduced
A/CN.9/WG.V/XXXVI/ CRP.2	Legislative Guide on Insolvency Law	Not reproduced

Document Symbol	*Title or description*	*Location in Present volume*
	3. Information series	
A/CN.9/WG.V/XXXVI/ INF.1	List of participants	Not reproduced
	I. List of documents before the Working Group on Security Interests at its fourteenth session	
	1. Working papers	
A/CN.9/WG.VI/WP.34	Annotated provisional agenda	Not reproduced
A/CN.9/WG.VI/WP.35 and Add.1	Note by the Secretariat on the Annex to the UNCITRAL Legislative Guide on Secured Transactions dealing with security rights in intellectual property, submitted to the Working Group on Security Interests at its fourteenth session	Part two, chap. IV, B
A/CN.9/WG.VI/WP.37 and Add.1-4	Note by the Secretariat on the Draft Annex to the UNCITRAL Legislative Guide on Secured Transactions dealing with security rights in intellectual property, submitted to the Working Group on Security Interests at its fifteenth session	Part two, chap. IV, D
	2. Restricted series	
A/CN.9/WG.VI/IVX/CRP.1 and Add. 1-5	Draft report of Working Group VI (Security Interests) on the work of its fourteenth session	Not reproduced
A/CN.9/WG.VI/XIV/ CRP. 2	Proposal by the International Trademark Association	Not reproduced
A/CN.9/WG.VI/XIV/ CRP. 3	Proposal by the United States of America	Not reproduced
A/CN.9/WG.VI/XIV/ CRP. 4	Proposal by the United States of America — Impact of insolvency on a security right in licensed intellectual property	Not reproduced
A/CN.9/WG.VI/XIV/ CRP. 5	Proposal by the United States of America — Impact of insolvency on a security right in licensed intellectual property	Not reproduced
	3. Information series	
A/CN.9/WG.VI/XIV/INF.1	List of participants	Not reproduced

IV. 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 and chapter 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 to1971); 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 (2002 to 2008)**

   (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)**

---

* 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).

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.

** At its 35th session, the Commission adopted one-week sessions, creating six working groups.

Document symbol	*Volume, year*	*Part, chapter*
1. Reports on the annual sessions of the Commission		
A/7216 (first session)	Volume I: 1968-1970	Part two, I, A
A/7618 (second session)	Volume I: 1968-1970	Part two, II, A
A/8017 (third session)	Volume I: 1968-1970	Part two, III, A
A/8417 (fourth session)	Volume II: 1971	Part one, II, A
A/8717 (fifth session)	Volume III: 1972	Part one, II, A
A/9017 (sixth session)	Volume IV: 1973	Part one, II, A
A/9617 (seventh session)	Volume V: 1974	Part one, II, A
A/10017 (eighth session)	Volume VI: 1975	Part one, II, A
A/31/17 (ninth session)	Volume VII: 1976	Part one, II, A
A/32/17 (tenth session)	Volume VIII: 1977	Part one, II, A
A/33/17 (eleventh session)	Volume IX: 1978	Part one, II, A
A/34/17 (twelfth session)	Volume X: 1979	Part one, II, A
A/35/17 (thirteenth session)	Volume XI: 1980	Part one, II, A
A/36/17 (fourteenth session)	Volume XII: 1981	Part one, A
A/37/17 and Corr.1 (fifteenth session)	Volume XIII: 1982	Part one, A
A/38/17 (sixteenth session)	Volume XIV: 1983	Part one, A
A/39/17 (seventeenth session)	Volume XV: 1984	Part one, A
A/40/17 (eighteenth session)	Volume XVI: 1985	Part one, A
A/41/17 (nineteenth session)	Volume XVII: 1986	Part one, A
A/42/17 (twentieth session)	Volume XVIII: 1987	Part one, A
A/43/17 (twenty-first session)	Volume XIX: 1988	Part one, A
A/44/17 (twenty-second session)	Volume XX: 1989	Part one, A
A/45/17 (twenty-third session)	Volume XXI: 1990	Part one, A
A/46/17 (twenty-fourth session)	Volume XXII: 1991	Part one, A
A/47/17 (twenty-fifth session)	Volume XXIII: 1992	Part one, A
A/48/17 (twenty-sixth session)	Volume XXIV: 1993	Part one, A
A/49/17 (twenty-seventh session)	Volume XXV: 1994	Part one, A
A/50/17 (twenty-eighth session)	Volume XXVI: 1995	Part one, A
A/51/17 (twenty-ninth session)	Volume XXVII: 1996	Part one, A
A/52/17 (thirtieth session)	Volume XXVIII: 1997	Part one, A
A/53/17 (thirty-first session)	Volume XXIX: 1998	Part one, A

Document symbol	*Volume, year*	*Part, chapter*
A/54/17 (thirty-second session)	Volume XXX: 1999	Part one, A
A/55/17 (thirty-third session)	Volume XXXI: 2000	Part one, A
A/56/17 (thirty-fourth session)	Volume XXXII: 2001	Part one, A
A/57/17 (thirty-fifth session)	Volume XXXIII: 2002	Part one, A
A/58/17 (thirty-sixth session)	Volume XXXIV: 2003	Part one, A
A//59/17 (thirty-seventh session)	Volume XXXV: 2004	Part one, A
A/60/17 (thirty-eighth session)	Volume XXXVI: 2005	Part one, A
A/61/17 (thirty-ninth session)	Volume XXXVII:2006	Part one, A
A/62/17 (fortieth session)	Volume XXXVIII:2007	Part one, A
A/63/17 (fortieth-first session)	Volume XXXIX:2008	Part one, A
2. Resolutions of the General Assembly		
2102 (XX)	Volume I: 1968-1970	Part one, II, A
2205 (XXI)	Volume I: 1968-1970	Part one, II, E
2421 (XXIII)	Volume I: 1968-1970	Part two, I, B, 3
2502 (XXIV)	Volume I: 1968-1970	Part two, II, B, 3
2635 (XXV)	Volume II: 1971	Part one, I, C
2766 (XXVI)	Volume III: 1972	Part one, I, C
2928 (XXVII)	Volume IV: 1973	Part one, I, C
2929 (XXVII)	Volume IV: 1973	Part one, I, C
3104 (XXVIII)	Volume V: 1974	Part one, I, C
3108 (XXVIII)	Volume V: 1974	Part one, I, C
3316 (XXIX)	Volume VI: 1975	Part one, I, C
3317 (XXIX)	Volume VI: 1975	Part three, I, B
3494 (XXX)	Volume VII: 1976	Part one, I, C
31/98	Volume VIII: 1977	Part one, I, C
31/99	Volume VIII: 1977	Part one, I, C
31/100	Volume XIII: 1977	Part one, I, C
32/145	Volume IX: 1978	Part one, I, C
32/438	Volume IX: 1978	Part one, I, C
33/92	Volume X: 1979	Part one, I, B
33/93	Volume X: 1979	Part one, I, C
34/143	Volume XI: 1980	Part one, I, C

Document symbol	*Volume, year*	*Part, chapter*
34/150	Volume XI: 1980	Part three, III
35/166	Volume XI: 1980	Part three, III
35/51	Volume XI: 1980	Part one, II, D
35/52	Volume XI: 1980	Part one, II, D
36/32	Volume XII: 1981	Part one, D
36/107	Volume XII: 1981	Part three, I
36/111	Volume XII: 1981	Part three, II
37/103	Volume XIII: 1982	Part three, III
37/106	Volume XIII: 1982	Part one, D
37/107	Volume XIII: 1982	Part one, D
38/128	Volume XIV: 1983	Part three, III
38/134	Volume XIV: 1983	Part one, D
38/135	Volume XIV: 1983	Part one, D
39/82	Volume XV: 1984	Part one, D
40/71	Volume XVI: 1985	Part one, D
40/72	Volume XVI: 1985	Part one, D
41/77	Volume XVII: 1986	Part one, D
42/152	Volume XVIII: 1987	Part one, D
42/153	Volume XVIII: 1987	Part one, E
43/165 and annex	Volume XIX: 1988	Part one, D
43/166	Volume XIX: 1988	Part one, E
44/33	Volume XX: 1989	Part one, E
45/42	Volume XXI: 1990	Part one, D
46/56	Volume XXII: 1991	Part one, D
47/34	Volume XXIII: 1992	Part one, D
48/32	Volume XXIV: 1993	Part one, D
48/33	Volume XXIV: 1993	Part one, D
48/34	Volume XXIV: 1993	Part one, D
49/54	Volume XXV: 1994	Part one, D
49/55	Volume XXV: 1994	Part one, D
50/47	Volume XXVI: 1995	Part one, D
51/161	Volume XXVII: 1996	Part one, D

Document symbol	*Volume, year*	*Part, chapter*
51/162	Volume XXVII: 1996	Part one, D
52/157	Volume XXVIII: 1997	Part one, D
52/158	Volume XXVIII: 1997	Part one, D
53/103	Volume XXIX: 1998	Part one, D
54/103	Volume XXX: 1999	Part one, D
55/151	Volume XXXI: 2000	Part one, D
56/79	Volume XXXII: 2001	Part one, D
56/80	Volume XXXII: 2001	Part one, D
56/81	Volume XXXII: 2001	Part one, D
57/17	Volume XXXIII: 2002	Part one, D
57/18	Volume XXXIII: 2002	Part one, D
57/19	Volume XXXIII: 2002	Part one, D
57/20	Volume XXXIII: 2002	Part one, D
58/75	Volume XXXIV: 2003	Part one, D
58/76	Volume XXXIV: 2003	Part one, D
59/39	Volume XXXV: 2004	Part one, D
59/40	Volume XXXV: 2004	Part one, D
61/32	Volume XXXVII: 2006	Part one, D
60/33	Volume XXXVII: 2006	Part one, D
62/64	Volume XXXVIII: 2007	Part one, D
62/65	Volume XXXVIII: 2007	Part one, D
62/70	Volume XXXVIII: 2007	Part one, D
63/120	Volume XXXIX: 2008	Part one, D
63/121	Volume XXXIX: 2008	Part one, D
63/123	Volume XXXIX: 2008	Part one, D
63/128	Volume XXXIX: 2008	Part one, D
	3. Reports of the Sixth Committee	
A/5728	Volume I: 1968-1970	Part one, I, A
A/6396	Volume I: 1968-1970	Part one, II, B
A/6594	Volume I: 1968-1970	Part one, II, D
A/7408	Volume I: 1968-1970	Part two, I, B, 2
A/7747	Volume I: 1968-1970	Part two, II, B, 2

