

# YEARBOOK

Volume XXXIX: 2008





**UNITED NATIONS COMMISSION ON  
INTERNATIONAL TRADE LAW**

**YEARBOOK**

**Volume XXXIX 2008**



**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/2008

UNITED NATIONS PUBLICATION

Sales No. E.12.V.7

ISBN 987-92-1-133710-5

e-ISBN 978-92-1-055399-5

ISSN 0251-4265

## CONTENTS

	<i>Page</i>
INTRODUCTION .....	vii
<b>Part One. Report of the Commission on its annual session and comments and action thereon</b>	
THE FORTY-FIRST SESSION (2008) .....	3
A. Report of the United Nations Commission on International Trade Law on its forty-first session (New York, 16 June-3 July 2008) (A/63/17) .....	3
B. United Nations Conference on Trade and Development (UNCTAD): extract from the report of the Trade and Development Board on its fifty-fifth session (TD/B/55/10) .....	128
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-first session (A/63/438) .....	129
D. General Assembly resolutions 63/120, 63/121, 63/122 and 63/128 .....	175
<b>Part Two. Studies and reports on specific subjects</b>	
I. TRANSPORT LAW .....	225
A. Report of the Working Group on Transport Law on the work of its twentieth session (Vienna, 15-25 October 2007) (A/CN.9/642) .....	225
B. Note by the Secretariat on the preparation of a draft convention on the carriage of goods [wholly or partly] [by sea] – Comments and Proposals of the Government of Nigeria (A/CN.9/WG.III/WP.93) ..	282
C. Note by the Secretariat on the preparation of a draft convention on the carriage of goods [wholly or partly] [by sea] – Revised text of articles 42, 44 and 49 of the draft convention on the carriage of goods [wholly or partly] [by sea] (A/CN.9/WG.III/WP.94) .....	288
D. Note by the Secretariat on the preparation of a draft convention on the carriage of goods [wholly or partly] [by sea] – Proposal by the delegations of Denmark and the Netherlands (A/CN.9/WG.III/WP.95) .....	292
E. Note by the Secretariat on the preparation of a draft convention on the carriage of goods [wholly or partly] [by sea] – Proposal on Chapter 12 “Transfer of Rights” submitted by the Delegation of the Netherlands (A/CN.9/WG.III/WP.96) .....	294
F. Note by the Secretariat on the preparation of a draft convention on the carriage of goods [wholly or partly] [by sea] – Comments from Non-Governmental Organizations (A/CN.9/WG.III/WP.97) .....	297
G. Note by the Secretariat on the preparation of a draft convention on the carriage of goods [wholly or partly] [by sea] – Proposal by the Government of China on Jurisdiction (A/CN.9/WG.III/WP.98) .....	300
H. Note by the Secretariat on the preparation of a draft convention on the carriage of goods [wholly or partly] [by sea] – Proposal by the Government of China on Delivery of the Goods when a Negotiable Transport Document or a Negotiable Electronic Transport Record has been issued and on Goods Remaining Undelivered (A/CN.9/WG.III/WP.99) .....	303

I.	Report of the Working Group on Transport Law on the work of its twenty-first session (Vienna, 14-25 January 2008) (A/CN.9/645) . . . . .	306
J.	Note by the Secretariat on the draft convention on the carriage of goods [wholly or partly] [by sea] (A/CN.9/WG.III/WP.101) . . . . .	397
K.	Note by the Secretariat on the preparation of a draft convention on the carriage of goods [wholly or partly] [by sea] – Proposal of the delegation of the Netherlands to include “road cargo vehicle” in the definition of “container” (A/CN.9/WG.III/WP.102) . . . . .	457
L.	Note by the Secretariat on the preparation of a draft convention on the carriage of goods [wholly or partly] [by sea] – Proposal by the delegations of Italy, the Republic of Korea and the Netherlands to delete any reference to “consignor” and to simplify the definition of “transport document” (A/CN.9/WG.III/WP.103) . . . . .	459
II.	PROCUREMENT . . . . .	463
A.	Report of the Working Group on Procurement on the work of its twelfth session (Vienna, 3-7 September 2007) (A/CN.9/640) . . . . .	463
B.	Note by the Secretariat on 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, and abnormally low tenders, submitted to the Working Group on Procurement at its twelfth session (A/CN.9/WG.I/WP.54) . . . . .	485
C.	Note by the Secretariat on revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services – drafting materials for the use of electronic reverse auctions in public procurement, submitted to the Working Group on Procurement at its twelfth session (A/CN.9/WG.I/WP.55) . . . . .	503
D.	Note by the Secretariat on revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services – Proposal by the United States, submitted to the Working Group on Procurement at its twelfth session (A/CN.9/WG.I/WP.56) . . . . .	521
E.	Report of the Working Group on Procurement on the work of its thirteenth session (New York, 7-11 April 2008) (A/CN.9/648) . . . . .	526
F.	Note by the Secretariat on 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, and abnormally low tenders, submitted to the Working Group on Procurement at its thirteenth session (A/CN.9/WG.I/WP.58) . . . . .	554
G.	Note by the Secretariat on revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services – drafting materials for the use of electronic reverse auctions in public procurement, submitted to the Working Group on Procurement at its thirteenth session (A/CN.9/WG.I/WP.59) . . . . .	571
III.	INTERNATIONAL COMMERCIAL ARBITRATION AND CONCILIATION . . . . .	585
A.	Report of the Working Group on Arbitration and Conciliation on the work of its forty-seventh session (Vienna, 10-14 September 2007) (A/CN.9/641) . . . . .	585
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-seventh session (A/CN.9/WG.II/WP.147 and Add.1) . . . . .	606

C.	Report of the Working Group on Arbitration on the work of its forty-eighth session (New York, 4-8 February 2008) (A/CN.9/646) . . . . .	634
D.	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-eighth session (A/CN.9/WG.II/WP.149) . . . . .	657
IV.	INSOLVENCY LAW . . . . .	675
A.	Report of the Working Group on Insolvency Law on the work of its thirty-third session (Vienna, 5-9 November 2007) (A/CN.9/643) . . . . .	675
B.	Note by the Secretariat on the treatment of corporate groups in insolvency, submitted to the Working Group on Insolvency Law at its thirty-third session (A/CN.9/WG.V/WP.78 and Add.1) . . . . .	696
C.	Report of the Working Group on Insolvency Law on the work of its thirty-fourth session (New York, 3-5 March 2008) (A/CN.9/647) . . . . .	726
D.	Note by the Secretariat on the treatment of corporate groups in insolvency, submitted to the Working Group on Insolvency Law at its thirty-fourth session (A/CN.9/WG.V/WP.80 and Add.1) . . . . .	742
V.	SECURITY INTERESTS . . . . .	767
A.	Report of the Working Group on Security Interests on the work of its thirteenth session (New York, 19-23 May 2008) (A/CN.9/649) . . . . .	767
B.	Note by the Secretariat on security rights in intellectual property rights, submitted to the Working Group on Security Interests at its thirteenth session (A/CN.9/WG.VI/WP.33 and Add.1) . . . . .	791
VI.	POSSIBLE FUTURE WORK . . . . .	849
A.	Note by the Secretariat on possible future work in the area of electronic commerce: Legal issues arising out of the implementation and operation of single windows in international trade (A/CN.9/655) . . . . .	849
B.	Note by the Secretariat on possible future work in the area of commercial fraud: Indicators of Commercial Fraud (A/CN.9/659 and Add.1-2) . . . . .	861
VII.	CASE LAW ON UNCITRAL TEXTS (CLOUT) . . . . .	879
VIII.	TECHNICAL ASSISTANCE TO LAW REFORM . . . . .	881
	Note by the Secretariat on technical cooperation and assistance (A/CN.9/652) . . . . .	881
IX.	STATUS AND PROMOTION OF UNCITRAL LEGAL TEXTS . . . . .	897
	Status of conventions and model laws (A/CN.9/651) . . . . .	897
X.	COORDINATION AND COOPERATION . . . . .	899
	Note by the Secretariat on current activities of international organizations related to the harmonization and unification of international trade law (A/CN.9/657 and Add.1-2) . . . . .	899

**Part Three. Annexes**

I.	SUMMARY RECORDS OF THE MEETINGS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW DEVOTED TO THE DRAFT CONVENTION ON THE CARRIAGE OF GOODS [WHOLLY OR PARTLY] [BY SEA] . . . . .	941
II.	BIBLIOGRAPHY OF RECENT WRITINGS RELATED TO THE WORK OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW – NOTE BY THE SECRETARIAT (A/CN.9/650) . . . . .	1039
III.	CHECK-LIST OF DOCUMENTS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW . . . . .	1063
IV.	LIST OF DOCUMENTS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW REPRODUCED IN PREVIOUS VOLUMES OF THE <i>YEARBOOK</i> . . . . .	1069



## INTRODUCTION

This is the thirty-ninth volume in the series of *Yearbooks* of the United Nations Commission on International Trade Law (UNCITRAL).<sup>1</sup>

The present volume consists of three parts. Part one contains the Commission's report on the work of its forty-first session, which was held in New York, from 16 June-3 July 2008, 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-first session of the Commission are reproduced. These documents include reports of the Commission's Working Groups as well as studies, reports and notes by the Secretary-General and the Secretariat. Also included in this part are selected working papers that were prepared for the Working Groups.

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

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

<i>Volume</i>	<i>Years covered</i>	<i>United Nations publication Sales No. or document symbol</i>
I	1968-1970	E.71.V.1
II	1971	E.72.V.4
III	1972	E.73.V.6
III Suppl.	1972	E.73.V.9
IV	1973	E.74.V.3
V	1974	E.75.V.2
VI	1975	E.76.V.5
VII	1976	E.77.V.1
VIII	1977	E.78.V.7
IX	1978	E.80.V.8
X	1979	E.81.V.2

<i>Volume</i>	<i>Years covered</i>	<i>United Nations publication Sales No. or document symbol</i>
XI	1980	E.81.V.8
XII	1981	E.82.V.6
XIII	1982	E.84.V.5
XIV	1983	E.85.V.3
XV	1984	E.86.V.2
XVI	1985	E.87.V.4
XVII	1986	E.88.V.4
XVIII	1987	E.89.V.4
XIX	1988	E.89.V.8
XX	1989	E.90.V.9
XXI	1990	E.91.V.6
XXII	1991	E.93.V.2
XXIII	1992	E.94.V.7
XXIV	1993	E.94.V.16
XXV	1994	E.95.V.20
XXVI	1995	E.96.V.8
XXVII	1996	E.98.V.7
XXVIII	1997	E.99.V.6
XXIX	1998	E.99.V.12
XXX	1999	E.00.V.9
XXXI	2000	E.02.V.3
XXXII	2001	E.04.V.4
XXXIII	2002	E.05.V.13
XXXIV	2003	E.06.V.14
XXXV	2004	E.08.V.8
XXXVI	2005	E.10.V.4
XXXVII	2006	A/CN.9/SER.A/2006
XXXVIII	2007	A/CN.9/SER.A/2007

*Part One*

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



## THE FORTY-FIRST SESSION (2008)

### A. Report of the United Nations Commission on International Trade Law on its forty-first session (New York, 16 June-3 July 2008) (A/63/17 and Corr.1) [Original: English]

#### CONTENTS

<i>Chapter</i>	<i>Paragraphs</i>
I. Introduction . . . . .	1-2
II. Organization of the session. . . . .	3-11
A. Opening of the session . . . . .	3
B. Membership and attendance . . . . .	4-8
C. Election of officers. . . . .	9
D. Agenda . . . . .	10
E. Adoption of the report . . . . .	11
III. Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea . . . . .	12-298
A. Introduction. . . . .	12-14
B. Consideration of draft articles . . . . .	15-296
C. Report of the drafting group . . . . .	297
D. Decision of the Commission and recommendation to the General Assembly. . . . .	298
IV. Procurement: progress report of Working Group I . . . . .	299-307
V. Arbitration and conciliation: progress report of Working Group II . . . . .	308-316
VI. Insolvency law . . . . .	317-321
A. Progress report of Working Group V . . . . .	317-318
B. Facilitation of cooperation and coordination in cross-border insolvency proceedings . . . . .	319-321
VII. Security interests: progress report of Working Group VI . . . . .	322-326
VIII. Possible future work in the area of electronic commerce . . . . .	327-338
IX. Possible future work in the area of commercial fraud . . . . .	339-347
A. Work on indicators of commercial fraud . . . . .	339-344
B. Collaboration with the United Nations Office on Drugs and Crime with respect to commercial and economic fraud. . . . .	345-347

X.	Fiftieth anniversary of the New York Convention. . . . .	348-352
XI.	Monitoring implementation of the New York Convention . . . . .	353-360
XII.	Technical assistance to law reform . . . . .	361-369
	A. Technical cooperation and assistance activities . . . . .	361-364
	B. Technical assistance resources . . . . .	365-369
XIII.	Status and promotion of UNCITRAL legal texts. . . . .	370-372
XIV.	Working methods of UNCITRAL. . . . .	373-381
XV.	Coordination and cooperation . . . . .	382-384
XVI.	Role of UNCITRAL in promoting the rule of law at the national and international levels. . .	385-386
XVII.	Willem C. Vis International Commercial Arbitration Moot competition. . . . .	387
XVIII.	Relevant General Assembly resolutions . . . . .	388-389
XIX.	Other business . . . . .	390-394
	A. Internship programme . . . . .	390
	B. Proposed strategic framework for the period 2010-2011. . . . .	391
	C. Evaluation of the role of the Secretariat in facilitating the work of the Commission . .	392
	D. Retirement of the Secretary of the Commission . . . . .	393-394
XX.	Date and place of future meetings . . . . .	395-398
	A. Forty-second session of the Commission . . . . .	395
	B. Sessions of working groups up to the forty-second session of the Commission . . . . .	396-397
	C. Sessions of working groups in 2009 after the forty-second session of the Commission . . . . .	398

#### Annexes

- I. Draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea
  - II. Letter dated 5 June 2008 from the Minister of Transport of the Netherlands, the Mayor of Rotterdam and the Executive Board of the Port of Rotterdam Authority addressed to the delegates at the forty-first session of the United Nations Commission on International Trade Law
  - III. List of documents before the Commission at its forty-first session
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## I. Introduction

1. The present report of the United Nations Commission on International Trade Law (UNCITRAL) covers the forty-first session of the Commission, held in New York from 16 June to 3 July 2008.
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-first session of the Commission was opened on 16 June 2008 by the Under-Secretary-General for Legal Affairs and the Legal Counsel of the United Nations, Nicolas Michel.

### 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:<sup>1</sup> Algeria (2010), Armenia (2013), Australia (2010), Austria (2010), Bahrain (2013), Belarus (2010), Benin (2013), Bolivia (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 Zimbabwe (2010).

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<sup>1</sup> 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

5. With the exception of Armenia, Bulgaria, Lebanon, Mongolia, Namibia, Pakistan, Sri Lanka 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, Belgium, Brazil, Burkina Faso, Chad, Congo, Côte d'Ivoire, Croatia, Cyprus, Democratic Republic of the Congo, Denmark, Ethiopia, Finland, Ghana, Guinea, Holy See, Indonesia, Kuwait, Libyan Arab Jamahiriya, Moldova, Myanmar, Netherlands, New Zealand, Niger, Philippines, Romania, Saudi Arabia, Slovakia, Slovenia, Sweden, the former Yugoslav Republic of Macedonia and Turkey.

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

(a) *United Nations system*: Special Representative of the Secretary-General on human rights, and transnational corporations and other business enterprises and the World Bank;

(b) *Intergovernmental organizations*: Asian-African Legal Consultative Organization, European Community World Customs Organization (WCO);

(c) *Non-governmental organizations invited by the Commission*: Advisory Council of the United Nations Convention on Contracts for the International Sale of Goods, American Arbitration Association, American Bar Association, Asociación Americana de Derecho Internacional Privado, Association of American Railroads, Association of the Bar of the City of New York, BIMCO, Center for International Environment Law, Center for International Legal Studies, Comité maritime international (CMI), European Shippers' Council, Federación Latinoamericana de Bancos, Institute of International Banking Law and Practice, Instituto Iberoamericano de Derecho Marítimo, International Association of Ports and Harbors, International Bar Association, International Chamber of Shipping, International Council for Commercial Arbitration, International Federation of Freight Forwarders Associations, International Group of P and I Clubs, International Institute for Sustainable Development, International Multimodal Transport Association, International Swaps and Derivatives Association, Kuala Lumpur Regional Centre for Arbitration, London Court of International Arbitration, Private International Law Interest Group of the American Society of International Law, Union internationale des avocats and World Maritime University.

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.

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on the last day prior to the opening of the seventh regular annual session following their election.



### C. Election of officers

9. The Commission elected the following officers:

<i>Chairperson:</i>	Rafael ILLESCAS ORTIZ (Spain)
<i>Vice-Chairpersons:</i>	Amadou Kane DIALLO (Senegal) Ricardo SANDOVAL LÓPEZ (Chile) Tomotaka FUJITA (Japan)
<i>Rapporteur:</i>	Anita ZIKMANE (Latvia)

### D. Agenda

10. The agenda of the session, as adopted by the Commission at its 865th meeting, on 16 June 2008, was as follows:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea.
5. Procurement: progress report of Working Group I.
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 electronic commerce.
10. Possible future work in the area of commercial fraud.
11. Fiftieth anniversary of the 1958 New York Convention.
12. Monitoring implementation of the 1958 New York Convention.
13. Technical assistance to law reform.
14. Status and promotion of UNCITRAL legal texts.
15. Working methods of UNCITRAL.
16. Coordination and cooperation.
17. Role of UNCITRAL in promoting rule of law at the national and international levels.
18. Willem C. Vis International Commercial Arbitration Moot competition.
19. Relevant General Assembly resolutions.
20. Other business.
21. Date and place of future meetings.
22. Adoption of the report of the Commission.

## E. Adoption of the report

11. At its 886th and 887th meetings, on 3 July 2008, the Commission adopted the present report by consensus.

## III. Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea

### A. Introduction

12. The Commission noted that, at its thirty-fourth session, in 2001, it had established Working Group III (Transport Law) to prepare, in close cooperation with interested international organizations, a legislative instrument on issues relating to the international carriage of goods, such as the scope of application, the period of responsibility of the carrier, obligations of the carrier, liability of the carrier, obligations of the shipper and transport documents.<sup>2</sup> At its thirty-fifth session, in 2002, the Commission approved the working assumption that the draft instrument on transport law should cover door-to-door transport operations.<sup>3</sup> At its thirty-sixth to fortieth sessions, in 2003 to 2007, the Commission noted the complexities involved in the preparation of the draft instrument, and authorized the Working Group, on an exceptional basis, to hold its sessions on the basis of two week sessions.<sup>4</sup> At its thirty-ninth and fortieth sessions, in 2006 and 2007, the Commission commended the Working Group for the progress it had made and agreed that 2008 would be a desirable goal for completion of the project.<sup>5</sup>

13. At the current session, the Commission had before it the reports of the twentieth (Vienna, 15-25 October 2007) and twenty-first (Vienna, 14-25 January 2008) sessions of the Working Group (A/CN.9/642 and A/CN.9/645). The report of the twenty-first session contained in an annex the text of the draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea approved by the Working Group. The Commission also had before it a compilation of comments submitted by Governments and intergovernmental organizations regarding the draft Convention as approved by the Working Group (A/CN.9/658 and Add.1-14).

14. The Commission was reminded that, according to the schedule agreed upon at its fortieth session, it was expected to finalize and approve the text of a draft convention at the current session.<sup>6</sup> The draft convention would then be submitted to the General Assembly for adoption at its sixty-third session, in 2008.

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<sup>2</sup> *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), para. 345.

<sup>3</sup> *Ibid.*, *Fifty-seventh Session, Supplement No. 17* (A/57/17), para. 224.

<sup>4</sup> *Ibid.*, *Fifty-eighth Session, Supplement No. 17* (A/58/17), para. 208; *ibid.*, *Fifty-ninth Session, Supplement No. 17* (A/59/17), paras. 64, 132 and 133; *ibid.*, *Sixtieth Session, Supplement No. 17* (A/60/17), paras. 183 and 238; *ibid.*, *Sixty-first Session, Supplement No. 17* (A/61/17), para. 200 and subpara. 273 (c); and *ibid.*, *Sixty-second Session, Supplement No. 17* (A/62/17), part I, para. 184.

<sup>5</sup> *Ibid.*, *Sixty-first Session, Supplement No. 17* (A/61/17), para. 200; and *ibid.*, *Sixty-second Session, Supplement No. 17* (A/62/17), part I, paras. 183 and 184.

<sup>6</sup> *Ibid.*, *Sixty-second Session, Supplement No. 17* (A/62/17), part I, para. 184.

## **B. Consideration of draft articles**

15. The Commission agreed that it should consider the draft articles in the order they appeared in the annex to document A/CN.9/645, except where the interrelationship between certain draft articles required their consideration in a different order. The Commission agreed that the draft definitions should be considered in conjunction with the substantive provisions to which they related.

### **Chapter 1. General provisions**

#### **Draft article 2. Interpretation of this Convention**

16. The Commission approved the substance of draft article 2 and referred it to the drafting group.

#### **Draft article 3. Form requirements; and draft article 1, paragraph 17 (“electronic communication”)**

17. The Commission agreed that the cross references contained in draft article 3 were incomplete and that reference should also be made to draft articles 24, paragraph 4; 69, paragraph 2; and 77, paragraph 4, as those provisions also contemplated communications that needed to be made in writing.

18. The question was asked whether the definition of electronic communication contained in draft article 1, paragraph 17, should include as well the requirement that the communication should also identify its originator. In response to that question, it was observed that the definition of electronic communication used in the draft Convention followed the definition of the same term in the United Nations Convention on the Use of Electronic Communications in International Contracts. The capability of identifying the originator, it was said, was a function of electronic signature methods, which was dealt with in draft article 40, and not a necessary element of the electronic communication itself. The Commission agreed that the draft definition adequately reflected that understanding.

19. Subject to the agreed amendments, the Commission approved the substance of draft article 3 and the definition in draft article 1, paragraph 17, and referred them to the drafting group.

#### **Draft article 4. Applicability of defences and limits of liability**

20. The Commission approved the substance of draft article 4 and referred it to the drafting group.

### **Chapter 2. Scope of application**

#### **Draft article 5. General scope of application; and draft article 1, paragraphs 1 (“contract of carriage”), 5 (“carrier”) and 8 (“shipper”)**

21. The view was expressed that the notion of “contract of carriage” in the draft convention was wider than under previous conventions, such as the Protocol to amend the International Convention for the unification of certain rules of law relating to bills of lading, 25 August 1924, as amended by the Protocol of 23 February 1968 (the “Hague-Visby Rules”) and the United Nations Convention on the Carriage of Goods by Sea (the “Hamburg Rules”), because the Convention would also apply to carriage of goods done only partly by sea. However, it was pointed out that there was no

requirement in the draft Convention for the goods actually to be carried by sea, which meant that, in theory, as long as the contract of carriage provided that the goods would be carried by sea, the Convention would apply even if the goods were not actually so carried. As the contract could identify a port of loading and a port of discharge in different States, the Convention would apply, even if the goods had not actually been loaded or discharged at those named ports. Alternatively, if the contract of carriage failed to mention any of the places or ports listed in draft article 5, subparagraphs 1 (a)-(d), it would be possible to infer that the Convention would not apply, even though the goods might, in fact, have been carried by sea in a manner that would have complied with the Convention requirements. The draft Convention, it was proposed, should be amended so as to place the emphasis on the actual carriage rather than on the contractual provisions. One delegation proposed new text for subparagraphs 1 (d) and (e) and a new paragraph 3 to attempt to achieve that. There was some support for that proposal.

22. It was pointed out that from time to time many contracts, for good commercial reasons, left the means of transport open, either entirely or as between a number of possibilities. In that regard, if the contract was not “mode-specific”, it might be assumed that the Convention would not apply, except if a requirement for carriage by sea could be implied. Moreover, the requirement that the contract “provide for carriage by sea” might technically exclude contracts that did not specify the mode of transport to be used. It was proposed that additional language should be added to indicate that a contract which permitted carriage by sea should be deemed a “contract of carriage” in cases where the goods were in fact carried by sea.

23. Another proposal was to open the possibility for limiting the scope of the draft Convention only to contracts for carriage by sea so as not to cover contracts for carriage by sea and other modes of transport. The concern was expressed that the draft Convention established special rules applying to one particular type of multimodal transport contract, namely multimodal transport contracts that provided for carriage by sea. That, it was said, would lead to a fragmentation of the laws on multimodal transport contracts. Moreover, the draft convention was said to be generally unsuitable for application to contracts for multimodal transport. It was also said that a comparison between the provisions of the draft and the provisions of other conventions dealing with the carriage of goods, such as the Convention on the Contract for the International Carriage of Goods by Road (1956), as amended by the 1978 Protocol (the “CMR”), the Uniform Rules concerning the Contract for International Carriage of Goods by Rail (Appendix B to the Convention concerning International Carriage by Rail, as amended by the Protocol of Modification of 1999 (the “CIM-COTIF”)) and the Convention for the Unification of Certain Rules for International Carriage by Air (the “Montreal Convention”), revealed not only that the draft Convention was designed almost exclusively with a view to sea carriage but also that it considerably diminished the liability of the carrier, as compared with those other conventions.

24. The Commission took note of those concerns, but was not in favour of amending the provisions that dealt with the scope of application of the Convention. It was observed that the basic assumption of the Working Group had been that the key for determining the scope of application of the draft instrument was the contract of carriage, not the actual carriage of the goods. It was also observed that the Working Group had spent a significant amount of time in considering the scope of the draft Convention and its suitability for contracts of carriage that included other modes of transportation in addition to carriage by sea.

25. The Commission approved the substance of draft article 5 and the definitions contained in draft article 1, paragraphs 1, 5 and 8, and referred them to the drafting group.

**Draft article 6. Specific exclusions**

26. The Commission approved the substance of draft article 6 and referred it to the drafting group.

**Draft article 1, paragraph 3 (“liner transportation”)**

27. The Commission approved the substance of draft article 1, paragraph 3, on the definition of “liner transportation” and referred it to the drafting group.

**Draft article 1, paragraph 4 (“non-liner transportation”)**

28. The Commission approved the substance of draft article 1, paragraph 4, on the definition of “non-liner transportation” and referred it to the drafting group.

**Draft article 7. Application to certain parties**

29. The Commission approved the substance of draft article 7 and referred it to the drafting group.

**Draft article 1, paragraph 10 (“holder”)**

30. The Commission approved the substance of draft article 1, paragraph 10, on the definition of “holder” and referred it to the drafting group.

**Draft article 1, paragraph 11 (“consignee”)**

31. The Commission approved the substance of draft article 1, paragraph 11, on the definition of “consignee” and referred it to the drafting group.

**Draft article 1, paragraph 2 (“volume contract”)**

32. As a possible solution to the concerns expressed with respect to the operation of the volume contract provision (see paras. 243 and 244 below), it was suggested that the definition of “volume contract” in draft article 1, paragraph 2, could be adjusted in order to narrow the potential breadth of the volume contract provision. In particular, the view was expressed that if a specific number of shipments or containers or a specific amount of tonnage of cargo were to be added to the definition, it could provide additional protection, so that parties actually entering into volume contracts would clearly be of equal bargaining power. Some support was expressed for that suggestion.

33. However, the Commission noted that previous attempts by the Working Group to find a workable solution that would provide greater specificity to the definition of “volume contract” had not met with success, and that the Working Group had thus turned its attention to inserting additional protection for parties perceived to be at a disadvantage in the text of draft article 82 itself (see para. 245 below). The Commission agreed that the definition of “volume contract” should be retained as drafted, and that the compromise reached by the Working Group (see A/CN.9/645, paras. 196-204) should therefore be maintained.

34. The Commission approved the substance of draft article 1, paragraph 2, on the definition of “volume contract” and referred it to the drafting group.

### **Chapter 3. Electronic transport records**

#### **Draft article 8. Use and effect of electronic transport records**

35. The Commission approved the substance of draft article 8 and referred it to the drafting group.

#### **Draft article 9. Procedures for use of negotiable electronic transport records**

36. The Commission approved the substance of draft article 9 and referred it to the drafting group.

#### **Draft article 10. Replacement of negotiable transport document or negotiable electronic transport record**

37. The Commission approved the substance of draft article 10 and referred it to the drafting group.

### **Chapter 4. Obligations of the carrier**

#### **Draft article 11. Carriage and delivery of the goods**

38. The Commission approved the substance of draft article 11 and referred it to the drafting group.

#### **Draft article 12. Period of responsibility of the carrier**

39. Concerns were expressed in the Commission regarding the possible effect of paragraph 3 of draft article 12, which stated that a provision was void to the extent that it provided that the time of receipt of the goods was subsequent to the beginning of their initial loading under the contract of carriage, or that the time of delivery of the goods was prior to the completion of their final unloading under the contract of carriage. In particular, the view was expressed that paragraph 3 could thus be taken to mean that a provision would be valid that provided for an exemption of the carrier from liability for loss or damage that occurred prior to the loading of the goods on the means of transport, or following their having been unloaded, despite the fact that at such time the carrier or its servants had custody of the goods. In order to avoid that result, the following text was suggested to replace paragraph 3:

“3. For the purposes of determining the carrier’s period of responsibility, the parties may agree on the time and location of receipt and delivery of the goods, but a provision in a contract of carriage is void to the extent that it provides that:

“(a) The time of receipt of the goods is subsequent to the time when the carrier or any person referred to in article 19 has actually received the goods; or

“(b) The time of delivery of the goods is prior to the time when the carrier or any person referred to in article 19 has actually delivered the goods.”

40. Some support was expressed for that proposal and for adjusting the text. However, support was also expressed for an alternative interpretation of paragraph 3, such that the carrier should be responsible for the goods for the period set out in the contract of carriage, which could be limited to “tackle-to-tackle” carriage. Those that agreed with the above interpretation of paragraph 3 were generally of the view that the text of the provision should be retained as drafted. However, there was general agreement in the

Commission that nothing in the draft Convention prevented the applicable law from containing a mandatory regime that applied in respect of the period prior to the start of the carrier's period of responsibility or following its end.

41. Another interpretation was that paragraph 3 did not modify paragraph 1, but only aimed at preventing the carrier, even if it had concluded an agreement on the basis of draft article 14, paragraph 2, from limiting its period of responsibility to exclude the time after initial loading of the goods or prior to final unloading of the goods. To that end, a suggestion was made that paragraph 3 could be moved to a position in the text immediately following paragraph 1 and that it could also be helpful to replace the opening phrase of paragraph 3 "For the purposes of determining the carrier's period of responsibility" with the words "Subject to paragraph 1". Some support was expressed for that possible approach.

42. There was agreement in the Commission that the different views that had been expressed on the possible interpretation of paragraph 3 illustrated that there could be some ambiguity in the text. However, the Commission was of the view that it might be possible to clarify the text so as to ensure a more uniform interpretation. The Commission agreed that revised text to resolve the apparent ambiguity in paragraph 3 should be considered, and that it would delay its approval of draft article 12 until such efforts had been pursued.

43. Following extensive efforts to clarify the text of paragraph 3 to resolve the apparent ambiguity in the text, the Commission took note that it had not been possible to reconcile the different interpretations of the provisions. In keeping with its earlier decision, the Commission approved the substance of draft article 12 and referred it to the drafting group.

44. An additional view was expressed with respect to the interrelationship between draft article 12 and the right of control. In particular, it was noted that draft article 52, paragraph 2, made it clear that the right of control existed during the period of responsibility and ceased when that period expired. Concern was expressed that if draft article 12, paragraph 3, operated to allow the parties to agree on a period of responsibility that began after the receipt of the goods for carriage or ended before delivery, there could be a corresponding gap in the right of control between the time of receipt and the start of the period of responsibility and between the end of the period of responsibility and the delivery of the goods. The Commission took note of that concern.

#### **Draft article 13. Transport beyond the scope of the contract of carriage**

45. Some concerns were expressed in the Commission with respect to a perceived lack of clarity in draft article 13. In particular, concerns were expressed regarding how a single transport document could be issued when the transport would be undertaken by both the carrier and another person. It was felt by some that the text was in contradiction with the basic principle of the draft Convention in that the carrier could issue a transport document for carriage beyond the contract of carriage but would be responsible for only a portion of the transport. In addition, it was observed that problems could arise with respect to the provision in draft article 43 that the transport document was prima facie evidence of the carrier's receipt of the goods if the transport document could include specified transport that was not covered by the contract of carriage. Given the perceived difficulties of draft article 13, it was proposed that it should be deleted. There was some support in the Commission for that proposal.

46. However, there was also support for the view that draft article 13 reflected an important commercial practice and need, and that it should be maintained in the text as

drafted. In particular, it was said that there was a long-standing commercial practice where, as a consequence of the underlying sales agreement in respect of the goods, shippers required a single transport document, despite the fact that a carrier might not be willing or able to complete the entire transport itself. In such cases, it was said to be important that shippers should be able to request that the carrier issue a single transport document, and that carriers should be able to issue such a document even though it included transport beyond the scope of the contract of carriage. However, of greater commercial significance due to their frequency were said to be cases of “merchant haulage”, where the consignee of the goods preferred to perform the final leg of the transport to an inland destination. It was observed that strong industry support for such a provision had been expressed during internal consultations undertaken by a number of delegations. In addition, it was observed that draft article 13 was operative only at the request of the shipper, thereby protecting the shipper’s interest from any unscrupulous activity by the carrier.

47. Concerns were expressed that the simple deletion of draft article 13 could have a detrimental effect on merchant haulage. If merchant haulage were performed in the absence of draft article 13, it could be found to conflict with draft article 12, paragraph 3. Further, if there were loss of or damage to the goods during the final stage of the transport, it might be expected that such loss or damage should be the responsibility of the consignee. However, as draft article 43 stated that the transport document was conclusive evidence of the carrier’s receipt of the goods as stated in the contract particulars, and in contrast to the outcome pursuant to the Hague-Visby Rules, the carrier could unfairly be held responsible for loss or damage occurring during the final leg of the transport that was performed by another party. A possible remedy for this potential problem was said to be that paragraph 2 of draft article 14 could be adjusted to allow the consignee and the carrier to agree to merchant haulage. However, it was observed that that approach could be problematic owing to other concerns in respect of draft article 14, paragraph 2.

48. A proposal was made that text could be added to draft article 13 to clarify that the portion of the carriage that the carrier was not performing itself should be specified, for example through the use of text such as “for the remaining part of the transport the carrier shall act as forwarding agent on behalf of the shipper”. However, it was observed that such an approach had been considered and not adopted by the Working Group, in the interests of avoiding regulation by the draft Convention of agency or forwarding matters.

49. The view was also expressed that the deletion of draft article 13 was unlikely to alter commercial practice in this regard, but that it could cause uncertainty with respect to current practice. In any event, it was observed that if draft article 13 were deleted, care should be taken to ensure that draft article 12, paragraph 3, did not prevent the commercial practice of merchant haulage agreements. While it was observed that the deletion of draft article 13 was unlikely to stop merchant haulage, there was support in the Commission for a clear rule in the draft Convention permitting such a practice.

50. Another proposal was made that draft article 13 could restrict its application to non-negotiable transport documents. However, it was observed that such a restriction would represent a major change in current commercial practice and would thus be more undesirable than deletion of the provision.

51. It was observed that, in the light of the diverging views in the Commission, two options seemed possible. The first was to simply delete draft article 13, but to ensure that the *travaux préparatoires* were clear in indicating that its deletion did not intend to indicate that the long-established commercial practice was no longer allowed. The



second option was that the Commission could attempt to redraft draft article 13 in order to retain its purpose but address the concerns that had been raised in regard to its current text. It was further observed that any attempt to redraft the text should make it clear that the provision was operative only at the express request of the shipper, and that it might be possible to redraft the text in order to clarify the carrier's obligation in respect of the shipper in such cases.

52. The Commission agreed that revised text for draft article 13 should be considered and that it would delay its final consideration of draft article 13 until such efforts had been pursued.

53. Following extensive efforts to clarify the text of draft article 13 to resolve the concerns that had been raised with respect to it, the Commission took note that it had not been possible to agree on a revised text for the provision. In keeping with its earlier decision, the Commission agreed that draft article 13 should be deleted, taking note that that deletion did not in any way signal that the draft Convention intended to criticize or condemn the use of such types of contract of carriage.

#### **Draft article 14. Specific obligations**

54. Concerns were expressed in the Commission with respect to the title of the draft provision. It was observed that the term "specific obligations" did not seem appropriate, particularly as translated into some of the language versions, as the provision itself set out very standard obligations of the carrier. It was suggested that the title of the provision should be "general obligations" or possibly "obligations in respect of the goods". While the view was also expressed that the existing title of the provision was appropriate, there was some support for changing the title along the lines suggested.

55. A proposal was made to include in paragraph 1 the requirement that the carrier carefully receive and mark the goods. However, it was observed that marking the goods was generally felt to be the shipper's obligation, and the proposal was not taken up.

56. Support was expressed for a proposal to delete paragraph 2 of draft article 14, which regulated FIOS (free in and out, stowed) clauses. Concern was expressed that paragraph 2 required the consignee to perform certain obligations without requiring that it consent to such performance. Concern was also expressed that a traditional responsibility of the carrier was now being left to freedom of contract. However, it was observed that the intention of the provision was not to establish obligations for the consignee, but rather to allow for common commercial situations in which the carrier and the shipper agreed that the shipper would perform obligations usually required of the carrier, and for which the carrier should therefore not be held responsible should loss or damage result. For example, it was noted that shippers often preferred to load and stow the goods themselves for a variety of commercial reasons, including superior technical knowledge, or the possession of special equipment. It was stated that paragraph 2 was a positive step in terms of settling the law in the area of FIOS clauses, which was quite unclear.

57. A suggestion was made that paragraph 2 could be limited to non-liner transportation as, in liner trade, the carrier typically performed the listed obligations itself in respect of the containers. It was noted that draft article 83, subparagraph (b), could cover those cases where the shipper itself undertook the handling of the goods in liner transportation. However, it was observed that in some situations, as for example with respect to irregular or non-containerized goods such as large machinery, special equipment or particular products, FIOS clauses were employed in the liner trade as well. Accordingly, the suggestion was not taken up.

58. At the conclusion of its consideration of the draft provision, the Commission approved the substance of draft article 14 and referred it to the drafting group.

**Draft article 15. Specific obligations applicable to the voyage by sea**

59. The view was expressed that the draft article represented a significant increase in the carrier's liability, as it made the obligation to provide a seaworthy ship a continuing one rather than limiting it to the time before and at the beginning of the voyage by sea. The Commission took note of that view and of the countervailing view, for which there was some support, that the draft article still set the carrier's liability at a low standard, as it contemplated only an obligation to exercise due diligence to make the ship seaworthy, rather than a firm obligation to provide a seaworthy ship. In that connection, there was not sufficient support for a proposal to qualify the carrier's due diligence obligations to provide a seaworthy ship by including a reference to "prevailing standards of maritime safety".

60. It was noted that, as currently worded, draft article 15 seemed to suggest that a container might be regarded as an intrinsic part of the ship, which in most situations was not the case. In order to avoid misunderstanding, it was proposed to replace the words "including any containers" with the words "and any containers" in subparagraph (c) of the draft article, and to make the necessary grammatical adjustments in the provision. The Commission accepted that proposal.

61. In connection with the same provision, it was pointed out that, at its twenty first session, the Working Group had agreed to add references to "road or railroad cargo vehicle" in those provisions that mentioned containers, pallets and similar articles used to consolidate goods, where such addition was required by the context. Those additional words, it was suggested, should also be added to subparagraph (c) of draft article 15. However, the Commission did not accept that proposal, which was considered to be of little practical relevance in the context of the provision in question, as it was regarded as highly unlikely that a carrier would also supply a "road or railroad cargo vehicle" for the purpose of the voyage by sea.

62. The Commission approved the substance of draft article 15 and referred it to the drafting group.

**Draft article 16. Goods that may become a danger**

63. A proposal was made to limit the carrier's rights under draft article 16 by providing that the carrier could take any of the measures contemplated in the draft article only if it was not aware of the dangerous nature of the goods. The carrier, it was further suggested, should also be required to explain the reasons for taking any of those measures and to show that the actual or potential danger posed by the goods could not have been averted by less drastic measures than the ones actually taken.

64. There was not sufficient support for those proposals. On the one hand, it was felt that requiring the carrier to justify the reasons for any measures taken under the draft article was unnecessary, as the carrier would be required to do so in court in case the measures were challenged by the cargo interests. On the other hand, it was pointed out that draft articles 16 and 17 were important to confirm the carrier's authority to take whatever measures were reasonable, or even necessary, under the circumstances to prevent danger to persons, property or the environment. The carrier did not enjoy unlimited and uncontrolled discretion under draft article 16, which merely made it clear that measures reasonably taken by the carrier to avoid danger posed by the goods did

not constitute a breach of the carrier's obligations to care for the goods received for carriage. However, the carrier's release of liability under draft article 18, subparagraph 3 (o), was not an absolute one as, in any event, the measures taken by the carrier under draft articles 16 and 17 were subject to the standard of reasonableness stated in those provisions and otherwise inherent to the carrier's duty of care for the cargo under the draft Convention. It was also said that limiting the carrier's rights under the draft article to situations where the carrier could prove that it was not aware of the dangerous nature of the goods would be tantamount to shifting the risk of carrying dangerous goods from the shipper to the carrier, a result which should not be condoned in the draft Convention.

65. The Commission approved the substance of draft article 16 and referred it to the drafting group.

#### **Draft article 17. Sacrifice of the goods during the voyage by sea**

66. The Commission approved the substance of draft article 17 and referred it to the drafting group.

### **Chapter 5. Liability of the carrier for loss, damage or delay**

#### **Draft article 18. Basis of liability**

##### *Paragraph 2*

67. The Commission heard expressions of strong support for amendments to paragraph 2 of draft article 18, in addition to a request to delete paragraph 3.

##### *Paragraph 3*

68. The Commission heard strong expressions of support for the deletion of paragraph 3 and the entire list of circumstances under which the carrier was relieved of liability for loss of or damage to the goods. It was stated that such a system was reminiscent of early stages of liner transportation and was not justified at a time when the shipping industry had made tremendous technological strides, with the appearance of new generations of vessels, container ships and ships specializing in the carriage of hazardous or highly perishable goods. The Hamburg Rules, it was noted, did not retain the list of excepted perils of the Hague-Visby Rules, which meant that for all States that had adopted the Hamburg Rules the draft Convention represented a step backwards. Paragraph 3 of draft article 18, it was said, was likely to adversely affect the legal situation of the party entitled to the cargo and might result, as a normal practical consequence, in higher insurance premiums, which would obviously be reflected in the price of the goods. That snowball effect would ultimately reach the final consumers, with all the obvious implications for their purchasing power and hence for national economies.

69. While giving sympathetic consideration to those arguments, the Commission broadly agreed that the paragraph should not be deleted. The Commission was reminded of the extensive debate that had taken place in the Working Group on the same matter and of the various views that had been expressed. The Commission was aware of the depth of those discussions and of the careful compromise that had been achieved with the current text of draft article 18. That compromise, the Commission felt, would be jeopardized by the proposed deletion of paragraph 3 of the draft article, a provision which in the view of many delegations was an essential piece of an equitable liability regime.

70. Furthermore, it was generally felt that the objections raised to the draft paragraph resulted from a misunderstanding of its practical significance. The liability of carriers was generally based on fault, not on strict liability. The principle that the carrier would be liable for damage to goods if the damage was proved to be the result of the carrier's fault was not, therefore, any novelty introduced by the draft Convention. Paragraph 3 was part of a general system of fault liability and the circumstances listed therein were typically situations where a carrier would not be at fault. Even more importantly, the list in paragraph 3 was not a list of instances of absolute exoneration of liability, but merely a list of circumstances that would reverse the burden of proof and would create a rebuttable presumption that the damage was not caused by the carrier's fault. The shipper still retained the possibility, under paragraphs 4 and 5 of the draft article, to prove that the fault of the carrier caused or contributed to the circumstances invoked by the carrier, or that the damage was or was probably the result of the unseaworthiness of the ship. Even many of those who had originally opposed the list in paragraph 3 in the Working Group were now, as a whole, satisfied of the adequacy of the liability system set forth in draft article 18.

*Paragraphs 4, 5 and 6*

71. Another criticism that was voiced in respect of draft article 18 concerned the burden of proof, which was said to depart from previous regimes. While it was not questioned that the party having the onus of proof must produce the evidence to support its claim, it was said that it would be more difficult for shippers to discharge their burden of proof under the draft article than under existing law. It was observed that evidence about the causes of a loss of cargo was often difficult to obtain, particularly for the consignee or shipper as they would not have access to all (or any) of the relevant facts. The burden of proof with respect to the actual causes of the loss should normally rest with the carrier, which was in a better position than the shipper to know what happened while the goods were in the carrier's custody. If there was more than one cause of loss or damage, the carrier should have the onus of proving to what extent a proportion of the loss was due to a particular cause.

72. It was argued that the shipper would have difficulty proving unseaworthiness, improper crewing, equipping or supplying, or that the holds were not fit for the purpose of carrying goods, as required by paragraph 5. The combined effect of paragraphs 4, 5 and 6 was to change the general rule on allocation of liability in a manner that was likely to affect a significant number of cargo claims and disadvantage shippers in cases where there was more than one cause of the loss or damage and a contributing cause was the negligently caused unseaworthiness of the vessel. In such cases, the shipper would bear the onus of proving to what extent unseaworthiness contributed to the loss. It was said that whenever loss or damage had resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under the draft article, which should be amended accordingly. Furthermore, it was proposed that paragraph 6 should be deleted, as it was feared that the concept of proportionate liability introduced therein might create evidentiary hurdles for claimants in litigation.

73. The Commission took note of those concerns. However, there was ample support for retaining paragraphs 4, 5 and 6 of the draft article as they currently appeared. The burden placed on the shipper, it was noted, was not as great as had been stated. In fact, nothing in the draft article required the shipper to submit conclusive proof of unseaworthiness, as the burden of proof would fall back on the carrier as soon as the shipper had showed that the damage was "probably" caused by or contributed to by

unseaworthiness. Paragraph 6, too, had been the subject of extensive debate within the Working Group and the current text reflected a compromise that many delegations regarded as an essential piece of the overall balance of draft article 18.

*Conclusions concerning the draft article*

74. The Commission reverted to a general debate on draft article 18, in particular its paragraph 3, after it had reviewed paragraphs 4-6.

75. The Commission heard strong objections to the decision not to amend the draft article, in particular its paragraph 3 (see paras. 68-70 above). The maintenance of that paragraph, it was stated, would have a number of negative consequences, such as higher insurance premiums, resulting in higher prices of goods and consequently reduced quality of life for the final consumers, which would particularly be felt by the populations of least developed countries, landlocked developing countries and small island developing States. That outcome, it was further stated, would be contrary to a number of fundamental policy goals and principles of the United Nations, as formally adopted by the General Assembly. The Commission was reminded, for instance, of the Millennium Development Goals expressed in General Assembly resolution 60/1 of 16 September 2005, which adopted the 2005 World Summit Outcome. Those goals called for the right to development to be made a reality for everyone. All organs and agencies of the United Nations, it was pointed out, were requested to work towards the linkage between their activities and the Millennium Development Goals in accordance with Assembly resolution 60/1. The Commission was urged not to ignore its role in that process and to bear in mind the negative impact that its decision regarding draft article 18 would have for a number of developing and least developed countries. The concern was expressed that by retaining in the text provisions that unduly favoured carriers to the detriment of shippers, the Commission might diminish the acceptability of the draft Convention in entire regions of the world.

76. The Commission paused to consider those concerns, including suggestions for attempting to redraft the draft article in a manner that might accommodate some of them. The prevailing and strongly held view, however, was that over the years of extensive negotiations the Working Group had eventually achieved a workable balance between the interests of shippers and carriers and that the draft article represented the best compromise that could be arrived at. It was considered that it would be highly unlikely that a better result could be achieved at such a late stage of the negotiations. Moreover, the draft article was part of an overall balance of interests, and any changes in its substance would necessitate adjustments in other parts of the draft Convention, some of which were themselves the subject of delicate and carefully negotiated compromises.

77. While reiterating its sympathy for those who were not entirely satisfied with the draft article, the Commission decided to approve the substance of draft article 18 and to refer it to the drafting group. In doing so, the Commission requested the drafting group to align the reference to containers in subparagraph 5 (a)(iii) with a similar reference in draft article 15, subparagraph (c), deleting the brackets around the relevant phrase.

**Draft article 19. Liability of the carrier for other persons**

78. The Commission approved the substance of draft article 19 and referred it to the drafting group.

**Draft article 20. Liability of maritime performing parties; and draft article 1, paragraphs 6 (“performing party”) and 7 (“maritime performing party”)**

79. It was noted that draft article 20 made the maritime performing party subject to the same liabilities imposed on the carrier. According to the definition in draft article 1, paragraph 7, an inland carrier would be regarded as a maritime performing party only if it performed or undertook to perform its services exclusively within a port area. The combined effect of those provisions was said to be inappropriate, as seaworthy packing could also be performed inland. Furthermore, cargo companies located in seaports were more and more frequently performing services that did not fall under the obligations of the carrier. Furthermore, there might be doubts as to whether a road or rail carrier that brought goods into the port area would qualify as a maritime performing party for its entire journey or whether it would be a mere performing party until it reached the port area and would become a maritime performing party upon entering the port area. As it was in practice difficult to establish the boundaries of port areas, the practical application of those provisions would be problematic. In view of those problems, it was suggested that the draft Convention should allow for declarations whereby Contracting States could limit the scope of the Convention to carriage by sea only.

80. In response, it was noted that in accordance with draft article 1, paragraph 7, an inland carrier would be regarded as a maritime performing party only if it performed or undertook to perform its services exclusively within a port area. That qualification was consistent with a policy decision taken by the Working Group that road carriers should generally not be equated with maritime performing parties. Therefore, a road carrier that brought goods from outside the port area into the port area would not be regarded as a maritime performing party, as the road carrier had not performed its obligations exclusively in the port area. Furthermore, it was noted that it had become common for local authorities to define the extent of their port areas, which would in most cases provide a clear basis for the application of the draft article. The Working Group, it was further noted, did not consider that there was any practical need for providing a uniform definition of “port area”.

81. The Commission approved the substance of draft article 20 and of the definitions contained in draft article 1, paragraphs 6 and 7, and referred them to the drafting group.

**Draft article 21. Joint and several liability**

82. The Commission approved the substance of draft article 21 and referred it to the drafting group.

**Draft article 22. Delay**

83. The view was expressed that the draft article was unsatisfactory, as it did not limit the amount recoverable for delay in delivery, leaving the issue entirely to freedom of contract. Another criticism was that it was unclear whether under the draft article damage caused by the delay would also be recoverable in case of implied delivery deadlines or periods. It was proposed, therefore, that the draft article should be deleted and that the matter of liability for delay should be left for applicable national law.

84. In response, it was noted that, as currently worded, the draft article did not require an express agreement on a delivery time or period, neither did it allow the carrier to exclude its liability for delay.

85. The Commission approved the substance of draft article 22 and referred it to the drafting group.

**Draft article 23. Calculation of compensation**

86. There was no support for a proposal to mention a determination of value of the goods by the competent courts in cases where there were no similar goods. It was felt that courts generally would assess the compensation according to the local rules and that the draft Convention should not venture into offering concrete rules for exceptional situations.

87. The Commission approved the substance of draft article 23 and referred it to the drafting group.

**Draft article 24. Notice in case of loss, damage or delay**

88. The Commission approved the substance of draft article 24 and referred it to the drafting group.

**Chapter 6. Additional provisions relating to particular stages of carriage****Draft article 25. Deviation**

89. The Commission approved the substance of draft article 25 and referred it to the drafting group.

**Draft article 26. Deck cargo on ships; and draft article 1, paragraphs 24 (“goods”), 25 (“ship”) and 26 (“container”)**

90. There was not sufficient support for a proposal to supplement the definition of the word “goods” with a reference to road and railroad cargo vehicles, as it was considered that the proposed addition would require amendments in other provisions of the draft Convention, such as draft article 61, paragraph 2, that mentioned goods, containers or road and railroad cargo vehicles.

91. The Commission approved the substance of draft article 26 and of the definitions contained in draft article 1, paragraphs 24, 25 and 26, and referred them to the drafting group. The Commission requested the drafting group to ensure consistency throughout the draft Convention in references to “customs, usages and practices of the trade”.

**Draft article 27. Carriage preceding or subsequent to sea carriage**

92. It was recalled by the Commission that, in addition to referring to other international instruments, previous versions of draft article 27 of the draft Convention had also contained a bracketed reference to “national law”. It was further recalled that at the nineteenth and twentieth sessions of the Working Group, that reference had been deleted as part of a compromise proposal concerning several issues, including the level of the limitation of the carrier’s liability (see A/CN.9/621, paras. 189-192 and A/CN.9/642, paras. 163 and 166).

93. A proposal was made in the Commission to reinstate the reference to “national law” in draft article 27, or to include a provision in the draft Convention allowing a Contracting State to make a declaration including its mandatory national law in draft article 27. In support of that proposal, it was observed that some States had very specific national rules to deal with particular geographical areas, such as deserts, and would like to preserve those special rules once the draft Convention came into force. Further, it was suggested that as the current text of draft article 27 provided a solution in the case of possible conflicts with regional unimodal transport conventions, other States that were not parties to such conventions should have their national law accorded the same status,

even though their national rules did not arise as a result of international obligations. In addition, it was suggested that re-establishing a reference to “national law” in draft article 27 could allow more States to ratify the Convention and thus allow for broader acceptance of the instrument by as many States as possible.

94. Concern was also expressed in the Commission with respect to the fact that draft article 27 applied only to loss or damage of goods that could be identified as having occurred during a particular leg of the carriage. It was suggested that in most cases it would be quite difficult to prove where the loss or damage had occurred and that draft article 27 was likely to have limited operability as a result. It was further suggested that in those cases in which it was possible to localize the loss or damage, it would be particularly important to give way to national law governing that particular leg of the carriage.

95. While some support and sympathy were expressed for the reinsertion of a reference to “national law” in draft article 27, reference was made to the fact that the current text of draft article 27, including the deletion of the reference to “national law”, had arisen as a result of a complex compromise that had taken shape over the course of several sessions of the Working Group. Caution was expressed that that compromise had involved a number of different and difficult issues, including the establishment of the level of limitation of the carrier’s liability, and that reinserting the reference to national law could cause that compromise to unravel. The Commission was called upon to support the existing text that had been the outcome of that compromise, and there was support for that view. A number of delegations noted that they had not been completely satisfied with the outcome of the compromise, but that they continued to support it in the interests of reaching as broad a consensus on the text as possible.

96. In further support of the text as drafted, it was observed that the inclusion of “national law” in draft article 27 was quite different from including international legal instruments. In the case of international instruments, the substance of the legislation could be expected to be quite well known, transparent and harmonized, thus not posing too great an obstacle to international trade. In contrast, national law differed dramatically from State to State, it would be much more difficult to discover the legal requirements in a particular domestic regime, and national law was much more likely to change at any time. It was suggested that those factors made the inclusion of national law in draft article 27 much more problematic and would likely result in substantially less harmonization than including international instruments in the provision. There was support in the Commission for that view.

97. It was suggested that, as draft article 27 was clearly no longer a provision governing conflict of conventions, the use of the phrase “do not prevail” in its chapeau might be misconstrued. In its place, it was suggested that the phrase “do not apply” might be preferable. However, it was observed that simply replacing the phrase as suggested could be problematic, as the conflicting provisions would not simply be inapplicable, but would be inapplicable only to the extent that they were in conflict with the provisions of the draft Convention. Further, it was recognized that a more substantial redraft of the text of draft article 27 would probably be necessary in order to achieve the suggested result. The Commission agreed that the current text of draft article 27 was acceptable.

98. After consideration, the Commission approved the substance of draft article 27 and referred it to the drafting group.



**Chapter 7. Obligations of the shipper to the carrier****Draft article 28. Delivery for carriage**

99. The Commission approved the substance of draft article 28 and referred it to the drafting group.

**Draft article 29. Cooperation of the shipper and the carrier in providing information and instructions**

100. The Commission approved the substance of draft article 29 and referred it to the drafting group.

**Draft article 30. Shipper's obligation to provide information, instructions and documents**

101. The Commission approved the substance of draft article 30 and referred it to the drafting group.

**Draft article 31. Basis of shipper's liability to the carrier**

102. The Commission approved the substance of draft article 31 and referred it to the drafting group.

**Draft article 32. Information for compilation of contract particulars; and draft article 1, paragraph 23 ("contract particulars")**

103. It was observed in the Commission that draft articles 32 and 33 provided for potentially unlimited liability on the part of the shipper for not fulfilling its obligations in respect of the provision of information for the contract particulars or in respect of shipping dangerous goods. Concern was expressed that the potentially unlimited liability of the shipper was in contrast with the position of the carrier, which faced only limited liability as a result of the operation of draft article 61. Given other contractual freedoms permitted pursuant to the draft Convention, it was suggested that some relief in this regard could be granted to the shipper by deleting the reference to "limits" in draft article 81, paragraph 2, thereby allowing the parties to the contract of carriage to agree to limit the shipper's liability. (See the discussion of the proposed deletion of "limits" in respect of draft art. 81, para. 2, in paras. 236-241 below.) The Commission agreed that it would consider that proposal in conjunction with its review of draft article 81 of the text.

104. The Commission approved the substance of draft article 32 and of the definition contained in draft article 1, paragraph 23, and referred them to the drafting group.

**Draft article 33. Special rules on dangerous goods**

105. The Commission approved the substance of draft article 33 and referred it to the drafting group.

**Draft article 34. Assumption of shipper's rights and obligations by the documentary shipper; and draft article 1, paragraph 9 ("documentary shipper")**

106. A concern was expressed that draft article 34 was too broad in subjecting the documentary shipper to all of the obligations of the shipper. That view was not taken up by the Commission. In response to a question whether the documentary shipper and the

shipper could be found to be jointly and severally liable, the view was expressed that there was not intended to be joint and several liability as between the two.

107. The Commission approved the substance of draft article 34 and of the definition contained in draft article 1, paragraph 9, and referred them to the drafting group.

**Draft article 35. Liability of the shipper for other persons**

108. The Commission approved the substance of draft article 35 and referred it to the drafting group.

**Draft article 36. Cessation of shipper's liability**

109. Questions were raised in the Commission regarding the rationale for the inclusion of draft article 36 in the text, particularly in the light of the generally permissive approach of the draft Convention to freedom of contract. While it was recalled that certain delegations in the Working Group had requested the inclusion of a provision on the cessation of the shipper's liability, the Commission was of the general view that the provision was not necessary in the text and could be deleted.

110. The Commission agreed to delete article 36 from the text of the draft Convention.

**Chapter 8. Transport documents and electronic transport records**

**Draft article 37. Issuance of the transport document or the electronic transport record**

111. The Commission approved the substance of draft article 37 and referred it to the drafting group.

**Draft article 38. Contract particulars**

112. There was strong support for the view that, in its present formulation, the draft article was incomplete in that it related only to the goods and the carrier, but did not mention, in particular, other essential aspects, such as delivery and means of transport. It was observed that the shipper or the consignee, as the case might be, would require additional information to enable it to take action in respect of the shipment. Banks often required shippers to present "shipped" bills of lading, which required the shipper to name the vessel on which the goods were loaded. By the same token, a consignee that expected goods at a certain destination should not be surprised by requests to take delivery of the goods at a different place, and the draft Convention should require the transport document to state information that the consignee could rely upon. The consignee should further be able, on the basis of the information contained in the transport document, to take the steps necessary for an orderly delivery of the goods, such as hiring inland transportation, and would thus need to know at least the place of destination and the expected time of arrival. It was therefore proposed that the following information should be required to be stated in the transport document, in addition to those elements already mentioned in the draft article: the name and address of the consignee; the name of the ship; the ports of loading and unloading; and the date on which the carrier or a performing party received the goods, or the approximate date of delivery.

113. Another proposal for adding new elements to the list in the draft article argued for the inclusion of the places of receipt and delivery, as those elements were necessary in order to determine the geographic scope of application of the Convention in accordance

with its article 5. In the absence of those elements, the parties might not know whether the Convention applied to the contract of carriage.

114. In response to those proposals, it was pointed out that the draft article was concerned only with mandatory contract particulars without which the transport could not be carried out and which were needed for the operation of other provisions in the draft Convention. Nothing prevented the parties from agreeing to include other particulars that were seen as commercially desirable to be mentioned in the transport document. It was further noted, however, that the proposed addition contemplated some factual information, such as the name of the vessel, the port of loading or unloading or the approximate date of delivery, which, at the moment of issuance of the transport documents, the parties might not yet know. One of the primary interests of the shipper, it was said, would usually be to obtain a transport document as soon as possible, so as to be able to tender the transport document to the bank that issued the documentary credit in order to obtain payment in respect of the goods sold. However, the issuance of the transport document would unnecessarily be delayed if all the additional information proposed for inclusion in the draft article were to be made mandatory. It was explained that in the case of multimodal transport, for instance, several days might elapse between the departure of the goods from an inland location and their actual arrival at the initial port of loading. Some more time would again pass before the goods were then carried by another vessel to a hub port, where they would be again unloaded for carriage to a final destination. In such a situation, which was quite common in practice, usually only the name of the first vessel or of the feeder vessel was known at the time when the transport document was issued. In addition to that, the ports of loading and unloading were often not known, as large carriers might allocate cargo among various alternative ports on the basis of financial considerations (such as terminal charges) or operational considerations (such as availability of space on seagoing vessels).

115. It was argued that the mention of the name of the shipper should not be made mandatory either. It was true, it was said, that transport documents always stated a named person as shipper. In practice, however, the named person was often only a documentary shipper and carriers often received requests for changing the named shipper. In some cases, a shipper might even, for entirely legitimate commercial reasons, prefer to keep its name confidential. That practice never prevented the carriage of the goods, as carriers typically knew their clients and would know whom to charge for the freight. Similar reasons, it was further stated, gave cause for caution in requiring the transport document to mention other elements, such as the name and address of the consignee, as in many cases goods might be sold in transit and the name of the ultimate buyer would not be known at the time when the transport document was issued. The usual practice in many trades was simply to name the consignee as “to the order of the shipper”. Negotiating chains in some trades meant also that even the place of delivery might be not known at the time the goods were loaded. Shippers in the bulk oil trade originating in the Far East, for example, often described the destination of the cargo in unspecific terms (such as “West of Gibraltar”), a usage that in practice seldom caused problems but would be precluded by the proposed extension of the mandatory contract particulars.

116. Indication of the date of delivery was said to be equally unsuitable for becoming a mandatory element of the transport document, as in most cases a sea carrier might be in a position to give only an inexact estimate of the duration of the voyage. Uncertainty about the date of delivery was solved, and delivery to the consignee facilitated, by the current practice of advising the carrier about the notify party. The draft Convention further improved that practice by requiring the transport document to state the name and

address of the carrier, a requirement not included in the Hamburg Rules, for example. The progress in information and communication technology, which was illustrated by the advanced cargo tracking system that many carriers had offered via the Internet in recent years, made it much easier for cargo interests to obtain details about the delivery of goods directly from the carrier, than it was in the time when consignees needed to rely essentially on the transport document itself for that information.

117. The Commission engaged in an extensive debate concerning the desirability of adding new elements to those already mentioned in draft article 38 and what the practical consequences of such addition would be. In response to a question, it was noted that the qualification of the elements listed in draft article 38 as “mandatory” contract particulars was to some extent misleading, as draft article 41 made it clear that the absence or inaccuracy of one or more of those contract particulars did not affect the legal nature and validity of the transport document. Accordingly, the consignee, for example, would not be deprived of its rights to claim delivery under a transport document if draft article 38 had not been entirely or accurately complied with owing to an error or omission of the shipper or the carrier. Similarly, the draft Convention did not affect any right that the shipper might have, under the applicable law, to obtain certain information that the carrier failed to insert in the transport document, or to rely on a certain factual assumption in the absence of information to the contrary. That did not mean, however, that it would be reasonable to expand the list endlessly, as further requirements would necessarily increase the burden on the parties.

118. The Commission was sensitive to the arguments advanced in favour of keeping the list of requirements in draft article 38 within the limits of commercial reasonableness. Nevertheless, there was wide agreement that some additional requirements might be appropriate in order to place the shipper and the consignee in a better position to meet the demands of banks issuing documentary credit or to make the logistical and other arrangements necessary for collecting the goods at destination. It was pointed out that in view of the relationship between draft articles 38 and 41, an expanded list would not negatively affect trade usage, as the transport document could still be validly issued even without some information not yet available before the beginning of the carriage. The Commission also recognized that some elements might necessitate some qualification as regards, for instance, their availability at the time of issuance of the transport document.

119. A proposal was made to insert into the text of draft article 38 the following paragraph:

“2 bis. The contract particulars in the transport document or the electronic transport record referred to in article 37 shall furthermore include:

“(a) The name and address of the consignee, if named by the shipper;

“(b) The name of a ship, if specified in the contract of carriage;

“(c) The place of receipt and, if known to the carrier, the place of delivery;  
and

“(d) The port of loading and the port of discharge, if specified in the contract of carriage.”

120. It was noted that although most of the suggestions for inclusion in draft article 38 had been accommodated, it had not been possible to include reference to the expected date of delivery of the goods. Although efforts had been made to include that information, it was felt that such information was so closely related to draft

article 22 and the liability of the carrier for delay in delivery of the goods, that it was best not to risk upsetting the approved content of those provisions. There was broad support in the Commission for the inclusion of the new paragraph 2 bis in draft article 38.

121. The Commission approved the substance of draft article 38, with the addition of paragraph 2 bis, and referred it to the drafting group.

#### **Draft article 39. Identity of the carrier**

122. The Commission took note of a statement to the effect that the policy adopted in the draft article was unsatisfactory.

123. The Commission approved the substance of draft article 39 and referred it to the drafting group.

#### **Draft article 40. Signature**

124. There was support for understanding that the draft article did not specify the requirements for the validity of a signature, be it a handwritten or an electronic one, which was a matter left for the applicable law.

125. The Commission approved the substance of draft article 40 and referred it to the drafting group.

#### **Draft article 41. Deficiencies in the contract particulars**

126. Subject to terminological adjustments that might be needed in some language versions, the Commission approved the substance of draft article 41 and referred it to the drafting group.

#### **Draft article 42. Qualifying the information relating to the goods in the contract particulars**

127. It was pointed out that, in practice, goods might be delivered for carriage in a closed road or railroad cargo vehicle, such as to limit the carrier's ability to verify information relating to the goods. The Commission agreed that the references to "container" in the draft article should be expanded in order to cover those vehicles as well. The Commission requested the drafting group to consider alternatives for making reference to those vehicles in a manner that avoided burdening the draft article with unnecessary repetitions and bearing in mind the use of similar references elsewhere in the text.

128. The Commission approved the substance of draft article 42 and referred it to the drafting group.

#### **Draft article 43. Evidentiary effect of the contract particulars**

129. There was not sufficient support for a proposal to replace the words "but not" with the word "and" in subparagraph (c)(ii) of draft article 43. It was noted that, unlike the identifying numbers of containers, the identifying numbers of container seals might not be known to the carrier, as seals might be placed by parties other than the shipper or the carrier, such as customs or sanitary authorities.

130. The Commission agreed that in the situation contemplated by subparagraph (c)(ii) of the draft article, it would not be appropriate to extend the provision in question to road or railroad cargo vehicles.

131. The Commission approved the substance of draft article 43 and referred it to the drafting group.

**Draft article 44. “Freight prepaid”**

132. The Commission approved the substance of draft article 44 and referred it to the drafting group.

**Draft article 1, paragraph 14 “transport document”**

133. It was observed that the Working Group had agreed at its final session to delete reference to the “consignor” in the draft Convention and that, as a consequence, the definition of “transport document” had been adjusted to make subparagraphs (a) and (b) conjunctive rather than disjunctive. As mere receipts were thus excluded from the definition of a “transport document”, it was proposed that the phrase “or a performing party” could be deleted from the chapeau of the definition. The Commission approved that correction.

134. An additional proposal was made that the phrase “or a person acting on its behalf” should be inserted where the previous phrase had been deleted, in order to bring the definition in line with the phrase in draft article 40, paragraph 1, on signature. However, it was noted that in the preparation of the draft Convention, care had been taken to avoid reference to matters of agency, which, while common relationships in commercial transport, were thought to be too complex to be brought within the scope of the Convention. Further, it was observed that while there was perceived to be a need to reference acting on behalf of the carrier with respect to signature, it was thought that inserting the phrase in the definition of “transport document” would raise questions regarding its absence elsewhere in the draft Convention. The Commission supported that view, and decided against including the additional phrase.

135. It was also suggested that the following text should be inserted as a paragraph into the definition: “Evidences when goods are acquired by/delivered to the consignee”. However, it was observed that draft article 11 set out the obligation of the carrier to carry the goods to the place of destination and deliver them to the consignee, and the proposal was not taken up by the Commission.

**Draft article 1, paragraphs 15 (“negotiable transport document”), 16 (“non-negotiable transport document”), 18 (“electronic transport record”), 19 (“negotiable electronic transport record”), 20 (“non-negotiable electronic transport record”), 21 (“issuance” of a negotiable electronic transport record), 22 (“transfer” of a negotiable electronic transport record) and 27 (“freight”)**

136. After making the same correction to draft article 1, paragraph 18, as had been made to draft article 1, paragraph 14, by twice deleting the phrase “or a performing party” where it appeared in the chapeau of draft article 1, paragraph 18, the Commission approved the substance of the definitions contained in draft article 1, paragraphs 15, 16, 18, 19, 20, 21, 22 and 27, and referred them to the drafting group.

## **Chapter 9. Delivery of the goods**

### **General comment**

137. A concern was expressed with respect to chapter 9 as a whole. In general, the aim of the legal regime in chapter 9 to provide legal solutions to a number of thorny questions was applauded. However, it was thought that certain difficult questions remained, such as: when did the consignee have an obligation to accept delivery; what was the carrier's remedy if the consignee was in breach of that obligation; and what steps were necessary on the part of the carrier to ensure that the goods were delivered to the proper person.

138. It was suggested that the chapter created more problems than it solved and that adoption of the chapter could negatively affect ratification of the Convention. The Commission took note of those concerns.

### **Draft article 45. Obligation to accept delivery**

139. Concerns in line with the general comment expressed in respect of chapter 9 were also raised with respect to draft article 45. While there was some support for that approach, the focus of concern in respect of the draft provision was the phrase "the consignee that exercises its rights". It was suggested that that phrase was too vague in terms of setting an appropriate trigger for the assumption of obligations under the Convention. It was suggested that that uncertainty could be remedied by deleting the phrase at issue and substituting for it: "the consignee that demands delivery of the goods". There was support in the Commission for that view.

140. In response to that position, it was observed that draft article 45 had been included in the draft Convention to deal with the specific problem of consignees that were aware that their goods had arrived but wished to avoid delivery of those goods by simply refusing to claim them. It was noted that carriers were regularly faced with that problem and that draft article 45 was intended as a legislative response to it. It was further explained that the phrase "exercises its rights" was intended to cover situations such as when the consignee wished to examine the goods or to take samples of them prior to taking delivery, or when the consignee became involved in the carriage. It was observed that the United Nations Convention on Contracts for the International Sale of Goods (the "United Nations Sales Convention") required that buyers that wanted to reject the goods under the contract of sale take delivery of them from the carrier, but that the buyer would do so on behalf of the seller. It was suggested that draft article 45 was appropriate and in keeping with that approach. There was some support in the Commission for that view.

141. After discussion, the Commission decided to adopt the amendment suggested in paragraph 139 above. With that amendment, the Commission approved the substance of draft article 45 and referred it to the drafting group.

### **Draft article 46. Obligation to acknowledge receipt**

142. The Commission approved the substance of draft article 46 and referred it to the drafting group.

**Draft article 47. Delivery when no negotiable transport document or negotiable electronic transport record is issued**

143. A concern was expressed that draft article 47 protected the carrier only when it had followed the required procedure set out in the provision, but that the carrier was not protected when it had not followed that procedure. Further, the issue was raised that if the shipper was no longer the controlling party, it was probably because it had already transferred all of its rights in the goods to the controlling party, including the right to instruct on delivery. The Commission took note of those concerns.

144. The Commission approved the substance of draft article 47 and referred it to the drafting group. (For subsequent discussion and the conclusions on this draft article, see paras. 166-168 below.)

**Draft article 48. Delivery when a non-negotiable transport document that requires surrender is issued**

145. The Commission approved the substance of draft article 48 and referred it to the drafting group. (For subsequent discussion and the conclusions on this draft article, see paras. 166-168 below.)

**Draft article 49. Delivery when a negotiable transport document or negotiable electronic transport record is issued**

146. It was generally acknowledged that the problems faced by carriers when cargo owners appeared at the place of destination without the requisite documentation, or failed to appear at all, represented real and practical problems for carriers. However, concerns were expressed in the Commission regarding whether the text of draft article 49 was the most appropriate way to solve those problems. In particular, the view was expressed that draft article 49 undermined the function of a negotiable transport document as a document of title by allowing carriers to seek alternative delivery instructions from the shipper or the documentary shipper and thus removing the requirement to deliver on the presentation of a bill of lading. Further concern was expressed that subparagraph (d) would increase the risk of fraud and have a negative impact on banks and others that relied on the security offered by negotiable transport documents. One delegation emphasized that discussions with banks had indicated that draft article 49 would result in banks having additional risks to manage.

147. It was also suggested that the indemnity in subparagraph (f) could be problematic for cargo insurers, for example, in a CIF (cost, insurance and freight) shipment, where insurance was arranged by the seller and the policy was assigned to the buyer when the risk of shipment transferred. It was suggested that if the seller unwittingly provided an indemnity to the carrier by providing alternative delivery instructions, this could have an impact on any recovery action that an insurer might have had against the carrier. That, it was said, would result in the loss of one avenue of redress for cargo claimants seeking recovery for misdelivery. A further complication was said to be that the combined effect of subparagraphs (d)-(f) was that a carrier that obtained alternate delivery instructions from a shipper would be relieved of liability to the holder, but that if the shipper had given an indemnity to the carrier, the shipper would have indemnified a party that had no liability.

148. As a response to some of the criticism expressed, various examples were given of how the new system envisioned under draft article 49 would reduce the current widespread possibility of fraud. For example, current practices subject to fraud were said to involve the issuance of multiple originals of the bill of lading, forgery of bills of



lading and the continued circulation and sale of bills of lading even following delivery. The regime established by draft article 49 was aimed at reducing or eliminating many of those abuses. Further, it was emphasized that that regime set up a system aimed at removing risk for bankers by restoring the integrity of the bill of lading system, and that discussions with banks and commodities traders had indicated that, while they might be forced to adjust some of their practices, they considered the new regime to present less risk for them. In addition, it was noted that the current system of obtaining letters of indemnity, possibly coupled with bank guarantees, was both a costly and a slow procedure for consignees.

149. It was noted that the serious problems which draft article 49 was attempting to solve were the problems not just of carriers but of the maritime transportation industry as a whole. It was further observed that the industry had grappled with the problems for some time without success, and that a legislative solution was the only viable option. While it was recognized that the approach taken in draft article 49 might not be optimal in every respect, broadly acceptable adjustments to the approach might still be possible. The Commission was urged to take the opportunity to adopt a provision such as draft article 49, in order to provide a legislative solution to restore the integrity of the function of negotiable transport documents in the draft Convention.

150. Some support was expressed for the concerns regarding the problems with respect to the anticipated operation of draft article 49 outlined in paragraphs 146 and 147 above, but views differed on how best to address those problems. While some delegations favoured deletion of the provision as a whole, others favoured only the deletion of subparagraphs (d)-(f) or of subparagraphs (e) and (f), while still others were in favour of considering possible clarification of those problematic subparagraphs. Some delegations supported the text of draft article 49 as drafted, without any amendment. However, there was widespread acknowledgement that the problems addressed by draft article 49 were real and pressing.

151. The Commission agreed to consider any improved text that might be presented.

152. The Commission resumed its deliberations on the draft article after it had completed its review of the draft Convention. In the meantime, extensive consultations had been informally conducted with the participation of a large number of delegations with a view to formulating alternative language for the draft article that addressed the various concerns expressed earlier (see paras. 146 and 147 above). The Commission was informed of the difficulty that had been faced in attempting to find a compromise solution in the light of the extent of disagreement concerning the draft article, as many had expressed the wish to delete subparagraphs (d)-(h), while many others had insisted on retaining the draft article in its entirety. Nevertheless, as a result of those informal consultations, the following new version of the draft article was submitted for consideration by the Commission:

“1. When a negotiable transport document or a negotiable electronic transport record has been issued:

“(a) 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 45 to the holder:

“(i) Upon surrender of the negotiable transport document and, if the holder is one of the persons referred to in article 1, subparagraph 10 (a)(i), upon the holder properly identifying itself; or

“(ii) Upon demonstration by the holder, in accordance with the procedures referred to in article 9, paragraph 1, 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, and the number of originals is stated in that document, 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, paragraph 1.

“2. If the negotiable transport document or the negotiable electronic transport record states that the goods may be delivered without the surrender of the transport document or the electronic transport record, the following rule applies:

“(a) If the goods are not deliverable because (i) the holder, after having received a notice of arrival, does not claim delivery of the goods at the time or within the time referred to in article 45 from the carrier after their arrival at the place of destination, (ii) the carrier refuses delivery because the person claiming to be a holder does not properly identify itself as one of the persons referred to in article 1, subparagraph 10 (a)(i), or (iii) the carrier is, after reasonable effort, unable to locate the holder in order to request delivery instructions, the carrier may so advise the shipper and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier may so advise the documentary shipper and request instructions in respect of the delivery of the goods;

“(b) The carrier that delivers the goods upon instruction of the shipper or the documentary shipper in accordance with subparagraph (2) (a) 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 negotiable electronic transport record has demonstrated, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder;

“(c) The person giving instructions under subparagraph 2 (a) of this article shall indemnify the carrier against loss arising from its being held liable to the holder under subparagraph (2) (e) of this article. The carrier may refuse to follow those instructions if the person fails to provide adequate security as the carrier may reasonably request;

“(d) 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 (2) (b) 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;

“(e) Notwithstanding subparagraphs (2) (b) and (2) (d) of this article, a holder that becomes a holder after such delivery, and that 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. When the contract particulars state the expected time of arrival of the goods, or indicate how to obtain information as to

whether the goods have been delivered, it is presumed that the holder at the time that it became a holder had or could reasonably have had knowledge of the delivery of the goods.”

153. It was explained that besides a few minor corrections to the original text, such as inserting in subparagraph 1 (a)(i) the proper cross reference to draft article 1, subparagraph 10 (a)(i), the proposed new text contained a number of substantive changes to the original text. The wording of subparagraph 2 (a), it was pointed out, was different from subparagraph 2 (d) of the original text in essentially two respects. First, while the original text obliged the carrier to advise that the goods had not been claimed and imposed on the controlling party or the shipper the obligation to give instructions in respect of the delivery of the goods, the new text allowed the carrier to seek instructions but imposed no obligation on the shipper to provide them. That change was proposed in order to address the concern that the shipper might not always be able to give appropriate instructions to the carrier under those circumstances. Secondly, it was explained that the previous text required notice to be given to the holder, and in the absence of notice – be it because the holder could not be found or because the location of the holder was not known to the carrier – the remainder of the provision did not apply. In contrast, the proposed new provisions would still apply in such situations, which were found to be typical and to warrant a solution in the draft article.

154. In addition to those changes, it was further explained, the proposed new text differed from the original text in another important aspect. Paragraph 2 of the proposed text now subjected the rules on delivery of goods set forth in its subparagraphs (a) and (b) to the existence, in the negotiable transport document or negotiable electronic transport record, of a statement to the effect that the goods could be delivered without the surrender of the transport document or the electronic transport record. This addition, it was pointed out, represented the most contentious point in the entire proposed new draft article. The original text, it was explained, had received strong criticism based on concern about the negative impact that rules allowing delivery of goods without the surrender of negotiable transport documents might have on common trade and banking practices, as well as from the viewpoint of the legal doctrine of documents of title. The proposed revised text was intended to address such concern by requiring a clear warning for all parties potentially affected, in the form of an appropriate statement in the negotiable transport document, that the carrier was authorized to deliver the goods even without the surrender of the transport document, provided that the carrier followed the procedures set forth in the draft article. The proposed rules, it was pointed out, were meant to operate in the form of a contractual “opt-in” system: in order for the carrier to be discharged of its obligation to deliver by delivering the goods under instructions received from the shipper even without the surrender of the negotiable transport document, the parties must have agreed to allow the carrier to deliver the goods in such a fashion under the circumstances described in the draft article. It was observed that, if the Commission agreed to replace draft article 49 with the proposed new text, consequential changes would be needed in draft articles 47, 48 and 50.

155. In commenting on the proposed new text for draft article 49, a number of the concerns that had been raised in regard to the original text of draft article 49 were reiterated, as were a number of the views expressed by those who supported the original text of the provision. There was some support for the view that the new text of draft article 49 did not solve the problems previously identified.

156. By way of specific comment on the proposed new text, some delegations that had expressed strong objections to the original text of the draft provision and had requested its deletion repeated that preference in respect of the proposed new text. At the same

time, some delegations that had strongly supported the original text of draft article 49 reiterated that support, but expressed the view that the proposed new text could be an acceptable alternative.

157. Although views concerning the original text of the provision remained sharply divided, there was general support in the Commission for the proposed new text of draft article 49 as representing a compromise approach that could achieve broader acceptance. Supporters of the original text of draft article 49 expressed the view that while the provisions of paragraph 2 of the revised text were no longer mandatory, as they had been in the original version, they were nonetheless an improvement over the current state of affairs.

158. In addition, while there was general support for the “opt-in” approach taken in the revised text as being less troubling for those with lingering concerns regarding the content of paragraph 2, some preference was still expressed for an “opt-out” or “default” approach to be taken in paragraph 2 of the new text. In that regard, it was thought that the “opt-out” approach would be less likely simply to preserve the status quo. Further, concern was expressed that in some jurisdictions a transport document containing a statement that the goods may be delivered without surrender of the transport document would not be considered a negotiable document at all. However, there was support for the view that the difference between an “opt-in” and an “opt-out” approach was probably not of great significance, as the three major parties involved in the commodities trade to which paragraph 2 would be most relevant (i.e. carriers, commodity traders and banks) would dictate whether or not paragraph 2 was actually used. It was observed that that decision would be made for commercial reasons, and would not likely rest on whether the provision was an “opt-in” or an “opt-out” one. It was generally thought that, regardless of the particular approach, the proposed new text of draft article 49 would provide the parties involved in the commodities trade, which was said to be highly subject to abuse in terms of delivery without presentation of the negotiable document or record, with the means to eliminate abuses of the bill of lading and its attendant problems.

159. In further support of the revised text, it was observed that the current situation was not satisfactory, as the treatment of bills of lading that included a statement that there could be delivery without their surrender varied depending on the jurisdiction. In some jurisdictions, only the statement was held to be invalid but, in others, it was held to be valid and carriers could simply deliver without surrender without following any particular rules at all. Further, there was a danger that such statements could appear in bills of lading, as at least one major carrier had previously introduced, and then withdrawn, such a statement in its documents. In the face of such uncertainty, the revised text of draft article 49 was an improvement and could be seen as a type of guarantee that some sort of procedure would be followed, even when goods were allowed to be delivered without surrender of the negotiable document or record.

160. There were some suggestions for adjustments to the proposed new text of draft article 49. It was suggested that as the provision would be most relevant in the commodities trade, which primarily incorporated into the transport document by reference the terms and conditions in the charterparty, the phrase “indicates either expressly or through incorporation by reference to the charterparty” should be included in the chapeau of paragraph 2 rather than the word “states”. There was some support for that suggestion.

161. However, objections were also voiced to allowing the delivery of goods without surrender of transport documents by mere incorporation by reference to the terms of a charterparty. There was support for the suggestion that if the possibility contemplated in paragraph 2 were to be widened any further, it would be preferable to delete the

paragraph altogether. An alternative proposal was made that the word “expressly” should be included before the word “states”. There was support for that approach, particularly among those who had supported deletion of all or part of the original text of draft article 49.

162. A question was raised whether it might be desirable to adjust the title of draft article 49 to reflect the fact that the negotiable transport document or electronic transport record might, in some cases, not require surrender. In response, it was said that it would be preferable to keep the title as drafted, as the general rule under draft article 49 would still require surrender of the negotiable document or record, and that paragraph 2 was meant to be an exception to that general rule. There was support for that view.

163. In response to a question whether the “contractual arrangement” referred to in paragraph 2 (d) could be a verbal agreement, it was noted that the term referred to a sales contract or a letter of credit, which would typically be in writing, but that since draft article 49 was not included in the draft article 3 list of provisions with a writing requirement, it was possible that it could be a verbal agreement.

164. A concern was raised with respect to whether the interrelationship between the new paragraph 2 and draft article 50 was sufficiently clear. In order to remedy that concern, the Commission agreed to insert the phrase “without prejudice to article 50, paragraph 1” at the start of paragraph 2.

165. Subject to the insertion of the words “without prejudice to article 50, paragraph 1” in the beginning of paragraph 2 and of the word “expressly” before the word “states” in that same sentence, the Commission approved the substance of the new draft article 49 and referred it to the drafting group.

**Consequential changes to draft article 47 (Delivery when no negotiable transport document or negotiable electronic transport record is issued); draft article 48 (Delivery when a non-negotiable transport document that requires surrender is issued); and draft article 50 (Goods remaining undelivered)**

166. Having decided to replace draft article 49 with the new text (see paras. 152 and 165 above), the Commission agreed that consequential changes needed to be made to draft articles 47 and 48 in order to align them with the new text. The following revised texts were proposed for the relevant provisions:

**Article 47. Delivery when no negotiable transport document or negotiable electronic transport record is issued**

“(c) Without prejudice to article 50, paragraph 1, if the goods are not deliverable because (i) the consignee, after having received a notice of arrival, does not claim delivery of the goods at the time or within the time referred to in article 45 from the carrier after their arrival at the place of destination, (ii) the carrier refuses delivery because the person claiming to be the consignee does not properly identify itself as the consignee, or (iii) the carrier is, after reasonable effort, unable to locate the consignee in order to request delivery instructions, the carrier may so advise the controlling party and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the controlling party, the carrier may so advise the shipper and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier may so advise the documentary shipper and request instructions in respect of the delivery of the goods;”

**Article 48. Delivery when a non-negotiable transport document that requires surrender is issued**

“(b) Without prejudice to article 50, paragraph 1, if the goods are not deliverable because (i) the consignee, after having received a notice of arrival, does not claim delivery of the goods at the time or within the time referred to in article 45 from the carrier after their arrival at the place of destination, (ii) the carrier is, after reasonable effort, unable to locate the consignee in order to request delivery instructions, or (iii) the carrier refuses delivery because the person claiming to be the consignee does not properly identify itself as the consignee or does not surrender the document, the carrier may so advise the shipper and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier may so advise the documentary shipper and request instructions in respect of the delivery of the goods;”.

167. It was further noted that the words “the holder” should be inserted after the words “the controlling party” in draft article 50, subparagraph 1 (b).

168. The Commission approved the proposed revisions to draft articles 47, 48 and 50 and referred them to the drafting group.

**Draft article 50. Goods remaining undelivered**

169. The view was expressed that the remedies set out in draft article 50 were only available to a carrier facing undelivered goods after it had attempted to deliver the goods in keeping with the procedure set out in draft article 49. However, there was support in the Commission for the alternative view that the use of the disjunctive “or” in listing the various bases on which goods would be deemed to have remained undelivered clearly indicated that an entitlement or an obligation to refuse delivery under draft article 49 constituted only one of several reasons for which goods could be deemed to have remained undelivered. A proposal was made to make that latter intention clear through the addition of a phrase along the lines of “without regard to the provisions of articles 47, 48 or 49” after the phrase “the carrier may exercise the rights under paragraph 2 of this article” in paragraph 3, but such an addition was not found to be necessary.

170. It was noted that in some jurisdictions, the applicable law required local authorities to destroy the goods rather than allowing the carrier itself to destroy them. In order to accommodate those jurisdictions, a proposal was made to insert into subparagraph 2 (b) a requirement along the lines of that for the sale of goods pursuant to subparagraph 2 (c) that the destruction of the goods be carried out in accordance with the law or regulations of the place where the goods were located at the time. There was support for that proposal and for the principle that the carrier should abide by the local laws and regulations, provided that those requirements were not so broadly interpreted as to unduly restrict the carrier’s ability to destroy the goods when that was necessary.

171. Some drafting suggestions were made to improve the provision. It was observed that depending on the outcome of the discussions relating to draft article 49, a consequential change might be required to add the word “holder” to subparagraph 1 (b). It was also suggested that the logic of draft article 50 might be improved by deleting subparagraph 1 (b) as being repetitious of other subparagraphs or that the order of subparagraphs (b) and (c) of paragraph 2 should be changed, since destruction was the more drastic remedy of the two. The Commission took note of those suggestions.

172. With the addition of a requirement in draft article 50, subparagraph 2 (b), along the lines of that of draft article 52, subparagraph 2 (c), that the destruction of the goods

by the carrier be carried out in accordance with the law or regulations of the place where the goods were located at the time, the Commission approved the substance of draft article 50 and referred it to the drafting group. (For consequential changes to this draft article, see also paras. 166-168 above.)

**Draft article 51. Retention of goods**

173. The Commission approved the substance of draft article 51 and referred it to the drafting group.

**Draft article 1, paragraph 9 (“documentary shipper”)**

174. The Commission approved the substance of draft article 1, paragraph 9, containing the definition of “documentary shipper” and referred it to the drafting group.

**Chapter 10. Rights of the controlling party**

**Draft article 52. Exercise and extent of right of control**

175. A question was raised regarding how a controlling party could exercise its right of control with respect to the matters set out in paragraph 1 when such details were not set out in the contract of carriage. Several examples were given in response, such as the situation where the controlling party was a seller who discovered that the buyer was bankrupt and the seller wanted to deliver the goods to another buyer, or the simple situation where a seller requested a change of temperature of the container on the ship. It was emphasized that there were safeguards written into the draft Convention to protect against potential abuses.

176. The Commission approved the substance of draft article 52 and referred it to the drafting group.

**Draft article 53. Identity of the controlling party and transfer of the right of control**

177. A correction was proposed to the text of draft article 53, paragraph 1. It was observed that when paragraph 2 of draft article 53 had been inserted in a previous version of the draft Convention, the consequential changes that ought to have been made to paragraph 1 had been overlooked. To remedy that situation, it was proposed that the chapeau of paragraph 1 be deleted and replaced with the words: “Except in the cases referred to in paragraphs 2, 3 and 4 of this article.” Further, it was observed that the reference in subparagraph 3 (c) should be corrected to read “article 1, subparagraph 10 (a)(i)” rather than “article 1, subparagraph 11 (a)(i).” The Commission agreed with those corrections.

178. Subject to the agreed corrections to paragraph 1, the Commission approved the substance of draft article 53 and referred it to the drafting group.

**Draft article 54. Carrier’s execution of instructions**

179. The Commission approved the substance of draft article 54 and referred it to the drafting group.

**Draft article 55. Deemed delivery**

180. The Commission approved the substance of draft article 55 and referred it to the drafting group.

**Draft article 56. Variations to the contract of carriage**

181. The Commission approved the substance of draft article 56 and referred it to the drafting group.

**Draft article 57. Providing additional information, instructions or documents to carrier**

182. The Commission approved the substance of draft article 57 and referred it to the drafting group.

**Draft article 58. Variation by agreement**

183. After deciding that it was not necessary to add a reference to draft article 53, paragraph 2, to draft article 58, the Commission approved the substance of draft article 58 and referred it to the drafting group.

**Draft article 1, paragraphs 12 (“right of control”) and 13 (“controlling party”)**

184. The Commission approved the substance of draft article 1, paragraph 12, containing the definition of “right of control” and paragraph 13, containing the definition of “controlling party” and referred them to the drafting group.

**Chapter 11. Transfer of rights**

185. There was some support for the view that, as a whole, the draft chapter was not sufficiently developed to achieve either certainty or harmonization of national law. It was also suggested that the draft chapter contained vague language and that further clarification and modification to the draft chapter was required if it was to be of benefit to future shippers, consignees and carriers.

186. It was suggested that draft articles 59 and 60 should be revised in such a way that the transfer of liabilities under the contract of carriage would coincide with the transfer of the rights under the underlying contract. That, however, was said to be a complex area of the law, which was ultimately better suited to being treated in a separate instrument. If the draft Convention were to venture into such a delicate area, it would also need to address other complex issues regarding the transfer of liabilities, such as whether a third-party holder of the document was bound and under which circumstances a transferor was relieved of its obligations. Those considerations, it was said, called for the deletion of the entire chapter or at least for allowing Contracting States to “opt out” of the draft chapter.

187. The Commission took note of those views but was generally favourable to retaining the draft chapter.

**Draft article 59. When a negotiable transport document or negotiable electronic transport record is issued**

188. The view was expressed that the draft article was not sufficiently elaborated as it did not deal, for instance, with the transfer of rights under straight bills of lading. That omission, it was said, illustrated the general inadequacy of the entire chapter.

189. The Commission took note of that view, but agreed to approve the draft article and to refer it to the drafting group.



**Draft article 60. Liability of holder**

190. Concerns were expressed that under paragraph 2 of the draft article a holder might face the risk that even a trivial exercise of a right under the contract of carriage might trigger an assumption of liability. In practice, negotiable transport documents might be consigned to a bank without prior notice or agreement. The effect of article 60, paragraph 2, would therefore be to increase the risks on banks or other holders. That was said to be a matter of particular concern for banks in some jurisdictions, where serious reservations had been expressed to paragraph 2 of the draft article.

191. The Commission took note of those concerns, but was generally in favour of maintaining paragraph 2 as currently worded.

192. In connection with paragraph 3, the question was asked whether the position of the holder under draft article 60 was similar to the position of the consignee under draft article 45. If that was the case, and in view of the Commission's decision in respect of draft article 45 (see para. 141 above), it was suggested that the two provisions might need to be aligned, for instance by replacing the phrase "does not exercise any right under the contract of carriage" with the phrase "does not demand delivery of the goods".

193. In response, it was noted that the ambit of the two provisions was different, and that paragraph 3 of the draft article was in fact broader than draft article 45. Draft article 45 was concerned with the consignee, which typically exercised rights by demanding delivery of the goods. Draft article 60, however, was concerned with the holder of the transport document, that is, the controlling party under draft article 53, paragraphs 2 to 4. Limiting the operation of paragraph 3 to cases where the holder had not claimed delivery of the goods would be tantamount to releasing a holder that exercised the right of control from any liability or obligation under the draft Convention. Given the extent of rights given to the controlling party by draft article 52, that result would not be acceptable. The only change that had become necessary in view of the Commission's decision in respect of draft article 45 was to delete the cross reference in paragraph 3.

194. Having considered the different views on the draft article, the Commission agreed to approve it and to refer it to the drafting group, with the request to delete the reference to draft article 45 in paragraph 3.

**Chapter 12. Limits of liability****Draft article 61. Limits of liability**

195. The Commission was reminded of the prolonged debate that had taken place in the Working Group concerning the monetary limits for the carrier's liability under the draft Convention. The Commission was reminded, in particular, that the liability limits set forth in the draft article were the result of extensive negotiations concluded at the twenty-first session of the Working Group with the support of a large number of delegations and were part of a larger compromise package that included various other aspects of the draft Convention in addition to the draft article (see A/CN.9/645, para. 197). Not all delegations that had participated in the deliberations of the Working Group were entirely satisfied with those limitation levels and the large number of supporters of the final compromise included both delegations that had pleaded for higher limits and delegations that had argued for limits lower than those finally arrived at.

196. The Commission heard expressions of concern that the proposed levels for the limitation of the carrier's liability were too high and that there was no commercial need

for such high limits, which were said to be unreasonable and unrealistic. There was some support for those concerns, in particular given that a number of delegations felt that the level of limitation of the Hague-Visby Rules was adequate for commercial purposes. It was said that it would have been possible for some delegations to make an effort to persuade their industry and authorities of the desirability of accepting liability limits as high as those set forth in the Hamburg Rules, as an indication of their willingness to achieve consensus. It was also said, however, that the levels now provided for in the draft article were so high as to be unacceptable and they might become an impediment for ratification of the Convention by some countries, which included large trading economies.

197. The Commission took note of those concerns. There was sympathy for the difficulties that existed in some countries to persuade industry and authorities to accept liability limits higher than they might have anticipated. Nevertheless, there was wide and strong support in the Commission for maintaining those limits so as not to endanger the difficult compromise that had been reached, which a large number of delegations were committed to preserving. It was noted that in some countries it had been difficult to gain support for the draft Convention, because domestic stakeholders had felt that the liability limits were lower than their expectations. It was hoped that those who now expressed objections to the liability limits in the draft article might likewise be able to join the consensus in the future. In the context of the draft article, however, the Commission was urged not to attempt to renegotiate the liability limits, even though they had not met the expectations of all delegations.

198. The Commission heard a proposal, which received some support, for attempting to broaden the consensus around the draft article by narrowing down the nature of claims to which the liability limits would apply in exchange for flexibility in respect of some matters on which differences of opinion had remained, including the applicability of the draft Convention to carriage other than sea carriage and the liability limits. The scope of the draft article, it was proposed, should be limited to “loss resulting from loss or damage to the goods, as well as loss resulting from misdelivery of the goods”. It was said that such an amendment would help improve the balance between shipper and carrier interests, in view of the fact that the liability of the shipper was unlimited.

199. The Commission did not agree to the proposed amendment to paragraph 1, which was said to touch upon an essential element of the compromise negotiated at the Working Group. The Commission noted and confirmed the wide and strong support for not altering the elements of that general compromise, as well as the expressions of hope that ways be found to broaden even further its basis of support.

200. The Commission approved the substance of draft article 61 and referred it to the drafting group.

#### **Draft article 62. Limits of liability for loss caused by delay**

201. In response to a question, it was pointed out that the liability limit set forth in the draft article applied only to economic or consequential loss resulting from delay and not physical loss of or damage to goods, which was subject to the limit set forth in draft article 61.

202. The Commission approved the substance of draft article 62 and referred it to the drafting group.

**Draft article 63. Loss of the benefit of limitation of liability**

203. The Commission approved the substance of draft article 63 and referred it to the drafting group.

**Chapter 13. Time for suit****Draft article 64. Period of time for suit**

204. The Commission approved the substance of draft article 64 and referred it to the drafting group.

**Draft article 65. Extension of time for suit**

205. A concern was expressed that it would be unfair to the claimant to allow the person against which the claim was made to control whether or not an extension of the time period would be granted. The suggestion was made that the following phrase should be deleted: “by a declaration to the claimant. This period may be further extended by another declaration or declarations.” However, it was observed that such extensions by declaration or agreement were mechanisms that already existed in the Hague-Visby and Hamburg Rules.

206. Concern was also expressed that prohibiting the suspension or interruption of the period of time for suit would operate to the detriment of claimants by weakening their legal position vis-à-vis the person against which the claim was made. Further, it was suggested that this could elicit a negative response from insurers, since it was thought that any extension of the time for suit would depend on the goodwill of the carrier. In order to alleviate that perceived problem, it was suggested that the following phrase be deleted from the draft provision: “The period provided in article 64 shall not be subject to suspension or interruption, but?”. There was some support for that view.

207. In response to those concerns, it was observed that the provision, as drafted, intended to maintain a balance between establishing legal certainty with respect to outstanding liabilities and maintaining flexibility in allowing the claimant to seek additional time to pursue legal action or settlement, if necessary. It was noted that it was particularly important to harmonize the international rules with respect to interruption and suspension, since those matters would otherwise be governed by the applicable law, which varied widely from jurisdiction to jurisdiction. It was feared that the result of such an approach would be forum shopping by claimants, a lack of transparency and an overall lack of predictability, all of which could prove costly. It was also observed that the two-year period of time for suit was longer than that provided for in the Hague-Visby Rules and that it was expected to provide sufficient time for claimants to pursue their actions or for such claims to be settled without the need for suspension or interruption. A number of delegations observed that the draft provision would require them to revise their national laws, but that it was felt that such a harmonizing measure was useful and appropriate in the circumstances. There was support in the Commission for retention of the provision as drafted.

208. After discussion, the Commission approved the substance of draft article 65 and referred it to the drafting group.

**Draft article 66. Action for indemnity**

209. Although a concern was expressed as to whether it should be possible for a person held liable to institute an action for indemnity after the expiration of the period of time

for suit, that concern was not supported, and the Commission approved the substance of draft article 66 and referred it to the drafting group.

#### **Draft article 67. Actions against the person identified as the carrier**

210. A concern was raised that the bareboat charterer should not be included in draft article 67. By way of explanation, it was noted that the bareboat charterer had been included in the draft provision so as to provide the cargo claimant with the procedural tools necessary to take legal action against the bareboat charterer when that party had been identified as the carrier pursuant to draft article 39. There was support in the Commission for that view.

211. The Commission approved the substance of draft article 67 and referred it to the drafting group.

### **Chapter 14. Jurisdiction**

#### **General comment**

212. The Commission was reminded that the Working Group had agreed that chapter 14 on jurisdiction should be subject to an “opt-in” declaration system, as set out in draft article 76, such that the chapter would apply only to Contracting States that had made a declaration to that effect. It was observed that as the chapter on jurisdiction did not contain a provision equivalent to draft article 77, paragraph 5, which provided that certain arbitration clauses or agreements that were inconsistent with the arbitration chapter would be held void, it was desirable that there be clarity regarding the interpretation of the “opt-in” mechanism. To that end, it was observed that the operation of the “opt-in” mechanism meant that a Contracting State that did not make such a declaration was free to regulate jurisdiction under the law applicable in that State. There was support in the Commission for that interpretation of draft article 76. In addition, it was observed that chapter 14 as a whole had been the subject of protracted discussions and represented a carefully balanced compromise, for which support was maintained.

#### **Draft article 68. Actions against the carrier; and draft article 1, paragraphs 28 (“domicile”) and 29 (“competent court”)**

213. The Commission approved the substance of draft article 68 and the definitions in draft article 1, paragraphs 28 and 29, and referred them to the drafting group.

#### **Draft article 69. Choice of court agreements**

214. A concern was expressed that as the consignee would be the most likely claimant in a case of loss of or damage to the goods, the consignee should not be bound to an exclusive jurisdiction clause pursuant to draft article 69, subparagraph 2 (c), without it having provided its consent or agreement to be so bound. There was some support in the Commission for that view.

215. However, it was again observed that Contracting States were free to refrain from exercising the “opt-in” provision in draft article 76, in which circumstances the State would simply apply its applicable law. One example given was that such a State would be free to regulate questions of jurisdiction arising out of a volume contract, including the circumstances in which a third party might be bound.

216. The Commission approved the substance of draft article 69 and referred it to the drafting group.

**Draft article 70. Actions against the maritime performing party**

217. The Commission approved the substance of draft article 70 and referred it to the drafting group.

**Draft article 71. No additional bases of jurisdiction**

218. The Commission approved the substance of draft article 71 and referred it to the drafting group.

**Draft article 72. Arrest and provisional or protective measures**

219. In reference to draft article 72, subparagraph (a), in particular with respect to fulfilling “the requirements of this chapter”, it was observed that the court granting the provisional or protective measures would make a determination regarding its jurisdiction to determine a case upon its merits in light of the provisions set out in chapter 14. There was support in the Commission for that view.

220. The Commission approved the substance of draft article 72 and referred it to the drafting group.

**Draft article 73. Consolidation and removal of actions**

221. The Commission approved the substance of draft article 73 and referred it to the drafting group.

**Draft article 74. Agreement after dispute has arisen and jurisdiction when the defendant has entered an appearance**

222. The Commission approved the substance of draft article 74 and referred it to the drafting group.

**Draft article 75. Recognition and enforcement**

223. It was observed that following the decision of the Working Group to proceed with a full “opt-in” approach as opposed to a “partial opt-in” approach to the chapter on jurisdiction (see A/CN.9/616, paras. 245-252), certain consequential changes to the draft Convention had been made. However, it was observed that draft article 75, subparagraph 2 (b), which had been inserted into the text to accommodate the “partial opt-in” approach, had not been deleted when that approach was not approved by the Working Group. A proposal was made to delete draft article 75, subparagraph 2 (b), in order to correct the text. The Commission agreed with that proposal.

224. With that correction, the Commission approved the substance of draft article 75 and referred it to the drafting group.

**Draft article 76. Application of chapter 14**

225. The Commission approved the substance of draft article 76 and referred it to the drafting group.

## Chapter 15. Arbitration

### General comment

226. The Commission was reminded that the Working Group had agreed that, like chapter 14 on jurisdiction, chapter 15 on arbitration should be subject to an “opt-in” declaration system, as set out in draft article 80, such that the chapter would only apply to Contracting States that had made a declaration to that effect.

### Draft article 77. Arbitration agreements

227. It was observed that there might be inconsistencies in the terminology used in the draft Convention in terms of describing the party instituting a claim, which was described variously as “the person asserting a claim against the carrier” (draft art. 77, para. 2), the “claimant” (draft arts. 18 and 50, para. 5), and the “plaintiff” (draft arts. 68 and 70). There was support in the Commission for the suggestion that such terms be reviewed and standardized, to the extent advisable. In particular, it was noted that in chapters 14 and 15 the term “person asserting a claim against the carrier” should be used rather than the term “plaintiff” or “claimant”, in order to exclude cases where a carrier had instituted a claim against a cargo owner.

228. Subject to making appropriate changes to the terminology used to refer to the claimant, the Commission approved the substance of draft article 77 and referred it to the drafting group.

### Draft article 78. Arbitration agreement in non-liner transportation

229. It was observed that draft article 78, paragraph 2, was unclear in that it referred to the “arbitration agreement” in the chapeau, in subparagraph 2 (a) and elsewhere throughout chapter 15, but it referred to the “arbitration clause” in subparagraph 2 (b). It was also noted that some lack of clarity could result from different interpretations given to the terms “arbitration agreement” and “arbitration clause” in different jurisdictions. In response, it was noted that UNCITRAL instruments attempted to maintain consistent usage of terminology, such that “arbitration agreement” referred to the agreement of the parties to arbitrate, whether prior to a dispute or thereafter, in accordance with a provision in a contract or a separate agreement, whereas the “arbitration clause” referred to a specific contractual provision that contained the arbitration agreement.

230. By way of further explanation, it was observed that paragraph 1 of draft article 78 was not intended to apply to charterparties and that paragraph 2 of the provision was intended to include bills of lading into which the terms of a charterparty had been incorporated by reference. Further, the reference in draft article 78, subparagraph 2 (b), was intended to include as a condition that there be a specific arbitration clause and that reference to the general terms and conditions of the charterparty would not suffice.

231. In order to clarify the provision, it was suggested that paragraph 2 could be redrafted along the following lines:

“2. Notwithstanding paragraph 1 of this article, an arbitration agreement in a transport document or electronic transport record to which this Convention applies by reason of the application of article 7 is subject to this chapter unless such a transport document or electronic transport record:

“(a) Identifies the parties to and the date of the charterparty or other contract excluded from the application of this Convention by reason of the application of article 6; and

“(b) Incorporates by reference and specifically refers to the clause in the charterparty or other contract that contains the terms of the arbitration agreement.”

232. With clarification along those lines, the Commission approved the substance of draft article 78 and referred it to the drafting group.

#### **Draft article 79. Agreement to arbitrate after the dispute has arisen**

233. A question was raised regarding how draft article 79 would be applied to a Contracting State that had opted in to the application of chapter 15 on arbitration, but had opted out of the application of chapter 14 on jurisdiction. In response, it was observed that the likely interpretation would be that the reference to chapter 14 would simply have no meaning, but that its inclusion in the text would not cause any harm. However, it was also observed that it would be unlikely that a Contracting State would opt into chapter 15 but opt out of chapter 14, as the two chapters were intended to be complementary so that, while the arbitration provisions did not change the existing arbitration regime, they would nonetheless prevent circumvention of the jurisdiction provisions through resorting to arbitration.

234. The Commission approved the substance of draft article 79 and referred it to the drafting group.

#### **Draft article 80. Application of chapter 15**

235. The Commission approved the substance of draft article 80 and referred it to the drafting group.

### **Chapter 16. Validity of contractual terms**

#### **Draft article 81. General provisions**

236. It was observed that the liability of the shipper for breach of its obligations under the draft Convention was not subject to a monetary ceiling, unlike the carrier’s liability, which was limited to the amounts set forth in draft articles 61 and 62. In order to achieve a greater balance of rights and obligations between carriers and shippers, it was suggested that draft article 81 should at least allow the parties to the contract of carriage to agree on a limit to the liability of the shipper, which was currently not possible. For that purpose, the following amendments were proposed to paragraph 2 of the draft article:

“2. Unless otherwise provided in this Convention, any term in a contract of carriage is void to the extent that it:

“(a) Directly or indirectly excludes, reduces or increases the obligations under this Convention of the shipper, consignee, controlling party, holder or documentary shipper; or

“(b) Directly or indirectly excludes, reduces or increases the liability of the shipper, consignee, controlling party, holder or documentary shipper for breach of any of its obligations under this Convention.

“The contract of carriage may, however, provide for an amount of limitation of the liability of the shipper, consignee, controlling party, holder or documentary shipper for breach of obligations, provided that the claimant does not prove that the loss resulting from the breach of obligations was attributable to a personal act or omission of the person claiming a right to limit done with the intent to cause such loss or recklessly and with knowledge that such loss would probably result.”

237. It was explained that during the preparation of the draft Convention, the Working Group had not been able to agree on a formula or method for limiting the liability of the shipper. However, because draft articles 61 and 62 provided for a limitation of the carrier's liability, the carrier was in fact placed in a more favourable condition than the shipper. The proposed amendments would provide some remedy for that situation by allowing contractual limitation of the shipper's liability. The word "limits" in both subparagraph 2 (a) and subparagraph 2 (b) of draft article 81, it was suggested, should be replaced with the word "reduces" in order to better accommodate the freedom of contract envisaged by the additional subparagraph contained in that proposal. The additional text also reproduced some language from draft article 63 in order to set forth the conditions under which a contractual limitation of the shipper's obligations would not be enforceable, which mirrored the conditions under which the carrier would lose the benefit of limitation of liability under the draft Convention. That addition, it was stated, should be sufficient to address possible concerns that exculpatory clauses to the benefit of the shipper might deprive the carrier of any redress in the event that a shipper's reckless conduct (for instance, failure to provide information as to the dangerous nature of the goods) caused injury to persons or damage to the ship or other cargo.

238. There was support for that proposal, which was said to improve the balance of rights and obligations between carriers and shippers. It was said that in contrast with the carrier, whose liability was always based on fault, the shipper was exposed to instances of strict liability, for instance by virtue of draft articles 32 and 33. The notion of unlimited strict liability, however, was said to be unusual in many legal systems. Since it had not been possible for the Working Group to establish a limitation for the shipper's liability, the draft Convention should at least allow the parties to do so by contract. That possibility, it was further said, would enable shippers to obtain liability insurance under more predictable terms.

239. There were however strong objections to the proposed amendments. It was noted that the proper way for shippers and carriers to derogate from the provisions of the draft Convention that governed their mutual rights and obligations was by agreeing on deviations in a volume contract under draft article 82. It was noted, however, that even in the context of draft article 82, there were a number of provisions of the draft Convention from which the parties could not deviate. Those so-called "super-mandatory" provisions included, for instance, the carrier's obligations under draft article 15 and the shipper's obligations under draft articles 30 and 33. If freedom of contract was subject to limits even in the case of individually negotiated volume contracts, there were stronger reasons for freedom of contract to be excluded in routine cases to which the additional protection envisaged in draft article 82 did not apply.

240. It was also pointed out that, in practice, shippers were protected against excessive claims by the fact that their liability was limited to the amount of damage caused by their failure to fulfil their obligations under the draft Convention. As a matter of legislative policy, however, shippers should not be allowed to disclaim liability in those instances where the draft Convention imposed liability on shippers, since the breach of some of the shipper's obligations, in particular where dangerous goods were involved, might cause or contribute to damage to third parties or put human life and safety in jeopardy. At times when most general cargo in liner transportation was delivered to the carrier in closed containers, the risks involved in improper handling of dangerous goods due to misinformation by shippers could not be overestimated. The safety of shipping



required strict compliance by shippers with their obligations to provide adequate information about the cargo to the carrier.

241. There was also criticism of the proposed amendment from the viewpoint of the balance of interests it purported to achieve. It was also observed that it would be wrong to assume that the carrier was always in a stronger position vis-à-vis the shipper. A significant volume of shipping was nowadays arranged by large multinational corporations or intermediaries and they were often in a position to impose their terms on carriers. Draft article 82 provided the mechanism for commercially acceptable deviations, subject to a number of conditions and compliance with some basic obligations as a matter of public policy. There was some sympathy in respect of the search for mechanisms that might allow for some contractual relief for small shippers. However, many years of discussion of possible statutory limitation of the shipper's liability had been unsuccessful, both in the Working Group and during previous attempts, such as the negotiation of the Hamburg Rules. Offering the possibility of contractual limitation, in turn, was said to be insufficient in practice, since small shippers would seldom be in a position to obtain individually negotiated transport documents.

242. Having considered all the views that were expressed, the Commission decided to approve draft article 81 and refer it to the drafting group.

#### **Draft article 82. Special rules for volume contracts**

243. Concern was expressed with respect to the provision concerning volume contracts in draft article 82. One delegation reiterated its consistent and strong opposition to the inclusion of draft article 82 in its current form. In particular, it was suggested that the text, as currently drafted, allowed too broad an exemption from the mandatory regime established in the draft Convention. Since it was felt that a large number of contracts for the carriage of goods could fall into the definition of a volume contract, the concern was expressed that derogation from the obligations of the draft Convention would be widespread and could negatively affect smaller shippers. Further, it was thought that such a result would undermine the main goal of the draft Convention, which was to harmonize the law relating to the international carriage of goods. It was suggested that possible remedies to reduce the breadth of the provision could be to restrict the definition of "volume contract" (see para. 32 above) and to further protect weaker parties to the contract of carriage by requiring that the requirement in draft article 82, subparagraph 2 (b) that the volume contract be individually negotiated or that it prominently specify the sections of the contract containing any derogations should be amended to be conjunctive rather disjunctive. There was some support in the Commission for that position. There was also a proposal to allow States to make a reservation with respect to draft article 82.

244. Concern along the same lines was expressed with respect to the effect that the provision concerning volume contracts in draft article 82 could have on small liner carriers. In that respect, it was suggested that such carriers would not have sufficient bargaining power vis-à-vis large shippers and that such carriers would find themselves in the situation of having to accept very disadvantageous terms in cases where volume contracts allowed derogation from the mandatory provisions of the draft Convention.

245. The Commission was reminded that in addition to previous efforts that had been made in the Working Group to adjust the text of draft article 82 in order to ensure the protection of parties with weaker bargaining power, additional protection had been added to the draft text as recently as at the final session of the Working Group. In

particular, it was noted that delegations at the final session of the Working Group had succeeded in amending the text of the draft provision through the addition of draft subparagraphs 2 (c) and (d). In doing so, it was noted that the Working Group had achieved a compromise acceptable to many of the delegations that had previously expressed their concerns regarding the protection of parties with weaker bargaining power (see A/CN.9/645, paras. 196-204). Support was expressed in the Commission that the compromise that had been reached should be maintained.

246. The Commission approved the substance of draft article 82 and referred it to the drafting group.

#### **Draft article 83. Special rules for live animals and certain other goods**

247. With a view to aligning the text of the draft article with the provisions of draft article 63, paragraph 1, it was agreed that the words “done with the intent to cause such loss or damage to the goods or the loss due to the delay or” should be added before the word “recklessly” in subparagraph (a).