Document symbol	*Volume, year*	*Part, chapter*
A/8146	Volume II: 1971	Part one, I, B
A/8506	Volume III: 1972	Part one, I, B
A/8896	Volume IV: 1973	Part one, I, B
A/9408	Volume V: 1974	Part one, I, B
A/9920	Volume VI: 1975	Part one, I, B
A/9711	Volume VI: 1975	Part three, I, A
A/10420	Volume VII: 1976	Part one, I, B
A/31/390	Volume VIII: 1977	Part one, I, B
A/32/402	Volume IX: 1978	Part one, I, B
A/33/349	Volume X: 1979	Part one, I, B
A/34/780	Volume XI: 1980	Part one, I, B
A/35/627	Volume XI: 1980	Part one, II, C
A/36/669	Volume XII: 1981	Part one, C
A/37/620	Volume XIII: 1982	Part one, C
A/38/667	Volume XIV: 1983	Part one, C
A/39/698	Volume XV: 1984	Part one, C
A/40/935	Volume XVI: 1985	Part one, C
A/41/861	Volume XVII: 1986	Part one, C
A/42/836	Volume XVIII: 1987	Part one, C
A/43/820	Volume XIX: 1988	Part one, C
A/C.6/43/L.2	Volume XIX: 1988	Part three, II, A
A/43/405 and Add.1-3	Volume XIX: 1988	Part three, II, B
A/44/453 and Add.1	Volume XX: 1989	Part one, C
A/44/723	Volume XX: 1989	Part one, D
A/45/736	Volume XXI: 1990	Part one, C
A/46/688	Volume XXII: 1991	Part one, C
A/47/586	Volume XXIII: 1992	Part one, C
A/48/613	Volume XXIV: 1993	Part one, C
A/49/739	Volume XXV: 1994	Part one, C
A/50/640	Volume XXVI: 1995	Part one, C
A/51/628	Volume XXVII: 1996	Part one, C
A/52/649	Volume XXVIII: 1997	Part one, C

Document symbol	*Volume, year*	*Part, chapter*
A/53/632	Volume XXIX: 1998	Part one, C
A/54/611	Volume XXX: 1999	Part one, C
A/55/608	Volume XXXI: 2000	Part one, C
A/56/588	Volume XXXII: 2001	Part one, C
A/57/562	Volume XXXIII 2002	Part one, C
A/58/513	Volume XXXIV: 2003	Part one, C
A/59/509	Volume XXXV: 2004	Part one, C
A/60/515	Volume XXXVI: 2005	Part one, C
A/61/453	Volume XXXVII: 2006	Part one, C
A/62/449	Volume XXXVIII: 2007	Part one, C
A/63/438	Volume XXXIX: 2008	Part one, C

4. Extracts from the reports of the Trade and Development Board of the United Nations Conference on Trade and Development

A/7214	Volume I: 1968-1970	Part two, I, B, 1
A/7616	Volume I: 1968-1970	Part two, II, B, 1
A/8015/Rev.1	Volume II: 1971	Part one, I, A
TD/B/C.4/86, annex I	Volume II: 1971	Part two, IV
A/8415/Rev.1	Volume III: 1972	Part one, I, A
A/8715/Rev.1	Volume IV: 1973	Part one, I, A
A/9015/Rev.1	Volume V: 1974	Part one, I, A
A/9615/Rev.1	Volume VI: 1975	Part one, I, A
A/10015/Rev.1	Volume VII: 1976	Part one, I, A
TD/B/617	Volume VIII: 1977	Part one, I, A
TD/B/664	Volume IX: 1978	Part one, I, A
A/33/15/Vol.II	Volume X: 1979	Part one, I, A
A/34/15/Vol.II	Volume XI: 1980	Part one, I, A
A/35/15/Vol.II	Volume XI: 1980	Part one, II, B
A/36/15/Vol.II	Volume XII: 1981	Part one, B
TD/B/930	Volume XIII: 1982	Part one, B
TD/B/973	Volume XIV: 1983	Part one, B
TD/B/1026	Volume XV: 1984	Part one, B
TD/B/1077	Volume XVI: 1985	Part one, B

Document symbol	*Volume, year*	*Part, chapter*
TD/B/L.810/Add.9	Volume XVII: 1986	Part one, B
A/42/15	Volume XVIII: 1987	Part one, B
TD/B/1193	Volume XIX: 1988	Part one, B
TD/B/1234/Vol.II	Volume XX: 1989	Part one, B
TD/B/1277/Vol.II	Volume XXI: 1990	Part one, B
TD/B/1309/Vol.II	Volume XXII: 1991	Part one, B
TD/B/39(1)/15	Volume XXIII: 1992	Part one, B
TD/B/40(1) 14 (Vol.I)	Volume XXIV: 1993	Part one, B
TD/B/41(1)/14 (Vol.I)	Volume XXV: 1994	Part one, B
TD/B/42(1)19(Vol.I)	Volume XXVI: 1995	Part one, B
TD/B/43/12 (Vol.I)	Volume XXVII: 1996	Part one, B
TD/B/44/19 (Vol.I)	Volume XXVIII: 1997	Part one, B
TD/B/45/13 (Vol.I)	Volume XXIX: 1998	Part one, B
TD/B/46/15 (Vol.I)	Volume XXX: 1999	Part one, B
TD/B/47/11 (Vol.I)	Volume XXXI: 2000	Part one, B
TD/B/48/18 (Vol.I)	Volume XXXII: 2001	Part one, B
TD/B/49/15 (Vol.I)	Volume XXXIII: 2002	Part one, B
TD/B/50/14 (Vol.I)	Volume XXXIV: 2003	Part one, B
TD/B/51/8 (Vol.I)	Volume XXXV: 2004	Part one, B
TD/B/52/10 (Vol.I)	Volume XXXVI: 2005	Part one, B
TD/B/53/8 (Vol.I)	Volume XXXVII: 2006	Part one, B
TD/B/54/8 (Vol.I)	Volume XXXVIII: 2007	Part one, B
TD/B/55/10 (Vol.I)	Volume XXXIX: 2008	Part one, B
5. Documents submitted to the Commission, including reports of meetings of working groups		
A/C.6/L.571	Volume I: 1968-1970	Part one, I, B
A/C.6/L.572	Volume I: 1968-1970	Part one, I, C
A/CN.9/15 and Add.1	Volume I: 1968-1970	Part three, III, B
A/CN.9/18	Volume I: 1968-1970	Part three, I, C, 1
A/CN.9/19	Volume I: 1968-1970	Part three, III, A, 1
A/CN.9/21 and Corr.1	Volume I: 1968-1970	Part three, IV, A
A/CN.9/30	Volume I: 1968-1970	Part three, I, D
A/CN.9/31	Volume I: 1968-1970	Part three, I, A, 1

Document symbol	*Volume, year*	*Part, chapter*
A/CN.9/33	Volume I: 1968-1970	Part three, I, B
A/CN.9/34	Volume I: 1968-1970	Part three, I, C, 2
A/CN.9/35	Volume I: 1968-1970	Part three, I, A, 2
A/CN.9/38	Volume I: 1968-1970	Part three, II, A, 2
A/CN.9/L.19	Volume I: 1968-1970	Part three, V, A
A/CN.9/38/Add.1	Volume II: 1971	Part two, II, 1
A/CN.9/41	Volume I: 1968-1970	Part three, II, A
A/CN.9/48	Volume II: 1971	Part two, II, 2
A/CN.9/50 and annex I-IV	Volume II: 1971	Part two, I, C, 2
A/CN.9/52	Volume II: 1971	Part two, I, A, 2
A/CN.9/54	Volume II: 1971	Part two, I, B, 1
A/CN.9/55	Volume II: 1971	Part two, III
A/CN.9/60	Volume II: 1971	Part two, IV
A/CN.9/62 and Add.1 and 2	Volume III: 1972	Part two, I, A, 5
A/CN.9/63 and Add.1	Volume III: 1972	Part two, IV
A/CN.9/64	Volume III: 1972	Part two, III
A/CN.9/67	Volume III: 1972	Part two, II, 1
A/CN.9/70 and Add.2	Volume III: 1972	Part two, I, B, 1
A/CN.9/73	Volume III: 1972	Part two, II, B, 3
A/CN.9/74 and annex I	Volume IV: 1973	Part two, IV, 1
A/CN.9/75	Volume IV: 1973	Part two, I, A, 3
A/CN.9/76 and Add.1	Volume IV: 1973	Part two, IV, 4, 5
A/CN.9/77	Volume IV: 1973	Part two, II, 1
A/CN.9/78	Volume IV: 1973	Part two, I, B
A/CN.9/79	Volume IV: 1973	Part two, III, 1
A/CN.9/82	Volume IV: 1973	Part two, V
A/CN.9/86	Volume V: 1974	Part two, II, 1
A/CN.9/87	Volume V: 1974	Part two, I, 1
A/CN.9/87, annex I-IV	Volume V: 1974	Part two, I, 2-5
A/CN.9/88 and Add.1	Volume V: 1974	Part two, III, 1 and 2
A/CN.9/91	Volume V: 1974	Part two, IV
A/CN.9/94 and Add.1 and 2	Volume V: 1974	Part two, V

Document symbol	*Volume, year*	*Part, chapter*
A/CN.9/96 and Add.1	Volume VI: 1975	Part two, IV, 1 and 2
A/CN.9/97 and Add.1-4	Volume VI: 1975	Part two, III
A/CN.9/98	Volume VI: 1975	Part two, I, 6
A/CN.9/99	Volume VI: 1975	Part two, II, 1
A/CN.9/100, annex I-IV	Volume VI: 1975	Part two, I, 1-5
A/CN.9/101 and Add.1	Volume VI: 1975	Part two, II, 3 and 4
A/CN.9/102	Volume VI: 1975	Part two, II, 5
A/CN.9/103	Volume VI: 1975	Part two, V
A/CN.9/104	Volume VI: 1975	Part two, VI
A/CN.9/105	Volume VI: 1975	Part two, IV, 3
A/CN.9/105, annex	Volume VI: 1975	Part two, IV, 4
A/CN.9/106	Volume VI: 1975	Part two, VIII
A/CN.9/107	Volume VI: 1975	Part two, VII
A/CN.9/109 and Add.1 and 2	Volume VII: 1976	Part two, IV, 1-3
A/CN.9/110	Volume VII: 1976	Part two, IV, 4
A/CN.9/112 and Add.1	Volume VII: 1976	Part two, III, 1-2
A/CN.9/113	Volume VII: 1976	Part two, III, 3
A/CN.9/114	Volume VII: 1976	Part two, III, 4
A/CN.9/115	Volume VII: 1976	Part two, IV, 5
A/CN.9/116 and annex I and II	Volume VII: 1976	Part two, I, 1-3
A/CN.9/117	Volume VII: 1976	Part two, II, 1
A/CN.9/119	Volume VII: 1976	Part two, VI
A/CN.9/121	Volume VII: 1976	Part two, V
A/CN.9/125 and Add.1-3	Volume VIII: 1977	Part two, I, D
A/CN.9/126	Volume VIII: 1977	Part two, I, E
A/CN.9/127	Volume VIII: 1977	Part two, III
A/CN.9/128 and annex I-II	Volume VIII: 1977	Part two, I, A-C
A/CN.9/129 and Add.1	Volume VIII: 1977	Part two, VI, A and B
A/CN.9/131	Volume VIII: 1977	Part two, II, A
A/CN.9/132	Volume VIII: 1977	Part two, II, B
A/CN.9/133	Volume VIII: 1977	Part two, IV, A
A/CN.9/135	Volume VIII: 1977	Part two, I, F