248. Subject to that amendment, the Commission approved draft article 83 and referred it to the drafting group.

### **Chapter 17. Matters not governed by this Convention**

#### **Draft article 84. International conventions governing the carriage of goods by other modes of transport**

249. It was pointed out that draft article 84 preserved only the application of international conventions that governed unimodal carriage of goods on land, on inland waterways or by air that were already in force at the time that the Convention entered into force. That solution was said to be too narrow. Instead, the draft Convention should expressly give way both to future amendments to existing conventions as well as to new conventions on the carriage of goods on land, on inland waterways and by air. It was noted, in that connection, that an additional protocol to the Convention on the Contract for the Carriage of Goods by Road (the “CMR”) dealing with consignment notes in electronic form had recently been adopted under the auspices of the Economic Commission for Europe and that such amendments were common in the area of international transport. The Convention concerning International Carriage by Rail and Appendix B to that Convention containing the Uniform Rules concerning the Contract for International Carriage of Goods by Rail (the “CIM-COTIF”), for instance, had an amendment procedure as a result of which the 1980 Convention (“COTIF”) had been replaced with the 1999 version. Furthermore, the draft Convention should also preserve the application of any future convention on multimodal transport contracts. It was said that the provisions of the draft Convention had been mainly designed with a view to sea carriage and that it was therefore advisable to leave room for further development of the law with respect to other modes of carriage.

250. It was suggested that the words “in force at the time this Convention enters into force” should be deleted. There was some support for that proposal. Although it was said that additional protocols to existing international conventions might be seen as implicitly covered by the reference to the existing conventions they amended, the view was expressed that the draft Convention should not exclude the possibility of new instruments being developed in addition to or in replacement of the unimodal conventions contemplated by the draft article. That, it was proposed, should be done either by an expansion of the scope of the draft article or by way of appropriate reservations that Contracting States could be permitted to submit.

251. However, there were strong objections to the proposal that the draft Convention should also preserve the application of any future convention on other modes of transport that might have multimodal aspects. The draft Convention had been negotiated exactly for the purpose of covering door-to-door carriage, which in most cases meant “maritime plus” carriage. The purpose of the draft Convention would be defeated if it were to give way to any future instrument covering essentially the same type of carriage.

252. The views were divided as regards the impact of draft article 84 on future amendments to the conventions to which it referred. On the one hand, there was support for the proposition that the draft article should also encompass future amendments to existing conventions and that the draft article might need to be redrafted if that conclusion was not allowed by the current text. On the other hand, it was argued that the draft Convention should not give unlimited precedence to future amendments to those conventions. There was a risk that an amending protocol might expand the scope of application of an existing convention to such an extent that the convention in question might become applicable to multimodal carriage in circumstances other than those mentioned in draft article 84. The sensitive issue of localized damages was appropriately taken care of by draft article 27, which already envisaged future amendments to unimodal conventions so as to encompass, for instance, adjustments to liability limits that might be introduced in the future.

253. In view of the conflicting opinions that had been expressed on the matter, the Commission agreed to suspend its deliberations on the draft article.

254. Following informal consultations, it was proposed that the following phrase be inserted into the chapeau of the draft provision, after the phrase “enters into force”: “including any future amendment thereto”. Subject to the inclusion of a phrase along those lines, the Commission approved draft article 84 and referred it to the drafting group.

#### **Draft article 85. Global limitation of liability**

255. In response to a query as to the need for draft article 85, it was noted that the draft article aimed at solving situations where the carrier under the draft Convention was at the same time the ship owner under the 1976 Convention on Limitation of Liability for Maritime Claims (the “LLMC”), which subjected the combined amount of individual claims against the owner to a global liability limit. Thus, for example, in cases of a major accident where the entire cargo of a ship was lost, cargo claimants might have the right to submit individual claims up to a certain amount, but their claim might be reduced if the combined value of all claims exceeded the global limitation of liability under the other applicable convention. Global limitation of liability such as provided by the Convention on Limitation of Liability for Maritime Claims (the “LLMC”) or domestic law was an important element with a view to providing predictability in international sea carriage and should not be affected by the draft Convention.

256. There was some support for the view that the words “vessel owner” were unclear and possibly too restrictive, since the Convention on Limitation of Liability for Maritime Claims (the “LLMC”), for instance, also provided a global limit for claims against charterers and operators. One proposal to clarify the text was to replace the reference to “vessel owner” with a reference to international conventions or national laws regulating global limitation of liability “for maritime claims”. Another proposal was to qualify the words “vessel owner” by the phrase “as defined by the respective instrument”.

257. However, there was not sufficient support for either proposal. It was pointed out that the draft article merely preserved the application of other instruments, without venturing into the definition of the categories of persons to which those instruments applied. Replacing the term “vessel owners” with a reference to “maritime claims” in turn, would not be appropriate, since the draft article also preserved the application of rules on global limitation of liability of owners of inland navigation vessels and not only of seagoing vessels.

258. The Commission approved draft article 85 and referred it to the drafting group.

#### **Draft article 86. General average**

259. There was no support for a proposal to insert a definition of the term “general average”, but the Commission agreed that the various language versions should be reviewed to ensure appropriate translation.

260. The Commission approved draft article 86 and referred it to the drafting group.

#### **Draft article 87. Passengers and luggage**

261. The Commission approved the substance of draft article 87 and referred it to the drafting group.

#### **Draft article 88. Damage caused by nuclear incident**

262. After requesting the Secretariat to ascertain the current status of the nuclear conventions listed in the provision, the Commission approved the substance of draft article 88 and referred it to the drafting group.

### **Chapter 18. Final clauses**

#### **Draft article 89. Depositary**

263. The Commission approved the substance of draft article 89 and referred it to the drafting group.

#### **Draft article 90. Signature, ratification, acceptance, approval or accession**

264. In connection with draft article 90, the attention of the Commission was drawn to an invitation from the Minister of Transport of the Netherlands, the Mayor of Rotterdam and the Executive Board of the Port of Rotterdam Authority for States to visit the port of Rotterdam in the Netherlands in September 2009 to participate in an event for the celebration of the adoption of the draft Convention (see annex II). Further, if approved by the General Assembly, the Rotterdam event could include a ceremony for the signing of the draft Convention, once adopted. The event was also envisioned to include a seminar under the auspices of UNCITRAL and the International Maritime Committee (CMI). The Commission was informed that the Government of the Netherlands was prepared to assume all additional costs that might be incurred by convening a signing ceremony outside the premises of the United Nations so the organization of the proposed event and the signing ceremony would not require additional resources under the United Nations budget.

265. The proposal to host such an event in Rotterdam, the Netherlands, was accepted by acclamation by the Commission. The Commission expressed its gratitude for the generosity of the Government of the Netherlands and the City and Port of Rotterdam in offering to act as host for such an event.

266. It was observed that, given the strong positive response of the Commission to the invitation to attend a signing ceremony in Rotterdam, the Netherlands, the text of draft article 90 could be adjusted to include Rotterdam as the place at which the draft Convention would be opened for signature for a short time and the instrument could then be opened for further signature for a longer period at United Nations Headquarters in New York. There was broad support for that suggestion and the Commission agreed to delete the square brackets around the phrase “at [...] from [...] to [...] and thereafter”, as well as the square brackets after the word “at”, and to insert “Rotterdam, the Netherlands,” after “at”.

267. Following the insertion of “Rotterdam, the Netherlands,” into the first blank space in the draft provision and the deletion of the square brackets as indicated above, the Commission approved the substance of draft article 90 and referred it to the drafting group.

#### **Draft article 91. Denunciation of other conventions**

268. The Commission approved the substance of draft article 91 and referred it to the drafting group.

#### **Draft article 92. Reservations**

##### **Proposal regarding draft article 92**

269. A number of concerns with respect to the text of the draft Convention were reiterated. The Commission was reminded that concern had been raised regarding the perceived failure of the draft Convention to address specific problems relating to transport partially performed on land, on inland waterways and by air. Some examples were given in this regard, such as the failure of draft article 18, paragraph 3, to take into account non-maritime events, such as a fire on a vehicle other than a ship, or the failure of draft article 26 to address the situation of the carriage of goods in an open, unsheeted road cargo vehicle. Further, it was said that the definition of the term “volume contract” did not address the situation where the contract provided for a series of shipments by road but one single shipment by sea.

270. In addition to those perceived shortcomings in dealing with non-maritime transport, it was suggested that there was no justification for applying the draft Convention to cases where the inland leg of transport was longer than the maritime leg, in particular when the liability limit of the carrier in the case of non-localized damage would be lower than the Convention on the Contract for the Carriage of Goods by Road (the “CMR”), the Convention concerning International Carriage by Rail (the “COTIF”) or the Montreal Convention. It was further suggested that draft article 27 placed an unfair burden of proof on the shipper to determine when loss or damage could be said to be localized. Concern was also raised that, where other conventions provided a time shorter than two years for suit, it would prejudice the shipper who was relying on the two-year rule in the draft Convention if the carrier could prove that the damage occurred on a land leg to which another convention with a shorter time for suit applied. Further concerns were expressed regarding the failure of the draft Convention to provide for a direct action against the carrier performing the carriage by road or rail and for not allowing parties to opt out of the network system and adopt a single liability regime pursuant to draft article 81. In addition, it was suggested that the draft Convention would lead to a fragmentation of laws on multimodal transport contracts because of its “maritime plus” nature.

271. In order to address those perceived shortcomings in the draft Convention, it was suggested that the following text should be inserted in place of draft article 92:

“Article 92. Reservations

“1. Any State may, at the time of signature, ratification, acceptance or accession, or at any time thereafter, reserve the right to exclude the application of this Convention to contracts that provide for carriage by sea and by other modes of transport in addition to sea carriage.

“2. No other reservation is permitted to this Convention.”

272. There was some support for that proposal, in particular for the purpose of introducing additional flexibility into the draft Convention so as to allow a greater number of States to ratify it. Acceptance of the proposal, it was suggested, would lead to more widespread ratification of the international legal regime in respect of maritime transport. This would be preferable to achieving greater uniformity of the law, but at the price of ratification by fewer States. Although some delegations were not in favour of the text as drafted, they nonetheless favoured the pursuit of a possible additional compromise that would attract a greater number of States to ratify the Convention.

273. However, strong objections to the proposal were raised. It was said that the door-to-door nature of the draft Convention to provide for the commercial needs of modern container transport was an essential characteristic of the regime and that to allow States to make a reservation to such an integral part of the draft Convention would be tantamount to dismantling the instrument and nullifying years of negotiation, compromise and work that had gone into its preparation. The proposed reservation was said to be an attempt to reopen the decision that had been made regarding the door-to-door nature of the draft Convention and to attempt to re-insert the concept of mandatory national law to narrow the scope of the draft Convention, an approach that had been considered and discarded by the Working Group in pursuit of broader consensus. Such a resort to national law was said to be a dangerous move that would be contrary to the need for harmonization of the international rules governing the transport of goods, thus resulting in fragmentation of the overall regime and creating disharmony and a lack of transparency regarding the applicable rules. Further, it was pointed out that parties to the contract of carriage always had the right to negotiate a port-to-port agreement rather than a door-to-door contract and that, in many respects, the draft Convention had left certain matters open to applicable law, thus leaving ample scope for national rules in some areas.

274. In addition, it was noted that the perceived problems in the draft Convention said to have led to the proposal had been thoroughly considered by the Working Group and by the Commission and that the prevailing view did not regard the solutions adopted in those areas as unsatisfactory. It was strongly felt that adopting the proposed reservation would be to act in a manner contrary to the delicate compromise that was reached by the Working Group in January 2008 (see A/CN.9/645, paras. 196-204). In that vein, a number of delegations cited their own difficulties with certain aspects of the Convention as currently drafted, including contentious provisions such as draft article 18, paragraph 3, or even requests to remove entire chapters, but noted their determination to maintain the elements of the compromise agreement, encouraging those who were more reluctant to relinquish their criticism of the draft Convention and join the broader consensus. A strong desire was evinced to retain the various compromises resulting in the current text of the draft Convention, lest the adjustment of one or two points of agreement lead to unravelling the entire compromise and reopening the discussion on a host of related

issues. As such, there was strong support in the Commission for retaining the text of draft article 92 as currently drafted.

#### **Proposal for draft article 92 bis**

275. Since a number of delegations had opposed as being too radical the proposal to seek broader approval of the draft Convention by providing for a reservation to restrict the application of the draft Convention to maritime transport, but had left open the possibility of coming to another compromise, a further proposal was made. In an effort to enable States that had expressed concerns regarding the application of national law and the level of the carrier's limitation on liability to ratify the text, the following new provision was proposed:

“Article 92 bis. Special declarations

“A State may according to article 93 declare that:

“(a) It will apply the Convention only to maritime carriage; or

“(b) It will, for a period of time not exceeding ten years after entry into force of this Convention, substitute the amounts of limitation of liability set out in article 61, paragraph 1, by the amounts set out in article 6, paragraph 1 (a) of the United Nations Convention on Carriage of Goods by Sea, concluded at Hamburg on 31 March 1978. Such a declaration must include both amounts.”

276. In support of the proposal, it was noted that subparagraph (a) of the proposed article 92 bis was intended to be more limited than the other new reservation proposal (see para. 271 above) and thus it presented a less controversial method of narrowing the scope of application of the Convention to maritime carriage. Further, it was suggested that subparagraph (b) of the proposed article 92 bis could accommodate those who had expressed concerns about the level of the limitation on a carrier's liability currently in draft article 61, in that it offered those States the opportunity to adopt the level of limitation for the carrier's liability in the Hamburg Rules and to phase in their adherence to the higher limits over a 10-year period. That approach, it was suggested, could encourage broader approval of the draft Convention.

277. Although there was some support for the proposal, in particular for subparagraph (b) of the proposal, which was described as an innovative idea to gain broader acceptance of the text, the prevailing view in the Commission was that the compromise that had been reached among a large number of States in January 2008 (see A/CN.9/645, paras. 196-204) should be maintained, which precluded adoption of the proposal. Further, concerns were reiterated regarding the need to retain the door-to-door nature of the draft Convention and the likelihood that approval of the proposal could have the undesirable effect of causing the entire compromise to unravel and lead to renewed discussion on a number of issues of concern to various delegations.

278. The Commission decided against the inclusion of a new draft article 92 bis in the text of the Convention.

#### **Draft article 93. Procedure and effect of declarations**

279. There was support for the view that the second sentence of paragraph 1 of draft article 93, which required the declarations referred to therein, including the declaration contemplated in draft article 94, paragraph 1, to be made at the time of signature, ratification, acceptance, approval or accession, seemed to contradict paragraph 1 of draft

article 94, which allowed a Contracting State to amend a declaration made pursuant to that article by submitting another declaration at any time. It was noted that the apparent contradiction was not limited to draft article 94, paragraph 1, but also appeared to exist in respect of draft article 95, paragraph 2. It was pointed out that in order for the declarations envisaged in draft articles 94 and 95 to operate properly they must be capable of being amended from time to time to allow information about extensions to more territorial units or about changes in competence to be communicated to other Contracting States.

280. For the purpose of eliminating the perceived contradiction, the Commission agreed to insert the word “initial” before the word “declarations” in the second sentence of paragraph 1 of draft article 93. Subject to that amendment, the Commission approved the draft article and referred it to the drafting group.

#### **Draft article 94. Effect in domestic territorial units**

281. It was pointed out that draft article 94 contained an important provision to facilitate the ratification of the draft Convention by multi-unit States where legislative competence on private law matters was shared. It was noted, in that connection, that paragraph 3 of the draft article dealt with the effect that the extension of the Convention to some but not all the territorial units of a Contracting State might have on the geographic scope of application of the Convention.

282. Paragraph 3, it was further noted, was based on a similar provision in article 93, paragraph 3, of the United Nations Sales Convention. However, it was said that paragraph 3 required some additional refinement since the definition of the geographic scope of application of the draft Convention under draft article 5 was more elaborate than that of the United Nations Sales Convention and was not linked to the notion of place of business. In order to address that problem, it was suggested that paragraph 3 of the draft article should be replaced with text along the following lines:

“If, by virtue of a declaration pursuant to this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, the relevant connecting factor for the purposes of articles 1, paragraph 28, 5, paragraph 1, 20, subparagraph 1 (a), and 69, subparagraph 1 (b), is considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends.”

283. The Commission generally recognized the need for addressing the problem that had been identified, but was of the view that it might be preferable to avoid references to connecting factors in specific provisions of the draft Convention, since, at least as far as draft article 5 was concerned, not all of the connecting factors needed to be located in one and the same Contracting State in order to trigger the application of the draft Convention.

284. The Commission approved the substance of draft article 94 and referred it to the drafting group, with a request to propose an alternative text to draft paragraph 3 to reflect its deliberations.

#### **Draft article 95. Participation by regional economic integration organizations**

285. The view was expressed that paragraph 3 of draft article 95, which stated that reference to a “Contracting State” or “Contracting States” in the Convention applied equally to a regional economic integration organization when the context so required, seemed to contradict the last sentence of paragraph 1, which provided that when the



number of Contracting States was relevant in the draft Convention, the regional economic integration organization did not count as a Contracting State in addition to its member States that were Contracting States.

286. In response, it was observed that the interpretative provision in paragraph 3 was useful since international organizations were not generally regarded as equals to States under public international law and would not therefore be necessarily regarded as being covered by references to “Contracting States” in the Convention. To the extent, however, that they joined the Convention in their own right, it would be appropriate to extend to them, as appropriate, some of the provisions that applied to Contracting States, such as, for example, draft article 93 on the procedure and effect of declarations. The last sentence of paragraph 1, in turn, made it clear that a regional economic integration organization would not count as a “State” where the number of Contracting States was relevant, for instance in connection with the minimum number of ratifications for the entry into force of the Convention under article 96, paragraph 1. It was further noted that provisions along the lines of the draft article had become customary in many international conventions.

287. The Commission approved draft article 95 and referred it to the drafting group.

#### **Draft article 96. Entry into force**

288. The Commission approved draft article 96 and referred it to the drafting group.

#### **Draft article 97. Revision and amendment**

289. The Commission approved draft article 97 and referred it to the drafting group.

#### **Draft article 98. Denunciation of this Convention**

290. The Commission approved draft article 98 and referred it to the drafting group.

#### **Signature clause**

291. The text of the draft signature clause was as follows:

“DONE at [...], this [...] day of [...], [...], in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

“IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed this Convention.”

292. The Commission approved the substance of the signature clause.

#### **Title of the convention**

293. The Commission approved the title “Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea” for the draft Convention.

### Preamble

294. The Commission considered a proposal to insert the following text as a draft preamble:

*“The States Parties to this Convention,*

*“Reaffirming* their belief that international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,

*“Convinced* that the progressive harmonization and unification of international trade law, in reducing or removing legal obstacles to the flow of international trade, significantly contributes to universal economic cooperation among all States on a basis of equality, equity and common interest and to the well-being of all peoples,

*“Recognizing* the significant contribution of the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, signed in Brussels on 25 August 1924, and its amending Protocols, and of the United Nations Convention on the Carriage of Goods by Sea, signed in Hamburg on 31 March 1978, to the harmonization of the law governing the carriage of goods by sea,

*“Mindful* of the technological and commercial developments that have taken place since the adoption of those conventions and of the need to modernize and consolidate them,

*“Noting* that shippers and carriers do not have the benefit of a binding universal regime to support the operation of contracts of carriage involving various modes of transport,

*“Believing* that the adoption of uniform rules to govern international contracts of carriage wholly or partly by sea will promote legal certainty, improve the efficiency of international carriage of goods and facilitate new access opportunities for previously remote parties and markets, thus playing a fundamental role in promoting trade and economic development, both domestically and internationally,

*“Have agreed as follows:”*

295. The Commission agreed to delete the word “amending” before the word “Protocols” in the third paragraph of the draft preamble. The Commission also agreed to reverse the order of the words “modernize and consolidate” in the fourth paragraph. The Commission further agreed to insert the word “maritime” before the word “carriage” in the fifth paragraph and to replace the word “various” with the word “other” in the same paragraph.

296. Subject to those amendments, the Commission approved the substance of the draft preamble and referred it to the drafting group.

### C. Report of the drafting group

297. The Commission requested a drafting group established by the Secretariat to review the draft Convention with a view to ensuring consistency between the various language versions. At the close of its deliberations on the draft Convention, the

Commission considered the report of the drafting group and approved the draft Convention. The Commission requested the Secretariat to review the text of the draft Convention from a purely linguistic and editorial point of view before its adoption by the General Assembly.

#### **D. Decision of the Commission and recommendation to the General Assembly**

298. At its 887th meeting, on 3 July 2008, the Commission adopted by consensus the following decision and recommendation to the General Assembly:

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

*“Recalling that at its thirty-fourth and thirty-fifth sessions, in 2001 and 2002, it entrusted its Working Group III (Transport Law) with the preparation of an international legislative instrument governing door-to-door transport operations that involve a sea leg,*

*“Noting that the Working Group devoted thirteen sessions, held from 2002 to 2008, to the preparation of a draft convention on the carriage of goods wholly or partly by sea,*

*“Having considered the articles of the draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea at its forty-first session, in 2008,*

*“Noting the fact that all States and interested international organizations were invited to participate in the preparation of the draft Convention at all the sessions of the Working Group and at the forty-first session of the Commission, either as a member or as an observer, with a full opportunity to speak,*

*“Also noting that the text of the draft Convention was circulated for comment before the forty-first session of the Commission to all Governments and intergovernmental organizations invited to attend the meetings of the Commission and the Working Group as observers and that such comments were before the Commission at its forty-first session (A/CN.9/658 and Add.1-14),*

*“Considering that the draft Convention has received sufficient consideration and has reached the level of maturity for it to be generally acceptable to States,*

*“Conscious of the large and growing number of situations where transport, in particular transport of containerized goods, is operated under door-to-door contracts,*

*“Convinced that the modernization and harmonization of rules governing door-to-door transport operations that involve a sea leg would reduce legal obstacles to the flow of international trade, promote trade among all States on a basis of equality, equity and common interest, and thereby significantly contribute to the development of harmonious international economic relations and the well-being of all peoples,*

*“Expressing its appreciation to the Comité Maritime International for the advice it provided during the preparation of the draft Convention,*

“1. *Submits* to the General Assembly the draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, as set forth in annex I to the present report;

“2. *Recommends* that the General Assembly, taking into account the extensive consideration given to the draft Convention by the Commission and its Working Group III (Transport Law), consider the draft Convention with a view to adopting, at its sixty-third session, on the basis of the draft Convention approved by the Commission, a United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea and authorizing a signing ceremony to be held [as soon as practicable in 2009] in Rotterdam, the Netherlands, upon which the Convention would be open for signature by States.”

#### IV. Procurement: progress report of Working Group I

299. At its thirty-sixth and thirty-seventh sessions, in 2003 and 2004, the Commission considered<sup>7</sup> the possible updating of the *UNCITRAL Model Law on Procurement of Goods, Construction and Services with Guide to Enactment*<sup>8</sup> on the basis of notes by the Secretariat (A/CN.9/539 and Add.1 and A/CN.9/553).<sup>9</sup> At its thirty-seventh session, the Commission agreed that the Model Law would benefit from being updated to reflect new practices, in particular those which resulted from the use of electronic communications in public procurement, and the experience gained in the use of the Model Law as a basis for law reform in public procurement as well as possible additional issues. The Commission decided to entrust the preparation of proposals for the revision of the Model Law to its Working Group I (Procurement) and gave the Working Group a flexible mandate to identify the issues to be addressed in its deliberations. The Commission noted that, in updating the Model Law, care should be taken not to depart from the basic principles of the Model Law and not to modify the provisions whose usefulness had been proven.<sup>10</sup>

300. The Working Group commenced its work pursuant to that mandate at its sixth session (Vienna, 30 August-3 September 2004). At that session, it decided to proceed with the in-depth consideration of the topics suggested in the notes by the Secretariat (A/CN.9/WG.I/WP.31 and A/CN.9/WG.I/WP.32)<sup>11</sup> in sequence at its future sessions (A/CN.9/568, para. 10).

301. At its thirty-eighth and thirty-ninth sessions, in 2005 and 2006, the Commission took note of the reports of the sixth (Vienna, 30 August-3 September 2004), seventh (New York, 4-8 April 2005), eighth (Vienna, 7-11 November 2005) and ninth (New York, 24-28 April 2006) sessions of Working Group I (A/CN.9/568, A/CN.9/575, A/CN.9/590 and A/CN.9/595). At its thirty-ninth session, the Commission recommended that the Working Group, in updating the Model Law and the Guide,

<sup>7</sup> *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17* and corrigendum (A/49/17 and Corr.1), annex I.

<sup>8</sup> United Nations publication, Sales No. E.98.V.13.

<sup>9</sup> *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 17* (A/58/17), paras. 225-230, and *ibid.*, *Fifty-ninth Session, Supplement No. 17* (A/59/17), paras. 79-82.

<sup>10</sup> *Ibid.*, *Fifty-ninth Session, Supplement No. 17* (A/59/17), paras. 81-82.

<sup>11</sup> *Ibid.*, *Sixtieth Session, Supplement No. 17* (A/60/17), para. 171.

should take into account the question of conflicts of interest and consider whether any specific provisions addressing that question in the Model Law would be warranted.<sup>12</sup>

302. At its fortieth session, the Commission had before it the reports of the tenth (Vienna, 25-29 September 2006) and eleventh (New York, 21-25 May 2007) sessions of the Working Group (A/CN.9/615 and A/CN.9/623).<sup>13</sup> The Commission was informed that the Working Group had continued to consider the following topics: (a) the use of electronic means of communication in the procurement process; (b) aspects of the publication of procurement-related information, including revisions to article 5 of the Model Law and the publication of forthcoming procurement opportunities; (c) the procurement technique known as the electronic reverse auction; (d) abnormally low tenders; and (e) the method of contracting known as the framework agreement.

303. At its current session, the Commission took note of the reports of the twelfth (Vienna, 3-7 September 2007) and thirteenth (New York, 7-11 April 2008) sessions of the Working Group (A/CN.9/640 and A/CN.9/648).

304. At its twelfth session, the Working Group adopted the timeline for its deliberations, later modified at its thirteenth session (A/CN.9/648, annex), and agreed to bring an updated timeline to the attention of the Commission on a regular basis.

305. 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.

306. At that 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, and A/CN.9/WG.I/WP.45 and Add.1) 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.

307. The Commission commended the Working Group and the Secretariat for the progress made in its work and reaffirmed its support for the review being undertaken and for the inclusion of novel procurement practices and techniques in the Model Law. The Working Group was invited 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. (For the forthcoming two sessions of the Working Group, see paras. 397 and 398 below.)

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

308. 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

<sup>12</sup> *Ibid.*, *Sixty-first Session, Supplement No. 17* (A/61/17), para. 192.

<sup>13</sup> *Ibid.*, *Sixty-second Session, Supplement No. 17* (A/62/17), part I, paras. 166-169.

Arbitration Rules of the United Nations Commission on International Trade Law (the UNCITRAL Arbitration Rules).

309. At that session, the Commission 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.<sup>14</sup>

310. At its fortieth session, in 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.<sup>15</sup>

311. At that session, 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 include more detailed provisions concerning investor-State dispute settlement or administered arbitration remained to be considered by the Working Group at future sessions.<sup>16</sup>

312. At its current session, the Commission had before it the reports of the forty-seventh (Vienna, 10-14 September 2007) and forty-eighth (New York, 4-8 February 2008) sessions of the Working Group (A/CN.9/641 and A/CN.9/646). 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.

313. The Commission noted that the Working Group had discussed at its forty-eighth session the extent to which the revised UNCITRAL Arbitration Rules should include more detailed provisions concerning investor-State dispute settlement or administered arbitration. 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 (A/CN.9/646, para. 69).

314. 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 that the Working Group might have to undertake in the future should not delay the completion of the revision of the

<sup>14</sup> *Ibid.*, *Sixty-first Session, Supplement No. 17* (A/61/17), para. 184.

<sup>15</sup> *Ibid.*, *Sixty-second Session, Supplement No. 17* (A/62/17), part I, para. 174.

<sup>16</sup> *Ibid.*, para. 175.

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. Written observations regarding that issue were presented by one delegation (A/CN.9/662) and a statement was also made on behalf of the Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises. The Commission was 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 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. 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 requested the Secretariat, resources permitting, to undertake preliminary research and compile information regarding current practices. The Commission urged member States to contribute broad information to the Secretariat regarding their practices with respect to transparency in investor-State arbitration. It was 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.

315. 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.

316. With respect to future work in the field of settlement of commercial disputes, the Commission 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. (For the forthcoming two sessions of the Working Group, see paras. 397 and 398 below.)

## **VI. Insolvency law**

### **A. Progress report of Working Group V**

317. The Commission recalled that at its thirty-ninth session, in 2006, it had agreed 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 finance 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.

318. The Commission noted with appreciation the progress of the Working Group regarding consideration of the treatment of corporate groups in insolvency as reflected in the reports on its thirty-third (Vienna, 5-9 November 2007) and thirty-fourth (New York, 3-7 March 2008) sessions (A/CN.9/643 and A/CN.9/647) and commended the Secretariat for the working papers and reports prepared for those sessions.<sup>17</sup>

## **B. Facilitation of cooperation and coordination in cross-border insolvency proceedings**

319. The Commission recalled that at its thirty-ninth session, in 2006, it had 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.<sup>18</sup> At the first part of its fortieth session (Vienna, 25 June-12 July 2007) the Commission considered a preliminary report reflecting experience with respect to negotiating and using cross-border insolvency protocols (A/CN.9/629) and emphasized the practical importance of facilitating cross-border cooperation in insolvency cases. It 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.<sup>19</sup>

320. At its present 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. Because of timing and translation constraints, that compilation could not be submitted to the present session of the Commission.

321. The Commission expressed its satisfaction with respect to the progress made on the work of compiling practical experience with negotiating and using cross-border insolvency agreements. It 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. (For the decision on the

<sup>17</sup> *Ibid.*, subparas. 209 (a) and (b).

<sup>18</sup> *Ibid.*, *Sixty-first Session, Supplement No. 17* (A/61/17), subpara. 209 (c).

<sup>19</sup> *Ibid.*, *Sixty-second Session, Supplement No. 17* (A/62/17), part I, paras. 190 and 191.



length of the forty-second session of the Commission, see para. 395 below.) (For the conclusions of the Commission regarding insolvency matters that are of concern to Working Group VI (Security Interests), see para. 326 below.)

## VII. Security interests: progress report of Working Group VI

322. 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).<sup>20</sup> The note took into account the conclusions reached at a colloquium on security rights in intellectual property (Vienna, 18 and 19 January 2007), which had been organized by the Secretariat in cooperation with the World Intellectual Property Organization and during which several suggestions were made with respect to adjustments that would need to be made to the draft Legislative Guide on Secured Transactions (“the draft Legislative Guide”) to address issues specific to intellectual property financing.<sup>21</sup>

323. At that session, the Commission noted that a significant part of corporate wealth was included in intellectual property. It was also noted that coordination between secured transactions law and intellectual property law under the regimes existing in many States was not sufficiently developed to accommodate financing practices in the context of which credit was extended with intellectual property being used as security. In addition, it was noted that the draft Legislative Guide did not provide sufficient guidance to States as to the adjustments that would need to be made to address the needs of financing practices relating to intellectual property. Moreover, it was noted that work should be undertaken as expeditiously as possible to ensure that the draft Legislative Guide gave complete and comprehensive guidance in that regard.<sup>22</sup> 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 law and intellectual property law, the Commission decided to entrust Working Group VI (Security Interests) with the preparation of an annex to the draft Legislative Guide specifically dealing with security rights in intellectual property (“the Annex to the Legislative Guide”).<sup>23</sup>

324. At its resumed fortieth session (Vienna, 10-14 December 2007), the Commission finalized and adopted the *UNCITRAL Legislative Guide on Secured Transactions* on the understanding that the annex to the *Guide* would be prepared subsequently.<sup>24</sup>

325. At its current session, the Commission had before it the report (A/CN.9/649) of Working Group VI on the work of its thirteenth session (New York, 19-23 May 2008). The Commission noted with satisfaction the good progress made during the initial discussions at that session, based on the note by the Secretariat entitled “Security rights in intellectual property rights” (A/CN.9/WG.VI/WP.33 and Add.1), which had enabled

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<sup>20</sup> Ibid., para. 155.

<sup>21</sup> UNCITRAL Second International Colloquium on Secured Transactions: Security Interests in Intellectual Property Rights, held in Vienna on 18 and 19 January 2007; for further information about the Colloquium, see the UNCITRAL website ([www.uncitral.org/uncitral/en/commission/colloquia/2secint.html](http://www.uncitral.org/uncitral/en/commission/colloquia/2secint.html)).

<sup>22</sup> *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17 (A/62/17)*, part I, para. 156.

<sup>23</sup> Ibid., paras. 157 and 162.

<sup>24</sup> Ibid., part II, paras. 99 and 100.

the Working Group to request the Secretariat to prepare a first draft of the annex to the *Guide* dealing with security rights in intellectual property (A/CN.9/649, para. 13).

326. The Commission also noted that Working Group VI 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 in order to justify their discussion in the annex to the *Guide*. Working Group VI had decided to revisit those matters at a future meeting and to recommend that Working Group V (Insolvency Law) be requested to consider them. The Commission 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. (For the subsequent two sessions of Working Group VI and of Working Group V, see paras. 397 and 398 below.)

## VIII. Possible future work in the area of electronic commerce

327. In 2004, having completed its work on the 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 (see A/CN.9/571, para. 12).

328. 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.<sup>25</sup>

329. In 2006, UNCITRAL considered a note prepared by the Secretariat pursuant to that request (A/CN.9/604). The note identified the following areas as possible components of a comprehensive reference document: (a) authentication and cross-border recognition of electronic signatures; (b) liability and standards of conduct for information-services providers; (c) electronic invoicing and legal issues related to supply chains in electronic commerce; (d) transfer of rights in tangible goods and other rights through electronic communications; (e) unfair competition and deceptive trade practices in electronic commerce; and (f) privacy and data protection in electronic commerce. The note also identified other issues that could be included in such a document, although in a more summary fashion: (a) protection of intellectual property rights; (b) unsolicited electronic communications (spam); and (c) cybercrime.

330. At that session, there was support for the view that the task of legislators and policymakers, in particular in developing countries, might be greatly facilitated if the Commission were to formulate a comprehensive reference document dealing with the

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<sup>25</sup> *Ibid.*, *Sixtieth Session, Supplement No. 17* (A/60/17), para. 214.

topics identified by the Secretariat. Such a document, it was also said, might also assist the Commission to identify areas in which it might itself undertake future harmonization work. However, there were also concerns that the range of issues identified was too wide and that the scope of the comprehensive reference document might need to be reduced. The Commission eventually agreed to ask its 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, for review at its fortieth session, in 2007.<sup>26</sup>

331. The sample chapter that the Secretariat prepared pursuant to that request (A/CN.9/630 and Add.1-5) was submitted to the Commission at its fortieth session. The Commission commended the Secretariat for the preparation of the sample chapter and requested the Secretariat to publish it as a stand-alone publication. Although the Commission was not in favour of requesting the Secretariat to undertake a similar work in other areas with a view to preparing a comprehensive reference document, the Commission agreed to request the Secretariat to continue to follow legal developments in the relevant areas closely, with a view to making appropriate suggestions in due course.<sup>27</sup>

332. The Secretariat has continued to follow technological developments and new business models in the area of electronic commerce that may have an impact on international trade. One area that the Secretariat has examined closely concerns legal issues arising out of the use of single windows in international trade. The Secretariat had been invited by the World Customs Organization (WCO) and the United Nations Centre for Trade Facilitation and Electronic Business (UN/CEFACT), to consider possible topics of cooperation with those organizations in that area.

333. At the current session, the Commission had before it a note by the Secretariat (A/CN.9/655) setting out policy considerations and legal issues in the implementation and operation of single windows and submitting proposals for possible future work in cooperation with other international organizations. The note also summarized the proposal by WCO for joint work (*ibid.*, paras. 35-39).

334. The Commission was informed that single windows could enhance the availability and handling of information, expedite and simplify information flows between traders and Governments and result in a greater harmonization and sharing of the relevant data across governmental systems, bringing meaningful gains to all parties involved in cross-border trade. The Commission noted that the use of single windows could result in improved efficiency and effectiveness of official controls and could reduce costs for both Governments and traders as a result of better use of resources. At the same time, the Commission also noted that the implementation and operation of single windows gave rise to a number of legal issues including, for example, the legislative authority to operate single windows; identification, authentication and authorization to exchange documents and messages through single windows; data protection; liability of operators of single windows; and legal validity of documents exchanged in electronic form.

335. The Commission also heard a proposal for the Commission to 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. Such work, it was proposed, would likely focus to some extent on the use of electronic

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<sup>26</sup> *Ibid.*, *Sixty-first Session, Supplement No. 17* (A/61/17), para. 216.

<sup>27</sup> *Ibid.*, *Sixty-second Session, Supplement No. 17* (A/62/17), part I, para. 195.

registries, but should recognize that specific solutions would vary based on sector and application requirements. The proposed project would include a clear set of high-level principles that could be incorporated into any international system for transferable records. It was suggested that additional guidance could be provided to assist States, international organizations and industries to assess the legal risks and 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 that 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.

336. The Commission agreed that it would be worthwhile to study the legal aspects involved in implementing a cross-border single window facility with a view to formulating a comprehensive international reference document to which legislators, Government policymakers, single window operators and other stakeholders could refer for advice on legal aspects of creating and managing a single window designed to handle cross-border transactions. The Commission's involvement in such a project in cooperation with WCO and other organizations would have several benefits, including: (a) better coordination of work between the Commission, WCO and UN/CEFACT; (b) being able to influence the content of a trade-facilitation text that may contain significant legislative aspects; and (c) promoting the use of UNCITRAL standards in the countries using the future reference document.

337. The Commission also agreed that it would be worthwhile for the Secretariat to keep under examination legal issues related to electronic equivalents to negotiable documents and other electronic systems for the negotiation and transfer of rights in goods, securities and other rights in electronic form. It was also stated that such work might reveal elements of commonality between single windows and electronic equivalents to negotiable documents. The Commission was cautioned, however, that at present the project was not ripe for an intergovernmental working group as it had not yet been determined whether there was a need for any additional legislative work on the issues of negotiability in an electronic environment. It was also suggested that the organization of a colloquium by the Secretariat might help to identify specific areas in which the Commission might usefully undertake work in the future.

338. The Commission requested the Secretariat, at an initial stage, to engage actively, in cooperation with WCO and with the involvement of experts, in respect of the single window project and to report to the Commission on the progress of that work at its next session. The Commission agreed to authorize holding a Working Group session in the spring of 2009, after full consultation with States, should this be warranted by the progress of work done in cooperation with WCO.

## **IX. Possible future work in the area of commercial fraud**

### **A. Work on indicators of commercial fraud**

339. It was recalled that the Commission at its thirty-fifth to fortieth sessions, from 2002 to 2007, had considered possible future work on commercial fraud.<sup>28</sup> It was in

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<sup>28</sup> *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*

particular recalled that at its thirty-seventh session, in 2004, with a view towards education, training and prevention, the Commission had agreed that the preparation of lists of common features present in typical fraudulent schemes could be useful as educational material for participants in international trade and other potential targets of perpetrators of fraud to the extent that such lists would help potential targets protect themselves and avoid becoming victims of fraudulent schemes. While it was not proposed that the Commission itself or its intergovernmental working groups should be directly involved in that activity, it was agreed that the Secretariat should consider preparing, in close consultation with experts, such materials listing common features present in typical fraudulent schemes and that the Secretariat would keep the Commission informed of progress in that regard.<sup>29</sup>

340. At its fortieth session (Vienna, 25 June-12 July and 10-14 December 2007) the Commission was informed that the Secretariat had, as requested, continued its work in conjunction with experts and other interested organizations with respect to identifying common features of fraudulent schemes in order to prepare materials of an educational nature for the purpose of preventing the success of fraudulent schemes. The results of that work were reflected in a note by the Secretariat entitled "Indicators of commercial fraud" (A/CN.9/624 and Add.1 and 2). The Commission at that session commended the Secretariat, the experts and other interested organizations that had collaborated on the preparation of the indicators of commercial fraud for their work on the difficult task of identifying the issues and in drafting materials that could be of great educational and preventive benefit. At its fortieth session, the Commission requested the Secretariat to circulate the materials on indicators of commercial fraud for comment prior to the forty-first session of the Commission.<sup>30</sup>

341. By a note verbale dated 8 August 2007 and a letter dated 20 September 2007, the draft text of the indicators of commercial fraud was circulated for comment to States and to intergovernmental and international non-governmental organizations that were invited to attend the meetings of the Commission and its working groups as observers.

342. At its current session, the Commission had before it the comments of States and organizations on the indicators of commercial fraud submitted to the Secretariat (A/CN.9/659 and Add.1 and 2) and the text of the indicators that had been circulated (A/CN.9/624 and Add.1 and 2). Following its consideration of the comments of Governments and international organizations, the Commission reiterated its support for the preparation and dissemination of the indicators of commercial fraud, which were said to represent an extremely useful approach to a difficult problem. The indicators, it was said, would be an important and credible addition to the arsenal of weapons available in the battle against fraudulent practices, which were so detrimental to the commercial world.

343. The Commission considered how best to proceed with respect to completing the work on the indicators of commercial fraud. Given the technical nature of the comments received and bearing in mind that such treatment should keep separate any criminal law aspects of commercial fraud, the Secretariat was requested to make such adjustments and additions as were advisable to improve the materials and then to publish the materials as a Secretariat informational note for educational purposes and fraud

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(A/60/17), paras. 216-220; *ibid.*, *Sixty-first Session, Supplement No. 17 (A/61/17)*, paras. 211-217; and *ibid.*, *Sixty-second Session, Supplement No. 17 (A/62/17)*, part I, paras. 196-203.

<sup>29</sup> *Ibid.*, *Fifty-ninth Session, Supplement No. 17 (A/59/17)*, para. 112.

<sup>30</sup> *Ibid.*, *Sixty-second Session, Supplement No. 17 (A/62/17)*, part I, para. 200.

prevention. The Commission was of the view that the materials could be incorporated by the Secretariat as a component of its broader technical assistance work, which could include dissemination and explanation to Governments and international organizations intended to enhance the educational and preventive advantages of the materials. Further, Governments and international organizations could be encouraged in turn to publicize the materials and make use of them in whatever manner was appropriate, including tailoring them to meet the needs of various audiences or industries.

344. In terms of additional future work in the area of commercial fraud, one possible topic that was suggested was the creation of recommendations regarding fraud prevention. The Commission agreed that the publication of the indicators on commercial fraud and their incorporation into technical assistance work were very useful steps to be taken in the fight against such fraudulent schemes, leaving open the question of future work in the area to be considered by the Secretariat, which could make appropriate recommendations to the Commission.

## **B. Collaboration with the United Nations Office on Drugs and Crime with respect to commercial and economic fraud**

345. At its thirty-eighth session, in 2005, the Commission's attention was drawn to Economic and Social Council resolution 2004/26 of 21 July 2004, pursuant to which an intergovernmental expert group would prepare a study on fraud and the criminal misuse and falsification of identity and develop on the basis of such a study relevant practices, guidelines or other materials, taking into account in particular the relevant work of UNCITRAL. The resolution also recommended that the United Nations Office on Drugs and Crime (UNODC) serve as secretariat for the intergovernmental expert group, in consultation with the secretariat of UNCITRAL.<sup>31</sup>

346. At its thirty-ninth session, in 2006,<sup>32</sup> and at its fortieth session, in 2007, the Commission had been informed that two meetings of the intergovernmental expert group convened by UNODC had taken place (in March 2005 and January 2007), with participation by the UNCITRAL secretariat, and that the expert group had completed its work on the Study on Fraud and the Criminal Misuse and Falsification of Identity (E/CN.15/2007/8 and Add.1-3).<sup>33</sup> The Commission was informed at its fortieth session<sup>34</sup> that the Commission on Crime Prevention and Criminal Justice had considered the study at its sixteenth session (Vienna, 23-27 April 2007)<sup>35</sup> and had proposed a draft resolution for the Economic and Social Council with a number of recommendations, including encouraging the promotion of mutual understanding and cooperation between public- and private-sector entities through initiatives aimed at bringing together various stakeholders and facilitating the exchange of views and information among them and requesting UNODC to facilitate such cooperation in consultation with the UNCITRAL secretariat, pursuant to Council resolution 2004/26.<sup>36</sup> The Council subsequently adopted, as resolution 2007/20 of 26 July 2007, the draft resolution proposed by the Crime Commission.

<sup>31</sup> *Ibid.*, *Sixtieth Session, Supplement No. 17 (A/60/17)*, para. 217.

<sup>32</sup> *Ibid.*, *Sixty-first Session, Supplement No. 17 (A/61/17)*, paras. 211-217.

<sup>33</sup> *Ibid.*, *Sixty-second Session, Supplement No. 17 (A/62/17)*, part I, paras. 199-203.

<sup>34</sup> *Ibid.*

<sup>35</sup> See *Official Records of the Economic and Social Council, 2007, Supplement No. 10 (E/2007/30/Rev.1)*.

<sup>36</sup> *Ibid.*, chap. I, sect. B, draft resolution II.

347. At its current session, the Commission was advised that the UNODC secretariat had continued its work in pursuing various aspects of fraud, including work on identity fraud. In keeping with the request of the Commission at its previous session,<sup>37</sup> the UNCITRAL secretariat had cooperated with UNODC in order to provide appropriate private sector and commercial expertise. The Commission noted that information with interest and requested its secretariat to continue to cooperate with and to assist UNODC in its work with respect to commercial and economic fraud and to report to the Commission regarding any developments in that respect.

## X. Fiftieth anniversary of the New York Convention

348. The General Assembly adopted on 6 December 2007 resolution 62/65 in which it recognized the value of arbitration as a method of settling disputes in international commercial relations in a manner that contributed to harmonious commercial relations, stimulated international trade and development and promoted the rule of law at the international and national levels. The Assembly expressed its conviction that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958<sup>38</sup> (the “New York Convention”), strengthened respect for binding commitments, inspired confidence in the rule of law and ensured fair treatment in the resolution of disputes arising over contractual rights and obligations.

349. The General Assembly emphasized the necessity for further national efforts to achieve universal adherence to the Convention (which then had 142 States parties), together with its uniform interpretation and effective implementation. The Assembly expressed its hope that States that were not yet parties to the Convention would soon become parties to it, which would ensure that the legal certainty afforded by the Convention was universally enjoyed, decrease the level of risk and transactional costs associated with doing business and thus promote international trade. In that context, the Assembly welcomed the initiatives being undertaken by various organs and agencies within and outside the United Nations system to organize conferences and other similar events to celebrate the fiftieth anniversary of the Convention and encouraged the use of those events for the promotion of wider adherence to the Convention and greater understanding of its provisions and their uniform interpretation and effective implementation. The Assembly requested the Secretary-General to increase efforts to promote wider adherence to the Convention and its uniform interpretation and effective implementation.

350. At its current session, the Commission was informed that a one-day conference, organized jointly by the United Nations and the International Bar Association, was held in New York on 1 February 2008. More than 600 people from 50 countries participated in the event. Leading arbitration experts from more than 20 different States gave reports on matters such as the history and significance of the Convention, practical perspectives on the enforcement of arbitration agreements and arbitral awards, the interplay between the Convention and other international texts and national legislation on arbitration, the recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the New York Convention, the procedural framework in which the New York Convention operated and opportunities and challenges for the future. The New York Convention was praised as one of the most important and successful United

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<sup>37</sup> *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17 (A/62/17)*, part I, para. 203.

<sup>38</sup> United Nations, *Treaty Series*, vol. 330, No. 4739.

Nations treaties in the area of international trade law and as a landmark instrument for the legal effectiveness of international arbitration. Interventions underlined the importance of pursuing efforts to promote the Convention and to disseminate information on its interpretation, including by organizing judicial colloquiums.

351. The Commission was also informed that a conference to celebrate the anniversary of the New York Convention had been organized on 13 and 14 March 2008 in Vienna under the auspices of UNCITRAL and the International Arbitral Centre of the Austrian Federal Economic Chamber. Furthermore, part of the conference held by the International Council for Commercial Arbitration (Dublin, 8-10 June 2008) had been dedicated to celebrating and discussing the Convention. Other conferences dedicated to the Convention were being planned in Kuala Lumpur and Cairo.

352. The Commission expressed its appreciation to the organizers of the conferences and requested the Secretariat to continue monitoring such events and encouraged it to participate actively in initiatives for the promotion of the New York Convention. In that respect, the Commission also noted the importance of the project on monitoring the legislative implementation of the Convention (see paras. 353-360 below) as one that would assist States in ensuring the proper legislative implementation of the Convention and provide welcome advice to States considering becoming party to the Convention. It was recognized that information gathered in the context of the project on the procedural framework in which the Convention operated would enable the Commission to consider any further action it might take to improve the functioning of the Convention.

## **XI. Monitoring implementation of the New York Convention**

353. The Commission recalled that, at its twenty-eighth session, in 1995, it had approved a project, undertaken jointly with Committee D (now known as the Arbitration Committee) of the International Bar Association, aimed at monitoring the legislative implementation of the New York Convention<sup>39</sup> and at considering procedural mechanisms that States had adopted for the recognition and enforcement of arbitral awards under the New York Convention. 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).<sup>40</sup> At its fortieth session, in 2007, the Commission was informed that a written report was intended to be presented at its forty-first session.<sup>41</sup>

354. At its current session, the Commission 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

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<sup>39</sup> *Official Records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17)*, paras. 401-404.

<sup>40</sup> *Ibid.*, *Sixtieth Session, Supplement No. 17 (A/60/17)*, paras. 188-191.

<sup>41</sup> *Ibid.*, *Sixty-second Session, Supplement No. 17 (A/62/17)*, part I, para. 207.



108 States parties to the New York Convention (A/CN.9/656 and Add.1). The Commission expressed its appreciation to those States parties which had provided replies as well as to the Arbitration Committee of the International Bar Association for its assistance to the Secretariat in gathering the information required to prepare the report.

355. The Commission 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. It was noted that the application of national rules of procedure to matters on which the New York Convention was silent had given rise to diverging solutions to the many different procedural requirements that governed the recognition and enforcement of awards under the Convention, including on questions such as the requirements applicable to a request for enforcement, the correction of defects in applications, the time period for applying for recognition and enforcement of an award, and the procedures and competent courts for recourse against a decision granting or refusing enforcement of an award under the Convention. The Commission agreed that work should be undertaken to eliminate or limit the effect of legal disharmony in that field. The Commission was 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 requested the Secretariat to study the feasibility of preparing such a guide.

356. The Commission considered whether the replies to the questionnaire sent by States in the context of the project should be made publicly available by the Secretariat. It was recognized that the information on the procedural framework in which the Convention operated would enable the Commission to consider any further action it might take to improve the functioning of the Convention and would contribute to increasing awareness of its application. It was noted that replies to the questionnaire were provided by a number of States at the beginning of the project and that these were, in certain instances, outdated. After discussion, the Commission requested the Secretariat to publish on the UNCITRAL website the information collected during the project implementation, in the language in which it was received, and urged States to provide the Secretariat with accurate information to ensure that the data published on the UNCITRAL website remained up to date.

357. The Commission recalled that the Commission on Arbitration of the International Chamber of Commerce had created a task force to examine the national rules of procedure for recognition and enforcement of foreign arbitral awards on a country-by-country basis.<sup>42</sup> The Commission expressed its appreciation to the Commission on Arbitration of the International Chamber of Commerce and commended the Secretariat for maintaining close collaboration between the two institutions. It was noted that the cooperation between the Secretariat and the Commission on Arbitration of the International Chamber of Commerce would be helpful to identify information that might need to be updated. In view of the common features identified in the work of the Commission and the International Chamber of Commerce 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.

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<sup>42</sup> Ibid., para. 207.

358. The Commission was informed that conferences were expected to be organized to discuss the outcome of the project on monitoring the implementation of the New York Convention. Conferences were being planned to be organized under the auspices of the International Bar Association and the International Chamber of Commerce. The Secretariat was requested to monitor and seek active participation in such events.

359. The Commission noted that the recommendation adopted by the Commission at its thirty-ninth session, in 2006,<sup>43</sup> regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the New York Convention had been circulated to States in order to seek comments as to the impact of that recommendation in their jurisdictions. 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 recommendation was considered to be a means to encourage the development of rules favouring the validity of arbitration agreements and, despite its non-binding nature, it was said to be of particular importance in achieving a uniform interpretation of the Convention. States considered that the recommendation might be of assistance to national courts in interpreting the requirement that an arbitration agreement be in writing in a more liberal manner. A large number of delegations considered that the recommendation encouraged enforcement of awards in the greatest number of cases as possible through article VII, paragraph 1, of the New York Convention allowing the application of national provisions that contained more favourable conditions to a party seeking to enforce an award. After discussion, the Commission agreed that any further comments received by the Secretariat from States on the recommendation be made part of the project on monitoring the implementation of the New York Convention.

360. In addition, the Commission agreed that, resources permitting, the activities of the 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.

## **XII. Technical assistance to law reform**

### **A. Technical cooperation and assistance activities**

361. The Commission had before it a note by the Secretariat (A/CN.9/652) describing the technical cooperation and assistance activities undertaken subsequent to the date of the note on that topic submitted to the Commission at its fortieth session, in 2007 (A/CN.9/627). 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.9/652, paragraphs 7-27. 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. Regional events that were a source of technical assistance were pointed out as particularly useful.

362. The Commission noted that the continuing ability to participate in technical cooperation and assistance activities in response to specific requests of States was

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<sup>43</sup> *Ibid.*, *Sixty-first Session, Supplement No. 17* (A/61/17), annex II.

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. Particular emphasis was being placed on regional activities involving several countries. Beyond the end of 2008, requests for technical cooperation and assistance involving the expenditure of funds for travel or to meet other associated costs would have to be declined unless new donations to the Trust Fund were received or other alternative sources of funds could be found.

363. The Commission 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 Mexico and Singapore for contributing to the Trust Fund since the Commission's fortieth 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 and the Republic of Korea, which had funded junior professional officers to work in the Secretariat.

364. The Commission also 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 also expressed its appreciation to Austria for contributing to the Trust Fund for Travel Assistance since the Commission's fortieth session.

## **B. Technical assistance resources**

365. 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 2008, 726 issues of compiled case-law abstracts from the CLOUT system had been prepared for publication, dealing with 761 cases relating mainly to the United Nations Sales Convention and the UNCITRAL Model Law on International Commercial Arbitration, but including some cases on the UNCITRAL Model Law on Cross-Border Insolvency.

366. It was widely agreed that the CLOUT system continued to be an important aspect of the overall technical assistance activities undertaken by UNCITRAL and that its broad dissemination in all six official languages of the United Nations promoted the uniform interpretation and application of UNCITRAL texts. The Commission expressed its appreciation to the national correspondents and other contributors for their work in developing the CLOUT system. The Secretariat was encouraged to take initiatives to extend the composition and vitality of the network of contributors to the CLOUT system.

367. The Commission noted that the digest of case law on the United Nations Sales Convention was currently being published and that a quarterly bulletin and an information brochure on the CLOUT system had been developed to facilitate dissemination of information on the system.

368. The Commission also noted developments with respect to the UNCITRAL website ([www.uncitral.org](http://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 fortieth session of the Commission, the website had received over one million visits.

369. The Commission took note with appreciation of developments regarding the UNCITRAL Law Library and UNCITRAL publications, including the note of the Secretariat containing the bibliography of recent writings related to the work of UNCITRAL (A/CN.9/650).

### XIII. Status and promotion of UNCITRAL legal texts

370. 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.9/651) and updated information available on the UNCITRAL website. With respect to model laws and legislative guides elaborated by it, 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 note. The Commission noted with appreciation the information on the following legislative actions of jurisdictions received since its fortieth session regarding the following instruments:

(a) United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg):<sup>44</sup> new action by the Dominican Republic (2007) and Kazakhstan (2008); 34 States parties;

(b) United Nations Convention on the Use of Electronic Communications in International Contracts (2005):<sup>45</sup> signatures by Colombia, Honduras, Iran (Islamic Republic of), Montenegro, Panama, the Philippines, the Republic of Korea and Saudi Arabia;

(c) UNCITRAL Model Law on International Commercial Arbitration (1985):<sup>46</sup> legislation based on the Model Law enacted by Armenia (2006) and Slovenia (2008);

(d) UNCITRAL Model Law on Procurement of Goods, Construction and Services (1994):<sup>47</sup> legislation based on the Model Law enacted by Nigeria (2007);

(e) UNCITRAL Model Law on Electronic Commerce (1996):<sup>48</sup> legislation based on the Model Law enacted by Canada, including the territory of Nunavut (2004);

<sup>44</sup> United Nations, *Treaty Series*, vol. 1695, No. 29215.

<sup>45</sup> United Nations publication, Sales No. E.07.V.2.

<sup>46</sup> *Official Records of the General Assembly, Fifty-second Session, Supplement No. 17 (A/52/17)*, annex I.

<sup>47</sup> *Ibid.*, *Forty-ninth Session, Supplement No. 17* and corrigendum (A/49/17 and Corr.1), annex I.

<sup>48</sup> *Ibid.*, *Fifty-first Session, Supplement No. 17 (A/51/17)*, annex I; see also *UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996 with Additional Article 5 bis as Adopted in 1998* (United Nations publication, Sales No. E.99.V.4).

(f) UNCITRAL Model Law on Cross-Border Insolvency (1997):<sup>49</sup> legislation based on the Model Law enacted by Australia (2008) and the Republic of Korea (2006);

(g) UNCITRAL Model Law on International Commercial Conciliation (2002):<sup>50</sup> legislation based on the Model Law enacted by Slovenia (2008).

371. The Commission was informed, and noted with appreciation, that Japan had adopted legislation that would enable it to accede to the United Nations Sales Convention and that the instrument of accession would be deposited with the Secretary-General in due course.

372. The Commission heard that the United Nations Convention on the Use of Electronic Communications in International Contracts would be highlighted at the treaty event<sup>51</sup> to be held from 23 to 25 and from 29 to 30 September 2008. States were invited to consider participating in the treaty event by undertaking appropriate treaty actions relating to the Convention. It was recalled that the Convention had closed for signature on 16 January 2008.

#### XIV. Working methods of UNCITRAL

373. At the first part of its fortieth session (Vienna, 25 June-12 July 2007), the Commission 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.<sup>52</sup>

374. At its resumed fortieth session, the Commission 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 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

<sup>49</sup> *Official Records of the General Assembly, Fifty-second Session, Supplement No. 17 (A/52/17)*, annex I.

<sup>50</sup> United Nations publication, Sales No. E.05.V.4.

<sup>51</sup> The treaty event is a yearly exercise aimed at promoting the international rule of law through broader participation in multilateral treaties deposited with the Secretary-General. It usually takes place at United Nations Headquarters during the general debate of the General Assembly.

<sup>52</sup> *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17 (A/62/17)*, part I, paras. 234-241.

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 based on the application of its 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 at the Commission's forty-first session, time permitting.<sup>53</sup>

375. At its current session, the Commission 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, and outlining observations by the Secretariat on working methods (A/CN.9/653). That note had been circulated for comments. The Commission also had before it a note by the Secretariat compiling the comments received prior to the current session (A/CN.9/660 and Add.1-4).

376. The Commission expressed particular appreciation for document A/CN.9/653 and generally agreed that the document provided a sound basis for developing a text of a more normative nature. The Commission had a preliminary exchange of views on the three main items discussed in the document, namely, decision-making, the role of observers and the preparatory work undertaken by the Secretariat, as well as on the appropriateness of convening a working group on working methods.

377. With respect to decision-making, there was general agreement that consensus should remain the preferred method. As to the exact meaning of "consensus", the Commission took note of the view expressed at its fortieth session that it should exercise utmost caution in entering areas such as the possible definition of consensus, where its decisions might have an impact on the work of other bodies of the General Assembly.<sup>54</sup> At its current session, there was broad support in the Commission to avoid entering into efforts to arrive at a definition of "consensus". However, general support was expressed for clarifying the manner in which consensus operated in practice. Support was also expressed for clarifying that voting as a right of member States under the Charter of the United Nations was fully recognized by the Commission. On those two points, the Commission agreed with the substance of the explanations provided in paragraphs 9 to 11 and 13 to 18 of the note by the Secretariat (A/CN.9/653).

378. As to the role of observers, the Commission was generally of the view that its approach should continue to be based on flexibility and inclusiveness. The broad openness of the Commission and its subsidiary bodies to observers from State and non-State entities was widely recognized as a key element in maintaining the high quality and the practical relevance of the work of the Commission. The participation of observers in the deliberations of the Commission (including through their election as

<sup>53</sup> *Ibid.*, *Sixty-second Session, Supplement No. 17* (A/62/17), part II, paras. 101-107.

<sup>54</sup> *Ibid.*, para. 104.

members of the Bureau of the Commission or a working group in a personal capacity, as appropriate) and the possibility for them to circulate documents (subject to the authority of the presiding officer as mentioned in para. 47 of the note by the Secretariat) were generally welcomed. As to decision-making, it was widely felt that only States members of the Commission should be called upon to vote. When no formal voting was involved, the Commission noted that under existing practice States not members of the Commission would typically participate in the formation of a consensus, although some delegations were of the view that only States members of the Commission should be considered for the purposes of establishing a consensus. The current practice, which was generally regarded as having led to good results in the past, was found to be consistent with the Commission's aspiration to achieve universal acceptability of its standards. However, it was noted that a number of theoretical problems might result from that practice and that the issue might need to be further discussed at a future session. Regarding the possible distinction to be drawn between different categories of non-governmental entities depending upon their working relationships with the Commission, the Commission welcomed the proposals contained in paragraphs 29 to 36 of the note by the Secretariat and decided that more detailed consideration should be given to those issues at a later stage. There was agreement that non-State entities should not participate in decision-making.

379. With respect to the working methods of the Secretariat, the Commission expressed its general satisfaction with the substance of paragraphs 53 to 61 of the note by the Secretariat (A/CN.9/653). Transparency was recognized as a desirable objective. It was generally agreed that it was particularly important for the Secretariat to preserve the flexibility necessary to organize its work efficiently, including through recourse to external expertise. A widely held view was that efforts should be made, within existing resources, to increase the availability of working drafts and other preparatory materials used by the Secretariat in the two working languages and possibly in other official languages. Along the same lines, it was stated that every effort should be made to provide simultaneous interpretation at expert group meetings convened by the Secretariat.

380. With respect to the question of further work, a proposal was made to establish a working group. There was support for holding informal consultations instead. It was agreed that a meeting of such an informal group would take place in connection with the next session of the Commission.

381. After discussion, 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 itself. 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 its final form. 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. (For the decision on the dates of the forty-second session of the Commission, see para. 395 below.)

## XV. Coordination and cooperation

382. The Commission had before it a note by the Secretariat (A/CN.9/657 and Add.1 and 2) providing a brief survey of the work of international organizations related to the harmonization of international trade law, focusing upon substantive legislative work. The Commission commended the Secretariat for the preparation of the document, recognizing its value to coordination of the activities of international organizations in the field of international trade law, and welcomed the announced change from publication of the survey on an annual basis to the anticipated future publication of more numerous instalments of the survey as issues arose throughout the year.

383. It was recalled that the Commission at its thirty-seventh session, in 2004, had agreed that it should adopt a more proactive attitude, through its secretariat, to fulfilling its coordination role.<sup>55</sup> Recalling the endorsement by the General Assembly, most recently in its resolution 62/64 of 6 December 2007, paragraph 4, of UNCITRAL efforts and initiatives 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, the Organization for Economic Cooperation and Development, the Organization of American States, the International Institute for the Unification of Private Law (Unidroit), the World Bank and the World Trade Organization. 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.

384. By way of example of current efforts at coordination, the Commission was advised of coordination meetings having taken place in September 2007 in Rome and in May 2008 in New York among the secretariats of the Hague Conference on Private International Law, Unidroit and UNCITRAL. The main topic discussed at those meetings was the interrelationship among the texts on security interests prepared by the Hague Conference on Private International Law, Unidroit and UNCITRAL respectively, and ways in which States could adopt those texts to establish a modern comprehensive and consistent legislative regime on secured transactions. In particular, the Commission was advised that it was recognized that policymakers in States might have difficulty determining how the various instruments adopted by the three organizations in the field of security interests fit together, which ones would best serve the policy goals of the State and whether implementing one instrument would preclude the implementation of another. The Commission was advised that the three organizations were, therefore, preparing a paper aimed at assisting policymakers by summarizing the scope and application of those instruments, showing how they worked together and providing a comparative understanding of the coverage and basic themes of each instrument. It was suggested that the paper could be published as one of the future instalments of the ongoing survey of the work of international organizations related to the harmonization of international trade law. There were strong expressions of support in the Commission for those efforts.

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<sup>55</sup> *Ibid.*, *Fifty-ninth Session, Supplement No. 17 (A/59/17)*, paras. 113-115.



## **XVI. Role of UNCITRAL in promoting the rule of law at the national and international levels**

385. The Commission recalled General Assembly resolutions 61/39 of 4 December 2006 and 62/70 of 6 December 2007, both dealing with the rule of law at the national and international levels. The Commission was informed that pursuant to Assembly resolution 62/70, an inventory of activities devoted to the promotion of the rule of law at the national and international levels would be submitted to the Assembly at its sixty-third session, along with an inventory of activities of other organs and offices within the United Nations system devoted to the promotion of the rule of law at the national and international levels.<sup>56</sup> Furthermore, the Commission noted that the Assembly had requested the Secretary-General to submit, at its sixty-third session, a report identifying ways and means for strengthening and coordinating the activities listed in the inventory, with special regard to the effectiveness of assistance that might be requested by States in building capacity for the promotion of the rule of law at the national and international levels.<sup>57</sup> In addition, the Commission noted with appreciation the invitation of the Assembly addressed to the Commission (and the International Court of Justice and the International Law Commission) to comment, in their respective reports to the General Assembly, on their current roles in promoting the rule of law.<sup>58</sup> (For further consideration of relevant General Assembly resolutions, see below, paras. 388 and 389.)

386. The Commission welcomed and expressed its full support for the initiative of the General Assembly regarding the strengthening of the rule of law. The Commission expressed its conviction that the implementation and effective use of modern private law standards on international trade in a manner that was acceptable to States with different legal, social and economic systems were essential in advancing good governance, sustained economic development and the eradication of poverty and hunger. The work of the Commission was thus indispensable in promoting the well-being of all peoples and peaceful coexistence and cooperation among States. The Commission therefore expressed its conviction that promotion of the rule of law in commercial relations should be an integral part of the broader agenda of the Assembly and the Secretary-General 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 activities of the Organization and saw its role in particular as providing assistance to States that sought to promote the rule of law in the area of international and domestic trade and investment.

## **XVII. Willem C. Vis International Commercial Arbitration Moot competition**

387. It was noted that the Association for the Organization and Promotion of the Willem C. Vis International Commercial Arbitration Moot had organized the Fifteenth Moot in Vienna from 14 to 20 March 2008. 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 Fifteenth Moot had been based on the United Nations

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<sup>56</sup> Resolution 62/70, para. 1.

<sup>57</sup> *Ibid.*, para. 2.

<sup>58</sup> *Ibid.*, para. 3.

Sales Convention,<sup>59</sup> the Judicial Arbitration and Media Services JAMS International Arbitration Rules,<sup>60</sup> the Arbitration Model Law<sup>61</sup> and the New York Convention.<sup>62</sup> A total of 203 teams from law schools in 52 countries had participated in the Fifteenth Moot. The best team in oral arguments was that of Carlos III University of Madrid. The Sixteenth Willem C. Vis International Commercial Arbitration Moot would be held in Vienna from 2 to 9 April 2009.

## XVIII. Relevant General Assembly resolutions

388. The Commission took note with appreciation of General Assembly resolution 62/64 on the report of the Commission on the work of its fortieth session. The Commission noted in particular the appreciation expressed to the Commission by the Assembly for its work on the draft UNCITRAL Legislative Guide on Secured Transactions, for the progress achieved in the ongoing projects of the Commission, for the discussion by the Commission of its working methods and for the holding of the Congress "Modern Law for Global Commerce" in Vienna from 9 to 12 July 2007. The Commission also took note with appreciation of Assembly resolution 62/65 of 6 December 2007 on the Fiftieth anniversary of the New York Convention, and welcomed the emphasis placed on the need to promote wider adherence to the Convention and greater understanding of its provisions and their uniform interpretation and effective implementation.

389. The Commission was apprised of the pertinent statements made by the Vice-Chairperson of the Commission at its fortieth session, Kathryn Sabo, when she presented the annual report of the Commission to the Sixth Committee of the General Assembly on 22 October 2007 and at the conclusion of the Committee's consideration of the item on 23 October 2007. The Vice-Chairperson in her opening statement welcomed the consideration in a comprehensive and coherent manner by the Assembly of ways and means to promote the rule of law at the national and international levels. She noted current sporadic and fragmented approaches within the United Nations in that regard. With the primary focus on criminal justice, transitional justice and judicial reform, these approaches, she stated, often overlooked the economic dimension of the rule of law, including the need for commercial law reforms as an essential foundation for long-term stability, development, empowerment and good governance. She further stated that, as United Nations experience in various areas of its operation had shown, approaches to building and promoting the rule of law had to be comprehensive and coherent in order to achieve sustained results. (For the discussion of the role of the Commission in promoting the rule of law at the national and international levels, see paras. 385 and 386 above.)

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<sup>59</sup> United Nations, *Treaty Series*, vol. 1489, No. 25567.

<sup>60</sup> Available on the website of JAMS (<http://www.jamsadr.com>).

<sup>61</sup> *Official Records of the General Assembly, Fortieth Session, Supplement No. 17 (A/40/17)*, annex I.

<sup>62</sup> United Nations, *Treaty Series*, vol. 330, No. 4739.

## **XIX. Other business**

### **A. Internship programme**

390. An oral report was presented on the internship programme at the UNCITRAL secretariat. Although 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. Proposed strategic framework for the period 2010-2011**

391. The Commission had before it a document entitled “Proposed strategic framework for the period 2010-2011” (A/63/6 (Prog. 6)) and was invited to review the proposed biennial programme plan for “the progressive harmonization, modernization and unification of the law of international trade” (subprogramme 5 of the Office of Legal Affairs). The Commission noted that the proposed plan had been reviewed by the Committee for Programme and Coordination at its forty-eighth session and would be transmitted to the General Assembly at its sixty-third session. While the Commission noted with satisfaction that the objectives and expected accomplishments of the Secretariat and the overall strategy for subprogramme 5 as reflected in the document were in line with the general policy of the Commission, grave concerns were expressed that the resources allotted to the Secretariat under subprogramme 5 were insufficient for it to meet, in particular, the increased and pressing demand for technical assistance from developing countries and countries whose economies were in transition to meet their urgent need for law reform in the field of commercial law. The Commission 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 be made promptly available. (For the discussion of the role of the Commission in promoting the rule of law at the national and international levels, see paras. 385 and 386 above.)

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

392. As indicated to the Commission at its fortieth session,<sup>63</sup> it was recalled that 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).<sup>64</sup> The Commission agreed to

<sup>63</sup> *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17 (A/62/17)*, part I, para. 243.

<sup>64</sup> Proposed programme budget for the biennium 2008-2009, Part III, International justice and law, 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)).

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 fortieth session of the Commission. It had elicited replies from 20 delegations, with an average rating of 4.3.

#### **D. Retirement of the Secretary of the Commission**

393. The Commission noted that its Secretary, Jernej Sekolec, was to retire on 31 July 2008. Mr. Sekolec had served as a member of the Secretariat since 1982 and as Secretary of the Commission since 2001. It was widely recognized that the time during which Mr. Sekolec had served as Secretary of the Commission had been a most productive one and that the secretariat of the Commission under the leadership of Mr. Sekolec had made an excellent contribution to that work despite the limited resources available to it. The Commission expressed its appreciation to Mr. Sekolec for his outstanding contribution to the process of unification and harmonization of international trade law in general and to UNCITRAL in particular.

394. At its 885th meeting, on 30 June 2008, the Commission adopted the following declaration:

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

*“Being informed that Mr. Jernej Sekolec, Secretary, United Nations Commission on International Trade Law (UNCITRAL) and Director, International Trade Law Division, Office of Legal Affairs, having reached the age of retirement, would leave the United Nations Secretariat on 31 July 2008,*

*“Expresses its deep appreciation for his more than 25 years of exemplary United Nations service,*

*“Salutes his major contributions to achieving the goals of UNCITRAL, which the General Assembly has described as the “core legal body within the United Nations system in the field of international law, [with a mandate] to coordinate legal activities in this field in order to avoid duplication of effort and to promote efficiency, consistency, and coherence in the unification and harmonization of international trade law”. He has strongly supported the work of the Commission and has built enduring foundations for our ongoing projects and future endeavours. He has inspired and led the highly productive Commission secretariat. In these and other ways he has strengthened the efforts to achieve world peace,*

*“Recognizes his courage to stand up and speak, as well as to sit down and listen. The Commission has benefited because he has followed the precepts to keep his eyes on the stars and his feet on the ground. He has been a warm friend and a good companion,*

*“Requests that this declaration expressing the Commission’s profound thanks be set forth in its report to the General Assembly and thereby be recorded in the permanent history of the United Nations.”*

## **XX. Date and place of future meetings**

### **A. Forty-second session of the Commission**

395. The Commission approved the holding of its forty-second session in Vienna from 29 June to 17 July 2009. It was noted that the duration of the session might be modified, should a shorter session become advisable in light of the progress of work in Working Group II (Arbitration and Conciliation) and Working Group V (Insolvency Law).

### **B. Sessions of working groups up to the forty-second session of the Commission**

396. 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 an 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 resulted in an increase in 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.<sup>65</sup>

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

(a) Working Group I (Procurement) would hold its fourteenth session in Vienna from 8 to 12 September 2008 and its fifteenth session in New York from 2 to 6 February 2009;

(b) Working Group II (Arbitration and Conciliation) would hold its forty-ninth session in Vienna from 15 to 19 September 2008 and its fiftieth session in New York from 9 to 13 February 2009;

(c) Working Group IV (Electronic Commerce) would be authorized to hold its forty-fifth session in New York from 26 to 29 May 2009, should this be warranted by the progress of work done in cooperation with the World Customs Organization (see para. 338 above); (a four day session is scheduled, since 25 May will be an official holiday in New York.)

(d) Working Group V (Insolvency Law) would hold its thirty-fifth session in Vienna from 17 to 21 November 2008 and its thirty-sixth session in New York from 18 to 22 May 2009;

(e) Working Group VI (Security Interests) would hold its fourteenth session in Vienna from 20 to 24 October 2008 and its fifteenth session in New York from 27 April to 1 May 2009.

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<sup>65</sup> *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 17 (A/58/17)*, para. 275.

### **C. Sessions of working groups in 2009 after the forty-second session of the Commission**

398. The Commission noted that tentative arrangements had been made for working group meetings in 2009 after its forty-second session (the arrangements were subject to the approval of the Commission at its forty-second session):

(a) Working Group I (Procurement) would hold its sixteenth session in Vienna from 7 to 11 September 2009;

(b) Working Group II (Arbitration and Conciliation) would hold its fifty-first session in Vienna from 14 to 18 September 2009;

(c) Working Group IV (Electronic Commerce) would hold its forty-sixth session in Vienna from 28 September to 2 October 2009;

(d) Working Group V (Insolvency Law) would hold its thirty-seventh session in Vienna from 5 to 9 October 2009;

(e) Working Group VI (Security Interests) would hold its sixteenth session in Vienna from 7 to 11 December 2009.

## Annex I

### **Draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea**

*The States Parties to this Convention,*

*Reaffirming* their belief that international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,

*Convinced* that the progressive harmonization and unification of international trade law, in reducing or removing legal obstacles to the flow of international trade, significantly contributes to universal economic cooperation among all States on a basis of equality, equity and common interest, and to the well-being of all peoples,

*Recognizing* the significant contribution of the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, signed in Brussels on 25 August 1924, and its Protocols, and of the United Nations Convention on the Carriage of Goods by Sea, signed in Hamburg on 31 March 1978, to the harmonization of the law governing the carriage of goods by sea,

*Mindful* of the technological and commercial developments that have taken place since the adoption of those conventions and of the need to consolidate and modernize them,

*Noting* that shippers and carriers do not have the benefit of a binding universal regime to support the operation of contracts of maritime carriage involving other modes of transport,

*Believing* that the adoption of uniform rules to govern international contracts of carriage wholly or partly by sea will promote legal certainty, improve the efficiency of international carriage of goods and facilitate new access opportunities for previously remote parties and markets, thus playing a fundamental role in promoting trade and economic development, both domestically and internationally,

*Have agreed as follows:*

#### CHAPTER 1. GENERAL PROVISIONS

##### *Article 1. Definitions*

For the purposes of this Convention:

1. “Contract of carriage” means a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage.
2. “Volume contract” means a contract of carriage that provides for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time. The specification of the quantity may include a minimum, a maximum or a certain range.
3. “Liner transportation” means a transportation service that is offered to the public through publication or similar means and includes transportation by ships operating on a regular schedule between specified ports in accordance with publicly available timetables of sailing dates.

4. “Non-liner transportation” means any transportation that is not liner transportation.

5. “Carrier” means a person that enters into a contract of carriage with a shipper.

6. (a) “Performing party” means a person other than the carrier that performs or undertakes to perform any of the carrier’s obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, care, unloading or delivery of the goods, to the extent that such person acts, either directly or indirectly, at the carrier’s request or under the carrier’s supervision or control.

(b) “Performing party” does not include any person that is retained, directly or indirectly, by a shipper, by a documentary shipper, by the controlling party or by the consignee instead of by the carrier.

7. “Maritime performing party” means a performing party to the extent that it performs or undertakes to perform any of the carrier’s obligations during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship. An inland carrier is a maritime performing party only if it performs or undertakes to perform its services exclusively within a port area.

8. “Shipper” means a person that enters into a contract of carriage with a carrier.

9. “Documentary shipper” means a person, other than the shipper, that accepts to be named as “shipper” in the transport document or electronic transport record.

10. “Holder” means:

(a) A person that is in possession of a negotiable transport document; and (i) if the document is an order document, is identified in it as the shipper or the consignee, or is the person to which the document is duly endorsed; or (ii) if the document is a blank endorsed order document or bearer document, is the bearer thereof; or

(b) The person to which a negotiable electronic transport record has been issued or transferred in accordance with the procedures referred to in article 9, paragraph 1.

11. “Consignee” means a person entitled to delivery of the goods under a contract of carriage or a transport document or electronic transport record.

12. “Right of control” of the goods means the right under the contract of carriage to give the carrier instructions in respect of the goods in accordance with chapter 10.

13. “Controlling party” means the person that pursuant to article 51 is entitled to exercise the right of control.

14. “Transport document” means a document issued under a contract of carriage by the carrier that:

(a) Evidences the carrier’s or a performing party’s receipt of goods under a contract of carriage; and

(b) Evidences or contains a contract of carriage.

15. “Negotiable transport document” means a transport document that indicates, by wording such as “to order” or “negotiable” or other appropriate wording recognized as having the same effect by the law applicable to the document, that the goods have



been consigned to the order of the shipper, to the order of the consignee, or to bearer, and is not explicitly stated as being “non-negotiable” or “not negotiable”.

16. “Non-negotiable transport document” means a transport document that is not a negotiable transport document.

17. “Electronic communication” means information generated, sent, received or stored by electronic, optical, digital or similar means with the result that the information communicated is accessible so as to be usable for subsequent reference.

18. “Electronic transport record” means information in one or more messages issued by electronic communication under a contract of carriage by a carrier, including information logically associated with the electronic transport record by attachments or otherwise linked to the electronic transport record contemporaneously with or subsequent to its issue by the carrier, so as to become part of the electronic transport record, that:

(a) Evidences the carrier’s or a performing party’s receipt of goods under a contract of carriage; and

(b) Evidences or contains a contract of carriage.

19. “Negotiable electronic transport record” means an electronic transport record:

(a) That indicates, by wording such as “to order”, or “negotiable”, or other appropriate wording recognized as having the same effect by the law applicable to the record, that the goods have been consigned to the order of the shipper or to the order of the consignee, and is not explicitly stated as being “non-negotiable” or “not negotiable”; and

(b) The use of which meets the requirements of article 9, paragraph 1.

20. “Non-negotiable electronic transport record” means an electronic transport record that is not a negotiable electronic transport record.

21. The “issuance” of a negotiable electronic transport record means the issuance of the record in accordance with procedures that ensure that the record is subject to exclusive control from its creation until it ceases to have any effect or validity.

22. The “transfer” of a negotiable electronic transport record means the transfer of exclusive control over the record.

23. “Contract particulars” means any information relating to the contract of carriage or to the goods (including terms, notations, signatures and endorsements) that is in a transport document or an electronic transport record.

24. “Goods” means the wares, merchandise, and articles of every kind whatsoever that a carrier undertakes to carry under a contract of carriage and includes the packing and any equipment and container not supplied by or on behalf of the carrier.

25. “Ship” means any vessel used to carry goods by sea.

26. “Container” means any type of container, transportable tank or flat, swapbody, or any similar unit load used to consolidate goods, and any equipment ancillary to such unit load.

27. “Vehicle” means a road or railroad cargo vehicle.

28. “Freight” means the remuneration payable to the carrier for the carriage of goods under a contract of carriage.

29. “Domicile” means (a) a place where a company or other legal person or association of natural or legal persons has its (i) statutory seat or place of incorporation or central registered office, whichever is applicable, (ii) central administration or (iii) principal place of business, and (b) the habitual residence of a natural person.

30. “Competent court” means a court in a Contracting State that, according to the rules on the internal allocation of jurisdiction among the courts of that State, may exercise jurisdiction over the dispute.

#### *Article 2. Interpretation of this Convention*

In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

#### *Article 3. Form requirements*

The notices, confirmation, consent, agreement, declaration and other communications referred to in articles 19, paragraph 2; 23, paragraphs 1 to 4; 36, subparagraphs 1 (b), (c) and (d); 40, subparagraph 4 (b); 44; 48, paragraph 3; 51, subparagraph 1 (b); 59, paragraph 1; 63; 66; 67, paragraph 2; 75, paragraph 4; and 80, paragraphs 2 and 5, shall be in writing. Electronic communications may be used for these purposes, provided that the use of such means is with the consent of the person by which it is communicated and of the person to which it is communicated.

#### *Article 4. Applicability of defences and limits of liability*

1. Any provision of this Convention that may provide a defence for, or limit the liability of, the carrier applies in any judicial or arbitral proceeding, whether founded in contract, in tort, or otherwise, that is instituted in respect of loss of, damage to, or delay in delivery of goods covered by a contract of carriage or for the breach of any other obligation under this Convention against:

- (a) The carrier or a maritime performing party;
- (b) The master, crew or any other person that performs services on board the ship; or
- (c) Employees of the carrier or a maritime performing party.

2. Any provision of this Convention that may provide a defence for the shipper or the documentary shipper applies in any judicial or arbitral proceeding, whether founded in contract, in tort, or otherwise, that is instituted against the shipper, the documentary shipper, or their subcontractors, agents or employees.

## CHAPTER 2. SCOPE OF APPLICATION

#### *Article 5. General scope of application*

1. Subject to article 6, this Convention applies to contracts of carriage in which the place of receipt and the place of delivery are in different States, and the port of loading of a sea carriage and the port of discharge of the same sea carriage are in

different States, if, according to the contract of carriage, any one of the following places is located in a Contracting State:

- (a) The place of receipt;
- (b) The port of loading;
- (c) The place of delivery; or
- (d) The port of discharge.

2. This Convention applies without regard to the nationality of the vessel, the carrier, the performing parties, the shipper, the consignee, or any other interested parties.

#### *Article 6. Specific exclusions*

1. This Convention does not apply to the following contracts in liner transportation:

- (a) Charterparties; and
- (b) Other contracts for the use of a ship or of any space thereon.

2. This Convention does not apply to contracts of carriage in non-liner transportation except when:

- (a) There is no charterparty or other contract between the parties for the use of a ship or of any space thereon; and
- (b) A transport document or an electronic transport record is issued.

#### *Article 7. Application to certain parties*

Notwithstanding article 6, this Convention applies as between the carrier and the consignee, controlling party or holder that is not an original party to the charterparty or other contract of carriage excluded from the application of this Convention. However, this Convention does not apply as between the original parties to a contract of carriage excluded pursuant to article 6.

### CHAPTER 3. ELECTRONIC TRANSPORT RECORDS

#### *Article 8. Use and effect of electronic transport records*

Subject to the requirements set out in this Convention:

- (a) Anything that is to be in or on a transport document under this Convention may be recorded in an electronic transport record, provided the issuance and subsequent use of an electronic transport record is with the consent of the carrier and the shipper; and
- (b) The issuance, exclusive control, or transfer of an electronic transport record has the same effect as the issuance, possession, or transfer of a transport document.

*Article 9. Procedures for use of negotiable electronic transport records*

1. The use of a negotiable electronic transport record shall be subject to procedures that provide for:

- (a) The method for the issuance and the transfer of that record to an intended holder;
- (b) An assurance that the negotiable electronic transport record retains its integrity;
- (c) The manner in which the holder is able to demonstrate that it is the holder; and
- (d) The manner of providing confirmation that delivery to the holder has been effected, or that, pursuant to articles 10, paragraph 2, or 47,

subparagraphs 1 (a)(ii) and (c), the electronic transport record has ceased to have any effect or validity.

2. The procedures in paragraph 1 of this article shall be referred to in the contract particulars and be readily ascertainable.

*Article 10. Replacement of negotiable transport document or negotiable electronic transport record*

1. If a negotiable transport document has been issued and the carrier and the holder agree to replace that document by a negotiable electronic transport record:

- (a) The holder shall surrender the negotiable transport document, or all of them if more than one has been issued, to the carrier;
- (b) The carrier shall issue to the holder a negotiable electronic transport record that includes a statement that it replaces the negotiable transport document; and
- (c) The negotiable transport document ceases thereafter to have any effect or validity.

2. If a negotiable electronic transport record has been issued and the carrier and the holder agree to replace that electronic transport record by a negotiable transport document:

- (a) The carrier shall issue to the holder, in place of the electronic transport record, a negotiable transport document that includes a statement that it replaces the negotiable electronic transport record; and
- (b) The electronic transport record ceases thereafter to have any effect or validity.

#### CHAPTER 4. OBLIGATIONS OF THE CARRIER

*Article 11. Carriage and delivery of the goods*

The carrier shall, subject to this Convention and in accordance with the terms of the contract of carriage, carry the goods to the place of destination and deliver them to the consignee.

*Article 12. Period of responsibility of the carrier*

1. The period of responsibility of the carrier for the goods under this Convention begins when the carrier or a performing party receives the goods for carriage and ends when the goods are delivered.

2. (a) If the law or regulations of the place of receipt require the goods to be handed over to an authority or other third party from which the carrier may collect them, the period of responsibility of the carrier begins when the carrier collects the goods from the authority or other third party.

(b) If the law or regulations of the place of delivery require the carrier to hand over the goods to an authority or other third party from which the consignee may collect them, the period of responsibility of the carrier ends when the carrier hands the goods over to the authority or other third party.

3. For the purpose of determining the carrier's period of responsibility, the parties may agree on the time and location of receipt and delivery of the goods, but a provision in a contract of carriage is void to the extent that it provides that:

(a) The time of receipt of the goods is subsequent to the beginning of their initial loading under the contract of carriage; or

(b) The time of delivery of the goods is prior to the completion of their final unloading under the contract of carriage.

*Article 13. Specific obligations*

1. The carrier shall during the period of its responsibility as defined in article 12, and subject to article 26, properly and carefully receive, load, handle, stow, carry, keep, care for, unload and deliver the goods.

2. Notwithstanding paragraph 1 of this article, and without prejudice to the other provisions in chapter 4 and to chapters 5 to 7, the carrier and the shipper may agree that the loading, handling, stowing or unloading of the goods is to be performed by the shipper, the documentary shipper or the consignee. Such an agreement shall be referred to in the contract particulars.

*Article 14. Specific obligations applicable to the voyage by sea*

The carrier is bound before, at the beginning of, and during the voyage by sea to exercise due diligence to:

(a) Make and keep the ship seaworthy;

(b) Properly crew, equip and supply the ship and keep the ship so crewed, equipped and supplied throughout the voyage; and

(c) Make and keep the holds and all other parts of the ship in which the goods are carried, and any containers supplied by the carrier in or upon which the goods are carried, fit and safe for their reception, carriage and preservation.

*Article 15. Goods that may become a danger*

Notwithstanding articles 11 and 13, the carrier or a performing party may decline to receive or to load, and may take such other measures as are reasonable, including unloading, destroying, or rendering goods harmless, if the goods are, or reasonably

appear likely to become during the carrier's period of responsibility, an actual danger to persons, property or the environment.

*Article 16. Sacrifice of the goods during the voyage by sea*

Notwithstanding articles 11, 13, and 14, the carrier or a performing party may sacrifice goods at sea when the sacrifice is reasonably made for the common safety or for the purpose of preserving from peril human life or other property involved in the common adventure.

CHAPTER 5. LIABILITY OF THE CARRIER FOR LOSS, DAMAGE OR DELAY

*Article 17. Basis of liability*

1. The carrier is liable for loss of or damage to the goods, as well as for delay in delivery, if the claimant proves that the loss, damage, or delay, or the event or circumstance that caused or contributed to it took place during the period of the carrier's responsibility as defined in chapter 4.

2. The carrier is relieved of all or part of its liability pursuant to paragraph 1 of this article if it proves that the cause or one of the causes of the loss, damage, or delay is not attributable to its fault or to the fault of any person referred to in article 18.

3. The carrier is also relieved of all or part of its liability pursuant to paragraph 1 of this article if, alternatively to proving the absence of fault as provided in paragraph 2 of this article, it proves that one or more of the following events or circumstances caused or contributed to the loss, damage, or delay:

- (a) Act of God;
- (b) Perils, dangers, and accidents of the sea or other navigable waters;
- (c) War, hostilities, armed conflict, piracy, terrorism, riots, and civil commotions;
- (d) Quarantine restrictions; interference by or impediments created by governments, public authorities, rulers, or people including detention, arrest, or seizure not attributable to the carrier or any person referred to in article 18;
- (e) Strikes, lockouts, stoppages, or restraints of labour;
- (f) Fire on the ship;
- (g) Latent defects not discoverable by due diligence;
- (h) Act or omission of the shipper, the documentary shipper, the controlling party, or any other person for whose acts the shipper or the documentary shipper is liable pursuant to article 33 or 34;
- (i) Loading, handling, stowing, or unloading of the goods performed pursuant to an agreement in accordance with article 13, paragraph 2, unless the carrier or a performing party performs such activity on behalf of the shipper, the documentary shipper or the consignee;
- (j) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;
- (k) Insufficiency or defective condition of packing or marking not performed by or on behalf of the carrier;

- (l) Saving or attempting to save life at sea;
- (m) Reasonable measures to save or attempt to save property at sea;
- (n) Reasonable measures to avoid or attempt to avoid damage to the environment; or
- (o) Acts of the carrier in pursuance of the powers conferred by articles 15 and 16.

4. Notwithstanding paragraph 3 of this article, the carrier is liable for all or part of the loss, damage, or delay:

(a) If the claimant proves that the fault of the carrier or of a person referred to in article 18 caused or contributed to the event or circumstance on which the carrier relies; or

(b) If the claimant proves that an event or circumstance not listed in paragraph 3 of this article contributed to the loss, damage, or delay, and the carrier cannot prove that this event or circumstance is not attributable to its fault or to the fault of any person referred to in article 18.

5. The carrier is also liable, notwithstanding paragraph 3 of this article, for all or part of the loss, damage, or delay if:

(a) The claimant proves that the loss, damage, or delay was or was probably caused by or contributed to by (i) the unseaworthiness of the ship; (ii) the improper crewing, equipping, and supplying of the ship; or (iii) the fact that the holds or other parts of the ship in which the goods are carried, or any containers supplied by the carrier in or upon which the goods are carried, were not fit and safe for reception, carriage, and preservation of the goods; and

(b) The carrier is unable to prove either that: (i) none of the events or circumstances referred to in subparagraph 5 (a) of this article caused the loss, damage, or delay; or (ii) it complied with its obligation to exercise due diligence pursuant to article 14.

6. When the carrier is relieved of part of its liability pursuant to this article, the carrier is liable only for that part of the loss, damage or delay that is attributable to the event or circumstance for which it is liable pursuant to this article.

#### *Article 18. Liability of the carrier for other persons*

The carrier is liable for the breach of its obligations under this Convention caused by the acts or omissions of:

- (a) Any performing party;
- (b) The master or crew of the ship;
- (c) Employees of the carrier or a performing party; or
- (d) Any other person that performs or undertakes to perform any of the carrier's obligations under the contract of carriage, to the extent that the person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control.

*Article 19. Liability of maritime performing parties*

1. A maritime performing party is subject to the obligations and liabilities imposed on the carrier under this Convention and is entitled to the carrier's defences and limits of liability as provided for in this Convention if:

(a) The maritime performing party received the goods for carriage in a Contracting State, or delivered them in a Contracting State, or performed its activities with respect to the goods in a port in a Contracting State; and

(b) The occurrence that caused the loss, damage or delay took place: (i) during the period between the arrival of the goods at the port of loading of the ship and their departure from the port of discharge from the ship; (ii) while the maritime performing party had custody of the goods; or (iii) at any other time to the extent that it was participating in the performance of any of the activities contemplated by the contract of carriage.

2. If the carrier agrees to assume obligations other than those imposed on the carrier under this Convention, or agrees that the limits of its liability are higher than the limits specified under this Convention, a maritime performing party is not bound by this agreement unless it expressly agrees to accept such obligations or such higher limits.

3. A maritime performing party is liable for the breach of its obligations under this Convention caused by the acts or omissions of any person to which it has entrusted the performance of any of the carrier's obligations under the contract of carriage under the conditions set out in paragraph 1 of this article.

4. Nothing in this Convention imposes liability on the master or crew of the ship or on an employee of the carrier or of a maritime performing party.

*Article 20. Joint and several liability*

1. If the carrier and one or more maritime performing parties are liable for the loss of, damage to, or delay in delivery of the goods, their liability is joint and several but only up to the limits provided for under this Convention.

2. Without prejudice to article 61, the aggregate liability of all such persons shall not exceed the overall limits of liability under this Convention.

*Article 21. Delay*

Delay in delivery occurs when the goods are not delivered at the place of destination provided for in the contract of carriage within the time agreed.

*Article 22. Calculation of compensation*

1. Subject to article 59, the compensation payable by the carrier for loss of or damage to the goods is calculated by reference to the value of such goods at the place and time of delivery established in accordance with article 43.

2. The value of the goods is fixed according to the commodity exchange price or, if there is no such price, according to their market price or, if there is no commodity exchange price or market price, by reference to the normal value of the goods of the same kind and quality at the place of delivery.

3. In case of loss of or damage to the goods, the carrier is not liable for payment of any compensation beyond what is provided for in paragraphs 1 and 2 of this article



except when the carrier and the shipper have agreed to calculate compensation in a different manner within the limits of chapter 16.

*Article 23. Notice in case of loss, damage or delay*

1. The carrier is presumed, in absence of proof to the contrary, to have delivered the goods according to their description in the contract particulars unless notice of loss of or damage to the goods, indicating the general nature of such loss or damage, was given to the carrier or the performing party that delivered the goods before or at the time of the delivery, or, if the loss or damage is not apparent, within seven working days at the place of delivery after the delivery of the goods.

2. Failure to provide the notice referred to in this article to the carrier or the performing party shall not affect the right to claim compensation for loss of or damage to the goods under this Convention, nor shall it affect the allocation of the burden of proof set out in article 17.

3. The notice referred to in this article is not required in respect of loss or damage that is ascertained in a joint inspection of the goods by the person to which they have been delivered and the carrier or the maritime performing party against which liability is being asserted.

4. No compensation in respect of delay is payable unless notice of loss due to delay was given to the carrier within twenty-one consecutive days of delivery of the goods.

5. When the notice referred to in this article is given to the performing party that delivered the goods, it has the same effect as if that notice was given to the carrier, and notice given to the carrier has the same effect as a notice given to a maritime performing party.

6. In the case of any actual or apprehended loss or damage, the parties to the dispute shall give all reasonable facilities to each other for inspecting and tallying the goods and shall provide access to records and documents relevant to the carriage of the goods.

CHAPTER 6. ADDITIONAL PROVISIONS RELATING TO  
PARTICULAR STAGES OF CARRIAGE

*Article 24. Deviation*

When pursuant to applicable law a deviation constitutes a breach of the carrier's obligations, such deviation of itself shall not deprive the carrier or a maritime performing party of any defence or limitation of this Convention, except to the extent provided in article 61.

*Article 25. Deck cargo on ships*

1. Goods may be carried on the deck of a ship only if:

- (a) Such carriage is required by law;
- (b) They are carried in or on containers or vehicles that are fit for deck carriage, and the decks are specially fitted to carry such containers or vehicles; or
- (c) The carriage on deck is in accordance with the contract of carriage, or the customs, usages or practices of the trade in question.

2. The provisions of this Convention relating to the liability of the carrier apply to the loss of, damage to or delay in the delivery of goods carried on deck pursuant to paragraph 1 of this article, but the carrier is not liable for loss of or damage to such goods, or delay in their delivery, caused by the special risks involved in their carriage on deck when the goods are carried in accordance with subparagraphs 1 (a) or (c) of this article.

3. If the goods have been carried on deck in cases other than those permitted pursuant to paragraph 1 of this article, the carrier is liable for loss of or damage to the goods or delay in their delivery that is exclusively caused by their carriage on deck, and is not entitled to the defences provided for in article 17.

4. The carrier is not entitled to invoke subparagraph 1 (c) of this article against a third party that has acquired a negotiable transport document or a negotiable electronic transport record in good faith, unless the contract particulars state that the goods may be carried on deck.

5. If the carrier and shipper expressly agreed that the goods would be carried under deck, the carrier is not entitled to the benefit of the limitation of liability for any loss of, damage to or delay in the delivery of the goods to the extent that such loss, damage, or delay resulted from their carriage on deck.

*Article 26. Carriage preceding or subsequent to sea carriage*

When loss of or damage to goods, or an event or circumstance causing a delay in their delivery, occurs during the carrier's period of responsibility but solely before their loading onto the ship or solely after their discharge from the ship, the provisions of this Convention do not prevail over those provisions of another international instrument that, at the time of such loss, damage or event or circumstance causing delay:

(a) Pursuant to the provisions of such international instrument would have applied to all or any of the carrier's activities if the shipper had made a separate and direct contract with the carrier in respect of the particular stage of carriage where the loss of, or damage to goods, or an event or circumstance causing delay in their delivery occurred;

(b) Specifically provide for the carrier's liability, limitation of liability, or time for suit; and

(c) Cannot be departed from by contract either at all or to the detriment of the shipper under that instrument.

## CHAPTER 7. OBLIGATIONS OF THE SHIPPER TO THE CARRIER

*Article 27. Delivery for carriage*

1. Unless otherwise agreed in the contract of carriage, the shipper shall deliver the goods ready for carriage. In any event, the shipper shall deliver the goods in such condition that they will withstand the intended carriage, including their loading, handling, stowing, lashing and securing, and unloading, and that they will not cause harm to persons or property.

2. The shipper shall properly and carefully perform any obligation assumed under an agreement made pursuant to article 13, paragraph 2.

3. When a container is packed or a vehicle is loaded by the shipper, the shipper shall properly and carefully stow, lash and secure the contents in or on the container or vehicle, and in such a way that they will not cause harm to persons or property.

*Article 28. Cooperation of the shipper and the carrier in providing information and instructions*

The carrier and the shipper shall respond to requests from each other to provide information and instructions required for the proper handling and carriage of the goods if the information is in the requested party's possession or the instructions are within the requested party's reasonable ability to provide and they are not otherwise reasonably available to the requesting party.

*Article 29. Shipper's obligation to provide information, instructions and documents*

1. The shipper shall provide to the carrier in a timely manner such information, instructions and documents relating to the goods that are not otherwise reasonably available to the carrier, and that are reasonably necessary:

(a) For the proper handling and carriage of the goods, including precautions to be taken by the carrier or a performing party; and

(b) For the carrier to comply with law, regulations or other requirements of public authorities in connection with the intended carriage, provided that the carrier notifies the shipper in a timely manner of the information, instructions and documents it requires.

2. Nothing in this article affects any specific obligation to provide certain information, instructions and documents related to the goods pursuant to law, regulations or other requirements of public authorities in connection with the intended carriage.

*Article 30. Basis of shipper's liability to the carrier*

1. The shipper is liable for loss or damage sustained by the carrier if the carrier proves that such loss or damage was caused by a breach of the shipper's obligations under this Convention.

2. Except in respect of loss or damage caused by a breach by the shipper of its obligations pursuant to articles 31, paragraph 2, and 32, the shipper is relieved of all or part of its liability if the cause or one of the causes of the loss or damage is not attributable to its fault or to the fault of any person referred to in article 34.

3. When the shipper is relieved of part of its liability pursuant to this article, the shipper is liable only for that part of the loss or damage that is attributable to its fault or to the fault of any person referred to in article 34.

*Article 31. Information for compilation of contract particulars*

1. The shipper shall provide to the carrier, in a timely manner, accurate information required for the compilation of the contract particulars and the issuance of the transport documents or electronic transport records, including the particulars referred to in article 36, paragraph 1; the name of the party to be identified as the shipper in the contract particulars; the name of the consignee, if any; and the name of the person to whose order the transport document or electronic transport record is to be issued, if any.

2. The shipper is deemed to have guaranteed the accuracy at the time of receipt by the carrier of the information that is provided according to paragraph 1 of this article. The shipper shall indemnify the carrier against loss or damage resulting from the inaccuracy of such information.

*Article 32. Special rules on dangerous goods*

When goods by their nature or character are, or reasonably appear likely to become, a danger to persons, property or the environment:

(a) The shipper shall inform the carrier of the dangerous nature or character of the goods in a timely manner before they are delivered to the carrier or a performing party. If the shipper fails to do so and the carrier or performing party does not otherwise have knowledge of their dangerous nature or character, the shipper is liable to the carrier for loss or damage resulting from such failure to inform; and

(b) The shipper shall mark or label dangerous goods in accordance with any law, regulations or other requirements of public authorities that apply during any stage of the intended carriage of the goods. If the shipper fails to do so, it is liable to the carrier for loss or damage resulting from such failure.

*Article 33. Assumption of shipper's rights and obligations by the documentary shipper*

1. A documentary shipper is subject to the obligations and liabilities imposed on the shipper pursuant to this chapter and pursuant to article 55, and is entitled to the shipper's rights and defences provided by this chapter and by chapter 13.

2. Paragraph 1 of this article does not affect the obligations, liabilities, rights or defences of the shipper.

*Article 34. Liability of the shipper for other persons*

The shipper is liable for the breach of its obligations under this Convention caused by the acts or omissions of any person, including employees, agents and subcontractors, to which it has entrusted the performance of any of its obligations, but the shipper is not liable for acts or omissions of the carrier or a performing party acting on behalf of the carrier, to which the shipper has entrusted the performance of its obligations.

CHAPTER 8. TRANSPORT DOCUMENTS AND  
ELECTRONIC TRANSPORT RECORDS

*Article 35. Issuance of the transport document or the electronic transport record*

Unless the shipper and the carrier have agreed not to use a transport document or an electronic transport record, or it is the custom, usage or practice of the trade not to use one, upon delivery of the goods for carriage to the carrier or performing party, the shipper or, if the shipper consents, the documentary shipper, is entitled to obtain from the carrier, at the shipper's option:

(a) A non-negotiable transport document or, subject to article 8, subparagraph (a), a non-negotiable electronic transport record; or

(b) An appropriate negotiable transport document or, subject to article 8, subparagraph (a), a negotiable electronic transport record, unless the shipper and the

carrier have agreed not to use a negotiable transport document or negotiable electronic transport record, or it is the custom, usage or practice of the trade not to use one.

*Article 36. Contract particulars*

1. The contract particulars in the transport document or electronic transport record referred to in article 35 shall include the following information, as furnished by the shipper:

- (a) A description of the goods as appropriate for the transport;
- (b) The leading marks necessary for identification of the goods;
- (c) The number of packages or pieces, or the quantity of goods; and
- (d) The weight of the goods, if furnished by the shipper.

2. The contract particulars in the transport document or electronic transport record referred to in article 35 shall also include:

- (a) A statement of the apparent order and condition of the goods at the time the carrier or a performing party receives them for carriage;
- (b) The name and address of the carrier;
- (c) The date on which the carrier or a performing party received the goods, or on which the goods were loaded on board the ship, or on which the transport document or electronic transport record was issued; and
- (d) If the transport document is negotiable, the number of originals of the negotiable transport document, when more than one original is issued.

3. The contract particulars in the transport document or electronic transport record referred to in article 35 shall further include:

- (a) The name and address of the consignee, if named by the shipper;
- (b) The name of a ship, if specified in the contract of carriage;
- (c) The place of receipt and, if known to the carrier, the place of delivery; and
- (d) The port of loading and the port of discharge, if specified in the contract of carriage.

4. For the purposes of this article, the phrase “apparent order and condition of the goods” in subparagraph 2 (a) of this article refers to the order and condition of the goods based on:

- (a) A reasonable external inspection of the goods as packaged at the time the shipper delivers them to the carrier or a performing party; and
- (b) Any additional inspection that the carrier or a performing party actually performs before issuing the transport document or electronic transport record.

*Article 37. Identity of the carrier*

1. If a carrier is identified by name in the contract particulars, any other information in the transport document or electronic transport record relating to the identity of the carrier shall have no effect to the extent that it is inconsistent with that identification.

2. If no person is identified in the contract particulars as the carrier as required pursuant to article 36, subparagraph 2 (b), but the contract particulars indicate that the goods have been loaded on board a named ship, the registered owner of that ship is presumed to be the carrier, unless it proves that the ship was under a bareboat charter at the time of the carriage and it identifies this bareboat charterer and indicates its address, in which case this bareboat charterer is presumed to be the carrier. Alternatively, the registered owner may rebut the presumption of being the carrier by identifying the carrier and indicating its address. The bareboat charterer may rebut any presumption of being the carrier in the same manner.

3. Nothing in this article prevents the claimant from proving that any person other than a person identified in the contract particulars or pursuant to paragraph 2 of this article is the carrier.

#### *Article 38. Signature*

1. A transport document shall be signed by the carrier or a person acting on its behalf.

2. An electronic transport record shall include the electronic signature of the carrier or a person acting on its behalf. Such electronic signature shall identify the signatory in relation to the electronic transport record and indicate the carrier's authorization of the electronic transport record.

#### *Article 39. Deficiencies in the contract particulars*

1. The absence or inaccuracy of one or more of the contract particulars referred to in article 36, paragraphs 1, 2 or 3, does not of itself affect the legal character or validity of the transport document or of the electronic transport record.

2. If the contract particulars include the date but fail to indicate its significance, the date is deemed to be:

(a) The date on which all of the goods indicated in the transport document or electronic transport record were loaded on board the ship, if the contract particulars indicate that the goods have been loaded on board a ship; or

(b) The date on which the carrier or a performing party received the goods, if the contract particulars do not indicate that the goods have been loaded on board a ship.

3. If the contract particulars fail to state the apparent order and condition of the goods at the time the carrier or a performing party receives them, the contract particulars are deemed to have stated that the goods were in apparent good order and condition at the time the carrier or a performing party received them.

#### *Article 40. Qualifying the information relating to the goods in the contract particulars*

1. The carrier shall qualify the information referred to in article 36, paragraph 1, to indicate that the carrier does not assume responsibility for the accuracy of the information furnished by the shipper if:

(a) The carrier has actual knowledge that any material statement in the transport document or electronic transport record is false or misleading; or

(b) The carrier has reasonable grounds to believe that a material statement in the transport document or electronic transport record is false or misleading.

2. Without prejudice to paragraph 1 of this article, the carrier may qualify the information referred to in article 36, paragraph 1, in the circumstances and in the manner set out in paragraphs 3 and 4 of this article to indicate that the carrier does not assume responsibility for the accuracy of the information furnished by the shipper.

3. When the goods are not delivered for carriage to the carrier or a performing party in a closed container or vehicle, or when they are delivered in a closed container or vehicle and the carrier or a performing party actually inspects them, the carrier may qualify the information referred to in article 36, paragraph 1, if:

(a) The carrier had no physically practicable or commercially reasonable means of checking the information furnished by the shipper, in which case it may indicate which information it was unable to check; or

(b) The carrier has reasonable grounds to believe the information furnished by the shipper to be inaccurate, in which case it may include a clause providing what it reasonably considers accurate information.

4. When the goods are delivered for carriage to the carrier or a performing party in a closed container or vehicle, the carrier may qualify the information referred to in:

(a) Article 36, subparagraphs 1 (a), (b), or (c), if:

(i) The goods inside the container or vehicle have not actually been inspected by the carrier or a performing party; and

(ii) Neither the carrier nor a performing party otherwise has actual knowledge of its contents before issuing the transport document or the electronic transport record; and

(b) Article 36, subparagraph 1 (d), if:

(i) Neither the carrier nor a performing party weighed the container or vehicle, and the shipper and the carrier had not agreed prior to the shipment that the container or vehicle would be weighed and the weight would be included in the contract particulars; or

(ii) There was no physically practicable or commercially reasonable means of checking the weight of the container or vehicle.

*Article 41. Evidentiary effect of the contract particulars*

Except to the extent that the contract particulars have been qualified in the circumstances and in the manner set out in article 40:

(a) A transport document or an electronic transport record is prima facie evidence of the carrier's receipt of the goods as stated in the contract particulars;

(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 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;

(c) Proof to the contrary by the carrier shall not be admissible against a consignee that in good faith has acted in reliance on any 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 36, 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 36, paragraph 2.

*Article 42. "Freight prepaid"*

If the contract particulars contain the statement "freight prepaid" or a statement of a similar nature, the carrier cannot assert against the holder or the consignee the fact that the freight has not been paid. This article does not apply if the holder or the consignee is also the shipper.

CHAPTER 9. DELIVERY OF THE GOODS

*Article 43. Obligation to accept delivery*

When the goods have arrived at their destination, the consignee that demands delivery of the goods under the contract of carriage 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 at which, having regard to the terms of the contract, the customs, usages or practices of the trade and the circumstances of the carriage, delivery could reasonably be expected.

*Article 44. Obligation to acknowledge receipt*

On request of the carrier or the performing party that delivers the goods, the consignee shall acknowledge receipt of the goods from the carrier or the performing party in the manner that is customary at the place of delivery. The carrier may refuse delivery if the consignee refuses to acknowledge such receipt.

*Article 45. Delivery when no negotiable transport document  
or negotiable electronic transport record is issued*

When neither a negotiable transport document nor a negotiable electronic transport record has been issued:

- (a) The carrier shall deliver the goods to the consignee at the time and location referred to in article 43. The carrier may refuse delivery if the person claiming to be the consignee does not properly identify itself as the consignee on the request of the carrier;
- (b) If the name and address of the consignee are not referred to in the contract particulars, the controlling party shall prior to or upon the arrival of the goods at the place of destination advise the carrier of such name and address;
- (c) Without prejudice to article 48, paragraph 1, if the goods are not deliverable because (i) the consignee, after having received a notice of arrival, does not, at the time or within the time period referred to in article 43, claim delivery of the goods from the carrier after their arrival at the place of destination, (ii) the carrier



refuses delivery because the person claiming to be the consignee does not properly identify itself as the consignee, or (iii) the carrier is, after reasonable effort, unable to locate the consignee in order to request delivery instructions, the carrier may so advise the controlling party and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the controlling party, the carrier may so advise the shipper and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier may so advise the documentary shipper and request instructions in respect of the delivery of the goods;

(d) The carrier that delivers the goods upon instruction of the controlling party, the shipper or the documentary shipper pursuant to subparagraph (c) of this article is discharged from its obligations to deliver the goods under the contract of carriage.

*Article 46. Delivery when a non-negotiable transport document that requires surrender is issued*

When a non-negotiable transport document has been issued that indicates that it shall be surrendered in order to obtain delivery of the goods:

(a) The carrier shall deliver the goods at the time and location referred to in article 43 to the consignee upon the consignee properly identifying itself on the request of the carrier and surrender of the non-negotiable document. The carrier may refuse delivery if the person claiming to be the consignee fails to properly identify itself on the request of the carrier, and shall refuse delivery if the non negotiable document is not surrendered. If more than one original of the non negotiable document has been issued, the surrender of one original will suffice and the other originals cease to have any effect or validity;

(b) Without prejudice to article 48, paragraph 1, if the goods are not deliverable because (i) the consignee, after having received a notice of arrival, does not, at the time or within the time period referred to in article 43, claim delivery of the goods from the carrier after their arrival at the place of destination, (ii) the carrier refuses delivery because the person claiming to be the consignee does not properly identify itself as the consignee or does not surrender the document, or (iii) the carrier is, after reasonable effort, unable to locate the consignee in order to request delivery instructions, the carrier may so advise the shipper and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier may so advise the documentary shipper and request instructions in respect of the delivery of the goods;

(c) The carrier that delivers the goods upon instruction of the shipper or the documentary shipper pursuant to subparagraph (b) of this article is discharged from its obligation to deliver the goods under the contract of carriage, irrespective of whether the non-negotiable transport document has been surrendered to it.

*Article 47. Delivery when a negotiable transport document or negotiable electronic transport record is issued*

1. When a negotiable transport document or a negotiable electronic transport record has been issued:

(a) 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 43 to the holder:

- (i) Upon surrender of the negotiable transport document and, if the holder is one of the persons referred to in article 1, subparagraph 10 (a)(i), upon the holder properly identifying itself; or
  - (ii) Upon demonstration by the holder, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder of the negotiable electronic transport record;
- (b) The carrier shall refuse delivery if the requirements of subparagraph (a)(i) or (a)(ii) of this paragraph are not met;
- (c) If more than one original of the negotiable transport document has been issued, and the number of originals is stated in that document, 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, paragraph 1.

2. Without prejudice to article 48, paragraph 1, if the negotiable transport document or the negotiable electronic transport record expressly states that the goods may be delivered without the surrender of the transport document or the electronic transport record, the following rules apply:

- (a) If the goods are not deliverable because (i) the holder, after having received a notice of arrival, does not, at the time or within the time period referred to in article 43, claim delivery of the goods from the carrier after their arrival at the place of destination, (ii) the carrier refuses delivery because the person claiming to be a holder does not properly identify itself as one of the persons referred to in article 1, subparagraph 10 (a)(i), or (iii) the carrier is, after reasonable effort, unable to locate the holder in order to request delivery instructions, the carrier may so advise the shipper and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier may so advise the documentary shipper and request instructions in respect of the delivery of the goods;
- (b) The carrier that delivers the goods upon instruction of the shipper or the documentary shipper in accordance with subparagraph 2 (a) 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 negotiable electronic transport record has demonstrated, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder;
- (c) The person giving instructions under subparagraph 2 (a) of this article shall indemnify the carrier against loss arising from its being held liable to the holder under subparagraph 2 (e) of this article. The carrier may refuse to follow those instructions if the person fails to provide adequate security as the carrier may reasonably request;
- (d) 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 2 (b) 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;

(e) Notwithstanding subparagraphs 2 (b) and 2 (d) of this article, a holder that becomes a holder after such delivery, and that 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. When the contract particulars state the expected time of arrival of the goods, or indicate how to obtain information as to whether the goods have been delivered, it is presumed that the holder at the time that it became a holder had or could reasonably have had knowledge of the delivery of the goods.