Document symbol	*Volume, year*	*Part, chapter*
A/CN.9/137	Volume VIII: 1977	Part two, V
A/CN.9/139	Volume VIII: 1977	Part two, IV, B
A/CN.9/141	Volume IX: 1978	Part two, II, A
A/CN.9/142	Volume IX: 1978	Part two, I, A
A/CN.9/143	Volume IX: 1978	Part two, I, C
A/CN.9/144	Volume IX: 1978	Part two, I, D
A/CN.9/145	Volume IX: 1978	Part two, I, E
A/CN.9/146 and Add.1-4	Volume IX: 1978	Part two, I, F
A/CN.9/147	Volume IX: 1978	Part two, II, B
A/CN.9/148	Volume IX: 1978	Part two, III
A/CN.9/149 and Corr.1 and 2	Volume IX: 1978	Part two, IV, A
A/CN.9/151	Volume IX: 1978	Part two, V
A/CN.9/155	Volume IX: 1978	Part two, IV, B
A/CN.9/156	Volume IX: 1978	Part two, IV, C
A/CN.9/157	Volume X: 1979	Part two, II, A
A/CN.9/159	Volume X: 1979	Part two, I, A
A/CN.9/160	Volume X: 1979	Part two, I, B
A/CN.9/161	Volume X: 1979	Part two, I, C
A/CN.9/163	Volume X: 1979	Part two, II, B
A/CN.9/164	Volume X: 1979	Part two, I, D
A/CN.9/165	Volume X: 1979	Part two, II, C
A/CN.9/166	Volume X: 1979	Part two, III, A
A/CN.9/167	Volume X: 1979	Part two, III, B
A/CN.9/168	Volume X: 1979	Part two, III, C
A/CN.9/169	Volume X: 1979	Part two, III, D
A/CN.9/170	Volume X: 1979	Part two, III, E
A/CN.9/171	Volume X: 1979	Part two, IV
A/CN.9/172	Volume X: 1979	Part two, V
A/CN.9/175	Volume X: 1979	Part two, VI
A/CN.9/176	Volume XI: 1980	Part two, V, A
A/CN.9/177	Volume XI: 1980	Part two, II
A/CN.9/178	Volume XI: 1980	Part two, III, A

Document symbol	*Volume, year*	*Part, chapter*
A/CN.9/179	Volume XI: 1980	Part two, IV, A
A/CN.9/180	Volume XI: 1980	Part two, IV, B
A/CN.9/181 and annex	Volume XI: 1980	Part two, III, B, C
A/CN.9/183	Volume XI: 1980	Part two, I
A/CN.9/186	Volume XI: 1980	Part two, III, D
A/CN.9/187 and Add.1-3	Volume XI: 1980	Part two, IV, C
A/CN.9/189	Volume XI: 1980	Part two, IV, D
A/CN.9/191	Volume XI: 1980	Part two, V, B
A/CN.9/192 and Add.1 and 2	Volume XI: 1980	Part two, VI
A/CN.9/193	Volume XI: 1980	Part two, V, C
A/CN.9/194	Volume XI: 1980	Part two, V, D
A/CN.9/196	Volume XII: 1981	Part two, II, A
A/CN.9/197	Volume XII: 1981	Part two, I, A
A/CN.9/198	Volume XII: 1981	Part two, IV, A
A/CN.9/199	Volume XII: 1981	Part two, II, B
A/CN.9/200	Volume XII: 1981	Part two, II, C
A/CN.9/201	Volume XII: 1981	Part two, I, C
A/CN.9/202 and Add.1-4	Volume XII: 1981	Part two, V, A
A/CN.9/203	Volume XII: 1981	Part two, V, B
A/CN.9/204	Volume XII: 1981	Part two, VIII
A/CN.9/205/Rev.1	Volume XII: 1981	Part two, VI
A/CN.9/206	Volume XII: 1981	Part two, VII
A/CN.9/207	Volume XII: 1981	Part two, III
A/CN.9/208	Volume XII: 1981	Part two, V, C
A/CN.9/210	Volume XIII: l982	Part two, II, A, 1
A/CN.9/211	Volume XIII: 1982	Part two, II, A, 3
A/CN.9/212	Volume XIII: 1982	Part two, II, A, 5
A/CN.9/213	Volume XIII: 1982	Part two, II, A, 4
A/CN.9/214	Volume XIII: 1982	Part two, II, A, 6
A/CN.9/215	Volume XIII: 1982	Part two, II, B, 1
A/CN.9/216	Volume XIII: 1982	Part two, III, A
A/CN.9/217	Volume XIII: 1982	Part two, IV, A

Document symbol	*Volume, year*	*Part, chapter*
A/CN.9/218	Volume XIII: 1982	Part two, I, A
A/CN.9/219 and Add.1(F-Corr.1)	Volume XIII: 1982	Part two, I, B
A/CN.9/220	Volume XIII: 1982	Part two, II, B, 3
A/CN.9/221	Volume XIII: 1982	Part two, II, C
A/CN.9/222	Volume XIII: l982	Part two, III, C
A/CN.9/223	Volume XIII: 1982	Part two, II, A, 7
A/CN.9/224	Volume XIII: 1982	Part two, V
A/CN.9/225	Volume XIII: 1982	Part two, VI, B
A/CN.9/226	Volume XIII: 1982	Part two, VI, A
A/CN.9/227	Volume XIII: 1982	Part two, VII
A/CN.9/228	Volume XIII: 1982	Part two, VIII
A/CN.9/229	Volume XIII: 1982	Part two, VI, C
A/CN.9/232	Volume XIV: 1983	Part two, III, A
A/CN.9/233	Volume XIV: 1983	Part two, III, C
A/CN.9/234	Volume XIV: 1983	Part two, IV, A
A/CN.9/235	Volume XIV: 1983	Part two, I
A/CN.9/236	Volume XIV: 1983	Part two, V, C
A/CN.9/237 and Add.1-3	Volume XIV: 1983	Part two, V, B
A/CN.9/238	Volume XIV: 1983	Part two, V, D
A/CN.9/239	Volume XIV: 1983	Part two, V, A
A/CN.9/240	Volume XIV: 1983	Part two, VII
A/CN.9/241	Volume XIV: 1983	Part two, VI
A/CN.9/242	Volume XIV: 1983	Part two, II
A/CN.9/245	Volume XV: 1984	Part two, II, A, 1
A/CN.9/246 and annex	Volume XV: 1984	Part two, II, B, 1 and 2
A/CN.9/247	Volume XV: 1984	Part two, III, A
A/CN.9/248	Volume XV: 1984	Part two, I, A, 1
A/CN.9/249 and Add.1	Volume XV: 1984	Part two, I, A, 2
A/CN.9/250 and Add.1-4	Volume XV: 1984	Part two, I, B
A/CN.9/251	Volume XV: 1984	Part two, V, B
A/CN.9/252 and annex I and II	Volume XV: 1984	Part two, IV, A and B
A/CN.9/253	Volume XV: 1984	Part two, V, C

Document symbol	*Volume, year*	*Part, chapter*
A/CN.9/254	Volume XV: 1984	Part two, V, D
A/CN.9/255	Volume XV: 1984	Part two, V, A
A/CN.9/256	Volume XV: 1984	Part two, VII
A/CN.9/257	Volume XV: 1984	Part two, VI
A/CN.9/259	Volume XVI: 1985	Part two, III, A, 1
A/CN.9/260	Volume XVI: 1985	Part two, IV, A
A/CN.9/261	Volume XVI: 1985	Part two, II, A
A/CN.9/262	Volume XVI: 1985	Part two, III, B, 1
A/CN.9/263 and Add.1-3	Volume XVI: 1985	Part two, I, A
A/CN.9/264	Volume XVI: 1985	Part two, I, B
A/CN.9/265	Volume XVI: 1985	Part two, V
A/CN.9/266 and Add.1 and 2	Volume XVI: 1985	Part two, II, B
A/CN.9/267	Volume XVI: 1985	Part two, IX
A/CN.9/268	Volume XVI: 1985	Part two, III, C
A/CN.9/269	Volume XVI: 1985	Part two, VI
A/CN.9/270	Volume XVI: 1985	Part two, VIII
A/CN.9/271	Volume XVI: 1985	Part two, VII
A/CN.9/273	Volume XVII: 1986	Part two, I, A, 1
A/CN.9/274	Volume XVII: 1986	Part two, I, A, 2
A/CN.9/275	Volume XVII: 1986	Part two, III, A
A/CN.9/276	Volume XVII: 1986	Part two, II, A
A/CN.9/277	Volume XVII: 1986	Part two, II, C
A/CN.9/278	Volume XVII: 1986	Part two, I, B
A/CN.9/279	Volume XVII: 1986	Part two, V
A/CN.9/280	Volume XVII: 1986	Part two, IV
A/CN.9/281	Volume XVII: 1986	Part two, VI
A/CN.9/282	Volume XVII: 1986	Part two, VIII
A/CN.9/283	Volume XVII: 1986	Part two, VII
A/CN.9/285	Volume XVII: 1986	Part two, I, A, 4
A/CN.9/287	Volume XVIII: 1987	Part two, III, A
A/CN.9/288	Volume XVIII: 1987	Part two, I, 1
A/CN.9/289	Volume XVIII: 1987	Part two, II, A, 1

Document symbol	*Volume, year*	*Part, chapter*
A/CN.9/290	Volume XVIII: 1987	Part two, II, A, 4
A/CN.9/291	Volume XVIII: 1987	Part two, II, B
A/CN.9/292	Volume XVIII: 1987	Part two, IV
A/CN.9/293	Volume XVIII: 1987	Part two, VI
A/CN.9/294	Volume XVIII: 1987	Part two, V
A/CN.9/297	Volume XIX: 1988	Part two, I, A, 1
A/CN.9/298	Volume XIX: 1988	Part two, II, A
A/CN.9/299	Volume XIX: 1988	Part two, X, B
A/CN.9/300	Volume XIX: 1988	Part two, X, A
A/CN.9/301	Volume XIX: 1988	Part two, I, B
A/CN.9/302	Volume XIX: 1988	Part two, III
A/CN.9/303	Volume XIX: 1988	Part two, IX
A/CN.9/304	Volume XIX: 1988	Part two, VII, A
A/CN.9/305	Volume XIX: 1988	Part two, VII, B
A/CN.9/306	Volume XIX: 1988	Part two, IV
A/CN.9/307	Volume XIX: 1988	Part two, V, A
A/CN.9/308	Volume XIX: 1988	Part two, V, B
A/CN.9/309	Volume XIX: 1988	Part two, VI
A/CN.9/310	Volume XIX: 1988	Part two, VII, D
A/CN.9/311	Volume XIX: 1988	Part two, VIII
A/CN.9/312	Volume XIX: 1988	Part two, VII, C
A/CN.9/315	Volume XX: 1989	Part two, II, A
A/CN.9/316	Volume XX: 1989	Part two, IV, A
A/CN.9/317	Volume XX: 1989	Part two, I, A
A/CN.9/318	Volume XX: 1989	Part two, I, C
A/CN.9/319 and Add.1-5	Volume XX: 1989	Part two, III, A
A/CN.9/320	Volume XX: 1989	Part two, III, B
A/CN.9/321	Volume XX: 1989	Part two, III, C
A/CN.9/322	Volume XX: 1989	Part two, V
A/CN.9/323	Volume XX: 1989	Part two, VIII
A/CN.9/324	Volume XX: 1989	Part two, VI
A/CN.9/325	Volume XX: 1989	Part two, VII

Document symbol	*Volume, year*	*Part, chapter*
A/CN.9/328	Volume XXI: 1990	Part two, I, A
A/CN.9/329	Volume XXI: 1990	Part two, I, D
A/CN.9/330	Volume XXI: 1990	Part two, IV, A
A/CN/9/331	Volume XXI: 1990	Part two, II, A
A/CN.9/332 and Add.1-7	Volume XXI: 1990	Part two, III
A/CN.9/333	Volume XXI: 1990	Part two, V
A/CN.9/334	Volume XXI: 1990	Part two, VI
A/CN.9/335	Volume XXI: 1990	Part two, IX
A/CN.9/336	Volume XXI: 1990	Part two, VII
A/CN.9/337	Volume XXI: 1990	Part two, VIII
A/CN.9/338	Volume XXI: 1990	Part two, X
A/CN.9/341	Volume XXII: 1991	Part two, I, C
A/CN.9/342	Volume XXII: 1991	Part two, III, A
A/CN.9/343	Volume XXII: 1991	Part two, II, A
A/CN.9/344	Volume XXII: 1991	Part two, I, E
A/CN.9/345	Volume XXII: 1991	Part two, III, C
A/CN.9/346	Volume XXII: 1991	Part two, I, A
A/CN.9/347 and Add.1	Volume XXII: 1991	Part two, I, B
A/CN.9/348	Volume XXII: 1991	Part two, V, B
A/CN.9/349	Volume XXII: 1991	Part two, VIII
A/CN.9/350	Volume XXII: 1991	Part two, IV
A/CN.9/351	Volume XXII: 1991	Part two, VI
A/CN.9/352	Volume XXII: 1991	Part two, V,
A/CN.9/353	Volume XXII: 1991	Part two, VI
A/CN.9/356	Volume XXIII: 1992	Part two, III, A
A/CN.9/357	Volume XXIII: 1992	Part two, II, A
A/CN.9/358	Volume XXIII: 1992	Part two, IV, A
A/CN.9/359	Volume XXIII: 1992	Part two, III, C
A/CN.9/360	Volume XXIII: 1992	Part two, V, A
A/CN.9/361	Volume XXIII: 1992	Part two, IV, C
A/CN.9/362 and Add.1 to 17	Volume XXIII: 1992	Part two, II, C
A/CN.9/363	Volume XXIII: 1992	Part two, VIII

Document symbol	*Volume, year*	*Part, chapter*
A/CN.9/364	Volume XXIII: 1992	Part two, VI, A
A/CN.9/367	Volume XXIII: 1992	Part two, I, A
A/CN.9/368	Volume XXIII: 1992	Part two, VII
A/CN.9/371	Volume XXIV: 1993	Part two, I, A
A/CN.9/372	Volume XXIV: 1993	Part two, II, A
A/CN.9/373	Volume XXIV: 1993	Part two, III, A
A/CN.9/374 and Corr.1	Volume XXIV: 1993	Part two, II, C
A/CN.9/375	Volume XXIV: 1993	Part two, I, C
A/CN.9/376 and Add.1 and 2	Volume XXIV: 1993	Part two, I, D
A/CN.9/377	Volume XXIV: 1993	Part two, I, E
A/CN.9/378 and Add.1 to 5	Volume XXIV: 1993	Part two, IV, A to F
A/CN.9/379	Volume XXIV: 1993	Part two, VII
A/CN.9/380	Volume XXIV: 1993	Part two, V
A/CN.9/381	Volume XXIV: 1993	Part two, VI
A/CN.9/384	Volume XXV: 1994	Part two, VI, A
A/CN.9/385	Volume XXV: 1994	Part two, VII
A/CN.9/386	Volume XXV: 1994	Part two, VI, B
A/CN.9/387	Volume XXV: 1994	Part two, III, A
A/CN.9/388	Volume XXV: 1994	Part two, II, A
A/CN.9/389	Volume XXV: 1994	Part two, I, A
A/CN.9/390	Volume XXV: 1994	Part two, III, C
A/CN.9/391	Volume XXV: 1994	Part two, II, C
A/CN.9/392	Volume XXV: 1994	Part two, I, C
A/CN.9/393	Volume XXIV: 1994	Part three, I
A/CN.9/394	Volume XXV: 1994	Part two, I, E
A/CN.9/395	Volume XXV: 1994	Part two, VIII
A/CN.9/396 and Add.1	Volume XXV: 1994	Part two, IV
A/CN.9/397	Volume XXV: 1994	Part two, V, A
A/CN.9/398	Volume XXV: 1994	Part two, V, B
A/CN.9/399	Volume XXV: 1994	Part two, V, C
A/CN.9/400	Volume XXV: 1994	Part two, X
A/CN.9/401	Volume XXV: 1994	Part two, IX, A

Document symbol	*Volume, year*	*Part, chapter*
A/CN.9/401/Add.1	Volume XXV: 1994	Part two, IX, B
A/CN.9/403	Volume XXV: 1994	Part three, II
A/CN.9/405	Volume XXVI: 1995	Part two, I, A
A/CN.9/406	Volume XXVI: 1995	Part two, II, A
A/CN.9/407	Volume XXVI: 1995	Part two, II, C
A/CN.9/408	Volume XXVI: 1995	Part two, I, C
A/CN.9/409 and Add.1-4	Volume XXVI: 1995	Part two, II, E
A/CN.9/410	Volume XXVI: 1995	Part two, III
A/CN.9/411	Volume XXVI: 1995	Part two, I, D
A/CN.9/412	Volume XXVI: 1995	Part two, IV, C
A/CN.9/413	Volume XXVI: 1995	Part two, IV, A
A/CN.9/414	Volume XXVI: 1995	Part two, IV, B
A/CN.9/415	Volume XXVI: 1995	Part two, VI
A/CN.9/416	Volume XXVI: 1995	Part two, V
A/CN.9/419 and Corr.1 (English only)	Volume XXVII: 1996	Part two, III, A
A/CN.9/420	Volume XXVII: 1996	Part two, IV
A/CN.9/421	Volume XXVII: 1996	Part two, II, A
A/CN.9/422	Volume XXVII: 1996	Part two, III, C
A/CN.9/423	Volume XXVII: 1996	Part two, I, A
A/CN.9/424	Volume XXVII: 1996	Part two, V
A/CN.9/425	Volume XXVII: 1996	Part two, I, B
A/CN.9/426	Volume XXVII: 1996	Part two, II, C
A/CN.9/427	Volume XXVII: 1996	Part two, VII
A/CN.9/428	Volume XXVII: 1996	Part two, VI
A/CN.9/431	Volume XXVIII: 1997	Part two, V
A/CN.9/432	Volume XXVIII: 1997	Part two, II, B
A/CN.9/433	Volume XXVIII: 1997	Part two, I, B
A/CN.9/434	Volume XXVIII: 1997	Part two, II, D
A/CN.9/435	Volume XXVIII: 1997	Part two, I, D
A/CN.9/436	Volume XXVIII: 1997	Part two, I, E
A/CN.9/437	Volume XXVIII: 1997	Part two, III, B
A/CN.9/438 and Add.1-3	Volume XXVIII: 1997	Part two, IV

Document symbol	*Volume, year*	*Part, chapter*
A/CN.9/439	Volume XXVIII: 1997	Part two, VIII
A/CN.9/440	Volume XXVIII: 1997	Part two, VII
A/CN.9/444 and Add.1-5	Volume XXIX: 1998	Part two, III
A/CN.9/445	Volume XXIX: 1998	Part two, I, A
A/CN.9/446	Volume XXIX: 1998	Part two, II, A
A/CN.9/447	Volume XXIX: 1998	Part two, I, C
A/CN.9/448	Volume XXIX: 1998	Part two, VI
A/CN.9/449	Volume XXIX: 1998	Part two, V
A/CN.9/450	Volume XXIX: 1998	Part two, II, D
A/CN.9/454	Volume XXX: 1999	Part two, II, A
A/CN.9/455	Volume XXX: 1999	Part two, I, A
A/CN.9/456	Volume XXX: 1999	Part two, I, E
A/CN.9/457	Volume XXX: 1999	Part two, II, D
A/CN.9/458 and Add.1-9	Volume XXX: 1999	Part two, III
A/CN.9/459 and Add.1	Volume XXX: 1999	Part two, IV
A/CN.9/460	Volume XXX: 1999	Part two, V
A/CN.9/461	Volume XXX: 1999	Part two, IX
A/CN.9/462	Volume XXX: 1999	Part two, VIII
A/CN.9/462/Add.1	Volume XXX: 1999	Part two, VI
A/CN.9/465	Volume XXXI: 2000	Part two, III, A
A/CN.9/466	Volume XXXI: 2000	Part two, II, A
A/CN.9/467	Volume XXXI: 2000	Part two, III, C
A/CN.9/468	Volume XXXI: 2000	Part two, IV, A
A/CN.9/469	Volume XXXI: 2000	Part two, V, A
A/CN.9/470	Volume XXXI: 2000	Part two, II, E
A/CN.9/471 and Add.1-9	Volume XXXI: 2000	Part two, I
A/CN.9/472 and Add.1-4	Volume XXXI: 2000	Part two, II, F
A/CN.9/473	Volume XXXI: 2000	Part two, IX
A/CN.9/474	Volume XXXI: 2000	Part two, VIII
A/CN.9/475	Volume XXXI: 2000	Part two, V, C
A/CN.9/476	Volume XXXI: 2000	Part two, V, D
A/CN.9/477	Volume XXXI: 2000	Part two, VI, A

Document symbol	*Volume, year*	*Part, chapter*
A/CN.9/478	Volume XXXI: 2000	Part two, VI, B
A/CN.9/479	Volume XXXI: 2000	Part two, VI. C
A/CN.9/483	Volume XXXII: 2001	Part two, II, A
A/CN.9/484	Volume XXXII: 2001	Part two, II, C
A/CN.9/485 and Corr.1	Volume XXXII: 2001	Part two, III, A
A/CN.9/486	Volume XXXII: 2001	Part two, I, A
A/CN.9/487	Volume XXXII: 2001	Part two, III, D
A/CN.9/488	Volume XXXII: 2001	Part two, V, A
A/CN.9/489 and Add.1	Volume XXXII: 2001	Part two, I, B
A/CN.9/490 and Add.1-5	Volume XXXII: 2001	Part two, I, C
A/CN.9/491 and Add.1	Volume XXXII: 2001	Part two, I, D
A/CN.9/492 and Add.1-3	Volume XXXII: 2001	Part two, II, I
A/CN.9/493	Volume XXXII: 2001	Part two, II, J
A/CN.9/494	Volume XXXII: 2001	Part two, VIII
A/CN.9/495	Volume XXXII: 2001	Part two, IV
A/CN.9/496	Volume XXXII: 2001	Part two, V, B
A/CN.9/497	Volume XXXII: 2001	Part two, V, C
A/CN.9/498	Volume XXXII: 2001	Part two, VI
A/CN.9/499	Volume XXXII: 2001	Part two, IX, B
A/CN.9/500	Volume XXXII: 2001	Part two, IX, A
A/CN.9/501	Volume XXXII: 2001	Part two, VII
A/CN.9/504	Volume XXXIII: 2002	Part two, III, A
A/CN.9/505	Volume XXXIII: 2002	Part two, II
A/CN.9/506	Volume XXXIII: 2002	Part two, I, A
A/CN.9/507	Volume XXXIII: 2002	Part two, III, D
A/CN.9/508	Volume XXXIII: 2002	Part two, I, D
A/CN.9/509	Volume XXXIII: 2002	Part two, IV, A
A/CN.9/510	Volume XXXIII: 2002	Part two, VI, A
A/CN.9/511	Volume XXXIII: 2002	Part two, III, H
A/CN.9/512	Volume XXXIII: 2002	Part two, V, A
A/CN.9/513 and Add.1-2	Volume XXXIII: 2002	Part two, I, G
A/CN.9/514	Volume XXXIII: 2002	Part two, I, H