*Article 48. Goods remaining undelivered*

1. For the purposes of this article, goods shall be deemed to have remained undelivered only if, after their arrival at the place of destination:

(a) The consignee does not accept delivery of the goods pursuant to this chapter at the time and location referred to in article 43;

(b) The controlling party, the holder, the shipper or the documentary shipper cannot be found or does not give the carrier adequate instructions pursuant to articles 45, 46 and 47;

(c) The carrier is entitled or required to refuse delivery pursuant to articles 44, 45, 46 and 47;

(d) The carrier is not allowed to deliver the goods to the consignee pursuant to the law or regulations of the place at which delivery is requested; or

(e) The goods are otherwise undeliverable by the carrier.

2. Without prejudice to any other rights that the carrier may have against the shipper, controlling party or consignee, if the goods have remained undelivered, the carrier may, at the risk and expense of the person entitled to the goods, take such action in respect of the goods as circumstances may reasonably require, including:

(a) To store the goods at any suitable place;

(b) To unpack the goods if they are packed in containers or vehicles, or to act otherwise in respect of the goods, including by moving them; and

(c) To cause the goods to be sold or destroyed in accordance with the practices or pursuant to the law or regulations of the place where the goods are located at the time.

3. The carrier may exercise the rights under paragraph 2 of this article only after it has given reasonable notice of the intended action under paragraph 2 of this article to the person stated in the contract particulars as the person, if any, to be notified of the arrival of the goods at the place of destination, and to one of the following persons in the order indicated, if known to the carrier: the consignee, the controlling party or the shipper.

4. If the goods are sold pursuant to subparagraph 2 (c) of this article, the carrier shall hold the proceeds of the sale for the benefit of the person entitled to the goods, subject to the deduction of any costs incurred by the carrier and any other amounts that are due to the carrier in connection with the carriage of those goods.

5. The carrier shall not be liable for loss of or damage to goods that occurs during the time that they remain undelivered pursuant to this article unless the claimant proves that such loss or damage resulted from the failure by the carrier to take steps that would have been reasonable in the circumstances to preserve the goods and that the

carrier knew or ought to have known that the loss or damage to the goods would result from its failure to take such steps.

*Article 49. Retention of goods*

Nothing in this Convention affects a right of the carrier or a performing party that may exist pursuant to the contract of carriage or the applicable law to retain the goods to secure the payment of sums due.

CHAPTER 10. RIGHTS OF THE CONTROLLING PARTY

*Article 50. Exercise and extent of right of control*

1. The right of control may be exercised only by the controlling party and is limited to:

(a) The right to give or modify instructions in respect of the goods that do not constitute a variation of the contract of carriage;

(b) The right to obtain delivery of the goods at a scheduled port of call or, in respect of inland carriage, any place en route; and

(c) The right to replace the consignee by any other person including the controlling party.

2. The right of control exists during the entire period of responsibility of the carrier, as provided in article 12, and ceases when that period expires.

*Article 51. Identity of the controlling party and transfer of the right of control*

1. Except in the cases referred to in paragraphs 2, 3 and 4 of this article:

(a) The shipper is the controlling party unless the shipper, when the contract of carriage is concluded, designates the consignee, the documentary shipper or another person as the controlling party;

(b) The controlling party is entitled to transfer the right of control to another person. The transfer becomes effective with respect to the carrier upon its notification of the transfer by the transferor, and the transferee becomes the controlling party; and

(c) The controlling party shall properly identify itself when it exercises the right of control.

2. When a non-negotiable transport document has been issued that indicates that it shall be surrendered in order to obtain delivery of the goods:

(a) The shipper is the controlling party and may transfer the right of control to the consignee named in the transport document by transferring the document to that person without endorsement. If more than one original of the document was issued, all originals shall be transferred in order to effect a transfer of the right of control; and

(b) In order to exercise its right of control, the controlling party shall produce the document and properly identify itself. If more than one original of the document was issued, all originals shall be produced, failing which the right of control cannot be exercised.

3. When a negotiable transport document is issued:

(a) The holder or, if more than one original of the negotiable transport document is issued, the holder of all originals is the controlling party;

(b) The holder may transfer the right of control by transferring the negotiable transport document to another person in accordance with article 57. If more than one original of that document was issued, all originals shall be transferred to that person in order to effect a transfer of the right of control; and

(c) In order to exercise the right of control, the holder shall produce the negotiable transport document to the carrier, and if the holder is one of the persons referred to in article 1, subparagraph 10 (a)(i), the holder shall properly identify itself. If more than one original of the document was issued, all originals shall be produced, failing which the right of control cannot be exercised.

4. When a negotiable electronic transport record is issued:

(a) The holder is the controlling party;

(b) The holder may transfer the right of control to another person by transferring the negotiable electronic transport record in accordance with the procedures referred to in article 9, paragraph 1; and

(c) In order to exercise the right of control, the holder shall demonstrate, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder.

#### *Article 52. Carrier's execution of instructions*

1. Subject to paragraphs 2 and 3 of this article, the carrier shall execute the instructions referred to in article 50 if:

(a) The person giving such instructions is entitled to exercise the right of control;

(b) The instructions can reasonably be executed according to their terms at the moment that they reach the carrier; and

(c) The instructions will not interfere with the normal operations of the carrier, including its delivery practices.

2. In any event, the controlling party shall reimburse the carrier for any reasonable additional expense that the carrier may incur and shall indemnify the carrier against loss or damage that the carrier may suffer as a result of diligently executing any instruction pursuant to this article, including compensation that the carrier may become liable to pay for loss of or damage to other goods being carried.

3. The carrier is entitled to obtain security from the controlling party for the amount of additional expense, loss or damage that the carrier reasonably expects will arise in connection with the execution of an instruction pursuant to this article. The carrier may refuse to carry out the instructions if no such security is provided.

4. The carrier's liability for loss of or damage to the goods or for delay in delivery resulting from its failure to comply with the instructions of the controlling party in breach of its obligation pursuant to paragraph 1 of this article shall be subject to articles 17 to 23, and the amount of the compensation payable by the carrier shall be subject to articles 59 to 61.

*Article 53. Deemed delivery*

Goods that are delivered pursuant to an instruction in accordance with article 52, paragraph 1, are deemed to be delivered at the place of destination, and the provisions of chapter 9 relating to such delivery apply to such goods.

*Article 54. Variations to the contract of carriage*

1. The controlling party is the only person that may agree with the carrier to variations to the contract of carriage other than those referred to in article 50, subparagraphs 1 (b) and (c).

2. Variations to the contract of carriage, including those referred to in article 50, subparagraphs 1 (b) and (c), shall be stated in a negotiable transport document or in a non-negotiable transport document that requires surrender, or incorporated in a negotiable electronic transport record, or, upon the request of the controlling party, shall be stated in a non-negotiable transport document or incorporated in a non-negotiable electronic transport record. If so stated or incorporated, such variations shall be signed in accordance with article 38.

*Article 55. Providing additional information, instructions or documents to carrier*

1. The controlling party, on request of the carrier or a performing party, shall provide in a timely manner information, instructions or documents relating to the goods not yet provided by the shipper and not otherwise reasonably available to the carrier that the carrier may reasonably need to perform its obligations under the contract of carriage.

2. If the carrier, after reasonable effort, is unable to locate the controlling party or the controlling party is unable to provide adequate information, instructions or documents to the carrier, the shipper shall provide them. If the carrier, after reasonable effort, is unable to locate the shipper, the documentary shipper shall provide such information, instructions or documents.

*Article 56. Variation by agreement*

The parties to the contract of carriage may vary the effect of articles 50, subparagraphs 1 (b) and (c), 50, paragraph 2, and 52. The parties may also restrict or exclude the transferability of the right of control referred to in article 51, subparagraph 1 (b).

CHAPTER 11. TRANSFER OF RIGHTS

*Article 57. When a negotiable transport document or negotiable electronic transport record is issued*

1. When a negotiable transport document is issued, the holder may transfer the rights incorporated in the document by transferring it to another person:

(a) Duly endorsed either to such other person or in blank, if an order document;  
or

(b) Without endorsement, if: (i) a bearer document or a blank endorsed document; or (ii) a document made out to the order of a named person and the transfer is between the first holder and the named person.

2. When a negotiable electronic transport record is issued, its holder may transfer the rights incorporated in it, whether it be made out to order or to the order of a named person, by transferring the electronic transport record in accordance with the procedures referred to in article 9, paragraph 1.

*Article 58. Liability of holder*

1. Without prejudice to article 55, a holder that is not the shipper and that does not exercise any right under the contract of carriage does not assume any liability under the contract of carriage solely by reason of being a holder.

2. A holder that is not the shipper and that exercises any right under the contract of carriage assumes any liabilities imposed on it under the contract of carriage to the extent that such liabilities are incorporated in or ascertainable from the negotiable transport document or the negotiable electronic transport record.

3. For the purposes of paragraphs 1 and 2 of this article, a holder that is not the shipper does not exercise any right under the contract of carriage solely because:

(a) It agrees with the carrier, pursuant to article 10, to replace a negotiable transport document by a negotiable electronic transport record or to replace a negotiable electronic transport record by a negotiable transport document; or

(b) It transfers its rights pursuant to article 57.

CHAPTER 12. LIMITS OF LIABILITY

*Article 59. Limits of liability*

1. Subject to articles 60 and 61, paragraph 1, the carrier's liability for breaches of its obligations under this Convention is limited to 875 units of account per package or other shipping unit, or 3 units of account per kilogram of the gross weight of the goods that are the subject of the claim or dispute, whichever amount is the higher, except when the value of the goods has been declared by the shipper and included in the contract particulars, or when a higher amount than the amount of limitation of liability set out in this article has been agreed upon between the carrier and the shipper.

2. When goods are carried in or on a container, pallet or similar article of transport used to consolidate goods, or in or on a vehicle, the packages or shipping units enumerated in the contract particulars as packed in or on such article of transport or vehicle are deemed packages or shipping units. If not so enumerated, the goods in or on such article of transport or vehicle are deemed one shipping unit.

3. The unit of account referred to in this article is the Special Drawing Right as defined by the International Monetary Fund. The amounts referred to in this article are to be converted into the national currency of a State according to the value of such currency at the date of judgement or award or the date agreed upon by the parties. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State that is a member of the International Monetary Fund is to be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State that is not a member of the International Monetary Fund is to be calculated in a manner to be determined by that State.

*Article 60. Limits of liability for loss caused by delay*

Subject to article 61, paragraph 2, compensation for loss of or damage to the goods due to delay shall be calculated in accordance with article 22 and liability for economic loss due to delay is limited to an amount equivalent to two and one-half times the freight payable on the goods delayed. The total amount payable pursuant to this article and article 59, paragraph 1, may not exceed the limit that would be established pursuant to article 59, paragraph 1, in respect of the total loss of the goods concerned.

*Article 61. Loss of the benefit of limitation of liability*

1. Neither the carrier nor any of the persons referred to in article 18 is entitled to the benefit of the limitation of liability as provided in article 59, or as provided in the contract of carriage, if the claimant proves that the loss resulting from the breach of the carrier's obligation under this Convention was attributable to a personal act or omission of the person claiming a right to limit done with the intent to cause such loss or recklessly and with knowledge that such loss would probably result.

2. Neither the carrier nor any of the persons mentioned in article 18 is entitled to the benefit of the limitation of liability as provided in article 60 if the claimant proves that the delay in delivery resulted from a personal act or omission of the person claiming a right to limit done with the intent to cause the loss due to delay or recklessly and with knowledge that such loss would probably result.

#### CHAPTER 13. TIME FOR SUIT

*Article 62. Period of time for suit*

1. No judicial or arbitral proceedings in respect of claims or disputes arising from a breach of an obligation under this Convention may be instituted after the expiration of a period of two years.

2. The period referred to in paragraph 1 of this article commences on the day on which the carrier has delivered the goods or, in cases in which no goods have been delivered or only part of the goods have been delivered, on the last day on which the goods should have been delivered. The day on which the period commences is not included in the period.

3. Notwithstanding the expiration of the period set out in paragraph 1 of this article, one party may rely on its claim as a defence or for the purpose of set-off against a claim asserted by the other party.

*Article 63. Extension of time for suit*

The period provided in article 62 shall not be subject to suspension or interruption, but the person against which a claim is made may at any time during the running of the period extend that period by a declaration to the claimant. This period may be further extended by another declaration or declarations.



*Article 64. Action for indemnity*

An action for indemnity by a person held liable may be instituted after the expiration of the period provided in article 62 if the indemnity action is instituted within the later of:

- (a) The time allowed by the applicable law in the jurisdiction where proceedings are instituted; or
- (b) Ninety days commencing from the day when the person instituting the action for indemnity has either settled the claim or been served with process in the action against itself, whichever is earlier.

*Article 65. Actions against the person identified as the carrier*

An action against the bareboat charterer or the person identified as the carrier pursuant to article 37, paragraph 2, may be instituted after the expiration of the period provided in article 62 if the action is instituted within the later of:

- (a) The time allowed by the applicable law in the jurisdiction where proceedings are instituted; or
- (b) Ninety days commencing from the day when the carrier has been identified, or the registered owner or bareboat charterer has rebutted the presumption that it is the carrier, pursuant to article 37, paragraph 2.

## CHAPTER 14. JURISDICTION

*Article 66. Actions against the carrier*

Unless the contract of carriage contains an exclusive choice of court agreement that complies with article 67 or 72, the plaintiff has the right to institute judicial proceedings under this Convention against the carrier:

- (a) In a competent court within the jurisdiction of which is situated one of the following places:
  - (i) The domicile of the carrier;
  - (ii) The place of receipt agreed in the contract of carriage;
  - (iii) The place of delivery agreed in the contract of carriage; or
  - (iv) The port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship; or
- (b) In a competent court or courts designated by an agreement between the shipper and the carrier for the purpose of deciding claims against the carrier that may arise under this Convention.

*Article 67. Choice of court agreements*

1. The jurisdiction of a court chosen in accordance with article 66, paragraph (b), is exclusive for disputes between the parties to the contract only if the parties so agree and the agreement conferring jurisdiction:

- (a) Is contained in a volume contract that clearly states the names and addresses of the parties and either (i) is individually negotiated or (ii) contains a prominent

statement that there is an exclusive choice of court agreement and specifies the sections of the volume contract containing that agreement; and

(b) Clearly designates the courts of one Contracting State or one or more specific courts of one Contracting State.

2. A person that is not a party to the volume contract is bound by an exclusive choice of court agreement concluded in accordance with paragraph 1 of this article only if:

(a) The court is in one of the places designated in article 66, paragraph (a);

(b) That agreement is contained in the transport document or electronic transport record;

(c) That person is given timely and adequate notice of the court where the action shall be brought and that the jurisdiction of that court is exclusive; and

(d) The law of the court seized recognizes that that person may be bound by the exclusive choice of court agreement.

*Article 68. Actions against the maritime performing party*

The plaintiff has the right to institute judicial proceedings under this Convention against the maritime performing party in a competent court within the jurisdiction of which is situated one of the following places:

(a) The domicile of the maritime performing party; or

(b) The port where the goods are received by the maritime performing party, the port where the goods are delivered by the maritime performing party or the port in which the maritime performing party performs its activities with respect to the goods.

*Article 69. No additional bases of jurisdiction*

Subject to articles 71 and 72, no judicial proceedings under this Convention against the carrier or a maritime performing party may be instituted in a court not designated pursuant to articles 66 or 68.

*Article 70. Arrest and provisional or protective measures*

Nothing in this Convention affects jurisdiction with regard to provisional or protective measures, including arrest. A court in a State in which a provisional or protective measure was taken does not have jurisdiction to determine the case upon its merits unless:

(a) The requirements of this chapter are fulfilled; or

(b) An international convention that applies in that State so provides.

*Article 71. Consolidation and removal of actions*

1. Except when there is an exclusive choice of court agreement that is binding pursuant to articles 67 or 72, if a single action is brought against both the carrier and the maritime performing party arising out of a single occurrence, the action may be instituted only in a court designated pursuant to both article 66 and article 68. If there is no such court, such action may be instituted in a court designated pursuant to article 68, subparagraph (b), if there is such a court.

2. Except when there is an exclusive choice of court agreement that is binding pursuant to articles 67 or 72, a carrier or a maritime performing party that institutes an action seeking a declaration of non-liability or any other action that would deprive a person of its right to select the forum pursuant to article 66 or 68 shall, at the request of the defendant, withdraw that action once the defendant has chosen a court designated pursuant to article 66 or 68, whichever is applicable, where the action may be recommenced.

*Article 72. Agreement after a dispute has arisen and jurisdiction when the defendant has entered an appearance*

1. After a dispute has arisen, the parties to the dispute may agree to resolve it in any competent court.
2. A competent court before which a defendant appears, without contesting jurisdiction in accordance with the rules of that court, has jurisdiction.

*Article 73. Recognition and enforcement*

1. A decision made in one Contracting State by a court having jurisdiction under this Convention shall be recognized and enforced in another Contracting State in accordance with the law of such latter Contracting State when both States have made a declaration in accordance with article 74.
2. A court may refuse recognition and enforcement based on the grounds for the refusal of recognition and enforcement available pursuant to its law.
3. This chapter shall not affect the application of the rules of a regional economic integration organization that is a party to this Convention, as concerns the recognition or enforcement of judgements as between member States of the regional economic integration organization, whether adopted before or after this Convention.

*Article 74. Application of chapter 14*

The provisions of this chapter shall bind only Contracting States that declare in accordance with article 91 that they will be bound by them.

## CHAPTER 15. ARBITRATION

*Article 75. Arbitration agreements*

1. Subject to this chapter, parties may agree that any dispute that may arise relating to the carriage of goods under this Convention shall be referred to arbitration.
2. The arbitration proceedings shall, at the option of the person asserting a claim against the carrier, take place at:
  - (a) Any place designated for that purpose in the arbitration agreement; or
  - (b) Any other place situated in a State where any of the following places is located:
    - (i) The domicile of the carrier;
    - (ii) The place of receipt agreed in the contract of carriage;
    - (iii) The place of delivery agreed in the contract of carriage; or

(iv) The port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship.

3. The designation of the place of arbitration in the agreement is binding for disputes between the parties to the agreement if the agreement is contained in a volume contract that clearly states the names and addresses of the parties and either:

(a) Is individually negotiated; or

(b) Contains a prominent statement that there is an arbitration agreement and specifies the sections of the volume contract containing the arbitration agreement.

4. When an arbitration agreement has been concluded in accordance with paragraph 3 of this article, a person that is not a party to the volume contract is bound by the designation of the place of arbitration in that agreement only if:

(a) The place of arbitration designated in the agreement is situated in one of the places referred to in subparagraph 2 (b) of this article;

(b) The agreement is contained in the transport document or electronic transport record;

(c) The person to be bound is given timely and adequate notice of the place of arbitration; and

(d) Applicable law permits that person to be bound by the arbitration agreement.

5. The provisions of paragraphs 1, 2, 3 and 4 of this article are deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement to the extent that it is inconsistent therewith is void.

*Article 76. Arbitration agreement in non-liner transportation*

1. Nothing in this Convention affects the enforceability of an arbitration agreement in a contract of carriage in non-liner transportation to which this Convention or the provisions of this Convention apply by reason of:

(a) The application of article 7; or

(b) The parties' voluntary incorporation of this Convention in a contract of carriage that would not otherwise be subject to this Convention.

2. Notwithstanding paragraph 1 of this article, an arbitration agreement in a transport document or electronic transport record to which this Convention applies by reason of the application of article 7 is subject to this chapter unless such a transport document or electronic transport record:

(a) Identifies the parties to and the date of the charterparty or other contract excluded from the application of this Convention by reason of the application of article 6; and

(b) Incorporates by specific reference the clause in the charterparty or other contract that contains the terms of the arbitration agreement.

*Article 77. Agreement to arbitrate after a dispute has arisen*

Notwithstanding the provisions of this chapter and chapter 14, after a dispute has arisen the parties to the dispute may agree to resolve it by arbitration in any place.

*Article 78. Application of chapter 15*

The provisions of this chapter shall bind only Contracting States that declare in accordance with article 91 that they will be bound by them.

## CHAPTER 16. VALIDITY OF CONTRACTUAL TERMS

*Article 79. General provisions*

1. Unless otherwise provided in this Convention, any term in a contract of carriage is void to the extent that it:

(a) Directly or indirectly excludes or limits the obligations of the carrier or a maritime performing party under this Convention;

(b) Directly or indirectly excludes or limits the liability of the carrier or a maritime performing party for breach of an obligation under this Convention; or

(c) Assigns a benefit of insurance of the goods in favour of the carrier or a person referred to in article 18.

2. Unless otherwise provided in this Convention, any term in a contract of carriage is void to the extent that it:

(a) Directly or indirectly excludes, limits or increases the obligations under this Convention of the shipper, consignee, controlling party, holder or documentary shipper; or

(b) Directly or indirectly excludes, limits or increases the liability of the shipper, consignee, controlling party, holder or documentary shipper for breach of any of its obligations under this Convention.

*Article 80. Special rules for volume contracts*

1. Notwithstanding article 79, as between the carrier and the shipper, a volume contract to which this Convention applies may provide for greater or lesser rights, obligations and liabilities than those imposed by this Convention.

2. A derogation pursuant to paragraph 1 of this article is binding only when:

(a) The volume contract contains a prominent statement that it derogates from this Convention;

(b) The volume contract is (i) individually negotiated or (ii) prominently specifies the sections of the volume contract containing the derogations;

(c) The shipper is given an opportunity and notice of the opportunity to conclude a contract of carriage on terms and conditions that comply with this Convention without any derogation under this article; and

(d) The derogation is neither (i) incorporated by reference from another document nor (ii) included in a contract of adhesion that is not subject to negotiation.

3. A carrier's public schedule of prices and services, transport document, electronic transport record or similar document is not a volume contract pursuant to paragraph 1 of this article, but a volume contract may incorporate such documents by reference as terms of the contract.

4. Paragraph 1 of this article does not apply to rights and obligations provided in articles 14, subparagraphs (a) and (b), 29 and 32 or to liability arising from the breach thereof, nor does it apply to any liability arising from an act or omission referred to in article 61.

5. The terms of the volume contract that derogate from this Convention, if the volume contract satisfies the requirements of paragraph 2 of this article, apply between the carrier and any person other than the shipper provided that:

(a) Such person received information that prominently states that the volume contract derogates from this Convention and gave its express consent to be bound by such derogations; and

(b) Such consent is not solely set forth in a carrier's public schedule of prices and services, transport document or electronic transport record.

6. The party claiming the benefit of the derogation bears the burden of proof that the conditions for derogation have been fulfilled.

*Article 81. Special rules for live animals and certain other goods*

Notwithstanding article 79 and without prejudice to article 80, the contract of carriage may exclude or limit the obligations or the liability of both the carrier and a maritime performing party if:

(a) The goods are live animals, but any such exclusion or limitation will not be effective if the claimant proves that the loss of or damage to the goods, or delay in delivery, resulted from an act or omission of the carrier or of a person referred to in article 18, done with the intent to cause such loss of or damage to the goods or such loss due to delay or done recklessly and with knowledge that such loss or damage or such loss due to delay would probably result; or

(b) The character or condition of the goods or the circumstances and terms and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement, provided that such contract of carriage is not related to ordinary commercial shipments made in the ordinary course of trade and that no negotiable transport document or negotiable electronic transport record is issued for the carriage of the goods.

CHAPTER 17. MATTERS NOT GOVERNED BY THIS CONVENTION

*Article 82. International conventions governing the carriage of goods by other modes of transport*

Nothing in this Convention affects the application of any of the following international conventions in force at the time this Convention enters into force, including any future amendment to such conventions, that regulate the liability of the carrier for loss of or damage to the goods:

(a) Any convention governing the carriage of goods by air to the extent that such convention according to its provisions applies to any part of the contract of carriage;

(b) Any convention governing the carriage of goods by road to the extent that such convention according to its provisions applies to the carriage of goods that remain loaded on a road cargo vehicle carried on board a ship;

(c) Any convention governing the carriage of goods by rail to the extent that such convention according to its provisions applies to carriage of goods by sea as a supplement to the carriage by rail; or

(d) Any convention governing the carriage of goods by inland waterways to the extent that such convention according to its provisions applies to a carriage of goods without trans-shipment both by inland waterways and sea.

*Article 83. Global limitation of liability*

Nothing in this Convention affects the application of any international convention or national law regulating the global limitation of liability of vessel owners.

*Article 84. General average*

Nothing in this Convention affects the application of terms in the contract of carriage or provisions of national law regarding the adjustment of general average.

*Article 85. Passengers and luggage*

This Convention does not apply to a contract of carriage for passengers and their luggage.

*Article 86. Damage caused by nuclear incident*

No liability arises under this Convention for damage caused by a nuclear incident if the operator of a nuclear installation is liable for such damage:

(a) Under the Paris Convention on Third Party Liability in the Field of Nuclear Energy of 29 July 1960 as amended by the Additional Protocol of 28 January 1964 and by the Protocols of 16 November 1982 and 12 February 2004, the Vienna Convention on Civil Liability for Nuclear Damage of 21 May 1963 as amended by the Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention of 21 September 1988 and as amended by the Protocol to Amend the 1963 Vienna Convention on Civil Liability for Nuclear Damage of 12 September 1997, or the Convention on Supplementary Compensation for Nuclear Damage of 12 September 1997, including any amendment to these conventions and any future convention in respect of the liability of the operator of a nuclear installation for damage caused by a nuclear incident; or

(b) Under national law applicable to the liability for such damage, provided that such law is in all respects as favourable to persons that may suffer damage as either the Paris or Vienna Conventions or the Convention on Supplementary Compensation for Nuclear Damage.

CHAPTER 18. FINAL CLAUSES

*Article 87. Depositary*

The Secretary-General of the United Nations is hereby designated as the depositary of this Convention.

*Article 88. Signature, ratification, acceptance, approval or accession*

1. This Convention is open for signature by all States at [Rotterdam, the Netherlands] from [...] to [...] and thereafter at the Headquarters of the United Nations in New York from [...] to [...].
2. This Convention is subject to ratification, acceptance or approval by the signatory States.
3. This Convention is open for accession by all States that are not signatory States as from the date it is open for signature.
4. Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

*Article 89. Denunciation of other conventions*

1. A State that ratifies, accepts, approves or accedes to this Convention and is a party to the International Convention for the Unification of certain Rules of Law relating to Bills of Lading signed at Brussels on 25 August 1924; to the Protocol signed on 23 February 1968 to amend the International Convention for the Unification of certain Rules of Law relating to Bills of Lading signed at Brussels on 25 August 1924; or to the Protocol to amend the International Convention for the Unification of certain Rules of Law relating to Bills of Lading as Modified by the Amending Protocol of 23 February 1968, signed at Brussels on 21 December 1979 shall at the same time denounce that Convention and the protocol or protocols thereto to which it is a party by notifying the Government of Belgium to that effect, with a declaration that the denunciation is to take effect as from the date when this Convention enters into force in respect of that State.
2. A State that ratifies, accepts, approves or accedes to this Convention and is a party to the United Nations Convention on the Carriage of Goods by Sea concluded at Hamburg on 31 March 1978 shall at the same time denounce that Convention by notifying the Secretary-General of the United Nations to that effect, with a declaration that the denunciation is to take effect as from the date when this Convention enters into force in respect of that State.
3. For the purposes of this article, ratifications, acceptances, approvals and accessions in respect of this Convention by States parties to the instruments listed in paragraphs 1 and 2 of this article that are notified to the depositary after this Convention has entered into force are not effective until such denunciations as may be required on the part of those States in respect of these instruments have become effective. The depositary of this Convention shall consult with the Government of Belgium, as the depositary of the instruments referred to in paragraph 1 of this article, so as to ensure necessary coordination in this respect.

*Article 90. Reservations*

No reservation is permitted to this Convention.

*Article 91. Procedure and effect of declarations*

1. The declarations permitted by articles 74 and 78 may be made at any time. The initial declarations permitted by article 92, paragraph 1, and article 93, paragraph 2, shall be made at the time of signature, ratification, acceptance, approval or accession. No other declaration is permitted under this Convention.



2. Declarations made at the time of signature are subject to confirmation upon ratification, acceptance or approval.

3. Declarations and their confirmations are to be in writing and to be formally notified to the depositary.

4. A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary.

5. Any State that makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary. The withdrawal of a declaration, or its modification where permitted by this Convention, takes effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

*Article 92. Effect in domestic territorial units*

1. If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

3. When a Contracting State has declared pursuant to this article that this Convention extends to one or more but not all of its territorial units, a place located in a territorial unit to which this Convention does not extend is not considered to be in a Contracting State for the purposes of this Convention.

4. If a Contracting State makes no declaration pursuant to paragraph 1 of this article, the Convention is to extend to all territorial units of that State.

*Article 93. Participation by regional economic integration organizations*

1. A regional economic integration organization that is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention. The regional economic integration organization shall in that case have the rights and obligations of a Contracting State, to the extent that that organization has competence over matters governed by this Convention. When the number of Contracting States is relevant in this Convention, the regional economic integration organization does not count as a Contracting State in addition to its member States which are Contracting States.

2. The regional economic integration organization shall, at the time of signature, ratification, acceptance, approval or accession, make a declaration to the depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that organization by its member States. The regional economic integration organization shall promptly notify the depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration pursuant to this paragraph.

3. Any reference to a “Contracting State” or “Contracting States” in this Convention applies equally to a regional economic integration organization when the context so requires.

*Article 94. Entry into force*

1. This Convention enters into force on the first day of the month following the expiration of one year after the date of deposit of the twentieth instrument of ratification, acceptance, approval or accession.

2. For each State that becomes a Contracting State to this Convention after the date of the deposit of the twentieth instrument of ratification, acceptance, approval or accession, this Convention enters into force on the first day of the month following the expiration of one year after the deposit of the appropriate instrument on behalf of that State.

3. Each Contracting State shall apply this Convention to contracts of carriage concluded on or after the date of the entry into force of this Convention in respect of that State.

*Article 95. Revision and amendment*

1. At the request of not less than one third of the Contracting States to this Convention, the Secretary-General of the United Nations shall convene a conference of the Contracting States for revising or amending it.

2. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention is deemed to apply to the Convention as amended.

*Article 96. Denunciation of this Convention*

1. A Contracting State may denounce this Convention at any time by means of a notification in writing addressed to the depositary.

2. The denunciation takes effect on the first day of the month following the expiration of one year after the notification is received by the depositary. If a longer period is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

DONE at [Rotterdam, the Netherlands], this [...] day of [...], [...], in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed this Convention.

**Appendix****Renumbering of articles of the draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea**

<i>Current number (annex I to the present document)</i>	<i>Former article number (A/CN.9/645)</i>
1	1
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<i>Current number (annex I to the present document)</i>	<i>Former article number (A/CN.9/645)</i>
39	41
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<i>Current number (annex I to the present document)</i>	<i>Former article number (A/CN.9/645)</i>
84	86
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## Annex II

### **Letter dated 5 June 2008 from the Minister of Transport of the Netherlands, the Mayor of Rotterdam and the Executive Board of the Port of Rotterdam Authority addressed to the delegates at the forty-first session of the United Nations Commission on International Trade Law<sup>1</sup>**

After many years of hard work in Working Group III, during this session of UNCITRAL it is expected that the text of the new convention on maritime transport of goods will be finalized and approved. Most likely, at the end of the session, many of you will breathe a sigh of relief, while hoping that all your efforts will have resulted in a future unification and modernization of maritime law to the benefit of all parties interested in worldwide trade and transport.

The Netherlands and many of its major maritime interests under which the Municipality and Port of Rotterdam have highly appreciated the initiative of UNCITRAL and fully supported the work of all participating delegations over the years. Now that this task will finally be concluded, it would be an honour for the undersigned, The Netherlands Minister of Transport, The Mayor of Rotterdam and the Executive Board of the Port of Rotterdam Authority to invite all of you to come to the port of Rotterdam and to participate in an event for the celebration of the adoption of the Convention. If the General Assembly of the UN would decide so, this event could include a signing ceremony of the new Convention.

A preliminary program could be along the following lines:

- Monday 14 September 2009

Seminar to be held under the auspices of UNCITRAL and CMI with eminent speakers from all over the world on the subjects of the convention.

- Tuesday 15 September 2009

This day could be primarily devoted to port excursions and other practical matters of convenience.

- Wednesday 16 September 2009

A special session of the UN General Assembly could be held during which delegates will have the opportunity to express their policy view on the future of the convention, including the possibility to formally sign the Convention. Afterwards, the UNCITRAL Secretary could address the press.

At present, we are in an advanced stage of negotiations with the owners of the famous s.s. "Rotterdam", a former Holland-America Line passenger steamer, to host the larger part of the event on board of this ship.

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<sup>1</sup> The letter is transmitted in the form in which it was received (A/CN.9/XLI/CRP.3).

We would be very delighted if you would accept our invitation. You may be assured that we will do our utmost to host you during the above three days in view of your hard and laborious work on the convention over the past years.

Yours sincerely,

*[Signed]*

Camiel Eurlings

The Minister of Transport, Public Works and Water Management

*[Signed]*

Ivo Opstelten

The Mayor of Rotterdam

*[Signed]*

Hans Smits

The Executive Board of the Port of Rotterdam Authority

## Annex III

### List of documents before the Commission at its forty-first session

<i>Symbol</i>	<i>Title or description</i>
A/CN.9/640	Report of Working Group I (Procurement) on the work of its twelfth session (Vienna, 3-7 September 2007)
A/CN.9/641	Report of the Working Group on Arbitration and Conciliation on the work of its forty-seventh session (Vienna, 10-14 September 2007)
A/CN.9/642	Report of Working Group III (Transport Law) on the work of its twentieth session (Vienna, 15-25 October 2007)
A/CN.9/643	Report of Working Group V (Insolvency Law) on the work of its thirty-third session (Vienna, 5-9 November 2007)
A/CN.9/644	Provisional agenda, annotations thereto and scheduling of meetings of the forty-first session
A/CN.9/645	Report of Working Group III (Transport Law) on the work of its twenty-first session (Vienna, 14-25 January 2008)
A/CN.9/646	Report of the Working Group on Arbitration and Conciliation on the work of its forty-eighth session (New York, 4-8 February 2008)
A/CN.9/647	Report of Working Group V (Insolvency Law) on the work of its thirty-fourth session (New York, 3-7 March 2008)
A/CN.9/648	Report of Working Group I (Procurement) on the work of its thirteenth session (New York, 7-11 April 2008)
A/CN.9/649	Report of Working Group VI (Security Interests) on the work of its thirteenth session (New York, 19-23 May 2008)
A/CN.9/650	Bibliography of recent writings related to the work of UNCITRAL
A/CN.9/651	Note by the Secretariat on status of conventions and model laws
A/CN.9/652	Note by the Secretariat on technical cooperation and assistance
A/CN.9/653	Note by the Secretariat on UNCITRAL rules of procedure and methods of work
A/CN.9/654	Note by the Secretariat on facilitation of cooperation, direct communication and coordination in cross-border insolvency proceedings
A/CN.9/655	Note by the Secretariat on possible future work on electronic commerce: legal issues arising out of the implementation and operation of single windows in international trade
A/CN.9/656 and Add.1	Note by the Secretariat on the report on the survey relating to the legislative implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)
A/CN.9/657 and Add.1	Note by the Secretariat on current activities of international organizations related to the harmonization and unification of international trade law
A/CN.9/657/Add.2	Note by the Secretariat on current activities of international organizations related to the harmonization and unification of public procurement law



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<i>Symbol</i>	<i>Title or description</i>
A/CN.9/658 and Add.1-14	Draft convention on contracts for the international carriage of goods wholly or partly by sea: compilation of comments by Governments and intergovernmental organizations
A/CN.9/659 and Add.1 and 2	Indicators of Commercial Fraud (A/CN.9/624, A/CN.9/624/Add.1, and A/CN.9/624/Add.2): compilation of comments by Governments and international organizations
A/CN.9/660 and Add.1-5	Note by the Secretariat on UNCITRAL rules of procedure and methods of work: compilation of comments received from Governments
A/CN.9/661 and Add.1-3	Note by the Secretariat on settlement of commercial disputes: 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 (New York, 1958) ("New York Convention"); compilation of comments received from Governments
A/CN.9/662	Note by the Secretariat on settlement of commercial disputes: revision of the UNCITRAL Arbitration Rules; observations by the Government of Canada
A/63/6 (Prog. 6)	Proposed strategic framework for the period of 2010-2011: part two; biennial programme plan, programme 6, Legal affairs
A/CN.9/XLI/CRP.3	Note by the Secretariat transmitting a letter dated 5 June 2008 from the Minister of Transport of the Netherlands, the Mayor of Rotterdam and the Executive Board of the Port of Rotterdam Authority addressed to the delegates at the forty-first session of the United Nations Commission on International Trade Law

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

**(TD/B/55/10)**

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

At its 1027th plenary meeting, on 23 September 2008, the Board took note of the report of UNCITRAL on its fortieth session (A/63/17).

## 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-first session (A/63/438)

[Original: English]

*Rapporteur:* Mr. Marko **Rakovec** (Slovenia)

### I. Introduction

1. At its 2nd plenary meeting, on 19 September 2008, the General Assembly, on the recommendation of the General Committee, decided to include in the agenda of its sixty-third session the item entitled “Report of the United Nations Commission on International Trade Law on the work of its forty-first session” and to allocate it to the Sixth Committee.
2. The Sixth Committee considered the item at its 9th, 10th, 25th and 26th meetings, on 20 October and on 5 and 14 November 2008. The views of the representatives who spoke during the Committee’s consideration of the item are reflected in the relevant summary records (A/C.6/63/SR.9, 10, 25 and 26).
3. For its consideration of the item, the Committee had before it the reports of the United Nations Commission on International Trade Law on the work of its resumed fortieth<sup>1</sup> and forty-first<sup>2</sup> sessions.
4. At the 9th meeting, on 20 October, the Chairperson of the United Nations Commission on International Trade Law at its forty-first session introduced the reports of the Commission on the work of its resumed fortieth and forty-first sessions.

### II. Consideration of proposals

#### A. Draft resolution A/C.6/63/L.4

5. At the 25th meeting, on 5 November, the representative of Austria, on behalf of Algeria, Argentina, Australia, Austria, Belarus, Belgium, Benin, Brazil, Bulgaria, Cameroon, Canada, Chile, China, the Congo, Côte d’Ivoire, Croatia, Cyprus, the Czech Republic, the Democratic Republic of the Congo, Denmark, El Salvador, Estonia, Finland, France, Germany, Ghana, Greece, Guatemala, Hungary, India, Ireland, Israel, Italy, Japan, Jordan, Liechtenstein, Lithuania, Luxembourg, Madagascar, Mexico, Morocco, the Netherlands, Nigeria, Norway, Paraguay, the Philippines, Poland, Portugal, Romania, the Russian Federation, Senegal, Serbia, Singapore, Slovakia, Slovenia, South Africa, Spain, the Sudan, Sweden, Switzerland, Thailand, Trinidad and Tobago, Tunisia, Turkey, Uganda, Ukraine, the United Kingdom of Great Britain and Northern Ireland, Uruguay and Venezuela (Bolivarian Republic of), subsequently joined by Albania, Bosnia and Herzegovina, Egypt, Fiji, Iran (Islamic Republic of), Latvia, Malta, Montenegro, the Republic of Korea, the Republic of Moldova and the former

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<sup>1</sup> *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17 (A/62/17), part two.*

<sup>2</sup> *Ibid., Sixty-third Session, Supplement No. 17 (A/63/17).*

Yugoslav Republic of Macedonia introduced a draft resolution entitled “Reports of the United Nations Commission on International Trade Law on the work of its resumed fortieth and forty-first sessions” (A/C.6/63/L.4).

6. At its 26th meeting, on 14 November, the Committee adopted draft resolution A/C.6/63/L.4 without a vote (see para. 12).

#### **B. Draft resolution A/C.6/63/L.5**

7. At the 25th meeting, on 5 November, the representative of Austria, on behalf of the Bureau, introduced a draft resolution entitled “Legislative Guide on Secured Transactions of the United Nations Commission on International Trade Law” (A/C.6/63/L.5).

8. At its 26th meeting, on 14 November, the Committee adopted draft resolution A/C.6/63/L.5 without a vote (see para. 12).

#### **C. Draft resolution A/C.6/63/L.6**

9. At the 25th meeting, on 5 November, the representative of Austria, on behalf of the Bureau, introduced a draft resolution entitled “United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea” (A/C.6/63/L.6).

10. At the 26th meeting, on 14 November, the Secretary of the Committee made a statement regarding the financial implications of the draft resolution.

11. At the same meeting, the Committee adopted draft resolution A/C.6/63/L.6 without a vote (see para. 12).

### **III. Recommendations of the Sixth Committee**

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

#### **Draft resolution I**

#### **Reports of the United Nations Commission on International Trade Law on the work of its resumed fortieth and its forty-first sessions**

*The General Assembly,*

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

*Reaffirming* its belief that the progressive modernization and harmonization of international trade law, in reducing or removing legal obstacles to the flow of international trade, especially those affecting the developing countries, would contribute significantly to universal economic cooperation among all States on a basis of equality, equity, 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 reports of the Commission on the work of its resumed fortieth<sup>1</sup> and its forty-first sessions,<sup>2</sup>

*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 reports of the United Nations Commission on International Trade Law on the work of its resumed fortieth<sup>1</sup> and its forty-first sessions;<sup>2</sup>

2. *Commends* the Commission for the completion and adoption of the Legislative Guide on Secured Transactions;<sup>3</sup>

3. *Also commends* the Commission for the completion and approval of the draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea;<sup>4</sup>

4. *Welcomes* the progress made by the Commission in its work on a revision of its Model Law on Procurement of Goods, Construction and Services,<sup>5</sup> on the preparation of a draft legislative guide on the treatment of enterprise groups in insolvency, on the compilation of practical experience with negotiating and using cross-border insolvency agreements to facilitate cross-border insolvency proceedings and on the preparation of an annex to its Legislative Guide on Secured Transactions dealing with security rights in intellectual property, and endorses the decision of the Commission to undertake further work in the area of electronic commerce and commercial fraud;

5. *Also welcomes* the progress made by the Commission in its work on a revision of its Arbitration Rules,<sup>6</sup> and encourages the Commission to complete this work

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<sup>1</sup> *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17 (A/62/17), part two.*

<sup>2</sup> *Ibid.*, *Sixty-third Session, Supplement No. 17 and corrigendum (A/63/17 and Corr.1).*

<sup>3</sup> *Ibid.*, *Sixty-second Session, Supplement No. 17 (A/62/17), part two, para. 100.*

<sup>4</sup> *Ibid.*, *Sixty-third Session, Supplement No. 17 and corrigendum (A/63/17 and Corr.1), annex.*

<sup>5</sup> *Ibid.*, *Forty-ninth Session, Supplement No. 17 and corrigendum (A/49/17 and Corr.1), annex I.*

<sup>6</sup> United Nations publication, Sales No. E.77.V.6.

as soon as possible so that the revised Rules may be considered by the Commission at its forty-second session, in 2009;

6. *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;

7. *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 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;

8. *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,<sup>7</sup> 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

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<sup>7</sup> Resolution 48/32, para. 5.

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;

9. *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-third 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;

10. *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 last 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, and in this regard recalls its previous resolutions related to this matter;<sup>8</sup>

11. *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 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;<sup>9</sup>

12. *Further welcomes* the consideration by the Commission of the proposed strategic framework for the period 2010-2011<sup>10</sup> 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;<sup>11</sup>

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<sup>8</sup> *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17 and corrigendum (A/63/17 and Corr.1)*, paras. 373-381.

<sup>9</sup> *Ibid.*, para. 386.

<sup>10</sup> A/63/6 (Prog. 6).

<sup>11</sup> *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 and corrigendum (A/63/17 and Corr.1)*, para. 391.

13. *Recalls* its resolutions on partnerships between the United Nations and non-State actors, in particular the private sector,<sup>12</sup> 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;<sup>13</sup>

14. *Reiterates its request* to the Secretary-General, in conformity with the General Assembly resolutions on documentation-related matters,<sup>14</sup> 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;

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

16. *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,<sup>15</sup> 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*;

17. *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;

18. *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<sup>16</sup> and a digest of case law relating to the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law,<sup>17</sup> with the aim of assisting in the dissemination of information on those texts and promoting their use, enactment and uniform interpretation;

19. *Takes note with appreciation* of conferences celebrating the fiftieth anniversary of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards done in New York on 10 June 1958<sup>18</sup> (the “New York Convention”), the progress made in the ongoing project of the Commission on monitoring the implementation of the New York Convention, the decision of the Commission to develop a guide to enactment of the New York Convention to promote a uniform interpretation and application of the Convention and its decision that, resources permitting, the activities of the secretariat in the context of its technical assistance programme could usefully include dissemination of information on the judicial interpretation of the New York Convention, to complement other activities in support of the Convention;

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<sup>12</sup> Resolutions 55/215, 56/76, 58/129 and 60/215.

<sup>13</sup> Resolutions 59/39, 60/20 and 61/32.

<sup>14</sup> Resolutions 52/214, sect. B, 57/283 B, sect. III, and 58/250, sect. III.

<sup>15</sup> Resolution 2502 (XXIV), para. 7.

<sup>16</sup> United Nations, *Treaty Series*, vol. 1489, No. 25567.

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

<sup>18</sup> United Nations, *Treaty Series*, vol. 330, No. 4739.



20. *Recalls* its resolutions affirming the importance of high-quality, user-friendly and cost-effective United Nations websites and the need for their multilingual development, maintenance and enrichment,<sup>19</sup> commends the website of the Commission in the six official languages of the United Nations, and welcomes the continuous efforts of the Commission to maintain and improve its website in accordance with the applicable guidelines;

21. *Expresses its appreciation* to Jernej Sekolec, Secretary of the United Nations Commission on International Trade Law since 2001, who retired on 31 July 2008, for his outstanding and devoted contribution to the process of unification and harmonization of international trade law in general and to the Commission in particular.<sup>20</sup>

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<sup>19</sup> Resolutions 52/214, sect. C, para. 3; 55/222, sect. III, para. 12; 56/64 B, sect. X; 57/130 B, sect. X; 58/101 B, sect. V, paras. 61-76; 59/126 B, sect. V, paras. 76-95; 60/109 B, sect. IV, paras. 66-80; and 61/121 B, sect. IV, paras. 65-77.

<sup>20</sup> *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17* and corrigendum (A/63/17 and Corr.1), paras. 393 and 394.

**Draft resolution II**  
**Legislative Guide on Secured Transactions of the United Nations**  
**Commission on International Trade Law**

*The General Assembly,*

*Recognizing* the importance to all countries of efficient secured transactions regimes promoting access to secured credit,

*Recognizing also* that access to secured credit is likely to assist all countries, in particular developing countries and countries with economies in transition, in their economic development and in fighting poverty,

*Emphasizing* the expectation that modern and harmonized secured transactions regimes which balance the interests of all stakeholders (including grantors of security rights, secured and unsecured creditors, retention-of-title sellers and financial lessors, privileged creditors and the insolvency representative in the grantor's insolvency) will demonstrably facilitate access to secured credit, thereby promoting the movement of goods and services across national borders,

*Noting* that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,

*Taking into account* the need for reform in the field of secured transactions laws at both the national and international levels as demonstrated by the numerous current national law reform efforts and the work of international organizations, such as the Hague Conference on Private International Law, the International Institute for the Unification of Private Law and the Organization of American States, and of international financial institutions, such as the Asian Development Bank, the European Bank for Reconstruction and Development, the Inter-American Development Bank, the International Monetary Fund and the World Bank,

*Expressing its appreciation* to intergovernmental and international non governmental organizations active in the field of secured transactions law reform for their participation in and support for the development of the Legislative Guide on Secured Transactions of the United Nations Commission on International Trade Law,

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for the completion and adoption of the Legislative Guide on Secured Transactions;<sup>21</sup>
2. *Requests* the Secretary-General to disseminate broadly the text of the Legislative Guide, transmitting it to Governments and other interested bodies, such as national and international financial institutions and chambers of commerce;
3. *Recommends* that all States give favourable consideration to the Legislative Guide when revising or adopting legislation relevant to secured transactions, and invites States that have used the Legislative Guide to advise the Commission accordingly;
4. *Recommends also* that all States continue to consider becoming party to the United Nations Convention on the Assignment of Receivables in International Trade,<sup>22</sup> the principles of which are also reflected in the Legislative Guide.

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<sup>21</sup> See *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17* (A/62/17), part two, para. 100.

<sup>22</sup> Resolution 56/81, annex.

### **Draft resolution III**

## **United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea**

*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,

*Concerned* that the current legal regime governing the international carriage of goods by sea lacks uniformity and fails to adequately take into account modern transport practices, including containerization, door-to-door transport contracts and the use of electronic transport documents,

*Noting* that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,

*Convinced* that the adoption of uniform rules to modernize and harmonize the rules that govern the international carriage of goods involving a sea leg would enhance legal certainty, improve efficiency and commercial predictability in the international carriage of goods and reduce legal obstacles to the flow of international trade among all States,

*Believing* that the adoption of uniform rules to govern international contracts of carriage wholly or partly by sea will promote legal certainty, improve the efficiency of international carriage of goods and facilitate new access opportunities for previously remote parties and markets, thus playing a fundamental role in promoting trade and economic development, both domestically and internationally,

*Noting* that shippers and carriers do not have the benefit of a binding and balanced universal regime to support the operation of contracts of carriage involving various modes of transport,

*Recalling* that, at its thirty-fourth and thirty-fifth sessions, in 2001 and 2002, the Commission decided to prepare an international legislative instrument governing door-to-door transport operations that involve a sea leg,<sup>1</sup>

*Recognizing* that all States and interested international organizations were invited to participate in the preparation of the draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea and in the forty-first session of the Commission, either as members or as observers, with a full opportunity to speak and make proposals,

*Noting with satisfaction* that the text of the draft Convention was circulated for comment to all States Members of the United Nations and intergovernmental organizations invited to attend the meetings of the Commission as observers, and that the comments received were before the Commission at its forty-first session,<sup>2</sup>

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<sup>1</sup> *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), paras. 319-345; and *ibid.*, *Fifty-seventh Session, Supplement No. 17* (A/57/17), paras. 210-224.

<sup>2</sup> A/CN.9/658 and Add.1-14 and Add.14/Corr.1.

*Taking note with satisfaction* of the decision of the Commission at its forty-first session to submit the draft Convention to the General Assembly for its consideration,<sup>3</sup>

*Taking note* of the draft Convention approved by the Commission,<sup>4</sup>

*Expressing its appreciation* to the Government of the Netherlands for its offer to host a signing ceremony for the Convention in Rotterdam,

1. *Commends* the United Nations Commission on International Trade Law for preparing the draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea;

2. *Adopts* the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, contained in the annex to the present resolution;

3. *Authorizes* a ceremony for the opening for signature to be held on 23 September 2009 in Rotterdam, the Netherlands, and recommends that the rules embodied in the Convention be known as the “Rotterdam Rules”;

4. *Calls upon* all Governments to consider becoming party to the Convention.

## **Annex**

### **United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea**

*The States Parties to this Convention,*

*Reaffirming* their belief that international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,

*Convinced* that the progressive harmonization and unification of international trade law, in reducing or removing legal obstacles to the flow of international trade, significantly contributes to universal economic cooperation among all States on a basis of equality, equity and common interest, and to the well-being of all peoples,

*Recognizing* the significant contribution of the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, signed in Brussels on 25 August 1924, and its Protocols, and of the United Nations Convention on the Carriage of Goods by Sea, signed in Hamburg on 31 March 1978, to the harmonization of the law governing the carriage of goods by sea,

*Mindful* of the technological and commercial developments that have taken place since the adoption of those conventions and of the need to consolidate and modernize them,

*Noting* that shippers and carriers do not have the benefit of a binding universal regime to support the operation of contracts of maritime carriage involving other modes of transport,

*Believing* that the adoption of uniform rules to govern international contracts of

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<sup>3</sup> *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17* and corrigendum (A/63/17 and Corr.1), para. 298.

<sup>4</sup> *Ibid.*, annex I.

carriage wholly or partly by sea will promote legal certainty, improve the efficiency of international carriage of goods and facilitate new access opportunities for previously remote parties and markets, thus playing a fundamental role in promoting trade and economic development, both domestically and internationally,

*Have agreed as follows:*

## CHAPTER 1. GENERAL PROVISIONS

### *Article 1. Definitions*

For the purposes of this Convention:

1. “Contract of carriage” means a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage.
2. “Volume contract” means a contract of carriage that provides for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time. The specification of the quantity may include a minimum, a maximum or a certain range.
3. “Liner transportation” means a transportation service that is offered to the public through publication or similar means and includes transportation by ships operating on a regular schedule between specified ports in accordance with publicly available timetables of sailing dates.
4. “Non-liner transportation” means any transportation that is not liner transportation.
5. “Carrier” means a person that enters into a contract of carriage with a shipper.
6. (a) “Performing party” means a person other than the carrier that performs or undertakes to perform any of the carrier’s obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, care, unloading or delivery of the goods, to the extent that such person acts, either directly or indirectly, at the carrier’s request or under the carrier’s supervision or control.  
  
(b) “Performing party” does not include any person that is retained, directly or indirectly, by a shipper, by a documentary shipper, by the controlling party or by the consignee instead of by the carrier.
7. “Maritime performing party” means a performing party to the extent that it performs or undertakes to perform any of the carrier’s obligations during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship. An inland carrier is a maritime performing party only if it performs or undertakes to perform its services exclusively within a port area.
8. “Shipper” means a person that enters into a contract of carriage with a carrier.
9. “Documentary shipper” means a person, other than the shipper, that accepts to be named as “shipper” in the transport document or electronic transport record.

10. “Holder” means:

(a) A person that is in possession of a negotiable transport document; and (i) if the document is an order document, is identified in it as the shipper or the consignee, or is the person to which the document is duly endorsed; or (ii) if the document is a blank endorsed order document or bearer document, is the bearer thereof; or

(b) The person to which a negotiable electronic transport record has been issued or transferred in accordance with the procedures referred to in article 9, paragraph 1.

11. “Consignee” means a person entitled to delivery of the goods under a contract of carriage or a transport document or electronic transport record.

12. “Right of control” of the goods means the right under the contract of carriage to give the carrier instructions in respect of the goods in accordance with chapter 10.

13. “Controlling party” means the person that pursuant to article 51 is entitled to exercise the right of control.

14. “Transport document” means a document issued under a contract of carriage by the carrier that:

(a) Evidences the carrier’s or a performing party’s receipt of goods under a contract of carriage; and

(b) Evidences or contains a contract of carriage.

15. “Negotiable transport document” means a transport document that indicates, by wording such as “to order” or “negotiable” or other appropriate wording recognized as having the same effect by the law applicable to the document, that the goods have been consigned to the order of the shipper, to the order of the consignee, or to bearer, and is not explicitly stated as being “non-negotiable” or “not negotiable”.

16. “Non-negotiable transport document” means a transport document that is not a negotiable transport document.

17. “Electronic communication” means information generated, sent, received or stored by electronic, optical, digital or similar means with the result that the information communicated is accessible so as to be usable for subsequent reference.

18. “Electronic transport record” means information in one or more messages issued by electronic communication under a contract of carriage by a carrier, including information logically associated with the electronic transport record by attachments or otherwise linked to the electronic transport record contemporaneously with or subsequent to its issue by the carrier, so as to become part of the electronic transport record, that:

(a) Evidences the carrier’s or a performing party’s receipt of goods under a contract of carriage; and

(b) Evidences or contains a contract of carriage.

19. “Negotiable electronic transport record” means an electronic transport record:

(a) That indicates, by wording such as “to order”, or “negotiable”, or other appropriate wording recognized as having the same effect by the law applicable to the record, that the goods have been consigned to the order of the shipper or to the order of the consignee, and is not explicitly stated as being “non-negotiable” or “not negotiable”; and

(b) The use of which meets the requirements of article 9, paragraph 1.

20. “Non-negotiable electronic transport record” means an electronic transport record that is not a negotiable electronic transport record.

21. The “issuance” of a negotiable electronic transport record means the issuance of the record in accordance with procedures that ensure that the record is subject to exclusive control from its creation until it ceases to have any effect or validity.

22. The “transfer” of a negotiable electronic transport record means the transfer of exclusive control over the record.

23. “Contract particulars” means any information relating to the contract of carriage or to the goods (including terms, notations, signatures and endorsements) that is in a transport document or an electronic transport record.

24. “Goods” means the wares, merchandise, and articles of every kind whatsoever that a carrier undertakes to carry under a contract of carriage and includes the packing and any equipment and container not supplied by or on behalf of the carrier.

25. “Ship” means any vessel used to carry goods by sea.

26. “Container” means any type of container, transportable tank or flat, swapbody, or any similar unit load used to consolidate goods, and any equipment ancillary to such unit load.

27. “Vehicle” means a road or railroad cargo vehicle.

28. “Freight” means the remuneration payable to the carrier for the carriage of goods under a contract of carriage.

29. “Domicile” means (a) a place where a company or other legal person or association of natural or legal persons has its (i) statutory seat or place of incorporation or central registered office, whichever is applicable, (ii) central administration or (iii) principal place of business, and (b) the habitual residence of a natural person.

30. “Competent court” means a court in a Contracting State that, according to the rules on the internal allocation of jurisdiction among the courts of that State, may exercise jurisdiction over the dispute.

#### *Article 2. Interpretation of this Convention*

In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

#### *Article 3. Form requirements*

The notices, confirmation, consent, agreement, declaration and other communications referred to in articles 19, paragraph 2; 23, paragraphs 1 to 4; 36,

subparagraphs 1 (b), (c) and (d); 40, subparagraph 4 (b); 44; 48, paragraph 3; 51, subparagraph 1 (b); 59, paragraph 1; 63; 66; 67, paragraph 2; 75, paragraph 4; and 80, paragraphs 2 and 5, shall be in writing. Electronic communications may be used for these purposes, provided that the use of such means is with the consent of the person by which it is communicated and of the person to which it is communicated.

*Article 4. Applicability of defences and limits of liability*

1. Any provision of this Convention that may provide a defence for, or limit the liability of, the carrier applies in any judicial or arbitral proceeding, whether founded in contract, in tort, or otherwise, that is instituted in respect of loss of, damage to, or delay in delivery of goods covered by a contract of carriage or for the breach of any other obligation under this Convention against:

- (a) The carrier or a maritime performing party;
- (b) The master, crew or any other person that performs services on board the ship; or
- (c) Employees of the carrier or a maritime performing party.

2. Any provision of this Convention that may provide a defence for the shipper or the documentary shipper applies in any judicial or arbitral proceeding, whether founded in contract, in tort, or otherwise, that is instituted against the shipper, the documentary shipper, or their subcontractors, agents or employees.

CHAPTER 2. SCOPE OF APPLICATION

*Article 5. General scope of application*

1. Subject to article 6, this Convention applies to contracts of carriage in which the place of receipt and the place of delivery are in different States, and the port of loading of a sea carriage and the port of discharge of the same sea carriage are in different States, if, according to the contract of carriage, any one of the following places is located in a Contracting State:

- (a) The place of receipt;
- (b) The port of loading;
- (c) The place of delivery; or
- (d) The port of discharge.

2. This Convention applies without regard to the nationality of the vessel, the carrier, the performing parties, the shipper, the consignee, or any other interested parties.

*Article 6. Specific exclusions*

1. This Convention does not apply to the following contracts in liner transportation:

- (a) Charter parties; and
- (b) Other contracts for the use of a ship or of any space thereon.



2. This Convention does not apply to contracts of carriage in non-liner transportation except when:

- (a) There is no charter party or other contract between the parties for the use of a ship or of any space thereon; and
- (b) A transport document or an electronic transport record is issued.

*Article 7. Application to certain parties*

Notwithstanding article 6, this Convention applies as between the carrier and the consignee, controlling party or holder that is not an original party to the charter party or other contract of carriage excluded from the application of this Convention. However, this Convention does not apply as between the original parties to a contract of carriage excluded pursuant to article 6.

CHAPTER 3. ELECTRONIC TRANSPORT RECORDS

*Article 8. Use and effect of electronic transport records*

Subject to the requirements set out in this Convention:

- (a) Anything that is to be in or on a transport document under this Convention may be recorded in an electronic transport record, provided the issuance and subsequent use of an electronic transport record is with the consent of the carrier and the shipper; and
- (b) The issuance, exclusive control, or transfer of an electronic transport record has the same effect as the issuance, possession, or transfer of a transport document.

*Article 9. Procedures for use of negotiable electronic transport records*

1. The use of a negotiable electronic transport record shall be subject to procedures that provide for:

- (a) The method for the issuance and the transfer of that record to an intended holder;
- (b) An assurance that the negotiable electronic transport record retains its integrity;
- (c) The manner in which the holder is able to demonstrate that it is the holder; and
- (d) The manner of providing confirmation that delivery to the holder has been effected, or that, pursuant to articles 10, paragraph 2, or 47, subparagraphs 1 (a) (ii) and (c), the electronic transport record has ceased to have any effect or validity.

2. The procedures in paragraph 1 of this article shall be referred to in the contract particulars and be readily ascertainable.

*Article 10. Replacement of negotiable transport document or negotiable electronic transport record*

1. If a negotiable transport document has been issued and the carrier and the holder agree to replace that document by a negotiable electronic transport record:

(a) The holder shall surrender the negotiable transport document, or all of them if more than one has been issued, to the carrier;

(b) The carrier shall issue to the holder a negotiable electronic transport record that includes a statement that it replaces the negotiable transport document; and

(c) The negotiable transport document ceases thereafter to have any effect or validity.

2. If a negotiable electronic transport record has been issued and the carrier and the holder agree to replace that electronic transport record by a negotiable transport document:

(a) The carrier shall issue to the holder, in place of the electronic transport record, a negotiable transport document that includes a statement that it replaces the negotiable electronic transport record; and

(b) The electronic transport record ceases thereafter to have any effect or validity.

#### CHAPTER 4. OBLIGATIONS OF THE CARRIER

*Article 11. Carriage and delivery of the goods*

The carrier shall, subject to this Convention and in accordance with the terms of the contract of carriage, carry the goods to the place of destination and deliver them to the consignee.

*Article 12. Period of responsibility of the carrier*

1. The period of responsibility of the carrier for the goods under this Convention begins when the carrier or a performing party receives the goods for carriage and ends when the goods are delivered.

2. (a) If the law or regulations of the place of receipt require the goods to be handed over to an authority or other third party from which the carrier may collect them, the period of responsibility of the carrier begins when the carrier collects the goods from the authority or other third party.

(b) If the law or regulations of the place of delivery require the carrier to hand over the goods to an authority or other third party from which the consignee may collect them, the period of responsibility of the carrier ends when the carrier hands the goods over to the authority or other third party.

3. For the purpose of determining the carrier's period of responsibility, the parties may agree on the time and location of receipt and delivery of the goods, but a provision in a contract of carriage is void to the extent that it provides that:

(a) The time of receipt of the goods is subsequent to the beginning of their initial loading under the contract of carriage; or

(b) The time of delivery of the goods is prior to the completion of their final unloading under the contract of carriage.

*Article 13. Specific obligations*

1. The carrier shall during the period of its responsibility as defined in article 12, and subject to article 26, properly and carefully receive, load, handle, stow, carry, keep, care for, unload and deliver the goods.

2. Notwithstanding paragraph 1 of this article, and without prejudice to the other provisions in chapter 4 and to chapters 5 to 7, the carrier and the shipper may agree that the loading, handling, stowing or unloading of the goods is to be performed by the shipper, the documentary shipper or the consignee. Such an agreement shall be referred to in the contract particulars.

*Article 14. Specific obligations applicable to the voyage by sea*

The carrier is bound before, at the beginning of, and during the voyage by sea to exercise due diligence to:

- (a) Make and keep the ship seaworthy;
- (b) Properly crew, equip and supply the ship and keep the ship so crewed, equipped and supplied throughout the voyage; and
- (c) Make and keep the holds and all other parts of the ship in which the goods are carried, and any containers supplied by the carrier in or upon which the goods are carried, fit and safe for their reception, carriage and preservation.

*Article 15. Goods that may become a danger*

Notwithstanding articles 11 and 13, the carrier or a performing party may decline to receive or to load, and may take such other measures as are reasonable, including unloading, destroying, or rendering goods harmless, if the goods are, or reasonably appear likely to become during the carrier's period of responsibility, an actual danger to persons, property or the environment.

*Article 16. Sacrifice of the goods during the voyage by sea*

Notwithstanding articles 11, 13, and 14, the carrier or a performing party may sacrifice goods at sea when the sacrifice is reasonably made for the common safety or for the purpose of preserving from peril human life or other property involved in the common adventure.

**CHAPTER 5. LIABILITY OF THE CARRIER FOR LOSS, DAMAGE OR DELAY**

*Article 17. Basis of liability*

1. The carrier is liable for loss of or damage to the goods, as well as for delay in delivery, if the claimant proves that the loss, damage, or delay, or the event or circumstance that caused or contributed to it took place during the period of the carrier's responsibility as defined in chapter 4.

2. The carrier is relieved of all or part of its liability pursuant to paragraph 1 of this article if it proves that the cause or one of the causes of the loss, damage, or delay is not attributable to its fault or to the fault of any person referred to in article 18.

3. The carrier is also relieved of all or part of its liability pursuant to paragraph 1 of this article if, alternatively to proving the absence of fault as provided in paragraph 2 of this article, it proves that one or more of the following events or circumstances caused or contributed to the loss, damage, or delay:

- (a) Act of God;
- (b) Perils, dangers, and accidents of the sea or other navigable waters;
- (c) War, hostilities, armed conflict, piracy, terrorism, riots, and civil commotions;
- (d) Quarantine restrictions; interference by or impediments created by governments, public authorities, rulers, or people including detention, arrest, or seizure not attributable to the carrier or any person referred to in article 18;
- (e) Strikes, lockouts, stoppages, or restraints of labour;
- (f) Fire on the ship;
- (g) Latent defects not discoverable by due diligence;
- (h) Act or omission of the shipper, the documentary shipper, the controlling party, or any other person for whose acts the shipper or the documentary shipper is liable pursuant to article 33 or 34;
- (i) Loading, handling, stowing, or unloading of the goods performed pursuant to an agreement in accordance with article 13, paragraph 2, unless the carrier or a performing party performs such activity on behalf of the shipper, the documentary shipper or the consignee;
- (j) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;
- (k) Insufficiency or defective condition of packing or marking not performed by or on behalf of the carrier;
- (l) Saving or attempting to save life at sea;
- (m) Reasonable measures to save or attempt to save property at sea;
- (n) Reasonable measures to avoid or attempt to avoid damage to the environment; or
- (o) Acts of the carrier in pursuance of the powers conferred by articles 15 and 16.

4. Notwithstanding paragraph 3 of this article, the carrier is liable for all or part of the loss, damage, or delay:

- (a) If the claimant proves that the fault of the carrier or of a person referred to in article 18 caused or contributed to the event or circumstance on which the carrier relies; or
- (b) If the claimant proves that an event or circumstance not listed in paragraph 3 of this article contributed to the loss, damage, or delay, and the carrier cannot prove that this event or circumstance is not attributable to its fault or to the fault of any person referred to in article 18.

5. The carrier is also liable, notwithstanding paragraph 3 of this article, for all or part of the loss, damage, or delay if:

(a) The claimant proves that the loss, damage, or delay was or was probably caused by or contributed to by (i) the unseaworthiness of the ship; (ii) the improper crewing, equipping, and supplying of the ship; or (iii) the fact that the holds or other parts of the ship in which the goods are carried, or any containers supplied by the carrier in or upon which the goods are carried, were not fit and safe for reception, carriage, and preservation of the goods; and

(b) The carrier is unable to prove either that: (i) none of the events or circumstances referred to in subparagraph 5 (a) of this article caused the loss, damage, or delay; or (ii) it complied with its obligation to exercise due diligence pursuant to article 14.

6. When the carrier is relieved of part of its liability pursuant to this article, the carrier is liable only for that part of the loss, damage or delay that is attributable to the event or circumstance for which it is liable pursuant to this article.

*Article 18. Liability of the carrier for other persons*

The carrier is liable for the breach of its obligations under this Convention caused by the acts or omissions of:

(a) Any performing party;

(b) The master or crew of the ship;

(c) Employees of the carrier or a performing party; or

(d) Any other person that performs or undertakes to perform any of the carrier's obligations under the contract of carriage, to the extent that the person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control.

*Article 19. Liability of maritime performing parties*

1. A maritime performing party is subject to the obligations and liabilities imposed on the carrier under this Convention and is entitled to the carrier's defences and limits of liability as provided for in this Convention if:

(a) The maritime performing party received the goods for carriage in a Contracting State, or delivered them in a Contracting State, or performed its activities with respect to the goods in a port in a Contracting State; and

(b) The occurrence that caused the loss, damage or delay took place: (i) during the period between the arrival of the goods at the port of loading of the ship and their departure from the port of discharge from the ship; (ii) while the maritime performing party had custody of the goods; or (iii) at any other time to the extent that it was participating in the performance of any of the activities contemplated by the contract of carriage.

2. If the carrier agrees to assume obligations other than those imposed on the carrier under this Convention, or agrees that the limits of its liability are higher than the limits specified under this Convention, a maritime performing party is not bound by this agreement unless it expressly agrees to accept such obligations or such higher limits.

3. A maritime performing party is liable for the breach of its obligations under this Convention caused by the acts or omissions of any person to which it has entrusted the performance of any of the carrier's obligations under the contract of carriage under the conditions set out in paragraph 1 of this article.

4. Nothing in this Convention imposes liability on the master or crew of the ship or on an employee of the carrier or of a maritime performing party.

*Article 20. Joint and several liability*

1. If the carrier and one or more maritime performing parties are liable for the loss of, damage to, or delay in delivery of the goods, their liability is joint and several but only up to the limits provided for under this Convention.

2. Without prejudice to article 61, the aggregate liability of all such persons shall not exceed the overall limits of liability under this Convention.

*Article 21. Delay*

Delay in delivery occurs when the goods are not delivered at the place of destination provided for in the contract of carriage within the time agreed.

*Article 22. Calculation of compensation*

1. Subject to article 59, the compensation payable by the carrier for loss of or damage to the goods is calculated by reference to the value of such goods at the place and time of delivery established in accordance with article 43.

2. The value of the goods is fixed according to the commodity exchange price or, if there is no such price, according to their market price or, if there is no commodity exchange price or market price, by reference to the normal value of the goods of the same kind and quality at the place of delivery.

3. In case of loss of or damage to the goods, the carrier is not liable for payment of any compensation beyond what is provided for in paragraphs 1 and 2 of this article except when the carrier and the shipper have agreed to calculate compensation in a different manner within the limits of chapter 16.

*Article 23. Notice in case of loss, damage or delay*

1. The carrier is presumed, in absence of proof to the contrary, to have delivered the goods according to their description in the contract particulars unless notice of loss of or damage to the goods, indicating the general nature of such loss or damage, was given to the carrier or the performing party that delivered the goods before or at the time of the delivery, or, if the loss or damage is not apparent, within seven working days at the place of delivery after the delivery of the goods.

2. Failure to provide the notice referred to in this article to the carrier or the performing party shall not affect the right to claim compensation for loss of or damage to the goods under this Convention, nor shall it affect the allocation of the burden of proof set out in article 17.

3. The notice referred to in this article is not required in respect of loss or damage that is ascertained in a joint inspection of the goods by the person to which they have been delivered and the carrier or the maritime performing party against which liability is being asserted.

4. No compensation in respect of delay is payable unless notice of loss due to delay was given to the carrier within twenty-one consecutive days of delivery of the goods.

5. When the notice referred to in this article is given to the performing party that delivered the goods, it has the same effect as if that notice was given to the carrier, and notice given to the carrier has the same effect as a notice given to a maritime performing party.

6. In the case of any actual or apprehended loss or damage, the parties to the dispute shall give all reasonable facilities to each other for inspecting and tallying the goods and shall provide access to records and documents relevant to the carriage of the goods.

## CHAPTER 6. ADDITIONAL PROVISIONS RELATING TO PARTICULAR STAGES OF CARRIAGE

### *Article 24. Deviation*

When pursuant to applicable law a deviation constitutes a breach of the carrier's obligations, such deviation of itself shall not deprive the carrier or a maritime performing party of any defence or limitation of this Convention, except to the extent provided in article 61.

### *Article 25. Deck cargo on ships*

1. Goods may be carried on the deck of a ship only if:

- (a) Such carriage is required by law;
- (b) They are carried in or on containers or vehicles that are fit for deck carriage, and the decks are specially fitted to carry such containers or vehicles; or
- (c) The carriage on deck is in accordance with the contract of carriage, or the customs, usages or practices of the trade in question.

2. The provisions of this Convention relating to the liability of the carrier apply to the loss of, damage to or delay in the delivery of goods carried on deck pursuant to paragraph 1 of this article, but the carrier is not liable for loss of or damage to such goods, or delay in their delivery, caused by the special risks involved in their carriage on deck when the goods are carried in accordance with subparagraphs 1 (a) or (c) of this article.

3. If the goods have been carried on deck in cases other than those permitted pursuant to paragraph 1 of this article, the carrier is liable for loss of or damage to the goods or delay in their delivery that is exclusively caused by their carriage on deck, and is not entitled to the defences provided for in article 17.

4. The carrier is not entitled to invoke subparagraph 1 (c) of this article against a third party that has acquired a negotiable transport document or a negotiable electronic transport record in good faith, unless the contract particulars state that the goods may be carried on deck.

5. If the carrier and shipper expressly agreed that the goods would be carried under deck, the carrier is not entitled to the benefit of the limitation of liability for any loss of, damage to or delay in the delivery of the goods to the extent that such loss, damage, or delay resulted from their carriage on deck.

*Article 26. Carriage preceding or subsequent to sea carriage*

When loss of or damage to goods, or an event or circumstance causing a delay in their delivery, occurs during the carrier's period of responsibility but solely before their loading onto the ship or solely after their discharge from the ship, the provisions of this Convention do not prevail over those provisions of another international instrument that, at the time of such loss, damage or event or circumstance causing delay:

(a) Pursuant to the provisions of such international instrument would have applied to all or any of the carrier's activities if the shipper had made a separate and direct contract with the carrier in respect of the particular stage of carriage where the loss of, or damage to goods, or an event or circumstance causing delay in their delivery occurred;

(b) Specifically provide for the carrier's liability, limitation of liability, or time for suit; and

(c) Cannot be departed from by contract either at all or to the detriment of the shipper under that instrument.

CHAPTER 7. OBLIGATIONS OF THE SHIPPER TO THE CARRIER

*Article 27. Delivery for carriage*

1. Unless otherwise agreed in the contract of carriage, the shipper shall deliver the goods ready for carriage. In any event, the shipper shall deliver the goods in such condition that they will withstand the intended carriage, including their loading, handling, stowing, lashing and securing, and unloading, and that they will not cause harm to persons or property.

2. The shipper shall properly and carefully perform any obligation assumed under an agreement made pursuant to article 13, paragraph 2.

3. When a container is packed or a vehicle is loaded by the shipper, the shipper shall properly and carefully stow, lash and secure the contents in or on the container or vehicle, and in such a way that they will not cause harm to persons or property.

*Article 28. Cooperation of the shipper and the carrier in providing information and instructions*

The carrier and the shipper shall respond to requests from each other to provide information and instructions required for the proper handling and carriage of the goods if the information is in the requested party's possession or the instructions are within the requested party's reasonable ability to provide and they are not otherwise reasonably available to the requesting party.

*Article 29. Shipper's obligation to provide information, instructions and documents*

1. The shipper shall provide to the carrier in a timely manner such information, instructions and documents relating to the goods that are not otherwise reasonably available to the carrier, and that are reasonably necessary:

(a) For the proper handling and carriage of the goods, including precautions to be taken by the carrier or a performing party; and



(b) For the carrier to comply with law, regulations or other requirements of public authorities in connection with the intended carriage, provided that the carrier notifies the shipper in a timely manner of the information, instructions and documents it requires.

2. Nothing in this article affects any specific obligation to provide certain information, instructions and documents related to the goods pursuant to law, regulations or other requirements of public authorities in connection with the intended carriage.

*Article 30. Basis of shipper's liability to the carrier*

1. The shipper is liable for loss or damage sustained by the carrier if the carrier proves that such loss or damage was caused by a breach of the shipper's obligations under this Convention.

2. Except in respect of loss or damage caused by a breach by the shipper of its obligations pursuant to articles 31, paragraph 2, and 32, the shipper is relieved of all or part of its liability if the cause or one of the causes of the loss or damage is not attributable to its fault or to the fault of any person referred to in article 34.

3. When the shipper is relieved of part of its liability pursuant to this article, the shipper is liable only for that part of the loss or damage that is attributable to its fault or to the fault of any person referred to in article 34.

*Article 31. Information for compilation of contract particulars*

1. The shipper shall provide to the carrier, in a timely manner, accurate information required for the compilation of the contract particulars and the issuance of the transport documents or electronic transport records, including the particulars referred to in article 36, paragraph 1; the name of the party to be identified as the shipper in the contract particulars; the name of the consignee, if any; and the name of the person to whose order the transport document or electronic transport record is to be issued, if any.

2. The shipper is deemed to have guaranteed the accuracy at the time of receipt by the carrier of the information that is provided according to paragraph 1 of this article. The shipper shall indemnify the carrier against loss or damage resulting from the inaccuracy of such information.

*Article 32. Special rules on dangerous goods*

When goods by their nature or character are, or reasonably appear likely to become, a danger to persons, property or the environment:

(a) The shipper shall inform the carrier of the dangerous nature or character of the goods in a timely manner before they are delivered to the carrier or a performing party. If the shipper fails to do so and the carrier or performing party does not otherwise have knowledge of their dangerous nature or character, the shipper is liable to the carrier for loss or damage resulting from such failure to inform; and

(b) The shipper shall mark or label dangerous goods in accordance with any law, regulations or other requirements of public authorities that apply during any stage of the intended carriage of the goods. If the shipper fails to do so, it is liable to the carrier for loss or damage resulting from such failure.

*Article 33. Assumption of shipper's rights and obligations  
by the documentary shipper*

1. A documentary shipper is subject to the obligations and liabilities imposed on the shipper pursuant to this chapter and pursuant to article 55, and is entitled to the shipper's rights and defences provided by this chapter and by chapter 13.

2. Paragraph 1 of this article does not affect the obligations, liabilities, rights or defences of the shipper.

*Article 34. Liability of the shipper for other persons*

The shipper is liable for the breach of its obligations under this Convention caused by the acts or omissions of any person, including employees, agents and subcontractors, to which it has entrusted the performance of any of its obligations, but the shipper is not liable for acts or omissions of the carrier or a performing party acting on behalf of the carrier, to which the shipper has entrusted the performance of its obligations.

CHAPTER 8. TRANSPORT DOCUMENTS AND ELECTRONIC  
TRANSPORT RECORDS

*Article 35. Issuance of the transport document or the electronic transport record*

Unless the shipper and the carrier have agreed not to use a transport document or an electronic transport record, or it is the custom, usage or practice of the trade not to use one, upon delivery of the goods for carriage to the carrier or performing party, the shipper or, if the shipper consents, the documentary shipper, is entitled to obtain from the carrier, at the shipper's option:

(a) A non-negotiable transport document or, subject to article 8, subparagraph (a), a non-negotiable electronic transport record; or

(b) An appropriate negotiable transport document or, subject to article 8, subparagraph (a), a negotiable electronic transport record, unless the shipper and the carrier have agreed not to use a negotiable transport document or negotiable electronic transport record, or it is the custom, usage or practice of the trade not to use one.

*Article 36. Contract particulars*

1. The contract particulars in the transport document or electronic transport record referred to in article 35 shall include the following information, as furnished by the shipper:

- (a) A description of the goods as appropriate for the transport;
- (b) The leading marks necessary for identification of the goods;
- (c) The number of packages or pieces, or the quantity of goods; and
- (d) The weight of the goods, if furnished by the shipper.

2. The contract particulars in the transport document or electronic transport record referred to in article 35 shall also include:

(a) A statement of the apparent order and condition of the goods at the time the carrier or a performing party receives them for carriage;

- (b) The name and address of the carrier;

(c) The date on which the carrier or a performing party received the goods, or on which the goods were loaded on board the ship, or on which the transport document or electronic transport record was issued; and

(d) If the transport document is negotiable, the number of originals of the negotiable transport document, when more than one original is issued.

3. The contract particulars in the transport document or electronic transport record referred to in article 35 shall further include:

(a) The name and address of the consignee, if named by the shipper;

(b) The name of a ship, if specified in the contract of carriage;

(c) The place of receipt and, if known to the carrier, the place of delivery; and

(d) The port of loading and the port of discharge, if specified in the contract of carriage.

4. For the purposes of this article, the phrase “apparent order and condition of the goods” in subparagraph 2 (a) of this article refers to the order and condition of the goods based on:

(a) A reasonable external inspection of the goods as packaged at the time the shipper delivers them to the carrier or a performing party; and

(b) Any additional inspection that the carrier or a performing party actually performs before issuing the transport document or electronic transport record.

#### *Article 37. Identity of the carrier*

1. If a carrier is identified by name in the contract particulars, any other information in the transport document or electronic transport record relating to the identity of the carrier shall have no effect to the extent that it is inconsistent with that identification.

2. If no person is identified in the contract particulars as the carrier as required pursuant to article 36, subparagraph 2 (b), but the contract particulars indicate that the goods have been loaded on board a named ship, the registered owner of that ship is presumed to be the carrier, unless it proves that the ship was under a bareboat charter at the time of the carriage and it identifies this bareboat charterer and indicates its address, in which case this bareboat charterer is presumed to be the carrier. Alternatively, the registered owner may rebut the presumption of being the carrier by identifying the carrier and indicating its address. The bareboat charterer may rebut any presumption of being the carrier in the same manner.

3. Nothing in this article prevents the claimant from proving that any person other than a person identified in the contract particulars or pursuant to paragraph 2 of this article is the carrier.

#### *Article 38. Signature*

1. A transport document shall be signed by the carrier or a person acting on its behalf.

2. An electronic transport record shall include the electronic signature of the carrier or a person acting on its behalf. Such electronic signature shall identify the

signatory in relation to the electronic transport record and indicate the carrier's authorization of the electronic transport record.

*Article 39. Deficiencies in the contract particulars*

1. The absence or inaccuracy of one or more of the contract particulars referred to in article 36, paragraphs 1, 2 or 3, does not of itself affect the legal character or validity of the transport document or of the electronic transport record.

2. If the contract particulars include the date but fail to indicate its significance, the date is deemed to be:

(a) The date on which all of the goods indicated in the transport document or electronic transport record were loaded on board the ship, if the contract particulars indicate that the goods have been loaded on board a ship; or

(b) The date on which the carrier or a performing party received the goods, if the contract particulars do not indicate that the goods have been loaded on board a ship.

3. If the contract particulars fail to state the apparent order and condition of the goods at the time the carrier or a performing party receives them, the contract particulars are deemed to have stated that the goods were in apparent good order and condition at the time the carrier or a performing party received them.

*Article 40. Qualifying the information relating to the goods in the contract particulars*

1. The carrier shall qualify the information referred to in article 36, paragraph 1, to indicate that the carrier does not assume responsibility for the accuracy of the information furnished by the shipper if:

(a) The carrier has actual knowledge that any material statement in the transport document or electronic transport record is false or misleading; or

(b) The carrier has reasonable grounds to believe that a material statement in the transport document or electronic transport record is false or misleading.

2. Without prejudice to paragraph 1 of this article, the carrier may qualify the information referred to in article 36, paragraph 1, in the circumstances and in the manner set out in paragraphs 3 and 4 of this article to indicate that the carrier does not assume responsibility for the accuracy of the information furnished by the shipper.

3. When the goods are not delivered for carriage to the carrier or a performing party in a closed container or vehicle, or when they are delivered in a closed container or vehicle and the carrier or a performing party actually inspects them, the carrier may qualify the information referred to in article 36, paragraph 1, if:

(a) The carrier had no physically practicable or commercially reasonable means of checking the information furnished by the shipper, in which case it may indicate which information it was unable to check; or

(b) The carrier has reasonable grounds to believe the information furnished by the shipper to be inaccurate, in which case it may include a clause providing what it reasonably considers accurate information.

4. When the goods are delivered for carriage to the carrier or a performing party in a closed container or vehicle, the carrier may qualify the information referred to in:

- (a) Article 36, subparagraphs 1 (a), (b), or (c), if:
  - (i) The goods inside the container or vehicle have not actually been inspected by the carrier or a performing party; and
  - (ii) Neither the carrier nor a performing party otherwise has actual knowledge of its contents before issuing the transport document or the electronic transport record; and
- (b) Article 36, subparagraph 1 (d), if:
  - (i) Neither the carrier nor a performing party weighed the container or vehicle, and the shipper and the carrier had not agreed prior to the shipment that the container or vehicle would be weighed and the weight would be included in the contract particulars; or
  - (ii) There was no physically practicable or commercially reasonable means of checking the weight of the container or vehicle.

*Article 41. Evidentiary effect of the contract particulars*

Except to the extent that the contract particulars have been qualified in the circumstances and in the manner set out in article 40:

- (a) A transport document or an electronic transport record is prima facie evidence of the carrier's receipt of the goods as stated in the contract particulars;
- (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 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;
- (c) Proof to the contrary by the carrier shall not be admissible against a consignee that in good faith has acted in reliance on any 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 36, 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 36, paragraph 2.

*Article 42. "Freight prepaid"*

If the contract particulars contain the statement "freight prepaid" or a statement of a similar nature, the carrier cannot assert against the holder or the consignee the fact that the freight has not been paid. This article does not apply if the holder or the consignee is also the shipper.

## CHAPTER 9. DELIVERY OF THE GOODS

*Article 43. Obligation to accept delivery*

When the goods have arrived at their destination, the consignee that demands delivery of the goods under the contract of carriage 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 at which, having regard to the terms of the contract, the customs, usages or practices of the trade and the circumstances of the carriage, delivery could reasonably be expected.

*Article 44. Obligation to acknowledge receipt*

On request of the carrier or the performing party that delivers the goods, the consignee shall acknowledge receipt of the goods from the carrier or the performing party in the manner that is customary at the place of delivery. The carrier may refuse delivery if the consignee refuses to acknowledge such receipt.

*Article 45. Delivery when no negotiable transport document or negotiable electronic transport record is issued*

When neither a negotiable transport document nor a negotiable electronic transport record has been issued:

(a) The carrier shall deliver the goods to the consignee at the time and location referred to in article 43. The carrier may refuse delivery if the person claiming to be the consignee does not properly identify itself as the consignee on the request of the carrier;

(b) If the name and address of the consignee are not referred to in the contract particulars, the controlling party shall prior to or upon the arrival of the goods at the place of destination advise the carrier of such name and address;

(c) Without prejudice to article 48, paragraph 1, if the goods are not deliverable because (i) the consignee, after having received a notice of arrival, does not, at the time or within the time period referred to in article 43, claim delivery of the goods from the carrier after their arrival at the place of destination, (ii) the carrier refuses delivery because the person claiming to be the consignee does not properly identify itself as the consignee, or (iii) the carrier is, after reasonable effort, unable to locate the consignee in order to request delivery instructions, the carrier may so advise the controlling party and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the controlling party, the carrier may so advise the shipper and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier may so advise the documentary shipper and request instructions in respect of the delivery of the goods;

(d) The carrier that delivers the goods upon instruction of the controlling party, the shipper or the documentary shipper pursuant to subparagraph (c) of this article is discharged from its obligations to deliver the goods under the contract of carriage.

*Article 46. Delivery when a non-negotiable transport document that requires surrender is issued*

When a non-negotiable transport document has been issued that indicates that it shall be surrendered in order to obtain delivery of the goods:

(a) The carrier shall deliver the goods at the time and location referred to in article 43 to the consignee upon the consignee properly identifying itself on the request of the carrier and surrender of the non-negotiable document. The carrier may refuse delivery if the person claiming to be the consignee fails to properly identify itself on the request of the carrier, and shall refuse delivery if the non negotiable document is not surrendered. If more than one original of the non negotiable document has been issued, the surrender of one original will suffice and the other originals cease to have any effect or validity;

(b) Without prejudice to article 48, paragraph 1, if the goods are not deliverable because (i) the consignee, after having received a notice of arrival, does not, at the time or within the time period referred to in article 43, claim delivery of the goods from the carrier after their arrival at the place of destination, (ii) the carrier refuses delivery because the person claiming to be the consignee does not properly identify itself as the consignee or does not surrender the document, or (iii) the carrier is, after reasonable effort, unable to locate the consignee in order to request delivery instructions, the carrier may so advise the shipper and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier may so advise the documentary shipper and request instructions in respect of the delivery of the goods;

(c) The carrier that delivers the goods upon instruction of the shipper or the documentary shipper pursuant to subparagraph (b) of this article is discharged from its obligation to deliver the goods under the contract of carriage, irrespective of whether the non-negotiable transport document has been surrendered to it.

*Article 47. Delivery when a negotiable transport document or negotiable electronic transport record is issued*

1. When a negotiable transport document or a negotiable electronic transport record has been issued:

(a) 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 43 to the holder:

(i) Upon surrender of the negotiable transport document and, if the holder is one of the persons referred to in article 1, subparagraph 10 (a)(i), upon the holder properly identifying itself; or

(ii) Upon demonstration by the holder, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder of the negotiable electronic transport record;

(b) The carrier shall refuse delivery if the requirements of subparagraph (a)(i) or (a)(ii) of this paragraph are not met;

(c) If more than one original of the negotiable transport document has been issued, and the number of originals is stated in that document, 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, paragraph 1.

2. Without prejudice to article 48, paragraph 1, if the negotiable transport document or the negotiable electronic transport record expressly states that the goods may be delivered without the surrender of the transport document or the electronic transport record, the following rules apply:

(a) If the goods are not deliverable because (i) the holder, after having received a notice of arrival, does not, at the time or within the time period referred to in article 43, claim delivery of the goods from the carrier after their arrival at the place of destination, (ii) the carrier refuses delivery because the person claiming to be a holder does not properly identify itself as one of the persons referred to in article 1, subparagraph 10 (a)(i), or (iii) the carrier is, after reasonable effort, unable to locate the holder in order to request delivery instructions, the carrier may so advise the shipper and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier may so advise the documentary shipper and request instructions in respect of the delivery of the goods;

(b) The carrier that delivers the goods upon instruction of the shipper or the documentary shipper in accordance with subparagraph 2 (a) 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 negotiable electronic transport record has demonstrated, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder;

(c) The person giving instructions under subparagraph 2 (a) of this article shall indemnify the carrier against loss arising from its being held liable to the holder under subparagraph 2 (e) of this article. The carrier may refuse to follow those instructions if the person fails to provide adequate security as the carrier may reasonably request;

(d) 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 2 (b) 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;

(e) Notwithstanding subparagraphs 2 (b) and 2 (d) of this article, a holder that becomes a holder after such delivery, and that 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. When the contract particulars state the expected time of arrival of the goods, or indicate how to obtain information as to whether the goods have been delivered, it is presumed that the holder at the time that it became a holder had or could reasonably have had knowledge of the delivery of the goods.

#### *Article 48. Goods remaining undelivered*

1. For the purposes of this article, goods shall be deemed to have remained undelivered only if, after their arrival at the place of destination:

(a) The consignee does not accept delivery of the goods pursuant to this chapter at the time and location referred to in article 43;



(b) The controlling party, the holder, the shipper or the documentary shipper cannot be found or does not give the carrier adequate instructions pursuant to articles 45, 46 and 47;

(c) The carrier is entitled or required to refuse delivery pursuant to articles 44, 45, 46 and 47;

(d) The carrier is not allowed to deliver the goods to the consignee pursuant to the law or regulations of the place at which delivery is requested; or

(e) The goods are otherwise undeliverable by the carrier.

2. Without prejudice to any other rights that the carrier may have against the shipper, controlling party or consignee, if the goods have remained undelivered, the carrier may, at the risk and expense of the person entitled to the goods, take such action in respect of the goods as circumstances may reasonably require, including:

(a) To store the goods at any suitable place;

(b) To unpack the goods if they are packed in containers or vehicles, or to act otherwise in respect of the goods, including by moving them; and

(c) To cause the goods to be sold or destroyed in accordance with the practices or pursuant to the law or regulations of the place where the goods are located at the time.

3. The carrier may exercise the rights under paragraph 2 of this article only after it has given reasonable notice of the intended action under paragraph 2 of this article to the person stated in the contract particulars as the person, if any, to be notified of the arrival of the goods at the place of destination, and to one of the following persons in the order indicated, if known to the carrier: the consignee, the controlling party or the shipper.

4. If the goods are sold pursuant to subparagraph 2 (c) of this article, the carrier shall hold the proceeds of the sale for the benefit of the person entitled to the goods, subject to the deduction of any costs incurred by the carrier and any other amounts that are due to the carrier in connection with the carriage of those goods.

5. The carrier shall not be liable for loss of or damage to goods that occurs during the time that they remain undelivered pursuant to this article unless the claimant proves that such loss or damage resulted from the failure by the carrier to take steps that would have been reasonable in the circumstances to preserve the goods and that the carrier knew or ought to have known that the loss or damage to the goods would result from its failure to take such steps.

#### *Article 49. Retention of goods*

Nothing in this Convention affects a right of the carrier or a performing party that may exist pursuant to the contract of carriage or the applicable law to retain the goods to secure the payment of sums due.

### CHAPTER 10. RIGHTS OF THE CONTROLLING PARTY

#### *Article 50. Exercise and extent of right of control*

1. The right of control may be exercised only by the controlling party and is limited to:

(a) The right to give or modify instructions in respect of the goods that do not constitute a variation of the contract of carriage;

- (b) The right to obtain delivery of the goods at a scheduled port of call or, in respect of inland carriage, any place en route; and
  - (c) The right to replace the consignee by any other person including the controlling party.
2. The right of control exists during the entire period of responsibility of the carrier, as provided in article 12, and ceases when that period expires.

*Article 51. Identity of the controlling party and transfer of the right of control*

1. Except in the cases referred to in paragraphs 2, 3 and 4 of this article:
- (a) The shipper is the controlling party unless the shipper, when the contract of carriage is concluded, designates the consignee, the documentary shipper or another person as the controlling party;
  - (b) The controlling party is entitled to transfer the right of control to another person. The transfer becomes effective with respect to the carrier upon its notification of the transfer by the transferor, and the transferee becomes the controlling party; and
  - (c) The controlling party shall properly identify itself when it exercises the right of control.
2. When a non-negotiable transport document has been issued that indicates that it shall be surrendered in order to obtain delivery of the goods:
- (a) The shipper is the controlling party and may transfer the right of control to the consignee named in the transport document by transferring the document to that person without endorsement. If more than one original of the document was issued, all originals shall be transferred in order to effect a transfer of the right of control; and
  - (b) In order to exercise its right of control, the controlling party shall produce the document and properly identify itself. If more than one original of the document was issued, all originals shall be produced, failing which the right of control cannot be exercised.
3. When a negotiable transport document is issued:
- (a) The holder or, if more than one original of the negotiable transport document is issued, the holder of all originals is the controlling party;
  - (b) The holder may transfer the right of control by transferring the negotiable transport document to another person in accordance with article 57. If more than one original of that document was issued, all originals shall be transferred to that person in order to effect a transfer of the right of control; and
  - (c) In order to exercise the right of control, the holder shall produce the negotiable transport document to the carrier, and if the holder is one of the persons referred to in article 1, subparagraph 10 (a)(i), the holder shall properly identify itself. If more than one original of the document was issued, all originals shall be produced, failing which the right of control cannot be exercised.
4. When a negotiable electronic transport record is issued:
- (a) The holder is the controlling party;

(b) The holder may transfer the right of control to another person by transferring the negotiable electronic transport record in accordance with the procedures referred to in article 9, paragraph 1; and

(c) In order to exercise the right of control, the holder shall demonstrate, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder.

*Article 52. Carrier's execution of instructions*

1. Subject to paragraphs 2 and 3 of this article, the carrier shall execute the instructions referred to in article 50 if:

(a) The person giving such instructions is entitled to exercise the right of control;

(b) The instructions can reasonably be executed according to their terms at the moment that they reach the carrier; and

(c) The instructions will not interfere with the normal operations of the carrier, including its delivery practices.

2. In any event, the controlling party shall reimburse the carrier for any reasonable additional expense that the carrier may incur and shall indemnify the carrier against loss or damage that the carrier may suffer as a result of diligently executing any instruction pursuant to this article, including compensation that the carrier may become liable to pay for loss of or damage to other goods being carried.

3. The carrier is entitled to obtain security from the controlling party for the amount of additional expense, loss or damage that the carrier reasonably expects will arise in connection with the execution of an instruction pursuant to this article. The carrier may refuse to carry out the instructions if no such security is provided.

4. The carrier's liability for loss of or damage to the goods or for delay in delivery resulting from its failure to comply with the instructions of the controlling party in breach of its obligation pursuant to paragraph 1 of this article shall be subject to articles 17 to 23, and the amount of the compensation payable by the carrier shall be subject to articles 59 to 61.

*Article 53. Deemed delivery*

Goods that are delivered pursuant to an instruction in accordance with article 52, paragraph 1, are deemed to be delivered at the place of destination, and the provisions of chapter 9 relating to such delivery apply to such goods.

*Article 54. Variations to the contract of carriage*

1. The controlling party is the only person that may agree with the carrier to variations to the contract of carriage other than those referred to in article 50, subparagraphs 1 (b) and (c).

2. Variations to the contract of carriage, including those referred to in article 50, subparagraphs 1 (b) and (c), shall be stated in a negotiable transport document or in a non-negotiable transport document that requires surrender, or incorporated in a negotiable electronic transport record, or, upon the request of the controlling party, shall be stated in a non-negotiable transport document or incorporated in a non-negotiable electronic transport record. If so stated or incorporated, such variations shall be signed in accordance with article 38.

*Article 55. Providing additional information, instructions or documents to carrier*

1. The controlling party, on request of the carrier or a performing party, shall provide in a timely manner information, instructions or documents relating to the goods not yet provided by the shipper and not otherwise reasonably available to the carrier that the carrier may reasonably need to perform its obligations under the contract of carriage.

2. If the carrier, after reasonable effort, is unable to locate the controlling party or the controlling party is unable to provide adequate information, instructions or documents to the carrier, the shipper shall provide them. If the carrier, after reasonable effort, is unable to locate the shipper, the documentary shipper shall provide such information, instructions or documents.

*Article 56. Variation by agreement*

The parties to the contract of carriage may vary the effect of articles 50, subparagraphs 1 (b) and (c), 50, paragraph 2, and 52. The parties may also restrict or exclude the transferability of the right of control referred to in article 51, subparagraph 1 (b).

## CHAPTER 11. TRANSFER OF RIGHTS

*Article 57. When a negotiable transport document or negotiable electronic transport record is issued*

1. When a negotiable transport document is issued, the holder may transfer the rights incorporated in the document by transferring it to another person:

- (a) Duly endorsed either to such other person or in blank, if an order document; or
- (b) Without endorsement, if: (i) a bearer document or a blank endorsed document; or (ii) a document made out to the order of a named person and the transfer is between the first holder and the named person.

2. When a negotiable electronic transport record is issued, its holder may transfer the rights incorporated in it, whether it be made out to order or to the order of a named person, by transferring the electronic transport record in accordance with the procedures referred to in article 9, paragraph 1.

*Article 58. Liability of holder*

1. Without prejudice to article 55, a holder that is not the shipper and that does not exercise any right under the contract of carriage does not assume any liability under the contract of carriage solely by reason of being a holder.

2. A holder that is not the shipper and that exercises any right under the contract of carriage assumes any liabilities imposed on it under the contract of carriage to the extent that such liabilities are incorporated in or ascertainable from the negotiable transport document or the negotiable electronic transport record.

3. For the purposes of paragraphs 1 and 2 of this article, a holder that is not the shipper does not exercise any right under the contract of carriage solely because:

- (a) It agrees with the carrier, pursuant to article 10, to replace a negotiable transport document by a negotiable electronic transport record or to replace a negotiable electronic transport record by a negotiable transport document; or
- (b) It transfers its rights pursuant to article 57.

## CHAPTER 12. LIMITS OF LIABILITY

*Article 59. Limits of liability*

1. Subject to articles 60 and 61, paragraph 1, the carrier's liability for breaches of its obligations under this Convention is limited to 875 units of account per package or other shipping unit, or 3 units of account per kilogram of the gross weight of the goods that are the subject of the claim or dispute, whichever amount is the higher, except when the value of the goods has been declared by the shipper and included in the contract particulars, or when a higher amount than the amount of limitation of liability set out in this article has been agreed upon between the carrier and the shipper.

2. When goods are carried in or on a container, pallet or similar article of transport used to consolidate goods, or in or on a vehicle, the packages or shipping units enumerated in the contract particulars as packed in or on such article of transport or vehicle are deemed packages or shipping units. If not so enumerated, the goods in or on such article of transport or vehicle are deemed one shipping unit.

3. The unit of account referred to in this article is the Special Drawing Right as defined by the International Monetary Fund. The amounts referred to in this article are to be converted into the national currency of a State according to the value of such currency at the date of judgement or award or the date agreed upon by the parties. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State that is a member of the International Monetary Fund is to be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State that is not a member of the International Monetary Fund is to be calculated in a manner to be determined by that State.

*Article 60. Limits of liability for loss caused by delay*

Subject to article 61, paragraph 2, compensation for loss of or damage to the goods due to delay shall be calculated in accordance with article 22 and liability for economic loss due to delay is limited to an amount equivalent to two and one-half times the freight payable on the goods delayed. The total amount payable pursuant to this article and article 59, paragraph 1, may not exceed the limit that would be established pursuant to article 59, paragraph 1, in respect of the total loss of the goods concerned.

*Article 61. Loss of the benefit of limitation of liability*

1. Neither the carrier nor any of the persons referred to in article 18 is entitled to the benefit of the limitation of liability as provided in article 59, or as provided in the contract of carriage, if the claimant proves that the loss resulting from the breach of the carrier's obligation under this Convention was attributable to a personal act or omission of the person claiming a right to limit done with the intent to cause such loss or recklessly and with knowledge that such loss would probably result.

2. Neither the carrier nor any of the persons mentioned in article 18 is entitled to the benefit of the limitation of liability as provided in article 60 if the claimant proves that the delay in delivery resulted from a personal act or omission of the person claiming a right to limit done with the intent to cause the loss due to delay or recklessly and with knowledge that such loss would probably result.

## CHAPTER 13. TIME FOR SUIT

*Article 62. Period of time for suit*

1. No judicial or arbitral proceedings in respect of claims or disputes arising from a breach of an obligation under this Convention may be instituted after the expiration of a period of two years.

2. The period referred to in paragraph 1 of this article commences on the day on which the carrier has delivered the goods or, in cases in which no goods have been delivered or only part of the goods have been delivered, on the last day on which the goods should have been delivered. The day on which the period commences is not included in the period.

3. Notwithstanding the expiration of the period set out in paragraph 1 of this article, one party may rely on its claim as a defence or for the purpose of set-off against a claim asserted by the other party.

*Article 63. Extension of time for suit*

The period provided in article 62 shall not be subject to suspension or interruption, but the person against which a claim is made may at any time during the running of the period extend that period by a declaration to the claimant. This period may be further extended by another declaration or declarations.

*Article 64. Action for indemnity*

An action for indemnity by a person held liable may be instituted after the expiration of the period provided in article 62 if the indemnity action is instituted within the later of:

- (a) The time allowed by the applicable law in the jurisdiction where proceedings are instituted; or
- (b) Ninety days commencing from the day when the person instituting the action for indemnity has either settled the claim or been served with process in the action against itself, whichever is earlier.

*Article 65. Actions against the person identified as the carrier*

An action against the bareboat charterer or the person identified as the carrier pursuant to article 37, paragraph 2, may be instituted after the expiration of the period provided in article 62 if the action is instituted within the later of:

- (a) The time allowed by the applicable law in the jurisdiction where proceedings are instituted; or
- (b) Ninety days commencing from the day when the carrier has been identified, or the registered owner or bareboat charterer has rebutted the presumption that it is the carrier, pursuant to article 37, paragraph 2.

## CHAPTER 14. JURISDICTION

*Article 66. Actions against the carrier*

Unless the contract of carriage contains an exclusive choice of court agreement that complies with article 67 or 72, the plaintiff has the right to institute judicial proceedings under this Convention against the carrier:

(a) In a competent court within the jurisdiction of which is situated one of the following places:

- (i) The domicile of the carrier;
- (ii) The place of receipt agreed in the contract of carriage;
- (iii) The place of delivery agreed in the contract of carriage; or
- (iv) The port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship; or

(b) In a competent court or courts designated by an agreement between the shipper and the carrier for the purpose of deciding claims against the carrier that may arise under this Convention.

*Article 67. Choice of court agreements*

1. The jurisdiction of a court chosen in accordance with article 66, paragraph (b), is exclusive for disputes between the parties to the contract only if the parties so agree and the agreement conferring jurisdiction:

(a) Is contained in a volume contract that clearly states the names and addresses of the parties and either (i) is individually negotiated or (ii) contains a prominent statement that there is an exclusive choice of court agreement and specifies the sections of the volume contract containing that agreement; and

(b) Clearly designates the courts of one Contracting State or one or more specific courts of one Contracting State.

2. A person that is not a party to the volume contract is bound by an exclusive choice of court agreement concluded in accordance with paragraph 1 of this article only if:

- (a) The court is in one of the places designated in article 66, paragraph (a);
- (b) That agreement is contained in the transport document or electronic transport record;
- (c) That person is given timely and adequate notice of the court where the action shall be brought and that the jurisdiction of that court is exclusive; and
- (d) The law of the court seized recognizes that that person may be bound by the exclusive choice of court agreement.

*Article 68. Actions against the maritime performing party*

The plaintiff has the right to institute judicial proceedings under this Convention against the maritime performing party in a competent court within the jurisdiction of which is situated one of the following places:

- (a) The domicile of the maritime performing party; or

(b) The port where the goods are received by the maritime performing party, the port where the goods are delivered by the maritime performing party or the port in which the maritime performing party performs its activities with respect to the goods.

*Article 69. No additional bases of jurisdiction*

Subject to articles 71 and 72, no judicial proceedings under this Convention against the carrier or a maritime performing party may be instituted in a court not designated pursuant to articles 66 or 68.

*Article 70. Arrest and provisional or protective measures*

Nothing in this Convention affects jurisdiction with regard to provisional or protective measures, including arrest. A court in a State in which a provisional or protective measure was taken does not have jurisdiction to determine the case upon its merits unless:

- (a) The requirements of this chapter are fulfilled; or
- (b) An international convention that applies in that State so provides.

*Article 71. Consolidation and removal of actions*

1. Except when there is an exclusive choice of court agreement that is binding pursuant to articles 67 or 72, if a single action is brought against both the carrier and the maritime performing party arising out of a single occurrence, the action may be instituted only in a court designated pursuant to both article 66 and article 68. If there is no such court, such action may be instituted in a court designated pursuant to article 68, subparagraph (b), if there is such a court.

2. Except when there is an exclusive choice of court agreement that is binding pursuant to articles 67 or 72, a carrier or a maritime performing party that institutes an action seeking a declaration of non-liability or any other action that would deprive a person of its right to select the forum pursuant to article 66 or 68 shall, at the request of the defendant, withdraw that action once the defendant has chosen a court designated pursuant to article 66 or 68, whichever is applicable, where the action may be recommenced.

*Article 72. Agreement after a dispute has arisen and jurisdiction when the defendant has entered an appearance*

1. After a dispute has arisen, the parties to the dispute may agree to resolve it in any competent court.

2. A competent court before which a defendant appears, without contesting jurisdiction in accordance with the rules of that court, has jurisdiction.

*Article 73. Recognition and enforcement*

1. A decision made in one Contracting State by a court having jurisdiction under this Convention shall be recognized and enforced in another Contracting State in accordance with the law of such latter Contracting State when both States have made a declaration in accordance with article 74.

2. A court may refuse recognition and enforcement based on the grounds for the refusal of recognition and enforcement available pursuant to its law.



3. This chapter shall not affect the application of the rules of a regional economic integration organization that is a party to this Convention, as concerns the recognition or enforcement of judgements as between member States of the regional economic integration organization, whether adopted before or after this Convention.

*Article 74. Application of chapter 14*

The provisions of this chapter shall bind only Contracting States that declare in accordance with article 91 that they will be bound by them.

CHAPTER 15. ARBITRATION

*Article 75. Arbitration agreements*

1. Subject to this chapter, parties may agree that any dispute that may arise relating to the carriage of goods under this Convention shall be referred to arbitration.

2. The arbitration proceedings shall, at the option of the person asserting a claim against the carrier, take place at:

- (a) Any place designated for that purpose in the arbitration agreement; or
- (b) Any other place situated in a State where any of the following places is located:
  - (i) The domicile of the carrier;
  - (ii) The place of receipt agreed in the contract of carriage;
  - (iii) The place of delivery agreed in the contract of carriage; or
  - (iv) The port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship.

3. The designation of the place of arbitration in the agreement is binding for disputes between the parties to the agreement if the agreement is contained in a volume contract that clearly states the names and addresses of the parties and either:

- (a) Is individually negotiated; or
- (b) Contains a prominent statement that there is an arbitration agreement and specifies the sections of the volume contract containing the arbitration agreement.

4. When an arbitration agreement has been concluded in accordance with paragraph 3 of this article, a person that is not a party to the volume contract is bound by the designation of the place of arbitration in that agreement only if:

- (a) The place of arbitration designated in the agreement is situated in one of the places referred to in subparagraph 2 (b) of this article;
- (b) The agreement is contained in the transport document or electronic transport record;
- (c) The person to be bound is given timely and adequate notice of the place of arbitration; and
- (d) Applicable law permits that person to be bound by the arbitration agreement.

5. The provisions of paragraphs 1, 2, 3 and 4 of this article are deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement to the extent that it is inconsistent therewith is void.

*Article 76. Arbitration agreement in non-liner transportation*

1. Nothing in this Convention affects the enforceability of an arbitration agreement in a contract of carriage in non-liner transportation to which this Convention or the provisions of this Convention apply by reason of:

- (a) The application of article 7; or
- (b) The parties' voluntary incorporation of this Convention in a contract of carriage that would not otherwise be subject to this Convention.

2. Notwithstanding paragraph 1 of this article, an arbitration agreement in a transport document or electronic transport record to which this Convention applies by reason of the application of article 7 is subject to this chapter unless such a transport document or electronic transport record:

- (a) Identifies the parties to and the date of the charter party or other contract excluded from the application of this Convention by reason of the application of article 6; and
- (b) Incorporates by specific reference the clause in the charter party or other contract that contains the terms of the arbitration agreement.

*Article 77. Agreement to arbitrate after a dispute has arisen*

Notwithstanding the provisions of this chapter and chapter 14, after a dispute has arisen the parties to the dispute may agree to resolve it by arbitration in any place.

*Article 78. Application of chapter 15*

The provisions of this chapter shall bind only Contracting States that declare in accordance with article 91 that they will be bound by them.

CHAPTER 16. VALIDITY OF CONTRACTUAL TERMS

*Article 79. General provisions*

1. Unless otherwise provided in this Convention, any term in a contract of carriage is void to the extent that it:

- (a) Directly or indirectly excludes or limits the obligations of the carrier or a maritime performing party under this Convention;
- (b) Directly or indirectly excludes or limits the liability of the carrier or a maritime performing party for breach of an obligation under this Convention; or
- (c) Assigns a benefit of insurance of the goods in favour of the carrier or a person referred to in article 18.

2. Unless otherwise provided in this Convention, any term in a contract of carriage is void to the extent that it:

- (a) Directly or indirectly excludes, limits or increases the obligations under this Convention of the shipper, consignee, controlling party, holder or documentary shipper; or

(b) Directly or indirectly excludes, limits or increases the liability of the shipper, consignee, controlling party, holder or documentary shipper for breach of any of its obligations under this Convention.

*Article 80. Special rules for volume contracts*

1. Notwithstanding article 79, as between the carrier and the shipper, a volume contract to which this Convention applies may provide for greater or lesser rights, obligations and liabilities than those imposed by this Convention.

2. A derogation pursuant to paragraph 1 of this article is binding only when:

(a) The volume contract contains a prominent statement that it derogates from this Convention;

(b) The volume contract is (i) individually negotiated or (ii) prominently specifies the sections of the volume contract containing the derogations;

(c) The shipper is given an opportunity and notice of the opportunity to conclude a contract of carriage on terms and conditions that comply with this Convention without any derogation under this article; and

(d) The derogation is neither (i) incorporated by reference from another document nor (ii) included in a contract of adhesion that is not subject to negotiation.

3. A carrier's public schedule of prices and services, transport document, electronic transport record or similar document is not a volume contract pursuant to paragraph 1 of this article, but a volume contract may incorporate such documents by reference as terms of the contract.

4. Paragraph 1 of this article does not apply to rights and obligations provided in articles 14, subparagraphs (a) and (b), 29 and 32 or to liability arising from the breach thereof, nor does it apply to any liability arising from an act or omission referred to in article 61.

5. The terms of the volume contract that derogate from this Convention, if the volume contract satisfies the requirements of paragraph 2 of this article, apply between the carrier and any person other than the shipper provided that:

(a) Such person received information that prominently states that the volume contract derogates from this Convention and gave its express consent to be bound by such derogations; and

(b) Such consent is not solely set forth in a carrier's public schedule of prices and services, transport document or electronic transport record.

6. The party claiming the benefit of the derogation bears the burden of proof that the conditions for derogation have been fulfilled.

*Article 81. Special rules for live animals and certain other goods*

Notwithstanding article 79 and without prejudice to article 80, the contract of carriage may exclude or limit the obligations or the liability of both the carrier and a maritime performing party if:

(a) The goods are live animals, but any such exclusion or limitation will not be effective if the claimant proves that the loss of or damage to the goods, or delay in delivery, resulted from an act or omission of the carrier or of a person referred to in

article 18, done with the intent to cause such loss of or damage to the goods or such loss due to delay or done recklessly and with knowledge that such loss or damage or such loss due to delay would probably result; or

(b) The character or condition of the goods or the circumstances and terms and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement, provided that such contract of carriage is not related to ordinary commercial shipments made in the ordinary course of trade and that no negotiable transport document or negotiable electronic transport record is issued for the carriage of the goods.

## CHAPTER 17. MATTERS NOT GOVERNED BY THIS CONVENTION

### *Article 82. International conventions governing the carriage of goods by other modes of transport*

Nothing in this Convention affects the application of any of the following international conventions in force at the time this Convention enters into force, including any future amendment to such conventions, that regulate the liability of the carrier for loss of or damage to the goods:

(a) Any convention governing the carriage of goods by air to the extent that such convention according to its provisions applies to any part of the contract of carriage;

(b) Any convention governing the carriage of goods by road to the extent that such convention according to its provisions applies to the carriage of goods that remain loaded on a road cargo vehicle carried on board a ship;

(c) Any convention governing the carriage of goods by rail to the extent that such convention according to its provisions applies to carriage of goods by sea as a supplement to the carriage by rail; or

(d) Any convention governing the carriage of goods by inland waterways to the extent that such convention according to its provisions applies to a carriage of goods without trans-shipment both by inland waterways and sea.

### *Article 83. Global limitation of liability*

Nothing in this Convention affects the application of any international convention or national law regulating the global limitation of liability of vessel owners.

### *Article 84. General average*

Nothing in this Convention affects the application of terms in the contract of carriage or provisions of national law regarding the adjustment of general average.

### *Article 85. Passengers and luggage*

This Convention does not apply to a contract of carriage for passengers and their luggage.