Document symbol	*Volume, year*	*Part, chapter*
A/CN.9/515	Volume XXXIII: 2002	Part two, IX
A/CN.9/516	Volume XXXIII: 2002	Part two, VIII
A/CN.9/518	Volume XXXIII: 2002	Part two, III, J
A/CN.9/521	Volume XXXIV: 2003	Part two, I, A
A/CN.9/522, and Add.1 and 2	Volume XXXIV: 2003	Part two, I, C
A/CN.9/523	Volume XXXIV: 2003	Part two, III, A
A/CN.9/524	Volume XXXIV: 2003	Part two, III, C
A/CN.9/525	Volume XXXIV: 2003	Part two, IV, A
A/CN.9/526	Volume XXXIV: 2003	Part two, IV, C
A/CN.9/527	Volume XXXIV: 2003	Part two, V, A
A/CN.9/528	Volume XXXIV: 2003	Part two, V, C
A/CN.9/529	Volume XXXIV: 2003	Part two, II, A
A/CN.9/531	Volume XXXIV: 2003	Part two, VI, A
A/CN.9/532	Volume XXXIV: 2003	Part two, VI, C
A/CN.9/533, and Add.1-7	Volume XXXIV: 2003	Part two, I, D
A/CN.9/534	Volume XXXIV: 2003	Part two, II, G
A/CN.9/535	Volume XXXIV: 2003	Part two, II, F
A/CN.9/536	Volume XXXIV: 2003	Part two, IX
A/CN.9/537	Volume XXXIV: 2003	Part two, X
A/CN.9/539 and Add.1	Volume XXXIV: 2003	Part two, VII, A
A/CN.9/540	Volume XXXIV: 2003	Part two, VII, B
A/CN.9/542	Volume XXXV: 2004	Part two, I, A
A/CN.9/543	Volume XXXV: 2004	Part two, V, A
A/CN.9/544	Volume XXXV: 2004	Part two, III, A
A/CN.9/545	Volume XXXV: 2004	Part two, II, A
A/CN.9/546	Volume XXXV: 2004	Part two, IV, A
A/CN.9/547	Volume XXXV: 2004	Part two, II, C
A/CN.9/548	Volume XXXV: 2004	Part two, IV, F
A/CN.9/549	Volume XXXV: 2004	Part two, V, D
A/CN.9/550	Volume XXXV: 2004	Part two, I, H
A/CN.9/551	Volume XXXV: 2004	Part two, I, D
A/CN.9/552	Volume XXXV: 2004	Part two, III, F

Document symbol	*Volume, year*	*Part, chapter*
A/CN.9/553	Volume XXXV: 2004	Part two, VI
A/CN.9/554	Volume XXXV: 2004	Part two, I, I
A/CN.9/555	Volume XXXV: 2004	Part two, X, B
A/CN.9/557	Volume XXXV: 2004	Part three, I
A/CN.9/558 and Add.1	Volume XXXV: 2004	Part two, I, J
A/CN.9/559 and Add.1-3	Volume XXXV: 2004	Part two, I, K
A/CN.9/560	Volume XXXV: 2004	Part two, VII
A/CN.9/561	Volume XXXV: 2004	Part two, IX
A/CN.9/564	Volume XXXV: 2004	Part two, XI
A/CN.9/565	Volume XXXV: 2004	Part two, X, A
A/CN.9/566	Volume XXXV: 2004	Part three, II
A/CN.9/568	Volume XXXVI: 2005	Part two, II, A
A/CN.9/569	Volume XXXVI: 2005	Part two, III, A
A/CN.9/570	Volume XXXVI: 2005	Part two, V, A
A/CN.9/571	Volume XXXVI: 2005	Part two, I, A
A/CN.9/572	Volume XXXVI: 2005	Part two, IV, A
A/CN.9/573	Volume XXXVI: 2005	Part two, III, D
A/CN.9/574	Volume XXXVI: 2005	Part two, V, D
A/CN.9/575	Volume XXXVI: 2005	Part two, II, D
A/CN.9/576	Volume XXXVI: 2005	Part two, IV, F
A/CN.9/578 and Add.1-17	Volume XXXVI: 2005	Part two, I, G
A/CN.9/579	Volume XXXVI: 2005	Part two, X, C
A/CN.9/580 and Add.1-2	Volume XXXVI: 2005	Part two, IX, B
A/CN.9/581	Volume XXXVI: 2005	Part three, IV
A/CN.9/582 and Add.1-7	Volume XXXVI: 2005	Part two, X, B
A/CN.9/583	Volume XXXVI: 2005	Part two, IX, A
A/CN.9/584	Volume XXXVI: 2005	Part two, X, A
A/CN.9/585	Volume XXXVI: 2005	Part two, VI
A/CN.9/586	Volume XXXVI: 2005	Part two, VIII
A/CN.9/588	Volume XXXVII: 2006	Part two, I, A
A/CN.9/589	Volume XXXVII: 2006	Part two, II, A
A/CN.9/590	Volume XXXVII: 2006	Part two, III, A

Document symbol	*Volume, year*	*Part, chapter*
A/CN.9/591 and Corr1	Volume XXXVII: 2006	Part two, IV, A
A/CN.9/592	Volume XXXVII: 2006	Part two, II, E
A/CN.9/593	Volume XXXVII: 2006	Part two, I, D
A/CN.9/594	Volume XXXVII: 2006	Part two, IV, M
A/CN.9/595	Volume XXXVII: 2006	Part two, III, E
A/CN.9/596	Volume XXXVII: 2006	Part two, V, B
A/CN.9/597	Volume XXXVII: 2006	Part two, V, C
A/CN.9/598 and Add.1-2	Volume XXXVII: 2006	Part two, IX
A/CN.9/599	Volume XXXVII: 2006	Part two, VII
A/CN.9/600	Volume XXXVII: 2006	Part two, V, D
A/CN.9/601	Volume XXXVII: 2006	Part two, VIII
A/CN.9/602	Volume XXXVII: 2006	Part three, IV
A/CN.9/603	Volume XXXVII: 2006	Part two, I, F
A/CN.9/604	Volume XXXVII: 2006	Part two, V, A
A/CN.9/605	Volume XXXVII: 2006	Part two, II, H
A/CN.9/606	Volume XXXVII: 2006	Part two, II, I
A/CN.9/607	Volume XXXVII: 2006	Part two, II, J
A/CN.9/609 and Add.1-6	Volume XXXVII: 2006	Part two, II,K
A/CN.9/610 and Add.1	Volume XXXVII: 2006	Part two, II, L
A/CN.9/611 and Add.1-3	Volume XXXVII: 2006	Part two, I, I
A/CN.9/614	Volume XXXVIII: 2007	Part two, III, A
A/CN.9/615	Volume XXXVIII: 2007	Part two, II, A
A/CN.9/616	Volume XXXVIII: 2007	Part two, IV, A
A/CN.9/617	Volume XXXVIII: 2007	Part two, I, A
A/CN.9/618	Volume XXXVIII: 2007	Part two, V, A
A/CN.9/619	Volume XXXVIII: 2007	Part two, III, C
A/CN.9/620	Volume XXXVIII: 2007	Part two, I, C
A/CN.9/621	Volume XXXVIII: 2007	Part two, IV, J
A/CN.9/622	Volume XXXVIII: 2007	Part two, V, C
A/CN.9/623	Volume XXXVIII: 2007	Part two, II, D
A/CN.9/624 and Add.1-2	Volume XXXVIII: 2007	Part two, VI, C
A/CN.9/625	Volume XXXVIII: 2007	Part three, II

Document symbol	*Volume, year*	*Part, chapter*
A/CN.9/626	Volume XXXVIII: 2007	Part two, II, IX
A/CN.9/627	Volume XXXVIII: 2007	Part two, VIII
A/CN.9/628 and Add.1	Volume XXXVIII: 2007	Part two, X
A/CN.9/630 and Add.1-5	Volume XXXVIII: 2007	Part two, VI, B
A/CN.9/631 and Add.1-11	Volume XXXVIII: 2007	Part two, I, E
A/CN.9/632	Volume XXXVIII: 2007	Part two, VI, A
A/CN.9/634	Volume XXXVIII: 2007	Part two, III, E
A/CN.9/637 and Add.1-8	Volume XXXVIII: 2007	Part two, I, F
A/CN.9/640	Volume XXXIX: 2008	Part two, II, A
A/CN.9/641	Volume XXXIX: 2008	Part two, III, A
A/CN.9/642	Volume XXXIX: 2008	Part two, I, A
A/CN.9/643	Volume XXXIX: 2008	Part two, IV, A
A/CN.9/645	Volume XXXIX: 2008	Part two, I, I
A/CN.9/646	Volume XXXIX: 2008	Part two, III, C
A/CN.9/647	Volume XXXIX: 2008	Part two, IV, C
A/CN.9/648	Volume XXXIX: 2008	Part two, II, E
A/CN.9/649	Volume XXXIX: 2008	Part two, V, A
A/CN.9/650	Volume XXXIX: 2008	Part three, II
A/CN.9/651	Volume XXXIX: 2008	Part two, IX
A/CN.9/652	Volume XXXIX: 2008	Part two, VIII
A/CN.9/655	Volume XXXIX: 2008	Part two, VI, A
A/CN.9/657 and Add.1-2	Volume XXXIX: 2008	Part two, X
A/CN.9/659 and Add.1-2	Volume XXXIX: 2008	Part two, VI, B

6. Documents submitted to Working Groups

(a) Working Group I

(i) Time-limits and Limitation (Prescription)

A/CN.9/WG.1/WP.9	Volume II: 1971	Part two, I, C, 1

(ii) Privately Financed Infrastructure Projects

A/CN.9/WG.I/WP.29 and Add.1-2	Volume XXXIV: 2003	Part two, I, B

Document symbol	*Volume, year*	*Part, chapter*
	(b) Working Group II	
	(i) International Sale of Goods	
A/CN.9/WG.2/WP.1	Volume I: 1968 1979	Part three, I, A, 2
A/CN.9/WG.2/WP.6	Volume II: 1971	Part two, I, A, 1
A/CN.9/WG.2/WP.8	Volume III: 1972	Part two, I, A, 1
A/CN.9/WG.2/WP.9	Volume III: 1972	Part two, I, A, 2
A/CN.9/WG.2/WP.10	Volume III: 1972	Part two, I, A, 3
A/CN.9/WG.2/WP.11	Volume III: 1972	Part two, I, A, 4
A/CN.9/WG.2/WP.15	Volume IV: 1973	Part two, I, A, 1
A/CN.9/WG.2/WP.16	Volume IV: 1973	Part two, I, A, 2
A/CN.9/WG.2/WP.15/Add.1	Volume V: 1974	Part two, I, 3
A/CN.9/WG.2/WP.17/Add.1	Volume V: 1974	Part two, I, 4
A/CN.9/WG.2/WP.17/Add.2	Volume V: 1974	Part two, I, 4
A/CN.9/WG.2/WP.20	Volume VI: 1975	Part two, I, 4
A/CN.9/WG.2/WP.2 and Add.1-2	Volume VI: 1975	Part two, I, 3
A/CN.9/WG.2/WP.26 and Add.1 and appendix I	Volume VIII: 1977	Part two, I, C
A/CN.9/WG.2/WP.27	Volume IX: 1978	Part two, I, B
A/CN.9/WG.2/WP.28	Volume IX: 1978	Part two, I, B
	(ii) International Contract Practices	
A/CN.9/WG.II/WP.33 and Add.1	Volume XII: 1981	Part two, I, B, 1 and 2
A/CN.9/WG.II/WP.35	Volume XIII: 1982	Part two, III, B
A/CN.9/WG.II/WP.37	Volume XIV: 1983	Part two, III, B, 1
A/CN.9/WG.II/WP.38	Volume XIV: 1983	Part two, III, B, 2
A/CN.9/WG.II/WP.40	Volume XIV: 1983	Part two, III, D, 1
A/CN.9/WG.II/WP.41	Volume XIV: 1983	Part two, III, D, 2
A/CN.9/WG.II/WP.42	Volume XIV: 1983	Part two, III, D, 3
A/CN.9/WG.II/WP.44	Volume XV: 1984	Part two, II, A, 2(a)
A/CN.9/WG.II/WP.45	Volume XV: 1984	Part two, II, A, 2(b)
A/CN.9/WG.II/WP.46	Volume XV: 1984	Part two, II, A, 2(c)
A/CN.9/WG.II/WP.48	Volume XV: 1984	Part two, II, B, 3(a)
A/CN.9/WG.II/WP.49	Volume XV: 1984	Part two, II, B, 3(b)

Document symbol	*Volume, year*	*Part, chapter*
A/CN.9/WG.II/WP.50	Volume XV: 1984	Part two, II, B, 3(c)
A/CN.9/WG.II/WP.52 and Add.1	Volume XVI: 1985	Part two, IV, B, 1
A/CN.9/WG.II/WP.53	Volume XVI: 1985	Part two, IV, B, 3
A/CN.9/WG.II/WP.55	Volume XVII: 1986	Part two, III, B, 1
A/CN.9/WG.II/WP.56	Volume XVII: 1986	Part two, III, B, 2
A/CN.9/WG.II/WP.58	Volume XVIII: 1987	Part two, III, B
A/CN.9/WG.II/WP.60	Volume XIX: 1988	Part two, II, B
A/CN.9/WG.II/WP.62	Volume XX: 1989	Part two, IV, B, 1
A/CN.9/WG.II/WP.63	Volume XX: 1989	Part two, IV, B, 2
A/CN.9/WG.II/WP.65	Volume XXI: 1990	Part two, IV, B
A/CN.9/WG.II/WP.67	Volume XXII: 1991	Part two, III, B, 1
A/CN.9/WG.II/WP.68	Volume XXII: 1991	Part two, III, B, 2
A/CN.9/WG.II/WP.70	Volume XXII: 1991	Part two, III, D, 1
A/CN.9/WG.II/WP.71	Volume XXII: 1991	Part two, III, D, 2
A/CN.9/WG.II/WP.73 and Add.1	Volume XXIII: 1992	Part two, IV, B
A/CN.9/WG.II/WP.76 and Add.1	Volume XXIV: 1993	Part two, II, B, 1
A/CN.9/WG.II/WP.77	Volume XXIV: 1993	Part two, II, B, 2
A/CN.9/WG.II/WP.80	Volume XXV: 1994	Part two, II, B
A/CN.9/WG.II/WP.83	Volume XXVI: 1995	Part two, I, B
A/CN.9/WG.II/WP.87	Volume XXVIII: 1997	Part two, II, B
A/CN.9/WG.II/WP.89	Volume XXVIII: 1997	Part two, II, D, 1
A/CN.9/WG.II/WP.90	Volume XXVIII: 1997	Part two, II, D, 2
A/CN.9/WG.II/WP.91	Volume XXVIII: 1997	Part two, II, D, 3
A/CN.9/WG.II/WP.93	Volume XXIX: 1998	Part two, I, B
A/CN.9/WG.II/WP.96	Volume XXIX: 1998	Part two, I, D
A/CN.9/WG.II/WP.98	Volume XXX: 1999	Part two, I, B
A/CN.9/WG.II/WP.99	Volume XXX: 1999	Part two, I, C
A/CN.9/WG.II/WP.100	Volume XXX: 1999	Part two, I, D
A/CN.9/WG.II/WP.102	Volume XXX: 1999	Part two, I, F
A/CN.9/WG.II/WP.104	Volume XXXI: 2000	Part two, I, B
A/CN.9/WG.II/WP.105	Volume XXXI: 2000	Part two, I, C
A/CN.9/WG.II/WP.106	Volume XXXI: 2000	Part two, I, D

Document symbol	*Volume, year*	*Part, chapter*
	(iii) International Commercial Arbitration	
A/CN.9/WG.II/WP.108 and Add.1	Volume XXXI: 2000	Part two, IV, B
A/CN.9/WG.II/WP.110	Volume XXXII: 2001	Part two, III, B
A/CN.9/WG.II/WP.111	Volume XXXII: 2001	Part two, III, C
A/CN.9/WG.II/WP.113 and Add.1	Volume XXXII: 2001	Part two, III, E
A/CN.9/WG.II/WP.115	Volume XXXIII: 2002	Part two, I, B
A/CN.9/WG.II/WP.116	Volume XXXIII: 2002	Part two, I, C
A/CN.9/WG.II/WP.118	Volume XXXIII: 2002	Part two, I, E
A/CN.9/WG.II/WP.119	Volume XXXIII: 2002	Part two, I, F
A/CN.9/WG.II/WP.121	Volume XXXIV: 2003	Part two, III, B
A/CN.9/WG.II/WP.123	Volume XXXIV: 2003	Part two, III, D
A/CN.9/WG.II/WP.125	Volume XXXV: 2004	Part two, II, B
A/CN.9/WG.II/WP.127	Volume XXXV: 2004	Part two, II, D
A/CN.9/WG.II/WP.128	Volume XXXV: 2004	Part two, II, E
A/CN.9/WG.II/WP.129	Volume XXXV: 2004	Part two, II, F
A/CN.9/WG.II/WP.131	Volume XXXVI: 2005	Part two, III, B
A/CN.9/WG.II/WP.132	Volume XXXVI: 2005	Part two, III, C
A/CN.9/WG.II/WP.134	Volume XXXVI: 2005	Part two, III, E
A/CN.9/WG.II/WP.136	Volume XXXVII: 2006	Part two, II, B
A/CN.9/WG.II/WP.137 and Add.1	Volume XXXVII: 2006	Part two, II, C
A/CN.9/WG.II/WP.138	Volume XXXVII: 2006	Part two, II, D
A/CN.9/WG.II/WP.139	Volume XXXVII: 2006	Part two, II, F
A/CN.9/WG.II/WP.141	Volume XXXVII: 2006	Part two, II, G
A/CN.9/WG.II/WP.145 and Add.1	Volume XXXVIII: 2007	Part two, III, D
A/CN.9/WG.II/WP.147 and Add.1	Volume XXXIX: 2008	Part two, III, B
A/CN.9/WG.II/WP.149	Volume XXXIX: 2008	Part two, III, D
	(c) Working Group III	
	(i) International Legislation on Shipping	
A/CN.9/WG.III/WP.6	Volume IV: 1973	Part two, IV, 2
A/CN.9/WG.III/WP.7	Volume IV: 1973	Part two, IV, 3
A/CN.9/WG.III/WP.11	Volume V: 1974	Part two, III, 3

Document symbol	*Volume, year*	*Part, chapter*
	(ii) Transport Law	
A/CN.9/WG.III/WP.21 and Add.1	Volume XXXIII: 2002	Part two, VI, B
A/CN.9/WG.III/WP.23	Volume XXXIV: 2003	Part two, IV, B
A/CN.9/WG.III/WP.25	Volume XXXIV: 2003	Part two, IV, D
A/CN.9/WG.III/WP.26	Volume XXXIV: 2003	Part two, IV, E
A/CN.9/WG.III/WP.27	Volume XXXIV: 2003	Part two, IV, F
A/CN.9/WG.III/WP.28	Volume XXXIV: 2003	Part two, IV, G
A/CN.9/WG.III/WP.29	Volume XXXIV: 2003	Part two, IV, H
A/CN.9/WG.III/WP.30	Volume XXXIV: 2003	Part two, IV, I
A/CN.9/WG.III/WP.28/Add.1	Volume XXXV: 2004	Part two, III, B
A/CN.9/WG.III/WP.32	Volume XXXV: 2004	Part two, III, C
A/CN.9/WG.III/WP.33	Volume XXXV: 2004	Part two, III, D
A/CN.9/WG.III/WP.34	Volume XXXV: 2004	Part two, III, E
A/CN.9/WG.III/WP.36	Volume XXXV: 2004	Part two, III, G
A/CN.9/WG.III/WP.37	Volume XXXV: 2004	Part two, III, H
A/CN.9/WG.III/WP.39	Volume XXXVI: 2005	Part two, IV, B
A/CN.9/WG.III/WP.40	Volume XXXVI: 2005	Part two, IV, C
A/CN.9/WG.III/WP.41	Volume XXXVI: 2005	Part two, IV, D
A/CN.9/WG.III/WP.42	Volume XXXVI: 2005	Part two, IV, E
A/CN.9/WG.III/WP.44	Volume XXXVI: 2005	Part two, IV, G
A/CN.9/WG.III/WP.45	Volume XXXVI: 2005	Part two, IV, H
A/CN.9/WG.III/WP.46	Volume XXXVI: 2005	Part two, IV, I
A/CN.9/WG.III/WP.47	Volume XXXVI: 2005	Part two, IV, J
A/CN.9/WG.III/WP.49	Volume XXXVII: 2006	Part two, IV, B
A/CN.9/WG.III/WP.50/Rev.1	Volume XXXVII: 2006	Part two, IV, C
A/CN.9/WG.III/WP.51	Volume XXXVII: 2006	Part two, IV, D
A/CN.9/WG.III/WP.52	Volume XXXVII: 2006	Part two, IV, E
A/CN.9/WG.III/WP.53	Volume XXXVII: 2006	Part two, IV, F
A/CN.9/WG.III/WP.54	Volume XXXVII: 2006	Part two, IV, G
A/CN.9/WG.III/WP.55	Volume XXXVII: 2006	Part two, IV, H
A/CN.9/WG.III/WP.56	Volume XXXVII: 2006	Part two, IV, I
A/CN.9/WG.III/WP.57	Volume XXXVII: 2006	Part two, IV, J