*Article 86. Damage caused by nuclear incident*

No liability arises under this Convention for damage caused by a nuclear incident if the operator of a nuclear installation is liable for such damage:

(a) Under the Paris Convention on Third Party Liability in the Field of Nuclear Energy of 29 July 1960 as amended by the Additional Protocol of 28 January 1964 and by the Protocols of 16 November 1982 and 12 February 2004, the Vienna Convention on Civil Liability for Nuclear Damage of 21 May 1963 as amended by the Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention of 21 September 1988 and as amended by the Protocol to Amend the 1963 Vienna Convention on Civil Liability for Nuclear Damage of 12 September 1997, or the Convention on Supplementary Compensation for Nuclear Damage of 12 September 1997, including any amendment to these conventions and any future convention in respect of the liability of the operator of a nuclear installation for damage caused by a nuclear incident; or

(b) Under national law applicable to the liability for such damage, provided that such law is in all respects as favourable to persons that may suffer damage as either the Paris or Vienna Conventions or the Convention on Supplementary Compensation for Nuclear Damage.

## CHAPTER 18. FINAL CLAUSES

*Article 87. Depositary*

The Secretary-General of the United Nations is hereby designated as the depositary of this Convention.

*Article 88. Signature, ratification, acceptance, approval or accession*

1. This Convention is open for signature by all States at [Rotterdam, the Netherlands] from [...] to [...] and thereafter at the Headquarters of the United Nations in New York from [...] to [...].

2. This Convention is subject to ratification, acceptance or approval by the signatory States.

3. This Convention is open for accession by all States that are not signatory States as from the date it is open for signature.

4. Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

*Article 89. Denunciation of other conventions*

1. A State that ratifies, accepts, approves or accedes to this Convention and is a party to the International Convention for the Unification of certain Rules of Law relating to Bills of Lading signed at Brussels on 25 August 1924; to the Protocol signed on 23 February 1968 to amend the International Convention for the Unification of certain Rules of Law relating to Bills of Lading signed at Brussels on 25 August 1924; or to the Protocol to amend the International Convention for the Unification of certain Rules of Law relating to Bills of Lading as Modified by the Amending Protocol of 23 February 1968, signed at Brussels on 21 December 1979 shall at the same time denounce that Convention and the protocol or protocols thereto to which it is a party by notifying the Government of Belgium

to that effect, with a declaration that the denunciation is to take effect as from the date when this Convention enters into force in respect of that State.

2. A State that ratifies, accepts, approves or accedes to this Convention and is a party to the United Nations Convention on the Carriage of Goods by Sea concluded at Hamburg on 31 March 1978 shall at the same time denounce that Convention by notifying the Secretary-General of the United Nations to that effect, with a declaration that the denunciation is to take effect as from the date when this Convention enters into force in respect of that State.

3. For the purposes of this article, ratifications, acceptances, approvals and accessions in respect of this Convention by States parties to the instruments listed in paragraphs 1 and 2 of this article that are notified to the depositary after this Convention has entered into force are not effective until such denunciations as may be required on the part of those States in respect of these instruments have become effective. The depositary of this Convention shall consult with the Government of Belgium, as the depositary of the instruments referred to in paragraph 1 of this article, so as to ensure necessary coordination in this respect.

#### *Article 90. Reservations*

No reservation is permitted to this Convention.

#### *Article 91. Procedure and effect of declarations*

1. The declarations permitted by articles 74 and 78 may be made at any time. The initial declarations permitted by article 92, paragraph 1, and article 93, paragraph 2, shall be made at the time of signature, ratification, acceptance, approval or accession. No other declaration is permitted under this Convention.

2. Declarations made at the time of signature are subject to confirmation upon ratification, acceptance or approval.

3. Declarations and their confirmations are to be in writing and to be formally notified to the depositary.

4. A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary.

5. Any State that makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary. The withdrawal of a declaration, or its modification where permitted by this Convention, takes effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

#### *Article 92. Effect in domestic territorial units*

1. If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

3. When a Contracting State has declared pursuant to this article that this Convention extends to one or more but not all of its territorial units, a place located in a territorial unit to which this Convention does not extend is not considered to be in a Contracting State for the purposes of this Convention.

4. If a Contracting State makes no declaration pursuant to paragraph 1 of this article, the Convention is to extend to all territorial units of that State.

*Article 93. Participation by regional economic integration organizations*

1. A regional economic integration organization that is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention. The regional economic integration organization shall in that case have the rights and obligations of a Contracting State, to the extent that that organization has competence over matters governed by this Convention. When the number of Contracting States is relevant in this Convention, the regional economic integration organization does not count as a Contracting State in addition to its member States which are Contracting States.

2. The regional economic integration organization shall, at the time of signature, ratification, acceptance, approval or accession, make a declaration to the depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that organization by its member States. The regional economic integration organization shall promptly notify the depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration pursuant to this paragraph.

3. Any reference to a "Contracting State" or "Contracting States" in this Convention applies equally to a regional economic integration organization when the context so requires.

*Article 94. Entry into force*

1. This Convention enters into force on the first day of the month following the expiration of one year after the date of deposit of the twentieth instrument of ratification, acceptance, approval or accession.

2. For each State that becomes a Contracting State to this Convention after the date of the deposit of the twentieth instrument of ratification, acceptance, approval or accession, this Convention enters into force on the first day of the month following the expiration of one year after the deposit of the appropriate instrument on behalf of that State.

3. Each Contracting State shall apply this Convention to contracts of carriage concluded on or after the date of the entry into force of this Convention in respect of that State.

*Article 95. Revision and amendment*

1. At the request of not less than one third of the Contracting States to this Convention, the Secretary-General of the United Nations shall convene a conference of the Contracting States for revising or amending it.

2. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention is deemed to apply to the Convention as amended.

*Article 96. Denunciation of this Convention*

1. A Contracting State may denounce this Convention at any time by means of a notification in writing addressed to the depositary.

2. The denunciation takes effect on the first day of the month following the expiration of one year after the notification is received by the depositary. If a longer period is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

DONE at [Rotterdam, the Netherlands], this [...] day of [...], [...], in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed this Convention.



**D. General Assembly resolutions 63/120, 63/121, 63/122 and 63/128****Resolutions adopted by the General Assembly on the report  
of the Sixth Committee (A/63/438)****63/120. Report of the United Nations Commission on International Trade Law  
on the work of its forty-first session**

*The General Assembly,*

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

*Reaffirming its belief* that the progressive modernization and harmonization of international trade law, in reducing or removing legal obstacles to the flow of international trade, especially those affecting the developing countries, would contribute significantly to universal economic cooperation among all States on a basis of equality, equity, 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 reports of the Commission on the work of its resumed fortieth<sup>1</sup> and its forty-first sessions,<sup>2</sup>

*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 reports of the United Nations Commission on International Trade Law on the work of its resumed fortieth<sup>1</sup> and its forty-first sessions;<sup>2</sup>

2. *Commends* the Commission for the completion and adoption of the Legislative Guide on Secured Transactions;<sup>3</sup>

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<sup>1</sup> *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17 (A/62/17), part two.*

<sup>2</sup> *Ibid., Sixty-third Session, Supplement No. 17 and corrigendum (A/63/17 and Corr.1).*

<sup>3</sup> *Ibid., Sixty-second Session, Supplement No. 17 (A/62/17), part two, para. 100.*

3. *Also commends* the Commission for the completion and approval of the draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea;<sup>4</sup>

4. *Welcomes* the progress made by the Commission in its work on a revision of its Model Law on Procurement of Goods, Construction and Services,<sup>5</sup> on the preparation of a draft legislative guide on the treatment of enterprise groups in insolvency, on the compilation of practical experience with negotiating and using cross-border insolvency agreements to facilitate cross-border insolvency proceedings and on the preparation of an annex to its Legislative Guide on Secured Transactions dealing with security rights in intellectual property, and endorses the decision of the Commission to undertake further work in the area of electronic commerce and commercial fraud;

5. *Also welcomes* the progress made by the Commission in its work on a revision of its Arbitration Rules,<sup>6</sup> and encourages the Commission to complete this work as soon as possible so that the revised Rules may be considered by the Commission at its forty-second session, in 2009;

6. *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;

7. *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 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;

<sup>4</sup> Ibid., *Sixty-third Session, Supplement No. 17* and corrigendum (A/63/17 and Corr.1), annex.

<sup>5</sup> Ibid., *Forty-ninth Session, Supplement No. 17* and corrigendum (A/49/17 and Corr.1), annex I.

<sup>6</sup> United Nations publication, Sales No. E.77.V.6.

(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;

8. *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,<sup>7</sup> 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;

9. *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-third 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;

10. *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 last 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, and in this regard recalls its previous resolutions related to this matter;<sup>8</sup>

11. *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 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;<sup>9</sup>

<sup>7</sup> Resolution 48/32, para. 5.

<sup>8</sup> *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17* and corrigendum (A/63/17 and Corr.1), paras. 373-381.

<sup>9</sup> *Ibid.*, para. 386.

12. *Further welcomes* the consideration by the Commission of the proposed strategic framework for the period 2010-2011<sup>10</sup> 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;<sup>11</sup>

13. *Recalls* its resolutions on partnerships between the United Nations and non-State actors, in particular the private sector,<sup>12</sup> 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;<sup>13</sup>

14. *Reiterates its request* to the Secretary-General, in conformity with the General Assembly resolutions on documentation-related matters,<sup>14</sup> 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;

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

16. *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,<sup>15</sup> 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*;

17. *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;

18. *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<sup>16</sup> and a digest of case law relating to the

<sup>10</sup> A/63/6 (Prog. 6).

<sup>11</sup> *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* and corrigendum (A/63/17 and Corr.1), para. 391.

<sup>12</sup> Resolutions 55/215, 56/76, 58/129 and 60/215.

<sup>13</sup> Resolutions 59/39, 60/20 and 61/32.

<sup>14</sup> Resolutions 52/214, sect. B, 57/283 B, sect. III, and 58/250, sect. III.

<sup>15</sup> Resolution 2502 (XXIV), para. 7.

<sup>16</sup> United Nations, *Treaty Series*, vol. 1489, No. 25567.

Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law,<sup>17</sup> with the aim of assisting in the dissemination of information on those texts and promoting their use, enactment and uniform interpretation;

19. *Takes note with appreciation* of conferences celebrating the fiftieth anniversary of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards done in New York on 10 June 1958<sup>18</sup> (the “New York Convention”), the progress made in the ongoing project of the Commission on monitoring the implementation of the New York Convention, the decision of the Commission to develop a guide to enactment of the New York Convention to promote a uniform interpretation and application of the Convention and its decision that, resources permitting, the activities of the secretariat in the context of its technical assistance programme could usefully include dissemination of information on the judicial interpretation of the New York Convention, to complement other activities in support of the Convention;

20. *Recalls* its resolutions affirming the importance of high-quality, user-friendly and cost-effective United Nations websites and the need for their multilingual development, maintenance and enrichment,<sup>19</sup> commends the website of the Commission in the six official languages of the United Nations, and welcomes the continuous efforts of the Commission to maintain and improve its website in accordance with the applicable guidelines;

21. *Expresses its appreciation* to Jernej Sekolec, Secretary of the United Nations Commission on International Trade Law since 2001, who retired on 31 July 2008, for his outstanding and devoted contribution to the process of unification and harmonization of international trade law in general and to the Commission in particular.<sup>20</sup>

*67th plenary meeting  
11 December 2008*

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

<sup>18</sup> United Nations, *Treaty Series*, vol. 330, No. 4739.

<sup>19</sup> Resolutions 52/214, sect. C, para. 3; 55/222, sect. III, para. 12; 56/64 B, sect. X; 57/130 B, sect. X; 58/101 B, sect. V, paras. 61–76; 59/126 B, sect. V, paras. 76–95; 60/109 B, sect. IV, paras. 66–80; and 61/121 B, sect. IV, paras. 65–77.

<sup>20</sup> *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17 and corrigendum (A/63/17 and Corr.1)*, paras. 393 and 394.

**63/121. Legislative Guide on Secured Transactions of the United Nations  
Commission on International Trade Law**

*The General Assembly,*

*Recognizing* the importance to all countries of efficient secured transactions regimes promoting access to secured credit,

*Recognizing also* that access to secured credit is likely to assist all countries, in particular developing countries and countries with economies in transition, in their economic development and in fighting poverty,

*Emphasizing* the expectation that modern and harmonized secured transactions regimes which balance the interests of all stakeholders (including grantors of security rights, secured and unsecured creditors, retention-of-title sellers and financial lessors, privileged creditors and the insolvency representative in the grantor's insolvency) will demonstrably facilitate access to secured credit, thereby promoting the movement of goods and services across national borders,

*Noting* that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,

*Taking into account* the need for reform in the field of secured transactions laws at both the national and international levels as demonstrated by the numerous current national law reform efforts and the work of international organizations, such as the Hague Conference on Private International Law, the International Institute for the Unification of Private Law and the Organization of American States, and of international financial institutions, such as the Asian Development Bank, the European Bank for Reconstruction and Development, the Inter-American Development Bank, the International Monetary Fund and the World Bank,

*Expressing its appreciation* to intergovernmental and international non governmental organizations active in the field of secured transactions law reform for their participation in and support for the development of the Legislative Guide on Secured Transactions of the United Nations Commission on International Trade Law,

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for the completion and adoption of the Legislative Guide on Secured Transactions;<sup>1</sup>

2. *Requests* the Secretary-General to disseminate broadly the text of the Legislative Guide, transmitting it to Governments and other interested bodies, such as national and international financial institutions and chambers of commerce;

3. *Recommends* that all States give favourable consideration to the Legislative Guide when revising or adopting legislation relevant to secured transactions, and invites States that have used the Legislative Guide to advise the Commission accordingly;

4. *Recommends also* that all States continue to consider becoming party to the United Nations Convention on the Assignment of Receivables in International Trade,<sup>2</sup> the principles of which are also reflected in the Legislative Guide.

*67th plenary meeting  
11 December 2008*

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<sup>1</sup> See *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17* (A/62/17), part two, para. 100.

<sup>2</sup> Resolution 56/81, annex.

**RESOLUTION 63/122**

Adopted at the 67th plenary meeting, on 11 December 2008, without a vote, on the recommendation of the Committee (A/63/438, para. 12)<sup>1</sup> [\\_ftn1](#)

**63/122. United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea**

*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,

*Concerned* that the current legal regime governing the international carriage of goods by sea lacks uniformity and fails to adequately take into account modern transport practices, including containerization, door-to-door transport contracts and the use of electronic transport documents,

*Noting* that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,

*Convinced* that the adoption of uniform rules to modernize and harmonize the rules that govern the international carriage of goods involving a sea leg would enhance legal certainty, improve efficiency and commercial predictability in the international carriage of goods and reduce legal obstacles to the flow of international trade among all States,

*Believing* that the adoption of uniform rules to govern international contracts of carriage wholly or partly by sea will promote legal certainty, improve the efficiency of international carriage of goods and facilitate new access opportunities for previously remote parties and markets, thus playing a fundamental role in promoting trade and economic development, both domestically and internationally,

*Noting* that shippers and carriers do not have the benefit of a binding and balanced universal regime to support the operation of contracts of carriage involving various modes of transport,

*Recalling* that, at its thirty-fourth and thirty-fifth sessions, in 2001 and 2002, the Commission decided to prepare an international legislative instrument governing door-to-door transport operations that involve a sea leg,<sup>2</sup>

*Recognizing* that all States and interested international organizations were invited to participate in the preparation of the draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea and in the forty-first session of the Commission, either as members or as observers, with a full opportunity to speak and make proposals,

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<sup>1</sup> The draft resolution recommended in the report was introduced in the Committee by the representative of Austria on behalf of the Bureau.

<sup>2</sup> *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), paras. 319–345; and *ibid.*, *Fifty-seventh Session, Supplement No. 17* (A/57/17), paras. 210–224.

*Noting with satisfaction* that the text of the draft Convention was circulated for comment to all States Members of the United Nations and intergovernmental organizations invited to attend the meetings of the Commission as observers, and that the comments received were before the Commission at its forty-first session,<sup>3</sup>

*Taking note with satisfaction* of the decision of the Commission at its forty-first session to submit the draft Convention to the General Assembly for its consideration,<sup>4</sup>

*Taking note* of the draft Convention approved by the Commission,<sup>5</sup>

*Expressing its appreciation* to the Government of the Netherlands for its offer to host a signing ceremony for the Convention in Rotterdam,

1. *Commends* the United Nations Commission on International Trade Law for preparing the draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea;

2. *Adopts* the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, contained in the annex to the present resolution;

3. *Authorizes* a ceremony for the opening for signature to be held on 23 September 2009 in Rotterdam, the Netherlands, and recommends that the rules embodied in the Convention be known as “the Rotterdam Rules”;

4. *Calls upon* all Governments to consider becoming party to the Convention.

#### **Annex**

#### **United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea**

*The States Parties to this Convention,*

*Reaffirming* their belief that international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,

*Convinced* that the progressive harmonization and unification of international trade law, in reducing or removing legal obstacles to the flow of international trade, significantly contributes to universal economic cooperation among all States on a basis of equality, equity and common interest, and to the well-being of all peoples,

*Recognizing* the significant contribution of the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, signed in Brussels on 25 August 1924, and its Protocols, and of the United Nations Convention on the Carriage of Goods by Sea, signed in Hamburg on 31 March 1978, to the harmonization of the law governing the carriage of goods by sea,

*Mindful* of the technological and commercial developments that have taken place since the adoption of those conventions and of the need to consolidate and modernize them,

<sup>3</sup> A/CN.9/658 and Add.1–14 and Add.14/Corr.1.

<sup>4</sup> *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17* and corrigendum (A/63/17 and Corr.1), para. 298.

<sup>5</sup> *Ibid.*, annex I.



*Noting* that shippers and carriers do not have the benefit of a binding universal regime to support the operation of contracts of maritime carriage involving other modes of transport,

*Believing* that the adoption of uniform rules to govern international contracts of carriage wholly or partly by sea will promote legal certainty, improve the efficiency of international carriage of goods and facilitate new access opportunities for previously remote parties and markets, thus playing a fundamental role in promoting trade and economic development, both domestically and internationally,

*Have agreed* as follows:

## **Chapter 1**

### **General provisions**

#### *Article 1*

##### *Definitions*

For the purposes of this Convention:

1. “Contract of carriage” means a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage.
2. “Volume contract” means a contract of carriage that provides for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time. The specification of the quantity may include a minimum, a maximum or a certain range.
3. “Liner transportation” means a transportation service that is offered to the public through publication or similar means and includes transportation by ships operating on a regular schedule between specified ports in accordance with publicly available timetables of sailing dates.
4. “Non-liner transportation” means any transportation that is not liner transportation.
5. “Carrier” means a person that enters into a contract of carriage with a shipper.
6. (a) “Performing party” means a person other than the carrier that performs or undertakes to perform any of the carrier’s obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, care, unloading or delivery of the goods, to the extent that such person acts, either directly or indirectly, at the carrier’s request or under the carrier’s supervision or control.  
  
(b) “Performing party” does not include any person that is retained, directly or indirectly, by a shipper, by a documentary shipper, by the controlling party or by the consignee instead of by the carrier.
7. “Maritime performing party” means a performing party to the extent that it performs or undertakes to perform any of the carrier’s obligations during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship. An inland carrier is a maritime performing party only if it performs or undertakes to perform its services exclusively within a port area.
8. “Shipper” means a person that enters into a contract of carriage with a carrier.
9. “Documentary shipper” means a person, other than the shipper, that accepts to be named as “shipper” in the transport document or electronic transport record.

10. “Holder” means:

(a) A person that is in possession of a negotiable transport document; and (i) if the document is an order document, is identified in it as the shipper or the consignee, or is the person to which the document is duly endorsed; or (ii) if the document is a blank endorsed order document or bearer document, is the bearer thereof; or

(b) The person to which a negotiable electronic transport record has been issued or transferred in accordance with the procedures referred to in article 9, paragraph 1.

11. “Consignee” means a person entitled to delivery of the goods under a contract of carriage or a transport document or electronic transport record.

12. “Right of control” of the goods means the right under the contract of carriage to give the carrier instructions in respect of the goods in accordance with chapter 10.

13. “Controlling party” means the person that pursuant to article 51 is entitled to exercise the right of control.

14. “Transport document” means a document issued under a contract of carriage by the carrier that:

(a) Evidences the carrier’s or a performing party’s receipt of goods under a contract of carriage; and

(b) Evidences or contains a contract of carriage.

15. “Negotiable transport document” means a transport document that indicates, by wording such as “to order” or “negotiable” or other appropriate wording recognized as having the same effect by the law applicable to the document, that the goods have been consigned to the order of the shipper, to the order of the consignee, or to bearer, and is not explicitly stated as being “non-negotiable” or “not negotiable”.

16. “Non-negotiable transport document” means a transport document that is not a negotiable transport document.

17. “Electronic communication” means information generated, sent, received or stored by electronic, optical, digital or similar means with the result that the information communicated is accessible so as to be usable for subsequent reference.

18. “Electronic transport record” means information in one or more messages issued by electronic communication under a contract of carriage by a carrier, including information logically associated with the electronic transport record by attachments or otherwise linked to the electronic transport record contemporaneously with or subsequent to its issue by the carrier, so as to become part of the electronic transport record, that:

(a) Evidences the carrier’s or a performing party’s receipt of goods under a contract of carriage; and

(b) Evidences or contains a contract of carriage.

19. “Negotiable electronic transport record” means an electronic transport record:

(a) That indicates, by wording such as “to order”, or “negotiable”, or other appropriate wording recognized as having the same effect by the law applicable to the record, that the goods have been consigned to the order of the shipper or to the order of the consignee, and is not explicitly stated as being “non-negotiable” or “not negotiable”; and

- (b) The use of which meets the requirements of article 9, paragraph 1.
20. “Non-negotiable electronic transport record” means an electronic transport record that is not a negotiable electronic transport record.
21. The “issuance” of a negotiable electronic transport record means the issuance of the record in accordance with procedures that ensure that the record is subject to exclusive control from its creation until it ceases to have any effect or validity.
22. The “transfer” of a negotiable electronic transport record means the transfer of exclusive control over the record.
23. “Contract particulars” means any information relating to the contract of carriage or to the goods (including terms, notations, signatures and endorsements) that is in a transport document or an electronic transport record.
24. “Goods” means the wares, merchandise, and articles of every kind whatsoever that a carrier undertakes to carry under a contract of carriage and includes the packing and any equipment and container not supplied by or on behalf of the carrier.
25. “Ship” means any vessel used to carry goods by sea.
26. “Container” means any type of container, transportable tank or flat, swapbody, or any similar unit load used to consolidate goods, and any equipment ancillary to such unit load.
27. “Vehicle” means a road or railroad cargo vehicle.
28. “Freight” means the remuneration payable to the carrier for the carriage of goods under a contract of carriage.
29. “Domicile” means (a) a place where a company or other legal person or association of natural or legal persons has its (i) statutory seat or place of incorporation or central registered office, whichever is applicable, (ii) central administration or (iii) principal place of business, and (b) the habitual residence of a natural person.
30. “Competent court” means a court in a Contracting State that, according to the rules on the internal allocation of jurisdiction among the courts of that State, may exercise jurisdiction over the dispute.

#### *Article 2*

##### *Interpretation of this Convention*

In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

#### *Article 3*

##### *Form requirements*

The notices, confirmation, consent, agreement, declaration and other communications referred to in articles 19, paragraph 2; 23, paragraphs 1 to 4; 36, subparagraphs 1 (b), (c) and (d); 40, subparagraph 4 (b); 44; 48, paragraph 3; 51, subparagraph 1 (b); 59, paragraph 1; 63; 66; 67, paragraph 2; 75, paragraph 4; and 80, paragraphs 2 and 5, shall be in writing. Electronic communications may be used for these purposes, provided that the use of such means is with the consent of the person by which it is communicated and of the person to which it is communicated.

*Article 4**Applicability of defences and limits of liability*

1. Any provision of this Convention that may provide a defence for, or limit the liability of, the carrier applies in any judicial or arbitral proceeding, whether founded in contract, in tort, or otherwise, that is instituted in respect of loss of, damage to, or delay in delivery of goods covered by a contract of carriage or for the breach of any other obligation under this Convention against:

- (a) The carrier or a maritime performing party;
- (b) The master, crew or any other person that performs services on board the ship; or
- (c) Employees of the carrier or a maritime performing party.

2. Any provision of this Convention that may provide a defence for the shipper or the documentary shipper applies in any judicial or arbitral proceeding, whether founded in contract, in tort, or otherwise, that is instituted against the shipper, the documentary shipper, or their subcontractors, agents or employees.

**Chapter 2****Scope of application***Article 5**General scope of application*

1. Subject to article 6, this Convention applies to contracts of carriage in which the place of receipt and the place of delivery are in different States, and the port of loading of a sea carriage and the port of discharge of the same sea carriage are in different States, if, according to the contract of carriage, any one of the following places is located in a Contracting State:

- (a) The place of receipt;
- (b) The port of loading;
- (c) The place of delivery; or
- (d) The port of discharge.

2. This Convention applies without regard to the nationality of the vessel, the carrier, the performing parties, the shipper, the consignee, or any other interested parties.

*Article 6**Specific exclusions*

1. This Convention does not apply to the following contracts in liner transportation:

- (a) Charter parties; and
- (b) Other contracts for the use of a ship or of any space thereon.

2. This Convention does not apply to contracts of carriage in non-liner transportation except when:

- (a) There is no charter party or other contract between the parties for the use of a ship or of any space thereon; and
- (b) A transport document or an electronic transport record is issued.

*Article 7**Application to certain parties*

Notwithstanding article 6, this Convention applies as between the carrier and the consignee, controlling party or holder that is not an original party to the charter party or other contract of carriage excluded from the application of this Convention. However, this Convention does not apply as between the original parties to a contract of carriage excluded pursuant to article 6.

**Chapter 3****Electronic transport records***Article 8**Use and effect of electronic transport records*

Subject to the requirements set out in this Convention:

(a) Anything that is to be in or on a transport document under this Convention may be recorded in an electronic transport record, provided the issuance and subsequent use of an electronic transport record is with the consent of the carrier and the shipper; and

(b) The issuance, exclusive control, or transfer of an electronic transport record has the same effect as the issuance, possession, or transfer of a transport document.

*Article 9**Procedures for use of negotiable electronic transport records*

1. The use of a negotiable electronic transport record shall be subject to procedures that provide for:

(a) The method for the issuance and the transfer of that record to an intended holder;

(b) An assurance that the negotiable electronic transport record retains its integrity;

(c) The manner in which the holder is able to demonstrate that it is the holder; and

(d) The manner of providing confirmation that delivery to the holder has been effected, or that, pursuant to articles 10, paragraph 2, or 47, subparagraphs 1 (a) (ii) and (c), the electronic transport record has ceased to have any effect or validity.

2. The procedures in paragraph 1 of this article shall be referred to in the contract particulars and be readily ascertainable.

*Article 10**Replacement of negotiable transport document or negotiable electronic transport record*

1. If a negotiable transport document has been issued and the carrier and the holder agree to replace that document by a negotiable electronic transport record:

(a) The holder shall surrender the negotiable transport document, or all of them if more than one has been issued, to the carrier;

(b) The carrier shall issue to the holder a negotiable electronic transport record that includes a statement that it replaces the negotiable transport document; and

(c) The negotiable transport document ceases thereafter to have any effect or validity.

2. If a negotiable electronic transport record has been issued and the carrier and the holder agree to replace that electronic transport record by a negotiable transport document:

(a) The carrier shall issue to the holder, in place of the electronic transport record, a negotiable transport document that includes a statement that it replaces the negotiable electronic transport record; and

(b) The electronic transport record ceases thereafter to have any effect or validity.

#### **Chapter 4** **Obligations of the carrier**

##### *Article 11*

##### *Carriage and delivery of the goods*

The carrier shall, subject to this Convention and in accordance with the terms of the contract of carriage, carry the goods to the place of destination and deliver them to the consignee.

##### *Article 12*

##### *Period of responsibility of the carrier*

1. The period of responsibility of the carrier for the goods under this Convention begins when the carrier or a performing party receives the goods for carriage and ends when the goods are delivered.

2. (a) If the law or regulations of the place of receipt require the goods to be handed over to an authority or other third party from which the carrier may collect them, the period of responsibility of the carrier begins when the carrier collects the goods from the authority or other third party.

(b) If the law or regulations of the place of delivery require the carrier to hand over the goods to an authority or other third party from which the consignee may collect them, the period of responsibility of the carrier ends when the carrier hands the goods over to the authority or other third party.

3. For the purpose of determining the carrier's period of responsibility, the parties may agree on the time and location of receipt and delivery of the goods, but a provision in a contract of carriage is void to the extent that it provides that:

(a) The time of receipt of the goods is subsequent to the beginning of their initial loading under the contract of carriage; or

(b) The time of delivery of the goods is prior to the completion of their final unloading under the contract of carriage.

##### *Article 13*

##### *Specific obligations*

1. The carrier shall during the period of its responsibility as defined in article 12, and subject to article 26, properly and carefully receive, load, handle, stow, carry, keep, care for, unload and deliver the goods.

2. Notwithstanding paragraph 1 of this article, and without prejudice to the other provisions in chapter 4 and to chapters 5 to 7, the carrier and the shipper may agree that the loading, handling, stowing or unloading of the goods is to be performed by the shipper, the documentary shipper or the consignee. Such an agreement shall be referred to in the contract particulars.

#### *Article 14*

##### *Specific obligations applicable to the voyage by sea*

The carrier is bound before, at the beginning of, and during the voyage by sea to exercise due diligence to:

- (a) Make and keep the ship seaworthy;
- (b) Properly crew, equip and supply the ship and keep the ship so crewed, equipped and supplied throughout the voyage; and
- (c) Make and keep the holds and all other parts of the ship in which the goods are carried, and any containers supplied by the carrier in or upon which the goods are carried, fit and safe for their reception, carriage and preservation.

#### *Article 15*

##### *Goods that may become a danger*

Notwithstanding articles 11 and 13, the carrier or a performing party may decline to receive or to load, and may take such other measures as are reasonable, including unloading, destroying, or rendering goods harmless, if the goods are, or reasonably appear likely to become during the carrier's period of responsibility, an actual danger to persons, property or the environment.

#### *Article 16*

##### *Sacrifice of the goods during the voyage by sea*

Notwithstanding articles 11, 13, and 14, the carrier or a performing party may sacrifice goods at sea when the sacrifice is reasonably made for the common safety or for the purpose of preserving from peril human life or other property involved in the common adventure.

### **Chapter 5**

#### **Liability of the carrier for loss, damage or delay**

##### *Article 17*

###### *Basis of liability*

1. The carrier is liable for loss of or damage to the goods, as well as for delay in delivery, if the claimant proves that the loss, damage, or delay, or the event or circumstance that caused or contributed to it took place during the period of the carrier's responsibility as defined in chapter 4.
2. The carrier is relieved of all or part of its liability pursuant to paragraph 1 of this article if it proves that the cause or one of the causes of the loss, damage, or delay is not attributable to its fault or to the fault of any person referred to in article 18.

3. The carrier is also relieved of all or part of its liability pursuant to paragraph 1 of this article if, alternatively to proving the absence of fault as provided in paragraph 2 of this article, it proves that one or more of the following events or circumstances caused or contributed to the loss, damage, or delay:

- (a) Act of God;
- (b) Perils, dangers, and accidents of the sea or other navigable waters;
- (c) War, hostilities, armed conflict, piracy, terrorism, riots, and civil commotions;
- (d) Quarantine restrictions; interference by or impediments created by governments, public authorities, rulers, or people including detention, arrest, or seizure not attributable to the carrier or any person referred to in article 18;
- (e) Strikes, lockouts, stoppages, or restraints of labour;
- (f) Fire on the ship;
- (g) Latent defects not discoverable by due diligence;
- (h) Act or omission of the shipper, the documentary shipper, the controlling party, or any other person for whose acts the shipper or the documentary shipper is liable pursuant to article 33 or 34;
- (i) Loading, handling, stowing, or unloading of the goods performed pursuant to an agreement in accordance with article 13, paragraph 2, unless the carrier or a performing party performs such activity on behalf of the shipper, the documentary shipper or the consignee;
- (j) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;
- (k) Insufficiency or defective condition of packing or marking not performed by or on behalf of the carrier;
- (l) Saving or attempting to save life at sea;
- (m) Reasonable measures to save or attempt to save property at sea;
- (n) Reasonable measures to avoid or attempt to avoid damage to the environment; or
- (o) Acts of the carrier in pursuance of the powers conferred by articles 15 and 16.

4. Notwithstanding paragraph 3 of this article, the carrier is liable for all or part of the loss, damage, or delay:

- (a) If the claimant proves that the fault of the carrier or of a person referred to in article 18 caused or contributed to the event or circumstance on which the carrier relies; or
- (b) If the claimant proves that an event or circumstance not listed in paragraph 3 of this article contributed to the loss, damage, or delay, and the carrier cannot prove that this event or circumstance is not attributable to its fault or to the fault of any person referred to in article 18.



5. The carrier is also liable, notwithstanding paragraph 3 of this article, for all or part of the loss, damage, or delay if:

(a) The claimant proves that the loss, damage, or delay was or was probably caused by or contributed to by (i) the unseaworthiness of the ship; (ii) the improper crewing, equipping, and supplying of the ship; or (iii) the fact that the holds or other parts of the ship in which the goods are carried, or any containers supplied by the carrier in or upon which the goods are carried, were not fit and safe for reception, carriage, and preservation of the goods; and

(b) The carrier is unable to prove either that: (i) none of the events or circumstances referred to in subparagraph 5 (a) of this article caused the loss, damage, or delay; or (ii) it complied with its obligation to exercise due diligence pursuant to article 14.

6. When the carrier is relieved of part of its liability pursuant to this article, the carrier is liable only for that part of the loss, damage or delay that is attributable to the event or circumstance for which it is liable pursuant to this article.

#### *Article 18*

##### *Liability of the carrier for other persons*

The carrier is liable for the breach of its obligations under this Convention caused by the acts or omissions of:

(a) Any performing party;

(b) The master or crew of the ship;

(c) Employees of the carrier or a performing party; or

(d) Any other person that performs or undertakes to perform any of the carrier's obligations under the contract of carriage, to the extent that the person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control.

#### *Article 19*

##### *Liability of maritime performing parties*

1. A maritime performing party is subject to the obligations and liabilities imposed on the carrier under this Convention and is entitled to the carrier's defences and limits of liability as provided for in this Convention if:

(a) The maritime performing party received the goods for carriage in a Contracting State, or delivered them in a Contracting State, or performed its activities with respect to the goods in a port in a Contracting State; and

(b) The occurrence that caused the loss, damage or delay took place: (i) during the period between the arrival of the goods at the port of loading of the ship and their departure from the port of discharge from the ship; (ii) while the maritime performing party had custody of the goods; or (iii) at any other time to the extent that it was participating in the performance of any of the activities contemplated by the contract of carriage.

2. If the carrier agrees to assume obligations other than those imposed on the carrier under this Convention, or agrees that the limits of its liability are higher than the limits specified under this Convention, a maritime performing party is not bound by this agreement unless it expressly agrees to accept such obligations or such higher limits.

3. A maritime performing party is liable for the breach of its obligations under this Convention caused by the acts or omissions of any person to which it has entrusted the performance of any of the carrier's obligations under the contract of carriage under the conditions set out in paragraph 1 of this article.

4. Nothing in this Convention imposes liability on the master or crew of the ship or on an employee of the carrier or of a maritime performing party.

#### *Article 20*

##### *Joint and several liability*

1. If the carrier and one or more maritime performing parties are liable for the loss of, damage to, or delay in delivery of the goods, their liability is joint and several but only up to the limits provided for under this Convention.

2. Without prejudice to article 61, the aggregate liability of all such persons shall not exceed the overall limits of liability under this Convention.

#### *Article 21*

##### *Delay*

Delay in delivery occurs when the goods are not delivered at the place of destination provided for in the contract of carriage within the time agreed.

#### *Article 22*

##### *Calculation of compensation*

1. Subject to article 59, the compensation payable by the carrier for loss of or damage to the goods is calculated by reference to the value of such goods at the place and time of delivery established in accordance with article 43.

2. The value of the goods is fixed according to the commodity exchange price or, if there is no such price, according to their market price or, if there is no commodity exchange price or market price, by reference to the normal value of the goods of the same kind and quality at the place of delivery.

3. In case of loss of or damage to the goods, the carrier is not liable for payment of any compensation beyond what is provided for in paragraphs 1 and 2 of this article except when the carrier and the shipper have agreed to calculate compensation in a different manner within the limits of chapter 16.

#### *Article 23*

##### *Notice in case of loss, damage or delay*

1. The carrier is presumed, in absence of proof to the contrary, to have delivered the goods according to their description in the contract particulars unless notice of loss of or damage to the goods, indicating the general nature of such loss or damage, was given to the carrier or the performing party that delivered the goods before or at the time of the delivery, or, if the loss or damage is not apparent, within seven working days at the place of delivery after the delivery of the goods.

2. Failure to provide the notice referred to in this article to the carrier or the performing party shall not affect the right to claim compensation for loss of or damage to the goods under this Convention, nor shall it affect the allocation of the burden of proof set out in article 17.

3. The notice referred to in this article is not required in respect of loss or damage that is ascertained in a joint inspection of the goods by the person to which they have been delivered and the carrier or the maritime performing party against which liability is being asserted.

4. No compensation in respect of delay is payable unless notice of loss due to delay was given to the carrier within twenty-one consecutive days of delivery of the goods.

5. When the notice referred to in this article is given to the performing party that delivered the goods, it has the same effect as if that notice was given to the carrier, and notice given to the carrier has the same effect as a notice given to a maritime performing party.

6. In the case of any actual or apprehended loss or damage, the parties to the dispute shall give all reasonable facilities to each other for inspecting and tallying the goods and shall provide access to records and documents relevant to the carriage of the goods.

## **Chapter 6** **Additional provisions relating to particular stages of carriage**

### *Article 24* *Deviation*

When pursuant to applicable law a deviation constitutes a breach of the carrier's obligations, such deviation of itself shall not deprive the carrier or a maritime performing party of any defence or limitation of this Convention, except to the extent provided in article 61.

### *Article 25* *Deck cargo on ships*

1. Goods may be carried on the deck of a ship only if:
  - (a) Such carriage is required by law;
  - (b) They are carried in or on containers or vehicles that are fit for deck carriage, and the decks are specially fitted to carry such containers or vehicles; or
  - (c) The carriage on deck is in accordance with the contract of carriage, or the customs, usages or practices of the trade in question.
2. The provisions of this Convention relating to the liability of the carrier apply to the loss of, damage to or delay in the delivery of goods carried on deck pursuant to paragraph 1 of this article, but the carrier is not liable for loss of or damage to such goods, or delay in their delivery, caused by the special risks involved in their carriage on deck when the goods are carried in accordance with subparagraphs 1 (a) or (c) of this article.
3. If the goods have been carried on deck in cases other than those permitted pursuant to paragraph 1 of this article, the carrier is liable for loss of or damage to the goods or delay in their delivery that is exclusively caused by their carriage on deck, and is not entitled to the defences provided for in article 17.
4. The carrier is not entitled to invoke subparagraph 1 (c) of this article against a third party that has acquired a negotiable transport document or a negotiable electronic transport record in good faith, unless the contract particulars state that the goods may be carried on deck.

5. If the carrier and shipper expressly agreed that the goods would be carried under deck, the carrier is not entitled to the benefit of the limitation of liability for any loss of, damage to or delay in the delivery of the goods to the extent that such loss, damage, or delay resulted from their carriage on deck.

*Article 26*

*Carriage preceding or subsequent to sea carriage*

When loss of or damage to goods, or an event or circumstance causing a delay in their delivery, occurs during the carrier's period of responsibility but solely before their loading onto the ship or solely after their discharge from the ship, the provisions of this Convention do not prevail over those provisions of another international instrument that, at the time of such loss, damage or event or circumstance causing delay:

(a) Pursuant to the provisions of such international instrument would have applied to all or any of the carrier's activities if the shipper had made a separate and direct contract with the carrier in respect of the particular stage of carriage where the loss of, or damage to goods, or an event or circumstance causing delay in their delivery occurred;

(b) Specifically provide for the carrier's liability, limitation of liability, or time for suit; and

(c) Cannot be departed from by contract either at all or to the detriment of the shipper under that instrument.

**Chapter 7**

**Obligations of the shipper to the carrier**

*Article 27*

*Delivery for carriage*

1. Unless otherwise agreed in the contract of carriage, the shipper shall deliver the goods ready for carriage. In any event, the shipper shall deliver the goods in such condition that they will withstand the intended carriage, including their loading, handling, stowing, lashing and securing, and unloading, and that they will not cause harm to persons or property.

2. The shipper shall properly and carefully perform any obligation assumed under an agreement made pursuant to article 13, paragraph 2.

3. When a container is packed or a vehicle is loaded by the shipper, the shipper shall properly and carefully stow, lash and secure the contents in or on the container or vehicle, and in such a way that they will not cause harm to persons or property.

*Article 28*

*Cooperation of the shipper and the carrier in providing information and instructions*

The carrier and the shipper shall respond to requests from each other to provide information and instructions required for the proper handling and carriage of the goods if the information is in the requested party's possession or the instructions are within the requested party's reasonable ability to provide and they are not otherwise reasonably available to the requesting party.

*Article 29**Shipper's obligation to provide information, instructions and documents*

1. The shipper shall provide to the carrier in a timely manner such information, instructions and documents relating to the goods that are not otherwise reasonably available to the carrier, and that are reasonably necessary:

(a) For the proper handling and carriage of the goods, including precautions to be taken by the carrier or a performing party; and

(b) For the carrier to comply with law, regulations or other requirements of public authorities in connection with the intended carriage, provided that the carrier notifies the shipper in a timely manner of the information, instructions and documents it requires.

2. Nothing in this article affects any specific obligation to provide certain information, instructions and documents related to the goods pursuant to law, regulations or other requirements of public authorities in connection with the intended carriage.

*Article 30**Basis of shipper's liability to the carrier*

1. The shipper is liable for loss or damage sustained by the carrier if the carrier proves that such loss or damage was caused by a breach of the shipper's obligations under this Convention.

2. Except in respect of loss or damage caused by a breach by the shipper of its obligations pursuant to articles 31, paragraph 2, and 32, the shipper is relieved of all or part of its liability if the cause or one of the causes of the loss or damage is not attributable to its fault or to the fault of any person referred to in article 34.

3. When the shipper is relieved of part of its liability pursuant to this article, the shipper is liable only for that part of the loss or damage that is attributable to its fault or to the fault of any person referred to in article 34.

*Article 31**Information for compilation of contract particulars*

1. The shipper shall provide to the carrier, in a timely manner, accurate information required for the compilation of the contract particulars and the issuance of the transport documents or electronic transport records, including the particulars referred to in article 36, paragraph 1; the name of the party to be identified as the shipper in the contract particulars; the name of the consignee, if any; and the name of the person to whose order the transport document or electronic transport record is to be issued, if any.

2. The shipper is deemed to have guaranteed the accuracy at the time of receipt by the carrier of the information that is provided according to paragraph 1 of this article. The shipper shall indemnify the carrier against loss or damage resulting from the inaccuracy of such information.

*Article 32**Special rules on dangerous goods*

When goods by their nature or character are, or reasonably appear likely to become, a danger to persons, property or the environment:

(a) The shipper shall inform the carrier of the dangerous nature or character of the goods in a timely manner before they are delivered to the carrier or a performing party. If the shipper fails to do so and the carrier or performing party does not otherwise have knowledge of their dangerous nature or character, the shipper is liable to the carrier for loss or damage resulting from such failure to inform; and

(b) The shipper shall mark or label dangerous goods in accordance with any law, regulations or other requirements of public authorities that apply during any stage of the intended carriage of the goods. If the shipper fails to do so, it is liable to the carrier for loss or damage resulting from such failure.

*Article 33**Assumption of shipper's rights and obligations by the documentary shipper*

1. A documentary shipper is subject to the obligations and liabilities imposed on the shipper pursuant to this chapter and pursuant to article 55, and is entitled to the shipper's rights and defences provided by this chapter and by chapter 13.

2. Paragraph 1 of this article does not affect the obligations, liabilities, rights or defences of the shipper.

*Article 34**Liability of the shipper for other persons*

The shipper is liable for the breach of its obligations under this Convention caused by the acts or omissions of any person, including employees, agents and subcontractors, to which it has entrusted the performance of any of its obligations, but the shipper is not liable for acts or omissions of the carrier or a performing party acting on behalf of the carrier, to which the shipper has entrusted the performance of its obligations.

**Chapter 8****Transport documents and electronic transport records***Article 35**Issuance of the transport document or the electronic transport record*

Unless the shipper and the carrier have agreed not to use a transport document or an electronic transport record, or it is the custom, usage or practice of the trade not to use one, upon delivery of the goods for carriage to the carrier or performing party, the shipper or, if the shipper consents, the documentary shipper, is entitled to obtain from the carrier, at the shipper's option:

(a) A non-negotiable transport document or, subject to article 8, subparagraph (a), a non-negotiable electronic transport record; or

(b) An appropriate negotiable transport document or, subject to article 8, subparagraph (a), a negotiable electronic transport record, unless the shipper and the carrier have agreed not to use a negotiable transport document or negotiable electronic transport record, or it is the custom, usage or practice of the trade not to use one.

*Article 36**Contract particulars*

1. The contract particulars in the transport document or electronic transport record referred to in article 35 shall include the following information, as furnished by the shipper:

- (a) A description of the goods as appropriate for the transport;
- (b) The leading marks necessary for identification of the goods;
- (c) The number of packages or pieces, or the quantity of goods; and
- (d) The weight of the goods, if furnished by the shipper.

2. The contract particulars in the transport document or electronic transport record referred to in article 35 shall also include:

- (a) A statement of the apparent order and condition of the goods at the time the carrier or a performing party receives them for carriage;
- (b) The name and address of the carrier;
- (c) The date on which the carrier or a performing party received the goods, or on which the goods were loaded on board the ship, or on which the transport document or electronic transport record was issued; and
- (d) If the transport document is negotiable, the number of originals of the negotiable transport document, when more than one original is issued.

3. The contract particulars in the transport document or electronic transport record referred to in article 35 shall further include:

- (a) The name and address of the consignee, if named by the shipper;
- (b) The name of a ship, if specified in the contract of carriage;
- (c) The place of receipt and, if known to the carrier, the place of delivery; and
- (d) The port of loading and the port of discharge, if specified in the contract of carriage.

4. For the purposes of this article, the phrase “apparent order and condition of the goods” in subparagraph 2 (a) of this article refers to the order and condition of the goods based on:

- (a) A reasonable external inspection of the goods as packaged at the time the shipper delivers them to the carrier or a performing party; and
- (b) Any additional inspection that the carrier or a performing party actually performs before issuing the transport document or electronic transport record.

*Article 37**Identity of the carrier*

1. If a carrier is identified by name in the contract particulars, any other information in the transport document or electronic transport record relating to the identity of the carrier shall have no effect to the extent that it is inconsistent with that identification.

2. If no person is identified in the contract particulars as the carrier as required pursuant to article 36, subparagraph 2 (b), but the contract particulars indicate that the

goods have been loaded on board a named ship, the registered owner of that ship is presumed to be the carrier, unless it proves that the ship was under a bareboat charter at the time of the carriage and it identifies this bareboat charterer and indicates its address, in which case this bareboat charterer is presumed to be the carrier. Alternatively, the registered owner may rebut the presumption of being the carrier by identifying the carrier and indicating its address. The bareboat charterer may rebut any presumption of being the carrier in the same manner.

3. Nothing in this article prevents the claimant from proving that any person other than a person identified in the contract particulars or pursuant to paragraph 2 of this article is the carrier.

#### *Article 38*

##### *Signature*

1. A transport document shall be signed by the carrier or a person acting on its behalf.
2. An electronic transport record shall include the electronic signature of the carrier or a person acting on its behalf. Such electronic signature shall identify the signatory in relation to the electronic transport record and indicate the carrier's authorization of the electronic transport record.

#### *Article 39*

##### *Deficiencies in the contract particulars*

1. The absence or inaccuracy of one or more of the contract particulars referred to in article 36, paragraphs 1, 2 or 3, does not of itself affect the legal character or validity of the transport document or of the electronic transport record.
2. If the contract particulars include the date but fail to indicate its significance, the date is deemed to be:
  - (a) The date on which all of the goods indicated in the transport document or electronic transport record were loaded on board the ship, if the contract particulars indicate that the goods have been loaded on board a ship; or
  - (b) The date on which the carrier or a performing party received the goods, if the contract particulars do not indicate that the goods have been loaded on board a ship.
3. If the contract particulars fail to state the apparent order and condition of the goods at the time the carrier or a performing party receives them, the contract particulars are deemed to have stated that the goods were in apparent good order and condition at the time the carrier or a performing party received them.

#### *Article 40*

##### *Qualifying the information relating to the goods in the contract particulars*

1. The carrier shall qualify the information referred to in article 36, paragraph 1, to indicate that the carrier does not assume responsibility for the accuracy of the information furnished by the shipper if:
  - (a) The carrier has actual knowledge that any material statement in the transport document or electronic transport record is false or misleading; or
  - (b) The carrier has reasonable grounds to believe that a material statement in the transport document or electronic transport record is false or misleading.



2. Without prejudice to paragraph 1 of this article, the carrier may qualify the information referred to in article 36, paragraph 1, in the circumstances and in the manner set out in paragraphs 3 and 4 of this article to indicate that the carrier does not assume responsibility for the accuracy of the information furnished by the shipper.

3. When the goods are not delivered for carriage to the carrier or a performing party in a closed container or vehicle, or when they are delivered in a closed container or vehicle and the carrier or a performing party actually inspects them, the carrier may qualify the information referred to in article 36, paragraph 1, if:

(a) The carrier had no physically practicable or commercially reasonable means of checking the information furnished by the shipper, in which case it may indicate which information it was unable to check; or

(b) The carrier has reasonable grounds to believe the information furnished by the shipper to be inaccurate, in which case it may include a clause providing what it reasonably considers accurate information.

4. When the goods are delivered for carriage to the carrier or a performing party in a closed container or vehicle, the carrier may qualify the information referred to in:

(a) Article 36, subparagraphs 1 (a), (b), or (c), if:

(i) The goods inside the container or vehicle have not actually been inspected by the carrier or a performing party; and

(ii) Neither the carrier nor a performing party otherwise has actual knowledge of its contents before issuing the transport document or the electronic transport record; and

(b) Article 36, subparagraph 1 (d), if:

(i) Neither the carrier nor a performing party weighed the container or vehicle, and the shipper and the carrier had not agreed prior to the shipment that the container or vehicle would be weighed and the weight would be included in the contract particulars; or

(ii) There was no physically practicable or commercially reasonable means of checking the weight of the container or vehicle.

#### *Article 41*

##### *Evidentiary effect of the contract particulars*

Except to the extent that the contract particulars have been qualified in the circumstances and in the manner set out in article 40:

(a) A transport document or an electronic transport record is prima facie evidence of the carrier's receipt of the goods as stated in the contract particulars;

(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 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;

(c) Proof to the contrary by the carrier shall not be admissible against a consignee that in good faith has acted in reliance on any 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 36, 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 36, paragraph 2.

*Article 42*

*“Freight prepaid”*

If the contract particulars contain the statement “freight prepaid” or a statement of a similar nature, the carrier cannot assert against the holder or the consignee the fact that the freight has not been paid. This article does not apply if the holder or the consignee is also the shipper.

**Chapter 9**

**Delivery of the goods**

*Article 43*

*Obligation to accept delivery*

When the goods have arrived at their destination, the consignee that demands delivery of the goods under the contract of carriage 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 at which, having regard to the terms of the contract, the customs, usages or practices of the trade and the circumstances of the carriage, delivery could reasonably be expected.

*Article 44*

*Obligation to acknowledge receipt*

On request of the carrier or the performing party that delivers the goods, the consignee shall acknowledge receipt of the goods from the carrier or the performing party in the manner that is customary at the place of delivery. The carrier may refuse delivery if the consignee refuses to acknowledge such receipt.

*Article 45*

*Delivery when no negotiable transport document or negotiable electronic transport record is issued*

When neither a negotiable transport document nor a negotiable electronic transport record has been issued:

(a) The carrier shall deliver the goods to the consignee at the time and location referred to in article 43. The carrier may refuse delivery if the person claiming to be the consignee does not properly identify itself as the consignee on the request of the carrier;

(b) If the name and address of the consignee are not referred to in the contract particulars, the controlling party shall prior to or upon the arrival of the goods at the place of destination advise the carrier of such name and address;

(c) Without prejudice to article 48, paragraph 1, if the goods are not deliverable because (i) the consignee, after having received a notice of arrival, does not, at the time or within the time period referred to in article 43, claim delivery of the goods from the carrier after their arrival at the place of destination, (ii) the carrier refuses delivery because the person claiming to be the consignee does not properly identify itself as the consignee, or (iii) the carrier is, after reasonable effort, unable to locate the consignee in order to request delivery instructions, the carrier may so advise the controlling party and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the controlling party, the carrier may so advise the shipper and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier may so advise the documentary shipper and request instructions in respect of the delivery of the goods;

(d) The carrier that delivers the goods upon instruction of the controlling party, the shipper or the documentary shipper pursuant to subparagraph (c) of this article is discharged from its obligations to deliver the goods under the contract of carriage.

#### *Article 46*

##### *Delivery when a non-negotiable transport document that requires surrender is issued*

When a non-negotiable transport document has been issued that indicates that it shall be surrendered in order to obtain delivery of the goods:

(a) The carrier shall deliver the goods at the time and location referred to in article 43 to the consignee upon the consignee properly identifying itself on the request of the carrier and surrender of the non-negotiable document. The carrier may refuse delivery if the person claiming to be the consignee fails to properly identify itself on the request of the carrier, and shall refuse delivery if the non-negotiable document is not surrendered. If more than one original of the non-negotiable document has been issued, the surrender of one original will suffice and the other originals cease to have any effect or validity;

(b) Without prejudice to article 48, paragraph 1, if the goods are not deliverable because (i) the consignee, after having received a notice of arrival, does not, at the time or within the time period referred to in article 43, claim delivery of the goods from the carrier after their arrival at the place of destination, (ii) the carrier refuses delivery because the person claiming to be the consignee does not properly identify itself as the consignee or does not surrender the document, or (iii) the carrier is, after reasonable effort, unable to locate the consignee in order to request delivery instructions, the carrier may so advise the shipper and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier may so advise the documentary shipper and request instructions in respect of the delivery of the goods;

(c) The carrier that delivers the goods upon instruction of the shipper or the documentary shipper pursuant to subparagraph (b) of this article is discharged from its obligation to deliver the goods under the contract of carriage, irrespective of whether the non-negotiable transport document has been surrendered to it.

*Article 47**Delivery when a negotiable transport document or negotiable electronic transport record is issued*

1. When a negotiable transport document or a negotiable electronic transport record has been issued:

(a) 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 43 to the holder:

(i) Upon surrender of the negotiable transport document and, if the holder is one of the persons referred to in article 1, subparagraph 10 (a) (i), upon the holder properly identifying itself; or

(ii) Upon demonstration by the holder, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder of the negotiable electronic transport record;

(b) The carrier shall refuse delivery if the requirements of subparagraph (a) (i) or (a) (ii) of this paragraph are not met;

(c) If more than one original of the negotiable transport document has been issued, and the number of originals is stated in that document, 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, paragraph 1.

2. Without prejudice to article 48, paragraph 1, if the negotiable transport document or the negotiable electronic transport record expressly states that the goods may be delivered without the surrender of the transport document or the electronic transport record, the following rules apply:

(a) If the goods are not deliverable because (i) the holder, after having received a notice of arrival, does not, at the time or within the time period referred to in article 43, claim delivery of the goods from the carrier after their arrival at the place of destination, (ii) the carrier refuses delivery because the person claiming to be a holder does not properly identify itself as one of the persons referred to in article 1, subparagraph 10 (a) (i), or (iii) the carrier is, after reasonable effort, unable to locate the holder in order to request delivery instructions, the carrier may so advise the shipper and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier may so advise the documentary shipper and request instructions in respect of the delivery of the goods;

(b) The carrier that delivers the goods upon instruction of the shipper or the documentary shipper in accordance with subparagraph 2 (a) 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 negotiable electronic transport record has demonstrated, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder;

(c) The person giving instructions under subparagraph 2 (a) of this article shall indemnify the carrier against loss arising from its being held liable to the holder under subparagraph 2 (e) of this article. The carrier may refuse to follow those instructions if the person fails to provide adequate security as the carrier may reasonably request;

(d) 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 2 (b) 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;

(e) Notwithstanding subparagraphs 2 (b) and 2 (d) of this article, a holder that becomes a holder after such delivery, and that 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. When the contract particulars state the expected time of arrival of the goods, or indicate how to obtain information as to whether the goods have been delivered, it is presumed that the holder at the time that it became a holder had or could reasonably have had knowledge of the delivery of the goods.

#### *Article 48*

##### *Goods remaining undelivered*

1. For the purposes of this article, goods shall be deemed to have remained undelivered only if, after their arrival at the place of destination:

(a) The consignee does not accept delivery of the goods pursuant to this chapter at the time and location referred to in article 43;

(b) The controlling party, the holder, the shipper or the documentary shipper cannot be found or does not give the carrier adequate instructions pursuant to articles 45, 46 and 47;

(c) The carrier is entitled or required to refuse delivery pursuant to articles 44, 45, 46 and 47;

(d) The carrier is not allowed to deliver the goods to the consignee pursuant to the law or regulations of the place at which delivery is requested; or

(e) The goods are otherwise undeliverable by the carrier.

2. Without prejudice to any other rights that the carrier may have against the shipper, controlling party or consignee, if the goods have remained undelivered, the carrier may, at the risk and expense of the person entitled to the goods, take such action in respect of the goods as circumstances may reasonably require, including:

(a) To store the goods at any suitable place;

(b) To unpack the goods if they are packed in containers or vehicles, or to act otherwise in respect of the goods, including by moving them; and

(c) To cause the goods to be sold or destroyed in accordance with the practices or pursuant to the law or regulations of the place where the goods are located at the time.

3. The carrier may exercise the rights under paragraph 2 of this article only after it has given reasonable notice of the intended action under paragraph 2 of this article to the person stated in the contract particulars as the person, if any, to be notified of the arrival of the goods at the place of destination, and to one of the following persons in the order indicated, if known to the carrier: the consignee, the controlling party or the shipper.