Document symbol	*Volume, year*	*Part, chapter*
A/CN.9/WG.III/WP.58	Volume XXXVII: 2006	Part two, IV, K
A/CN.9/WG.III/WP.59	Volume XXXVII: 2006	Part two, IV, L
A/CN.9/WG.III/WP.61	Volume XXXVII: 2006	Part two, IV, N
A/CN.9/WG.III/WP.62	Volume XXXVII: 2006	Part two, IV, O
A/CN.9/WG.III/WP.63	Volume XXXVII: 2006	Part two, IV, P
A/CN.9/WG.III/WP.64	Volume XXXVII: 2006	Part two, IV, Q
A/CN.9/WG.III/WP.65	Volume XXXVII: 2006	Part two, IV, R
A/CN.9/WG.III/WP.66	Volume XXXVII: 2006	Part two, IV, S
A/CN.9/WG.III/WP.67	Volume XXXVII: 2006	Part two, IV, T
A/CN.9/WG.III/WP.68	Volume XXXVII: 2006	Part two, IV, U
A/CN.9/WG.III/WP.69	Volume XXXVII: 2006	Part two, IV, V
A/CN.9/WG.III/WP.70	Volume XXXVII: 2006	Part two, IV, V
A/CN.9/WG.III/WP.72	Volume XXXVIII: 2007	Part two, IV, B
A/CN.9/WG.III/WP.73	Volume XXXVIII: 2007	Part two, IV, C
A/CN.9/WG.III/WP.74	Volume XXXVIII: 2007	Part two, IV, D
A/CN.9/WG.III/WP.75	Volume XXXVIII: 2007	Part two, IV, E
A/CN.9/WG.III/WP.76	Volume XXXVIII: 2007	Part two, IV, F
A/CN.9/WG.III/WP.77	Volume XXXVIII: 2007	Part two, IV, G
A/CN.9/WG.III/WP.78	Volume XXXVIII: 2007	Part two, IV, H
A/CN.9/WG.III/WP.79	Volume XXXVIII: 2007	Part two, IV, I
A/CN.9/WG.III/WP.81	Volume XXXVIII: 2007	Part two, IV, K
A/CN.9/WG.III/WP.82	Volume XXXVIII: 2007	Part two, IV, L
A/CN.9/WG.III/WP.83	Volume XXXVIII: 2007	Part two, IV, M
A/CN.9/WG.III/WP.84	Volume XXXVIII: 2007	Part two, IV, N
A/CN.9/WG.III/WP.85	Volume XXXVIII: 2007	Part two, IV, O
A/CN.9/WG.III/WP.86	Volume XXXVIII: 2007	Part two, IV, P
A/CN.9/WG.III/WP.87	Volume XXXVIII: 2007	Part two, IV, Q
A/CN.9/WG.III/WP.88	Volume XXXVIII: 2007	Part two, IV, R
A/CN.9/WG.III/WP.89	Volume XXXVIII: 2007	Part two, IV, S
A/CN.9/WG.III/WP.90	Volume XXXVIII: 2007	Part two, IV, T
A/CN.9/WG.III/WP.91	Volume XXXVIII: 2007	Part two, IV, U
A/CN.9/WG.III/WP.93	Volume XXXIX: 2008	Part two, I, B

Document symbol	*Volume, year*	*Part, chapter*
A/CN.9/WG.III/WP.94	Volume XXXIX: 2008	Part two, I, C
A/CN.9/WG.III/WP.95	Volume XXXIX: 2008	Part two, I, D
A/CN.9/WG.III/WP.96	Volume XXXIX: 2008	Part two, I, E
A/CN.9/WG.III/WP.97	Volume XXXIX: 2008	Part two, I, F
A/CN.9/WG.III/WP.98	Volume XXXIX: 2008	Part two, I, G
A/CN.9/WG.III/WP.99	Volume XXXIX: 2008	Part two, I, H
A/CN.9/WG.III/WP.101	Volume XXXIX: 2008	Part two, I, J
A/CN.9/WG.III/WP.102	Volume XXXIX: 2008	Part two, I, K
A/CN.9/WG.III/WP.103	Volume XXXIX: 2008	Part two, I, L

(d) Working Group IV

(i) International Negotiable Instruments

A/CN.9/WG.IV/WP.2	Volume IV: 1973	Part two, II, 2
A/CN.9/WG.IV/CRP.5	Volume VI: 1975	Part two, II, 2
A/CN.9/WG.IV/WP.21	Volume XIII: 1982	Part two, II, A, 2(a)
A/CN.9/WG.IV/WP.22	Volume XIII: 1982	Part two, II, A, 2(b)
A/CN.9/WG.IV/WP.23	Volume XIII: 1982	Part two, II, A, 2(c)
A/CN.9/WG.IV/WP.24 and Add.1 and 2	Volume XIII: 1982	Part two, II, A, 2(d f)
A/CN.9/WG.IV/WP.25 and Add.1	Volume XIII: 1982	Part two, II, A, 2(g, h)
A/CN.9/WG.IV/WP.27	Volume XIII: 1982	Part two, II, B, 2
A/CN.9/WG.IV/WP.30	Volume XVII: 1986	Part two, I, A, 3
A/CN.9/WG.IV/WP.32 and Add.1-10	Volume XVIII: 1987	Part two, I, 2
A/CN.9/WG.IV/WP.33	Volume XVIII: 1987	Part two, I, 3

(ii) International Payments

A/CN.9/WG.IV/WP.35	Volume XIX: 1988	Part two, I, A, 2
A/CN.9/WG.IV/WP.37	Volume XX: 1989	Part two, I, B
A/CN.9/WG.IV/WP.39	Volume XX: 1989	Part two, I, D
A/CN.9/WG.IV/WP.41	Volume XXI: 1990	Part two, I, B
A/CN.9/WG.IV/WP.42	Volume XXI: 1990	Part two, I, C
A/CN.9/WG.IV/WP.44	Volume XXI: 1990	Part two, I, E
A/CN.9/WG.IV/WP.46 and Corr.1	Volume XXII: 1991	Part two, I, D, 1
A/CN.9/WG.IV/WP.47	Volume XXII: 1991	Part two, I, D, 2

Document symbol	*Volume, year*	*Part, chapter*
A/CN.9/WG.IV/WP.49	Volume XXII: 1991	Part two, I, F
A/CN.9/WG.IV/WP.51	Volume XXIII: 1992	Part two, II, B
	(iii) Electronic Commerce	
A/CN.9/WG.IV/WP.53	Volume XXIII: 1992	Part two, V, B
A/CN.9/WG.IV/WP.55	Volume XXIV: 1993	Part two, III, B
A/CN.9/WG.IV/WP.57	Volume XXV: 1994	Part two, III, B, 1
A/CN.9/WG.IV/WP.58	Volume XXV: 1994	Part two, III, B, 2
A/CN.9/WG.IV/WP.60	Volume XXV: 1994	Part two, III, D
A/CN.9/WG.IV/WP.62	Volume XXVI: 1995	Part two, II, B
A/CN.9/WG.IV/WP.64	Volume XXVI: 1995	Part two, II, D, 1
A/CN.9/WG.IV/WP.65	Volume XXVI: 1995	Part two, II, D, 2
A/CN.9/WG.IV/WP.66	Volume XXVI: 1995	Part two, II, D, 3
A/CN.9/WG.IV/WP.67	Volume XXVI: 1995	Part two, II, D, 4
A/CN.9/WG.IV/WP.69	Volume XXVII: 1996	Part two, II, B
A/CN.9/WG.IV/WP.71	Volume XXVIII: 1997	Part two, III, A
A/CN.9/WG.IV/WP.73	Volume XXIX: 1998	Part two, II, B
A/CN.9/WG.IV/WP.74	Volume XXIX: 1998	Part two, II, C
A/CN.9/WG.IV/WP.76	Volume XXX: 1999	Part two, II, B
A/CN.9/WG.IV/WP.77	Volume XXX: 1999	Part two, II, C
A/CN.9/WG.IV/WP.79	Volume XXX: 1999	Part two, II, E
A/CN.9/WG.IV/WP.80	Volume XXX: 1999	Part two, II, F
A/CN.9/WG.IV/WP.82	Volume XXXI: 2000	Part two, III, B
A/CN.9/WG.IV/WP.84	Volume XXXI: 2000	Part two, III, B
A/CN.9/WG.IV/WP.86 and Add.1	Volume XXXII: 2001	Part two, II, B
A/CN.9/WG.IV/WP.88	Volume XXXII: 2001	Part two, II, D
A/CN.9/WG.IV/WP.89	Volume XXXII: 2001	Part two, II, E
A/CN.9/WG.IV/WP.90	Volume XXXII: 2001	Part two, II, F
A/CN.9/WG.IV/WP.91	Volume XXXII: 2001	Part two, II, G
A/CN.9/WG.IV/WP.93	Volume XXXII: 2001	Part two, II, H
A/CN.9/WG.IV/WP.94	Volume XXXIII: 2002	Part two, IV, B
A/CN.9/WG.IV/WP.95	Volume XXXIII: 2002	Part two, IV, C
A/CN.9/WG.IV/WP.96	Volume XXXIII: 2002	Part two, IV, D

Document symbol	*Volume, year*	*Part, chapter*
A/CN.9/WG.IV/WP.98 and Add.1-4	Volume XXXIV: 2003	Part two, V, B
A/CN.9/WG.IV/WP.98 and Add. 5-6	Volume XXXIV: 2003	Part two, V, D
A/CN.9/WG.IV/WP.100	Volume XXXIV: 2003	Part two, V, E
A/CN.9/WG.IV/WP.101	Volume XXXIV: 2003	Part two, V, F
A/CN.9/WG.IV/WP.103	Volume XXXV: 2004	Part two, IV, B
A/CN.9/WG.IV/WP.104 and Add.1-4	Volume XXXV: 2004	Part two, IV, C
A/CN.9/WG.IV/WP.105	Volume XXXV: 2004	Part two, IV, D
A/CN.9/WG.IV/WP.106	Volume XXXV: 2004	Part two, IV, E
A/CN.9/WG.IV/WP.108	Volume XXXV: 2004	Part two, IV, G
A/CN.9/WG.IV/WP.110	Volume XXXVI: 2005	Part two, I, B
A/CN.9/WG.IV/WP.111	Volume XXXVI: 2005	Part two, I, C
A/CN.9/WG.IV/WP.112	Volume XXXVI: 2005	Part two, I, D
A/CN.9/WG.IV/WP.113	Volume XXXVI: 2005	Part two, I, E
	(e) Working Group V	
	(i) New International Economic Order	
A/CN.9/WG.V/WP.4 and Add.1-8	Volume XII: 1981	Part two, IV, B, 1
A/CN.9/WG.V/WP.5	Volume XII: 1981	Part two, IV, B, 2
A/CN.9/WG.V/WP.7 and Add.1-6	Volume XIII: 1982	Part two, IV, B
A/CN.9/WG.V/WP.9 and Add.1-5	Volume XIV: 1983	Part two, IV, B
A/CN.9/WG.V/WP.11 and Add.1-9	Volume XV: 1984	Part two, III, B
A/CN.9/WG.V/WP.13 and Add.1-6	Volume XVI: 1985	Part two, III, A, 2
A/CN.9/WG.V/WP.15 and Add.1-10	Volume XVI: 1985	Part two, III, B, 2
A/CN.9/WG.V/WP.17 and Add.1-9	Volume XVII: 1986	Part two, II, B
A/CN.9/WG.V/WP.19	Volume XVIII: 1987	Part two, II, A, 2
A/CN.9/WG.V/WP.20	Volume XVIII: 1987	Part two, II, A, 3
A/CN.9/WG.V/WP.22	Volume XX: 1989	Part two, II, B
A/CN.9/WG.V/WP.24	Volume XXI: 1990	Part two, II, B
A/CN.9/WG.V/WP.25	Volume XXI: 1990	Part two, II, C
A/CN.9/WG.V/WP.27	Volume XXII: 1991	Part two, II, B, 1
A/CN.9/WG.V/WP.28	Volume XXII: 1991	Part two, II, B, 2
A/CN.9/WG.V/WP.30	Volume XXIII: 1992	Part two, III, B, 1

Document symbol	*Volume, year*	*Part, chapter*
A/CN.9/WG.V/WP.31	Volume XXIII: 1992	Part two, III, B, 2
A/CN.9/WG.V/WP.33	Volume XXIII: 1992	Part two, III, D, 2
A/CN.9/WG.V/WP.34	Volume XXIII: 1992	Part two, III, D,
A/CN.9/WG.V/WP.36	Volume XXIV: 1993	Part two, I, B
A/CN.9/WG.V/WP.38	Volume XXV: 1994	Part two, I, B
A/CN.9/WG.V/WP.40	Volume XXV: 1994	Part two, I, D
	(ii) Insolvency Law	
A/CN.9/WG.V/WP.42	Volume XXVII: 1996	Part two, III, B
A/CN.9/WG.V/WP.44	Volume XXVII: 1996	Part two, III, D
A/CN.9/WG.V/WP.46	Volume XXVIII: 1997	Part two, I, B
A/CN.9/WG.V/WP.48	Volume XXVIII: 1997	Part two, I, D
A/CN.9/WG.V/WP.50	Volume XXXI: 2000	Part two, V, B
A/CN.9/WG.V/WP.54 and Add.1-2	Volume XXXIII: 2002	Part two, III, B
A/CN.9/WG.V/WP.55	Volume XXXIII: 2002	Part two, III, C
A/CN.9/WG.V/WP.57	Volume XXXIII: 2002	Part two, III, E
A/CN.9/WG.V/WP.58	Volume XXXIII: 2002	Part two, III, F
A/CN.9/WG.V/WP.59	Volume XXXIII: 2002	Part two, III, G
A/CN.9/WG.V/WP.61 and Add.1-2	Volume XXXIII: 2002	Part two, III, I
A/CN.9/WG.V/WP.63 and Add.3-15	Volume XXXIV: 2003	Part two, II, B
A/CN.9/WG.V/WP.64	Volume XXXIV: 2003	Part two, II, C
A/CN.9/WG.V/WP.63 and Add. 1-2 and Add.16-17	Volume XXXIV: 2003	Part two, II, E
A/CN.9/WG.V/WP.67	Volume XXXV: 2004	Part two, I, B
A/CN.9/WG.V/WP.68	Volume XXXV: 2004	Part two, I, C
A/CN.9/WG.V/WP.70 (Parts I and II)	Volume XXXV: 2004	Part two, I, E
A/CN.9/WG.V/WP.71	Volume XXXV: 2004	Part two, I, F
A/CN.9/WG.V/WP.72	Volume XXXV: 2004	Part two, I, G
A/CN.9/WG.V/WP.74 and Add.1-2	Volume XXXVIII: 2007	Part two, V, B
A/CN.9/WG.V/WP.76 and Add.1-2	Volume XXXVIII: 2007	Part two, V, D
A/CN.9/WG.V/WP.78 and Add.1	Volume XXXIX: 2008	Part two, IV, B
A/CN.9/WG.V/WP.80 and Add.1	Volume XXXIX: 2008	Part two, IV, D

Document symbol	*Volume, year*	*Part, chapter*
	(f) Working Group VI:Security Interests	
A/CN.9/WG.VI/WP.2 and Add.1-12	Volume XXXIII: 2002	Part two, V, B
A/CN.9/WG.VI/WP.3	Volume XXXIII: 2002	Part two, V, C
A/CN.9/WG.VI/WP.4	Volume XXXIII: 2002	Part two, V, D
A/CN.9/WG.VI/WP.6 and Add.1-5	Volume XXXIV: 2003	Part two, VI, B
A/CN.9/WG.VI/WP.9 and Add.1-4 and Add.6-8	Volume XXXV: 2004	Part two, V, B
A/CN.9/WG.VI/WP.11 and Add.1-2	Volume XXXV: 2004	Part two, V, E
A/CN.9/WG.VI/WP.13 and Add.1	Volume XXXVI: 2005	Part two, V, B
A/CN.9/WG.VI/WP.14 and Add.1-2 And Add.4	Volume XXXVI: 2005	Part two, V, C
A/CN.9/WG.VI/WP.16 and Add.1	Volume XXXVI: 2005	Part two, V, E
A/CN.9/WG.VI/WP.17 and Add.1	Volume XXXVI: 2005	Part two, V, F
A/CN.9/WG.VI/WP.18 and Add.1	Volume XXXVI: 2005	Part two, V, G
A/CN.9/WG.VI/WP.19	Volume XXXVI: 2005	Part two, V, H
A/CN.9/WG.VI/WP.21 and Add.1-5	Volume XXXVII: 2006	Part two, I, B
A/CN.9/WG.VI/WP.22 and Add.1	Volume XXXVII: 2006	Part two, I, C
A/CN.9/WG.VI/WP.24 and Add.1-5	Volume XXXVII: 2006	Part two, I, E
A/CN.9/WG.VI/WP.26 and Add.1-8	Volume XXXVII: 2006	Part two, I, G
A/CN.9/WG.VI/WP.27 and Add.1-2	Volume XXXVII: 2006	Part two, I, H
A/CN.9/WG.VI/WP.29	Volume XXXVIII: 2007	Part two, I, B
A/CN.9/WG.VI/WP.31 and Add.1	Volume XXXVIII: 2007	Part two, I, D
A/CN.9/WG.VI/WP.33 and Add.1	Volume XXXIX: 2008	Part two, V,B
	7. Summary Records of discussions in the Commission	
A/CN.9/SR.93 123	Volume III: 1972	Supplement
A/CN.9/SR.254 256	Volume XIV: 1983	Part three, I, A
A/CN.9/SR.255 261	Volume XIV: 1983	Part three, I, B, 1
A/CN.9/SR.270 278, 282 and 283	Volume XIV: 1983	Part three, I, B, 2
A/CN.9/SR.286 299 and 301	Volume XV: 1984	Part three, I
A/CN.9/SR.305 333	Volume XVI: 1985	Part three, II
A/CN.9/SR.335 353, 355 and 356	Volume XVII: 1986	Part three, II
A/CN.9/SR.378, 379, 381 385 and 388	Volume XVIII: 1987	Part three, III

Document symbol	*Volume, year*	*Part, chapter*
A/CN.9/SR.402 421, 424 and 425	Volume XX: 1989	Part three, II
A/CN.9/SR.439 462 and 465	Volume XXII: 1991	Part three, II
A/CN.9/SR.467 476, 481 and 482	Volume XXIII: 1992	Part three, III
A/CN.9/SR.494-512	Volume XXIV: 1993	Part three, III
A/CN.9/SR.520-540	Volume XXV: 1994	Part three, III
A/CN.9/SR.547-579	Volume XXVI: 1995	Part three, III
A/CN.9/SR.583-606	Volume XXVII: 1996	Part three, III
A/CN.9/SR.607-631	Volume XXVIII: 1997	Part three, III
A/CN.9/SR.676-703	Volume XXXI: 2000	Part three, II
A/CN.9/SR.711-730	Volume XXXII: 2001	Part three, III
A/CN.9/SR.739-752	Volume XXXIII: 2002	Part three, III
A/CN.9/SR. 758-774	Volume XXXIV: 2003	Part three, II
A/CN.9/SR.794-810	Volume XXXVI: 2005	Part three, II
A/CN.9/SR.836-864	Volume XXXVIII: 2007	Part three, I
A/CN.9/SR.865-882	Volume XXXIX: 2008	Part three, I
8. Texts adopted by Conferences of Plenipotentiaries		
A/CONF.63/14 and Corr.1	Volume V: 1974	Part three, I, A
A/CONF.63/15	Volume V: 1974	Part three, I, B
A/CONF.63/17	Volume X: 1979	Part three, I
A/CONF.89/13 and annexes I III	Volume IX: 1978	Part three, I, A D
A/CONF.97/18 and annexes I and II	Volume XI: 1980	Part three, I, A C
A/CONF.152/13	Volume XXIII: 1992	Part three, I
9. Bibliographies of writings relating to the work of the Commission		
	Volume I: 1968 1970	Part three
A/CN.9/L.20/Add.1	Volume II: 1971	Part two
	Volume II: l972	Part two
	Volume III: 1972	Part two
	Volume IV: 1973	Part two

Document symbol	*Volume, year*	*Part, chapter*
A/CN.9/L.25	Volume V: 1974	Part three, II, A
	Volume V: 1974	Part three, II, B
	Volume VI: 1975	Part three, II, A
	Volume VII: 1976	Part three, A
	Volume VIII: 1977	Part three, A
	Volume IX: 1978	Part three, II
	Volume X: 1979	Part three, II
	Volume XI: 1980	Part three, IV
	Volume XII: 1981	Part three, III
	Volume XIII: 1982	Part three, IV
	Volume XIV: 1983	Part three, IV
	Volume XV: 1984	Part three, II
A/CN.9/284	Volume XVI: 1985	Part three, III
A/CN.9/295	Volume XVII: 1986	Part three, III
A/CN.9/313	Volume XVIII: 1987	Part three, IV
A/CN.9/326	Volume XIX: 1988	Part three, III
A/CN.9/339	Volume XX: 1989	Part three, III
A/CN.9/354	Volume XXI: 1990	Part three, I
A/CN.9/369	Volume XXII: 1991	Part three, III
A/CN.9/382	Volume XXIII: 1992	Part three, V
A/CN.9/402	Volume XXIV: 1993	Part three, IV
A/CN.9/417	Volume XXV: 1994	Part three, IV
A/CN.9/429	Volume XXVI: 1995	Part three, IV
A/CN.9/441 and Corr.1 (not 442)	Volume XXVII: 1996	Part three, IV
A/CN.9/452	Volume XXVIII: 1997	Part three, IV
A/CN.9/463	Volume XXIX: 1998	Part three, II
A/CN.9/481	Volume XXX: 1999	Part three, I
A/CN.9/502 and Corr.1	Volume XXXI: 2000	Part three, III
A/CN.9/517	Volume XXXII 2001	Part three, IV
A/CN.9/538	Volume XXXIII: 2002	Part three, IV
A/CN.9/566	Volume XXXIV: 2003	Part three, III
A/CN.9/581	Volume XXXVI: 2005	Part three, III

Document symbol	*Volume, year*	*Part, chapter*
A/CN.9/602	Volume XXXVII: 2006	Part three, III
A/CN.9/625	Volume XXXVIII: 2007	Part three, II
A/CN.9/650	Volume XXXIX: 2008	Part three, II

United Nations Publication
Published on CD-Rom

Sales No.E.12.V.17
V.12-52994–November 2012
ISSN 0251-4265

USD 80
ISBN 978-92-1-133804-1