4. If the goods are sold pursuant to subparagraph 2 (c) of this article, the carrier shall hold the proceeds of the sale for the benefit of the person entitled to the goods, subject to the deduction of any costs incurred by the carrier and any other amounts that are due to the carrier in connection with the carriage of those goods.

5. The carrier shall not be liable for loss of or damage to goods that occurs during the time that they remain undelivered pursuant to this article unless the claimant proves that such loss or damage resulted from the failure by the carrier to take steps that would have been reasonable in the circumstances to preserve the goods and that the carrier knew or ought to have known that the loss or damage to the goods would result from its failure to take such steps.

#### *Article 49*

##### *Retention of goods*

Nothing in this Convention affects a right of the carrier or a performing party that may exist pursuant to the contract of carriage or the applicable law to retain the goods to secure the payment of sums due.

## **Chapter 10**

### **Rights of the controlling party**

#### *Article 50*

##### *Exercise and extent of right of control*

1. The right of control may be exercised only by the controlling party and is limited to:

(a) The right to give or modify instructions in respect of the goods that do not constitute a variation of the contract of carriage;

(b) The right to obtain delivery of the goods at a scheduled port of call or, in respect of inland carriage, any place en route; and

(c) The right to replace the consignee by any other person including the controlling party.

2. The right of control exists during the entire period of responsibility of the carrier, as provided in article 12, and ceases when that period expires.

#### *Article 51*

##### *Identity of the controlling party and transfer of the right of control*

1. Except in the cases referred to in paragraphs 2, 3 and 4 of this article:

(a) The shipper is the controlling party unless the shipper, when the contract of carriage is concluded, designates the consignee, the documentary shipper or another person as the controlling party;

(b) The controlling party is entitled to transfer the right of control to another person. The transfer becomes effective with respect to the carrier upon its notification of the transfer by the transferor, and the transferee becomes the controlling party; and

(c) The controlling party shall properly identify itself when it exercises the right of control.

2. When a non-negotiable transport document has been issued that indicates that it shall be surrendered in order to obtain delivery of the goods:

(a) The shipper is the controlling party and may transfer the right of control to the consignee named in the transport document by transferring the document to that person without endorsement. If more than one original of the document was issued, all originals shall be transferred in order to effect a transfer of the right of control; and

(b) In order to exercise its right of control, the controlling party shall produce the document and properly identify itself. If more than one original of the document was issued, all originals shall be produced, failing which the right of control cannot be exercised.

3. When a negotiable transport document is issued:

(a) The holder or, if more than one original of the negotiable transport document is issued, the holder of all originals is the controlling party;

(b) The holder may transfer the right of control by transferring the negotiable transport document to another person in accordance with article 57. If more than one original of that document was issued, all originals shall be transferred to that person in order to effect a transfer of the right of control; and

(c) In order to exercise the right of control, the holder shall produce the negotiable transport document to the carrier, and if the holder is one of the persons referred to in article 1, subparagraph 10 (a) (i), the holder shall properly identify itself. If more than one original of the document was issued, all originals shall be produced, failing which the right of control cannot be exercised.

4. When a negotiable electronic transport record is issued:

(a) The holder is the controlling party;

(b) The holder may transfer the right of control to another person by transferring the negotiable electronic transport record in accordance with the procedures referred to in article 9, paragraph 1; and

(c) In order to exercise the right of control, the holder shall demonstrate, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder.

#### *Article 52*

##### *Carrier's execution of instructions*

1. Subject to paragraphs 2 and 3 of this article, the carrier shall execute the instructions referred to in article 50 if:

(a) The person giving such instructions is entitled to exercise the right of control;

(b) The instructions can reasonably be executed according to their terms at the moment that they reach the carrier; and

(c) The instructions will not interfere with the normal operations of the carrier, including its delivery practices.

2. In any event, the controlling party shall reimburse the carrier for any reasonable additional expense that the carrier may incur and shall indemnify the carrier against loss or damage that the carrier may suffer as a result of diligently executing any instruction pursuant to this article, including compensation that the carrier may become liable to pay for loss of or damage to other goods being carried.

3. The carrier is entitled to obtain security from the controlling party for the amount of additional expense, loss or damage that the carrier reasonably expects will arise in connection with the execution of an instruction pursuant to this article. The carrier may refuse to carry out the instructions if no such security is provided.

4. The carrier's liability for loss of or damage to the goods or for delay in delivery resulting from its failure to comply with the instructions of the controlling party in breach of its obligation pursuant to paragraph 1 of this article shall be subject to articles 17 to 23, and the amount of the compensation payable by the carrier shall be subject to articles 59 to 61.

#### *Article 53*

##### *Deemed delivery*

Goods that are delivered pursuant to an instruction in accordance with article 52, paragraph 1, are deemed to be delivered at the place of destination, and the provisions of chapter 9 relating to such delivery apply to such goods.

#### *Article 54*

##### *Variations to the contract of carriage*

1. The controlling party is the only person that may agree with the carrier to variations to the contract of carriage other than those referred to in article 50, subparagraphs 1 (b) and (c).

2. Variations to the contract of carriage, including those referred to in article 50, subparagraphs 1 (b) and (c), shall be stated in a negotiable transport document or in a non-negotiable transport document that requires surrender, or incorporated in a negotiable electronic transport record, or, upon the request of the controlling party, shall be stated in a non-negotiable transport document or incorporated in a non-negotiable electronic transport record. If so stated or incorporated, such variations shall be signed in accordance with article 38.

#### *Article 55*

##### *Providing additional information, instructions or documents to carrier*

1. The controlling party, on request of the carrier or a performing party, shall provide in a timely manner information, instructions or documents relating to the goods not yet provided by the shipper and not otherwise reasonably available to the carrier that the carrier may reasonably need to perform its obligations under the contract of carriage.

2. If the carrier, after reasonable effort, is unable to locate the controlling party or the controlling party is unable to provide adequate information, instructions or documents to the carrier, the shipper shall provide them. If the carrier, after reasonable effort, is unable to locate the shipper, the documentary shipper shall provide such information, instructions or documents.



*Article 56**Variation by agreement*

The parties to the contract of carriage may vary the effect of articles 50, subparagraphs 1 (b) and (c), 50, paragraph 2, and 52. The parties may also restrict or exclude the transferability of the right of control referred to in article 51, subparagraph 1 (b).

**Chapter 11****Transfer of rights***Article 57**When a negotiable transport document or negotiable electronic transport record is issued*

1. When a negotiable transport document is issued, the holder may transfer the rights incorporated in the document by transferring it to another person:

(a) Duly endorsed either to such other person or in blank, if an order document; or

(b) Without endorsement, if: (i) a bearer document or a blank endorsed document; or (ii) a document made out to the order of a named person and the transfer is between the first holder and the named person.

2. When a negotiable electronic transport record is issued, its holder may transfer the rights incorporated in it, whether it be made out to order or to the order of a named person, by transferring the electronic transport record in accordance with the procedures referred to in article 9, paragraph 1.

*Article 58**Liability of holder*

1. Without prejudice to article 55, a holder that is not the shipper and that does not exercise any right under the contract of carriage does not assume any liability under the contract of carriage solely by reason of being a holder.

2. A holder that is not the shipper and that exercises any right under the contract of carriage assumes any liabilities imposed on it under the contract of carriage to the extent that such liabilities are incorporated in or ascertainable from the negotiable transport document or the negotiable electronic transport record.

3. For the purposes of paragraphs 1 and 2 of this article, a holder that is not the shipper does not exercise any right under the contract of carriage solely because:

(a) It agrees with the carrier, pursuant to article 10, to replace a negotiable transport document by a negotiable electronic transport record or to replace a negotiable electronic transport record by a negotiable transport document; or

(b) It transfers its rights pursuant to article 57.

**Chapter 12****Limits of liability***Article 59**Limits of liability*

1. Subject to articles 60 and 61, paragraph 1, the carrier's liability for breaches of its obligations under this Convention is limited to 875 units of account per package or other

shipping unit, or 3 units of account per kilogram of the gross weight of the goods that are the subject of the claim or dispute, whichever amount is the higher, except when the value of the goods has been declared by the shipper and included in the contract particulars, or when a higher amount than the amount of limitation of liability set out in this article has been agreed upon between the carrier and the shipper.

2. When goods are carried in or on a container, pallet or similar article of transport used to consolidate goods, or in or on a vehicle, the packages or shipping units enumerated in the contract particulars as packed in or on such article of transport or vehicle are deemed packages or shipping units. If not so enumerated, the goods in or on such article of transport or vehicle are deemed one shipping unit.

3. The unit of account referred to in this article is the Special Drawing Right as defined by the International Monetary Fund. The amounts referred to in this article are to be converted into the national currency of a State according to the value of such currency at the date of judgement or award or the date agreed upon by the parties. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State that is a member of the International Monetary Fund is to be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State that is not a member of the International Monetary Fund is to be calculated in a manner to be determined by that State.

#### *Article 60*

##### *Limits of liability for loss caused by delay*

Subject to article 61, paragraph 2, compensation for loss of or damage to the goods due to delay shall be calculated in accordance with article 22 and liability for economic loss due to delay is limited to an amount equivalent to two and one-half times the freight payable on the goods delayed. The total amount payable pursuant to this article and article 59, paragraph 1, may not exceed the limit that would be established pursuant to article 59, paragraph 1, in respect of the total loss of the goods concerned.

#### *Article 61*

##### *Loss of the benefit of limitation of liability*

1. Neither the carrier nor any of the persons referred to in article 18 is entitled to the benefit of the limitation of liability as provided in article 59, or as provided in the contract of carriage, if the claimant proves that the loss resulting from the breach of the carrier's obligation under this Convention was attributable to a personal act or omission of the person claiming a right to limit done with the intent to cause such loss or recklessly and with knowledge that such loss would probably result.

2. Neither the carrier nor any of the persons mentioned in article 18 is entitled to the benefit of the limitation of liability as provided in article 60 if the claimant proves that the delay in delivery resulted from a personal act or omission of the person claiming a right to limit done with the intent to cause the loss due to delay or recklessly and with knowledge that such loss would probably result.

## Chapter 13 Time for suit

### *Article 62*

#### *Period of time for suit*

1. No judicial or arbitral proceedings in respect of claims or disputes arising from a breach of an obligation under this Convention may be instituted after the expiration of a period of two years.
2. The period referred to in paragraph 1 of this article commences on the day on which the carrier has delivered the goods or, in cases in which no goods have been delivered or only part of the goods have been delivered, on the last day on which the goods should have been delivered. The day on which the period commences is not included in the period.
3. Notwithstanding the expiration of the period set out in paragraph 1 of this article, one party may rely on its claim as a defence or for the purpose of set-off against a claim asserted by the other party.

### *Article 63*

#### *Extension of time for suit*

The period provided in article 62 shall not be subject to suspension or interruption, but the person against which a claim is made may at any time during the running of the period extend that period by a declaration to the claimant. This period may be further extended by another declaration or declarations.

### *Article 64*

#### *Action for indemnity*

An action for indemnity by a person held liable may be instituted after the expiration of the period provided in article 62 if the indemnity action is instituted within the later of:

- (a) The time allowed by the applicable law in the jurisdiction where proceedings are instituted; or
- (b) Ninety days commencing from the day when the person instituting the action for indemnity has either settled the claim or been served with process in the action against itself, whichever is earlier.

### *Article 65*

#### *Actions against the person identified as the carrier*

An action against the bareboat charterer or the person identified as the carrier pursuant to article 37, paragraph 2, may be instituted after the expiration of the period provided in article 62 if the action is instituted within the later of:

- (a) The time allowed by the applicable law in the jurisdiction where proceedings are instituted; or
- (b) Ninety days commencing from the day when the carrier has been identified, or the registered owner or bareboat charterer has rebutted the presumption that it is the carrier, pursuant to article 37, paragraph 2.

## Chapter 14 Jurisdiction

### Article 66

#### *Actions against the carrier*

Unless the contract of carriage contains an exclusive choice of court agreement that complies with article 67 or 72, the plaintiff has the right to institute judicial proceedings under this Convention against the carrier:

(a) In a competent court within the jurisdiction of which is situated one of the following places:

- (i) The domicile of the carrier;
- (ii) The place of receipt agreed in the contract of carriage;
- (iii) The place of delivery agreed in the contract of carriage; or
- (iv) The port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship; or

(b) In a competent court or courts designated by an agreement between the shipper and the carrier for the purpose of deciding claims against the carrier that may arise under this Convention.

### Article 67

#### *Choice of court agreements*

1. The jurisdiction of a court chosen in accordance with article 66, subparagraph *b*), is exclusive for disputes between the parties to the contract only if the parties so agree and the agreement conferring jurisdiction:

(a) Is contained in a volume contract that clearly states the names and addresses of the parties and either (i) is individually negotiated or (ii) contains a prominent statement that there is an exclusive choice of court agreement and specifies the sections of the volume contract containing that agreement; and

(b) Clearly designates the courts of one Contracting State or one or more specific courts of one Contracting State.

2. A person that is not a party to the volume contract is bound by an exclusive choice of court agreement concluded in accordance with paragraph 1 of this article only if:

(a) The court is in one of the places designated in article 66, subparagraph *a*);

(b) That agreement is contained in the transport document or electronic transport record;

(c) That person is given timely and adequate notice of the court where the action shall be brought and that the jurisdiction of that court is exclusive; and

(d) The law of the court seized recognizes that that person may be bound by the exclusive choice of court agreement.

*Article 68**Actions against the maritime performing party*

The plaintiff has the right to institute judicial proceedings under this Convention against the maritime performing party in a competent court within the jurisdiction of which is situated one of the following places:

(a) The domicile of the maritime performing party; or

(b) The port where the goods are received by the maritime performing party, the port where the goods are delivered by the maritime performing party or the port in which the maritime performing party performs its activities with respect to the goods.

*Article 69**No additional bases of jurisdiction*

Subject to articles 71 and 72, no judicial proceedings under this Convention against the carrier or a maritime performing party may be instituted in a court not designated pursuant to article 66 or 68.

*Article 70**Arrest and provisional or protective measures*

Nothing in this Convention affects jurisdiction with regard to provisional or protective measures, including arrest. A court in a State in which a provisional or protective measure was taken does not have jurisdiction to determine the case upon its merits unless:

(a) The requirements of this chapter are fulfilled; or

(b) An international convention that applies in that State so provides.

*Article 71**Consolidation and removal of actions*

1. Except when there is an exclusive choice of court agreement that is binding pursuant to article 67 or 72, if a single action is brought against both the carrier and the maritime performing party arising out of a single occurrence, the action may be instituted only in a court designated pursuant to both article 66 and article 68. If there is no such court, such action may be instituted in a court designated pursuant to article 68, subparagraph (b), if there is such a court.

2. Except when there is an exclusive choice of court agreement that is binding pursuant to article 67 or 72, a carrier or a maritime performing party that institutes an action seeking a declaration of non-liability or any other action that would deprive a person of its right to select the forum pursuant to article 66 or 68 shall, at the request of the defendant, withdraw that action once the defendant has chosen a court designated pursuant to article 66 or 68, whichever is applicable, where the action may be recommenced.

*Article 72**Agreement after a dispute has arisen and jurisdiction when the defendant has entered an appearance*

1. After a dispute has arisen, the parties to the dispute may agree to resolve it in any competent court.

2. A competent court before which a defendant appears, without contesting jurisdiction in accordance with the rules of that court, has jurisdiction.

#### *Article 73*

##### *Recognition and enforcement*

1. A decision made in one Contracting State by a court having jurisdiction under this Convention shall be recognized and enforced in another Contracting State in accordance with the law of such latter Contracting State when both States have made a declaration in accordance with article 74.
2. A court may refuse recognition and enforcement based on the grounds for the refusal of recognition and enforcement available pursuant to its law.
3. This chapter shall not affect the application of the rules of a regional economic integration organization that is a party to this Convention, as concerns the recognition or enforcement of judgements as between member States of the regional economic integration organization, whether adopted before or after this Convention.

#### *Article 74*

##### *Application of chapter 14*

The provisions of this chapter shall bind only Contracting States that declare in accordance with article 91 that they will be bound by them.

### **Chapter 15 Arbitration**

#### *Article 75*

##### *Arbitration agreements*

1. Subject to this chapter, parties may agree that any dispute that may arise relating to the carriage of goods under this Convention shall be referred to arbitration.
2. The arbitration proceedings shall, at the option of the person asserting a claim against the carrier, take place at:
  - (a) Any place designated for that purpose in the arbitration agreement; or
  - (b) Any other place situated in a State where any of the following places is located:
    - (i) The domicile of the carrier;
    - (ii) The place of receipt agreed in the contract of carriage;
    - (iii) The place of delivery agreed in the contract of carriage; or
    - (iv) The port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship.
3. The designation of the place of arbitration in the agreement is binding for disputes between the parties to the agreement if the agreement is contained in a volume contract that clearly states the names and addresses of the parties and either:
  - (a) Is individually negotiated; or
  - (b) Contains a prominent statement that there is an arbitration agreement and specifies the sections of the volume contract containing the arbitration agreement.

4. When an arbitration agreement has been concluded in accordance with paragraph 3 of this article, a person that is not a party to the volume contract is bound by the designation of the place of arbitration in that agreement only if:

(a) The place of arbitration designated in the agreement is situated in one of the places referred to in subparagraph 2 (b) of this article;

(b) The agreement is contained in the transport document or electronic transport record;

(c) The person to be bound is given timely and adequate notice of the place of arbitration; and

(d) Applicable law permits that person to be bound by the arbitration agreement.

5. The provisions of paragraphs 1, 2, 3 and 4 of this article are deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement to the extent that it is inconsistent therewith is void.

#### *Article 76*

##### *Arbitration agreement in non-linear transportation*

1. Nothing in this Convention affects the enforceability of an arbitration agreement in a contract of carriage in non-linear transportation to which this Convention or the provisions of this Convention apply by reason of:

(a) The application of article 7; or

(b) The parties' voluntary incorporation of this Convention in a contract of carriage that would not otherwise be subject to this Convention.

2. Notwithstanding paragraph 1 of this article, an arbitration agreement in a transport document or electronic transport record to which this Convention applies by reason of the application of article 7 is subject to this chapter unless such a transport document or electronic transport record:

(a) Identifies the parties to and the date of the charter party or other contract excluded from the application of this Convention by reason of the application of article 6; and

(b) Incorporates by specific reference the clause in the charter party or other contract that contains the terms of the arbitration agreement.

#### *Article 77*

##### *Agreement to arbitrate after a dispute has arisen*

Notwithstanding the provisions of this chapter and chapter 14, after a dispute has arisen the parties to the dispute may agree to resolve it by arbitration in any place.

#### *Article 78*

##### *Application of chapter 15*

The provisions of this chapter shall bind only Contracting States that declare in accordance with article 91 that they will be bound by them.

## Chapter 16

### Validity of contractual terms

#### Article 79

##### *General provisions*

1. Unless otherwise provided in this Convention, any term in a contract of carriage is void to the extent that it:

(a) Directly or indirectly excludes or limits the obligations of the carrier or a maritime performing party under this Convention;

(b) Directly or indirectly excludes or limits the liability of the carrier or a maritime performing party for breach of an obligation under this Convention; or

(c) Assigns a benefit of insurance of the goods in favour of the carrier or a person referred to in article 18.

2. Unless otherwise provided in this Convention, any term in a contract of carriage is void to the extent that it:

(a) Directly or indirectly excludes, limits or increases the obligations under this Convention of the shipper, consignee, controlling party, holder or documentary shipper; or

(b) Directly or indirectly excludes, limits or increases the liability of the shipper, consignee, controlling party, holder or documentary shipper for breach of any of its obligations under this Convention.

#### Article 80

##### *Special rules for volume contracts*

1. Notwithstanding article 79, as between the carrier and the shipper, a volume contract to which this Convention applies may provide for greater or lesser rights, obligations and liabilities than those imposed by this Convention.

2. A derogation pursuant to paragraph 1 of this article is binding only when:

(a) The volume contract contains a prominent statement that it derogates from this Convention;

(b) The volume contract is (i) individually negotiated or (ii) prominently specifies the sections of the volume contract containing the derogations;

(c) The shipper is given an opportunity and notice of the opportunity to conclude a contract of carriage on terms and conditions that comply with this Convention without any derogation under this article; and

(d) The derogation is neither (i) incorporated by reference from another document nor (ii) included in a contract of adhesion that is not subject to negotiation.

3. A carrier's public schedule of prices and services, transport document, electronic transport record or similar document is not a volume contract pursuant to paragraph 1 of this article, but a volume contract may incorporate such documents by reference as terms of the contract.



4. Paragraph 1 of this article does not apply to rights and obligations provided in articles 14, subparagraphs (a) and (b), 29 and 32 or to liability arising from the breach thereof, nor does it apply to any liability arising from an act or omission referred to in article 61.
5. The terms of the volume contract that derogate from this Convention, if the volume contract satisfies the requirements of paragraph 2 of this article, apply between the carrier and any person other than the shipper provided that:
- (a) Such person received information that prominently states that the volume contract derogates from this Convention and gave its express consent to be bound by such derogations; and
- (b) Such consent is not solely set forth in a carrier's public schedule of prices and services, transport document or electronic transport record.
6. The party claiming the benefit of the derogation bears the burden of proof that the conditions for derogation have been fulfilled.

#### *Article 81*

##### *Special rules for live animals and certain other goods*

Notwithstanding article 79 and without prejudice to article 80, the contract of carriage may exclude or limit the obligations or the liability of both the carrier and a maritime performing party if:

- (a) The goods are live animals, but any such exclusion or limitation will not be effective if the claimant proves that the loss of or damage to the goods, or delay in delivery, resulted from an act or omission of the carrier or of a person referred to in article 18, done with the intent to cause such loss of or damage to the goods or such loss due to delay or done recklessly and with knowledge that such loss or damage or such loss due to delay would probably result; or
- (b) The character or condition of the goods or the circumstances and terms and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement, provided that such contract of carriage is not related to ordinary commercial shipments made in the ordinary course of trade and that no negotiable transport document or negotiable electronic transport record is issued for the carriage of the goods.

## **Chapter 17**

### **Matters not governed by this convention**

#### *Article 82*

##### *International conventions governing the carriage of goods by other modes of transport*

Nothing in this Convention affects the application of any of the following international conventions in force at the time this Convention enters into force, including any future amendment to such conventions, that regulate the liability of the carrier for loss of or damage to the goods:

- (a) Any convention governing the carriage of goods by air to the extent that such convention according to its provisions applies to any part of the contract of carriage;
- (b) Any convention governing the carriage of goods by road to the extent that such convention according to its provisions applies to the carriage of goods that remain loaded on a road cargo vehicle carried on board a ship;

(c) Any convention governing the carriage of goods by rail to the extent that such convention according to its provisions applies to carriage of goods by sea as a supplement to the carriage by rail; or

(d) Any convention governing the carriage of goods by inland waterways to the extent that such convention according to its provisions applies to a carriage of goods without trans-shipment both by inland waterways and sea.

*Article 83*

*Global limitation of liability*

Nothing in this Convention affects the application of any international convention or national law regulating the global limitation of liability of vessel owners.

*Article 84*

*General average*

Nothing in this Convention affects the application of terms in the contract of carriage or provisions of national law regarding the adjustment of general average.

*Article 85*

*Passengers and luggage*

This Convention does not apply to a contract of carriage for passengers and their luggage.

*Article 86*

*Damage caused by nuclear incident*

No liability arises under this Convention for damage caused by a nuclear incident if the operator of a nuclear installation is liable for such damage:

(a) Under the Paris Convention on Third Party Liability in the Field of Nuclear Energy of 29 July 1960 as amended by the Additional Protocol of 28 January 1964 and by the Protocols of 16 November 1982 and 12 February 2004, the Vienna Convention on Civil Liability for Nuclear Damage of 21 May 1963 as amended by the Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention of 21 September 1988 and as amended by the Protocol to Amend the 1963 Vienna Convention on Civil Liability for Nuclear Damage of 12 September 1997, or the Convention on Supplementary Compensation for Nuclear Damage of 12 September 1997, including any amendment to these conventions and any future convention in respect of the liability of the operator of a nuclear installation for damage caused by a nuclear incident; or

(b) Under national law applicable to the liability for such damage, provided that such law is in all respects as favourable to persons that may suffer damage as either the Paris or Vienna Conventions or the Convention on Supplementary Compensation for Nuclear Damage.

## **Chapter 18**

### **Final clauses**

#### *Article 87*

##### *Depositary*

The Secretary-General of the United Nations is hereby designated as the depositary of this Convention.

#### *Article 88*

##### *Signature, ratification, acceptance, approval or accession*

1. This Convention is open for signature by all States at Rotterdam, the Netherlands, on 23 September 2009, and thereafter at the Headquarters of the United Nations in New York.
2. This Convention is subject to ratification, acceptance or approval by the signatory States.
3. This Convention is open for accession by all States that are not signatory States as from the date it is open for signature.
4. Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

#### *Article 89*

##### *Denunciation of other conventions*

1. A State that ratifies, accepts, approves or accedes to this Convention and is a party to the International Convention for the Unification of certain Rules of Law relating to Bills of Lading signed at Brussels on 25 August 1924, to the Protocol to amend the International Convention for the Unification of certain Rules of Law relating to Bills of Lading, signed at Brussels on 23 February 1968, or to the Protocol to amend the International Convention for the Unification of certain Rules of Law relating to Bills of Lading as Modified by the Amending Protocol of 23 February 1968, signed at Brussels on 21 December 1979, shall at the same time denounce that Convention and the protocol or protocols thereto to which it is a party by notifying the Government of Belgium to that effect, with a declaration that the denunciation is to take effect as from the date when this Convention enters into force in respect of that State.
2. A State that ratifies, accepts, approves or accedes to this Convention and is a party to the United Nations Convention on the Carriage of Goods by Sea concluded at Hamburg on 31 March 1978 shall at the same time denounce that Convention by notifying the Secretary-General of the United Nations to that effect, with a declaration that the denunciation is to take effect as from the date when this Convention enters into force in respect of that State.
3. For the purposes of this article, ratifications, acceptances, approvals and accessions in respect of this Convention by States parties to the instruments listed in paragraphs 1 and 2 of this article that are notified to the depositary after this Convention has entered into force are not effective until such denunciations as may be required on the part of those States in respect of these instruments have become effective. The depositary of this Convention shall consult with the Government of Belgium, as the depositary of the instruments referred to in paragraph 1 of this article, so as to ensure necessary coordination in this respect.

*Article 90**Reservations*

No reservation is permitted to this Convention.

*Article 91**Procedure and effect of declarations*

1. The declarations permitted by articles 74 and 78 may be made at any time. The initial declarations permitted by article 92, paragraph 1, and article 93, paragraph 2, shall be made at the time of signature, ratification, acceptance, approval or accession. No other declaration is permitted under this Convention.
2. Declarations made at the time of signature are subject to confirmation upon ratification, acceptance or approval.
3. Declarations and their confirmations are to be in writing and to be formally notified to the depositary.
4. A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary.
5. Any State that makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary. The withdrawal of a declaration, or its modification where permitted by this Convention, takes effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

*Article 92**Effect in domestic territorial units*

1. If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.
2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.
3. When a Contracting State has declared pursuant to this article that this Convention extends to one or more but not all of its territorial units, a place located in a territorial unit to which this Convention does not extend is not considered to be in a Contracting State for the purposes of this Convention.
4. If a Contracting State makes no declaration pursuant to paragraph 1 of this article, the Convention is to extend to all territorial units of that State.

*Article 93**Participation by regional economic integration organizations*

1. A regional economic integration organization that is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention. The regional

economic integration organization shall in that case have the rights and obligations of a Contracting State, to the extent that that organization has competence over matters governed by this Convention. When the number of Contracting States is relevant in this Convention, the regional economic integration organization does not count as a Contracting State in addition to its member States which are Contracting States.

2. The regional economic integration organization shall, at the time of signature, ratification, acceptance, approval or accession, make a declaration to the depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that organization by its member States. The regional economic integration organization shall promptly notify the depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration pursuant to this paragraph.

3. Any reference to a “Contracting State” or “Contracting States” in this Convention applies equally to a regional economic integration organization when the context so requires.

#### *Article 94*

##### *Entry into force*

1. This Convention enters into force on the first day of the month following the expiration of one year after the date of deposit of the twentieth instrument of ratification, acceptance, approval or accession.

2. For each State that becomes a Contracting State to this Convention after the date of the deposit of the twentieth instrument of ratification, acceptance, approval or accession, this Convention enters into force on the first day of the month following the expiration of one year after the deposit of the appropriate instrument on behalf of that State.

3. Each Contracting State shall apply this Convention to contracts of carriage concluded on or after the date of the entry into force of this Convention in respect of that State.

#### *Article 95*

##### *Revision and amendment*

1. At the request of not less than one third of the Contracting States to this Convention, the Secretary-General of the United Nations shall convene a conference of the Contracting States for revising or amending it.

2. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention is deemed to apply to the Convention as amended.

#### *Article 96*

##### *Denunciation of this Convention*

1. A Contracting State may denounce this Convention at any time by means of a notification in writing addressed to the depositary.

2. The denunciation takes effect on the first day of the month following the expiration of one year after the notification is received by the depositary. If a longer period is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

DONE at New York, this eleventh day of December two thousand and eight, in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed this Convention.

**63/128. The rule of law at the national and international levels**

*The General Assembly,*

*Recalling* its resolution 62/70 of 6 December 2007,

*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 also* 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 further* 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,<sup>1</sup>

1. *Notes with appreciation* the inventory of current rule of law activities of the United Nations submitted by the Secretary-General<sup>2</sup> and the report of the Secretary-General on strengthening and coordinating United Nations rule of law activities;<sup>3</sup>

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

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<sup>1</sup> See resolution 60/1.

<sup>2</sup> See A/63/64.

<sup>3</sup> A/63/226.

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 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, and requests the Secretary-General to submit an annual report on United Nations rule of law activities, in particular the work of the Group and the Unit, with special regard to the improvement of the coordination, coherence and effectiveness of rule of law activities, taking note of the elements set out in paragraphs 77 and 78 of the report of the Secretary-General;<sup>3</sup>

6. Encourages the Secretary-General and the United Nations system to accord high priority to rule of law activities;

7. 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;

8. Invites the Rule of Law Coordination and Resource Group and the Rule of Law Unit to interact with Member States, in particular in informal briefings;

9. Stresses the need to consider without delay the report of the Secretary-General on the resource requirements of the Unit,<sup>4</sup> and urges the Secretary-General and Member States to continue to support the functioning of the Unit during the interim phase;

10. Decides to include in the provisional agenda of its sixty-fourth session the item entitled "The rule of law at the national and international levels", and invites Member States to focus their comments in future Sixth Committee debates on the sub-topics "Promoting the rule of law at the international level" (sixty-fourth session), "Laws and practices of Member States in implementing international law" (sixty-fifth session), and "Rule of law and transitional justice in conflict and post-conflict situations" (sixty-sixth session),<sup>5</sup> without prejudice to the consideration of the item as a whole.

*67th plenary meeting  
11 December 2008*

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<sup>4</sup> See A/63/154.

<sup>5</sup> For further explanations on the sub-topics see A/C.6/63/L.23.



*Part Two*

**STUDIES AND REPORTS ON  
SPECIFIC SUBJECTS**



# I. TRANSPORT LAW

## A. Report of the Working Group on Transport Law on the work of its twentieth session (Vienna, 15-25 October 2007)

(A/CN.9/642) [Original: English]

### CONTENTS

	<i>Paragraphs</i>
Introduction . . . . .	1-7
I. Deliberations and decisions . . . . .	8
II. Preparation of a draft convention on the carriage of goods [wholly or partly] [by sea] . .	9-280
Chapter 9 – Transport documents and electronic transport records ( <i>continued</i> ) . . . . .	9-14
Draft article 42. Evidentiary effect of the contract particulars . . . . .	9-14
Chapter 10 – Delivery of the goods . . . . .	15-85
Draft article 44. Obligation to accept delivery . . . . .	15-23
Draft article 45. Obligation to acknowledge receipt . . . . .	24
Draft article 46. Delivery when no negotiable transport document or negotiable electronic transport record is issued . . . . .	25-28
Draft article 47. Delivery when a non-negotiable transport document that requires surrender is issued . . . . .	29-35
Draft article 48. Delivery when a non-negotiable electronic transport record that requires surrender is issued . . . . .	36-41
Draft article 49. Delivery when a negotiable transport document or negotiable electronic transport record is issued . . . . .	42-67
Draft article 50. Goods remaining undelivered . . . . .	68-83
Draft article 51. Retention of goods . . . . .	84-85
Chapter 11 – Rights of the controlling party. . . . .	86-114
Draft article 52. Exercise and extent of right of control . . . . .	88-89
Draft article 53. Identity of the controlling party and transfer of the right of control . . . . .	90-96
Draft article 54. Carrier's execution of the instructions. . . . .	97-103
Draft article 55. Deemed delivery. . . . .	104
Draft article 56. Variations to the contract of carriage . . . . .	105-107
Draft article 57. Providing additional information, instructions or documents to carrier . . . . .	108-113
Draft article 58. Variation by agreement . . . . .	114
Chapter 12 – Transfer of rights . . . . .	115-132

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Draft article 59. When a negotiable transport document or negotiable electronic transport record is issued . . . . .	119
Draft article 60. Liability of the holder . . . . .	120-131
Draft article 61. When no negotiable transport document or negotiable electronic transport record is issued . . . . .	132
Chapter 13 – Limits of liability . . . . .	133-166
Draft article 62. Limits of liability . . . . .	133-156
Further consideration of the limits of liability . . . . .	157-166
Chapter 14 – Time for suit . . . . .	167-179
Draft article 65. Limitation of actions . . . . .	168
Draft article 66. Extension of limitation period . . . . .	169-172
Draft article 67. Action for indemnity . . . . .	173-177
Draft article 68. Actions against the person identified as the carrier . . . . .	178-179
Chapter 15 – Jurisdiction . . . . .	180-205
Draft article 69. Actions against the carrier . . . . .	181
Draft article 70. Choice of court agreements . . . . .	182-192
Draft article 71. Actions against the maritime performing party . . . . .	193
Draft article 72. No additional bases of jurisdiction . . . . .	194
Draft article 73. Arrest and provisional or protective measures . . . . .	195
Draft article 74. Consolidation and removal of actions . . . . .	196
Draft article 75. Agreement after dispute has arisen and jurisdiction when the defendant has entered an appearance . . . . .	197-198
Draft article 76. Recognition and enforcement . . . . .	199-201
Draft article 77. Application of chapter 15 . . . . .	202-205
Chapter 16 – Arbitration . . . . .	206-218
Draft article 78. Arbitration agreements . . . . .	207-211
Draft article 79. Arbitration agreement in non-liner transportation . . . . .	212-214
Draft article 80. Agreements for arbitration after the dispute has arisen . . . . .	215
Draft article 81. Application of chapter 16 . . . . .	216-218
Chapter 17 – General average . . . . .	219-220
Draft article 82. Provisions on general average . . . . .	219-220
Chapter 18 – Other conventions . . . . .	221-245
Draft article 83. Denunciation of other conventions . . . . .	221-227
Draft article 84. International conventions governing the carriage of goods by air . . . . .	228-231
Further consideration of draft article 84 conflict of convention issues . . . . .	232-236

Draft article 85. Global limitation of liability . . . . .	237-238
Draft article 86. Other provisions on carriage of passengers and luggage . . . . .	239-243
Draft article 87. Other provisions on damage caused by nuclear incident . . . . .	244-245
Chapter 20 – Final clauses . . . . .	246-280
Draft article 91. Depositary . . . . .	246
Draft article 92. Signature, ratification, acceptance, approval or accession . . . . .	247-251
Draft article 93. Reservations . . . . .	252-254
Draft article 94. Procedure and effect of declaration . . . . .	255-261
Draft article 95. Effect in domestic territorial units . . . . .	262
Draft article 96. Participation by regional economic integration organizations . . . . .	263
Draft article 97. Entry into force . . . . .	264-271
Draft article 98. Revision and amendment . . . . .	272-274
Draft article 99. Amendment of limitation amounts . . . . .	275-277
Draft article 100. Denunciation of this Convention . . . . .	278
Further comment on draft article 89 volume contracts . . . . .	279-280
III. Other business . . . . .	281
Planning of future work . . . . .	281

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## Introduction

1. At its thirty-fourth session, in 2001, the Commission established Working Group III (Transport Law) and entrusted it with the task of preparing, in close cooperation with interested international organizations, a legislative instrument on issues relating to the international carriage of goods such as the scope of application, the period of responsibility of the carrier, obligations of the carrier, liability of the carrier, obligations of the shipper and transport documents.<sup>1</sup> The Working Group commenced its deliberations on a draft convention on the carriage of goods [wholly or partly] [by sea] at its ninth session in 2002. The most recent compilation of historical references regarding the legislative history of the draft convention can be found in document A/CN.9/WG.III/WP.92.

2. Working Group III (Transport Law), which was composed of all States members of the Commission, held its twentieth session in Vienna from 15 to 25 October 2007. The session was attended by representatives of the following States members of the Working Group: Algeria, Australia, Austria, Belarus, Benin, Bolivia, Cameroon, Canada, Chile, China, Colombia, Czech Republic, El Salvador, France, Gabon, Germany, Greece, Guatemala, India, Iran (Islamic Republic of), Italy, Japan, Latvia,

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<sup>1</sup> *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), para. 345.

Lebanon, Mexico, Namibia, Nigeria, Norway, Republic of Korea, Russian Federation, Senegal, Singapore, Spain, Switzerland, Thailand, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

3. The session was also attended by observers from the following States: Argentina, Brazil, Burkina Faso, Congo, Côte d'Ivoire, Democratic Republic of the Congo, Denmark, Dominican Republic, Finland, Ghana, Indonesia, Kuwait, Netherlands, New Zealand, Nicaragua, Niger, Philippines, Portugal, Romania, Saudi Arabia, Slovakia, Slovenia, Sweden, Tunisia, Turkey, United Republic of Tanzania and Yemen.

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

(a) *United Nations system*: United Nations Conference on Trade and Development (UNCTAD);

(b) *Intergovernmental organizations*: Council of the European Union, European Commission and the Intergovernmental Organisation for International Carriage by Rail (OTIF);

(c) *International non-governmental organizations invited by the Working Group*: Association of American Railroads (AAR), BIMCO, Comité Maritime International (CMI), European Shippers' Council (ESC), International Chamber of Shipping (ICS), International Federation of Freight Forwarders Associations (FIATA), International Group of Protection and Indemnity (P&I) Clubs, Maritime Organization of West and Central Africa (MOWCA) and the World Maritime University (WMU).

5. The Working Group elected the following officers:

*Chairman*: Mr. Rafael Illescas (Spain)

*Rapporteur*: Mr. V. D. Sharma (India)

6. The Working Group had before it the following documents:

(a) Annotated provisional agenda and corrigendum (A/CN.9/WG.III/WP.92 and A/CN.9/WG.III/WP.92/Corr.1);

(b) The draft convention on the carriage of goods [wholly or partly] [by sea] and corrigendum (A/CN.9/WG.III/WP.81 and A/CN.9/WG.III/WP.81/Corr.1);

(c) A document containing comments and proposals of the Government of Nigeria (A/CN.9/WG.III/WP.93);

(d) A note by the Secretariat containing revised text of articles 42, 44 and 49 of the draft convention (A/CN.9/WG.III/WP.94);

(e) A proposal by the delegations of Denmark and the Netherlands (A/CN.9/WG.III/WP.95);

(f) A proposal on chapter 12 "Transfer of Rights" submitted by the delegation of the Netherlands (A/CN.9/WG.III/WP.96);

(g) A document containing comments from non-governmental organizations (A/CN.9/WG.III/WP.97);

(h) A proposal by the Government of China on jurisdiction (A/CN.9/WG.III/WP.98); and

(i) A proposal by the Government of China on delivery of the goods when a negotiable transport document or a negotiable electronic transport record has been issued and on goods remaining undelivered (A/CN.9/WG.III/WP.99).

7. The Working Group adopted the following agenda:
1. Opening of the session.
  2. Election of officers.
  3. Adoption of the agenda.
  4. Preparation of a draft convention on the carriage of goods [wholly or partly] [by sea].
  5. Other business.
  6. Adoption of the report.

## **I. Deliberations and decisions**

8. The Working Group continued its review of the draft convention on the carriage of goods [wholly or partly] [by sea] (“the draft convention”) on the basis of the text contained in the annex to a note by the Secretariat (A/CN.9/WG.III/WP.81). The Working Group was again reminded that the text contained in that note was the result of negotiations within the Working Group since 2002. The Working Group agreed that while the provisions of the draft convention could be further refined and clarified, to the extent that they reflected consensus already reached by the Working Group, the policy choices should only be revisited if there was a strong consensus to do so. Those deliberations and conclusions are reflected in section II below (see paras. 9 to 280 below). All references to A/CN.9/WG.III/WP.81 in the following paragraphs include reference to the corrections set forth in A/CN.9/WG.III/WP.81/Corr.1.

## **II. Preparation of a draft convention on the carriage of goods [wholly or partly] [by sea]**

### **Chapter 9 – Transport documents and electronic transport records**

*(continued from nineteenth session, see A/CN.9/621, paras. 301 to 302)*

#### **Draft article 42. Evidentiary effect of the contract particulars**

9. The Working Group proceeded to consider the text of draft article 42 as contained in paragraph 1 of A/CN.9/WG.III/WP.94. It was explained that that draft provision remained the same as it appeared in A/CN.9/WG.III/WP.81 except for corrections made to the cross-references to draft article 37. It was observed that the corrections to the text were not intended to alter its meaning.

10. The Working Group was reminded of the extensive debate that led to the formulation of draft article 42. As currently drafted, the text was the result of a careful compromise between conflicting views as to the treatment of the evidentiary value of transport documents.

11. It was pointed out that subparagraph (b)(i) used the term “third party”, while the term “consignee” was used in subparagraph (b)(ii). It was noted, in that connection, that

the term “third party” seemed to suggest the “holder” of the transport document, as defined in draft article 1, paragraph 12. However, since the consignee might also be a holder of a transport document, the concern was expressed that the distinction between the two terms used in subparagraphs (b)(i) and (ii) was unclear and that it might need further clarification. The Working Group agreed that in preparing the final revised draft for consideration by the Working Group, the Secretariat should carefully review the text so as to ensure consistency in the use of those two terms.

12. It was further proposed that, whilst the principle that proof to the contrary by the carrier should not be admissible against a consignee acting in good faith, the notion of good faith could not stand alone but rather should relate to a particular subject matter. In that respect, it was proposed to refer to wording along the lines contained in article 16 (3) of the Hamburg Rules by referring to “a consignee who in good faith has acted in reliance on the information therein”. There was support for that proposal.

13. A concern was expressed regarding the extension in draft article 42 of the conclusive evidentiary effect of the statements in a transport document to include not only non-negotiable transport documents, but also sea waybills.

*Conclusions reached by the Working Group regarding draft article 42:*

14. After discussion, the Working Group agreed that the text of draft article 42 as contained in A/CN.9/WG.III/WP.94 was acceptable subject to clarifying the context in which the notion of good faith would operate. The Working Group requested the Secretariat to review the use of terms throughout the draft convention, in particular the use of the terms “third parties” and “consignees” to ensure consistency of terminology.

## **Chapter 10 – Delivery of the goods**

### **Draft article 44. Obligation to accept delivery**

15. The Working Group proceeded to consider draft article 44 as contained in A/CN.9/WG.III/WP.94. In that respect it was observed that, for the sake of clarity, the Secretariat proposed to remove paragraph 2 from draft article 11, as contained in A/CN.9/WG.III/WP.81, and to move its content to the end of paragraph 1 of draft article 44, since it appeared that the rule regarding time and location of delivery would be best placed in draft article 44 in the chapter on delivery. Moreover, the Secretariat suggested that, as the obligation of unloading the goods pursuant to paragraph 2 of draft article 14 would be performed by the consignee, the corresponding provision should be moved from paragraph 2 of draft article 27 to a new paragraph 2 of article 44.

#### *Concept of delivery*

16. The view was expressed that the last sentence contained in paragraph 1 of draft article 44 dealt with actual delivery rather than the contractual time and place of delivery. For that reason, it was proposed that that sentence should be deleted and the following wording inspired by the current draft article 21 as contained in A/CN.9/WG.III/WP.81, should be added to the end of paragraph 1 after the words “time and location”: “at which, having regard to the terms of the contract, the customs, practices and usages of the trade and the circumstances of the journey, delivery could be reasonably expected.”

17. In support of a redrafting of paragraph 1, it was also stated that the reference, in that context to the time and location of delivery as being that “of the unloading of the



goods from the final means of transport in which they are carried under the contract of carriage” might be read to suggest that the consignee could be obliged to accept delivery at any time or place when or where the goods might be finally unloaded. That, it was said, would be an unreasonable imposition on the consignee.

18. The proposal to redraft paragraph 1 received some support, but the Working Group agreed to defer a final decision on the proposed additions, so as to allow delegations more time to reflect further on their implications.

*Choice between bracketed alternatives*

19. The Working Group proceeded to consider the two bracketed texts contained in draft article 44 which referred to the obligation to accept delivery of the goods by the consignee that either “exercises any of its rights under” or “has actively involved itself in” the contract of carriage. It was suggested that both texts could be deleted given that the definition of consignee as contained in draft article 1 already clarified the consignee’s entitlement to delivery and that in context of the draft article, the consignee’s obligation to take delivery should be made unconditional. While there was some support for that suggestion, the Working Group was predominantly in favour of retaining some form of qualification in the draft article, and proceeded to consider the options available in the draft before it.

20. The view was expressed that both sets of square brackets contained unclear language and that neither of them offered sufficient guidance as to the circumstances under which a consignee should be obliged to accept delivery under the contract of carriage. It was suggested that it would be preferable to delete both bracketed texts and refer instead to a requirement that the consignee demanded delivery or something comparable. However, concerns were expressed that such a requirement might prove overly onerous for the carrier that could not discharge itself of the custody of the goods under the contract of carriage in situations where a consignee took some legally relevant actions without formally demanding delivery, for example, when the consignee requested samples of the goods to determine whether or not to accept them pursuant to the underlying contract of sale.

21. Some support was expressed for the second bracketed text. It was suggested that the term “actively” should be deleted from the second bracketed text for the reason that passive behaviour might sometimes suffice to oblige the consignee to accept delivery of the goods. However, concern was expressed that the second bracketed text was too broad and ambiguous in that it did not indicate which level of “involvement” in the contract of carriage would suffice to obligate the consignee to take delivery of the goods. In the light of those concerns, the Working Group expressed a preference for the first bracketed text.

22. In considering the text in the first set of brackets, the Working Group heard expressions of concern that the reference to a consignee exercising “any” of its rights under the contract of carriage might be too broad. For example, should it be sufficient in order to trigger the provision that a consignee exercised a contractual right to obtain information on the whereabouts of goods during the voyage? It was suggested that such was not the case and that the exercise of a contractual right referred to matters such as exercising a right of control or asking the carrier to take samples of the cargo. To meet that concern, it was suggested that the words “any of” should be deleted from the first bracketed text. It was said that the intention of the article was that a consignee who wished to exercise its rights under the contract of sale, such as the right to reject the goods, should not be allowed to refuse to take delivery of the goods under the contract of carriage.

*Conclusions reached by the Working Group regarding draft article 44:*

23. After discussion, the Working Group agreed that the text of draft article 44 as contained in A/CN.9/WG.III/WP.94 was acceptable and that:

- The first bracketed text be included with the words “any of” being deleted; and
- The final wording of paragraph 1 of draft article 44 be revisited once delegations had an opportunity to reflect on the proposal to delete the last sentence thereof and redraft the final words of the first sentence.

**Draft article 45. Obligation to acknowledge receipt**

24. The Working Group was in agreement that the text in draft article 45 as contained in A/CN.9/WG.III/WP.81 was acceptable.

**Draft article 46. Delivery when no negotiable transport document or negotiable electronic transport record is issued**

25. It was recalled that draft article 46 had last been considered at the sixteenth session of the Working Group (see A/CN.9/591, paras. 223 to 230). The Working Group proceeded to consider the text in draft article 46 as contained in A/CN.9/WG.III/WP.81. A question was raised as to whether the reference to “after having received a notice of arrival” in paragraph (c) of draft article 46 could imply that notice should always be given to the consignee. It was said that such an interpretation would be inconsistent with draft article 50 (3), which allowed notice to be given to someone other than the consignee. It was proposed that paragraph (c) be redrafted so as to be consistent with draft article 50 (3).

26. Some support was expressed for the deletion of the words “after having received a notice of arrival” from paragraph (c) of draft article 46. It was noted that those words could place a heavy burden on a carrier, particularly in the context of container shipping where there could be a significant number of consignees. It was also suggested that the words were unnecessary given that paragraph 50 (3) already dealt with the circumstance where a carrier might wish to treat goods as undeliverable. If those words were retained, a suggestion was made to amend the wording to refer instead to a consignee “after having given notice of arrival” to take account of the possibility that a carrier could not be expected to know when a consignee had received a notice of arrival. However, support was expressed for retention of the text without amendment. It was said that draft article 46 dealt with the obligations of the carrier once the goods arrived at the place of destination and that it could therefore be distinguished from draft article 50 (3) which dealt with the situation where goods could be considered as undeliverable.

27. A suggestion was made to clarify that the obligation in paragraph (c) of draft article 46 of the controlling party or the shipper to give instructions in respect of delivery of the goods should be subject to the same terms that applied under article 54, for example, that the instructions be reasonable and not interfere with the normal operations of the carrier.

*Conclusions reached by the Working Group regarding draft article 46:*

28. After discussion, the Working Group agreed that the text of draft article 46 as contained in A/CN.9/WG.III/WP.81 was acceptable.

**Draft article 47. Delivery when a non-negotiable transport document that requires surrender is issued**

29. The Working Group was reminded that draft article 47 was inserted in A/CN.9/WG.III/WP.81 following a decision of the Working Group at its seventeenth session to insert into the text of the draft convention a provision concerning delivery of the goods when a non-negotiable transport document that required surrender had been issued (see A/CN.9/594, paras. 208 to 215). The Working Group was further reminded that draft article 47 appeared in A/CN.9/WG.III/WP.81 in square brackets, and that its text was based on that of proposed article 48 bis as set out in A/CN.9/WG.III/WP.68 (see para. 15).

*General discussion*

30. While it was acknowledged that non-negotiable transport documents that required surrender were not known in all jurisdictions, the Working Group was of the general view that draft article 47 was useful in cases where such documents existed. The Working Group decided that draft article 47 should be retained and the square brackets around the provision deleted.

*“[provides] [indicates] [specifies]”*

31. The Working Group next considered the three alternatives presented in the chapeau of draft article 47: whether such a non-negotiable transport document should “[provide]”, “[indicate]” or “[specify]” that it must be surrendered. It was observed that in some jurisdictions, the simple title “bill of lading” meant that surrender of the document was required upon delivery of the goods, and that if the intention of draft article 47 was to preserve existing law regarding these types of documents, the preferred text would be “indicates according to the law applicable to the document”. However, it was further suggested that if the Working Group did not agree with that proposal, the word “indicates” should be chosen, since, although being slightly vague, that term would at least preserve current practice with respect to such documents. There was support for the view that current practice should be preserved, but it was suggested that the word “indicates” would be preferable, since reference to the applicable law might be clear in legal terms, but it would be difficult for the carrier to know at the time of delivery whether or not the document in issue fulfilled the requirements of the applicable law. There was a preference in the Working Group for the retention of the term “indicates”, as among the three alternatives, and for the deletion of the other options, in order to retain current practice with respect to non-negotiable transport documents that required surrender.

32. However, it was observed in response that the draft convention classified all transport documents according to whether they were negotiable or non-negotiable, and that reference to documents as “bills of lading”, along with whatever legal consequences that label might entail in terms of national law, would resort to a taxonomy that was contrary to that used in the draft convention. It was further suggested that, while it had been decided by the Working Group to accommodate the current practice regarding non-negotiable transport documents that required surrender, there was no uniformity in national law regarding the treatment of such documents. Under the circumstances, an implicit referral to considerations of national law would allow too much scope for interpretation to fit with the categorization of documents in the draft convention. It was suggested that to preserve a uniform classification system in the draft convention, it should be clear that the wording of such a document must itself suffice to determine its character, and that, at a minimum, the term “indicates” should be deleted as lacking

clarity and as potentially importing uncertainty into the otherwise clear categorization in the draft convention. In addition, it was observed that the draft convention aimed to establish a clear, predictable system, and that the assumption that the parties had agreed to a non-negotiable transport document that required surrender, which would be unusual in some jurisdictions, should require an indication of a conscious decision. Thus, the draft convention should require a more rigorous standard than that denoted by the word “indicates”. There was support for the view that, for the purposes of consistency and certainty, the word “indicates” should be avoided in this context.

33. Support was also expressed in the Working Group for the term “provides”, and some support was expressed for the term “specifies”. In addition, there was some discussion regarding whether the different language versions of the three alternatives might suggest a term that was preferable to the three options set out in the text. However, no clear consensus emerged regarding which of the three alternatives should be selected. The least amount of support was expressed for the term “specifies”, and the Working Group decided that that option should be deleted from the draft convention, but that the other alternatives should be retained for future consideration. It was further observed that, in any event, the text of draft article 42 (b)(ii) should be aligned with whichever term was ultimately chosen by the Working Group.

#### *Notice of arrival*

34. It was observed that while a notice of arrival was required in subparagraph (c) of draft article 46, no notice of arrival was required by draft article 47. The Working Group agreed that, in the interests of consistency, a notice of arrival should also be required in subparagraph (b) of draft article 47.

#### *Conclusions reached by the Working Group regarding draft article 47:*

35. The Working Group was in agreement that:
- The text of draft article 47 should be retained and the square brackets around it deleted;
  - The alternatives “[provides]” and “[indicates]” should be retained in the chapeau in square brackets for future consideration, while the third alternative, “[specifies]” should be deleted;
  - The requirement for a notice of arrival should be added to subparagraph (b); and
  - Care should be taken to align the text of draft article 42 (b)(ii) depending on which term was ultimately chosen by the Working Group.

#### **Draft article 48. Delivery when a non-negotiable electronic transport record that requires surrender is issued**

36. The Working Group was reminded that draft article 48 was inserted in A/CN.9/WG.III/WP.81 following a decision of the Working Group at its seventeenth session to insert into the text of the draft convention a provision concerning delivery of the goods when a non-negotiable electronic transport record that required surrender had been issued (see A/CN.9/594, paras. 208 to 215). The Working Group was further reminded that draft article 48 appeared in A/CN.9/WG.III/WP.81 in square brackets, and that its text was based on that of proposed article 48 ter as set out in A/CN.9/WG.III/WP.68 (see para. 16).

37. It was observed that the term “non-negotiable electronic transport record” was somewhat illogical in light of the difficulty of requiring “surrender” of an electronic record, and it was suggested that the term “the electronic equivalent of a non-negotiable transport document” could be used in its stead. While some support was expressed for that suggestion, it was observed that it would be equally illogical to require surrender of the electronic equivalent of a non-negotiable transport document. It was also noted that this provision could have unintended consequences in terms of using the same approach as that taken in draft article 49 for negotiable electronic transport records, thus possibly affording a non-negotiable electronic transport record similar treatment to that given a negotiable electronic transport record.

38. Other concerns were raised regarding the treatment of the consignee and the use of the term “exclusive control” in subparagraph (a) of draft article 48. While the view was expressed that a consignee must have control over the goods, and thus must have control over the transport document or record, concerns were expressed regarding whether the standard of “exclusive control” was appropriate in draft article 48, since it was used in other contexts in respect of negotiable electronic transport records, as, for example, in draft article 1 (12) (b) definition of “holder”.

#### *Necessity of retaining draft article 48*

39. A question was raised regarding whether, in light of current industry practice, it was necessary to have a provision such as draft article 48 at all. It was suggested that draft article 48 could be deleted, and that, if some reference to the electronic equivalent of such documents was thought necessary by the Working Group, such an addition could be made through drafting adjustments to draft article 47.

#### *Notice of arrival*

40. It was also observed that while a notice of arrival was required in subparagraph (c) of draft article 46, no notice of arrival was required by draft article 48. The Working Group agreed that, in the interests of consistency, a notice of arrival should also be required in subparagraph (b) of draft article 48.

#### *Conclusions reached by the Working Group regarding draft article 48:*

41. The Working Group was in agreement that:
- Further consideration should be given to the title of the article;
  - The text of draft article 48 should be retained in square brackets;
  - Subparagraph (a) of draft article 48 should be placed in square brackets for further consideration by the Working Group; and
  - The requirement for a notice of arrival should be added to subparagraph (b).

#### **Draft article 49. Delivery when a negotiable transport document or negotiable electronic transport record is issued**

42. The Working Group was reminded that its most recent consideration of draft article 49 on delivery when a negotiable transport document or negotiable electronic transport record has been issued was at its sixteenth and seventeenth sessions (see A/CN.9/591, paras. 231 to 239, and A/CN.9/594, paras. 80 to 89). The Working Group was advised that consequential drafting changes to subparagraphs (d) and (g) were suggested, as described in paragraphs 4 to 6 of A/CN.9/WG.III/WP.94, and the Working

Group proceeded to consider the slightly revised text of draft article 49 as contained in A/CN.9/WG.III/WP.94.

*Subparagraph (a)*

43. A suggestion was made that the Working Group may wish to consider whether an addition should be made to subparagraph (a) to indicate the period within which the consignee was obliged to accept delivery. It was observed that this might be a particular problem in cases of delay in delivery of the goods. In response to a question regarding the purpose of subparagraph (a)(i) when the definition of “holder” in draft article 1 (12) already referred to a document that was “duly endorsed”, it was explained that subparagraph (a)(i) referred to so-called “order” documents that allowed for the endorsement of the document on to other persons, and that there should be a requirement in such cases for the holder to show that it was the person to whom the document had ultimately been endorsed. Finally, it was suggested that the phrase “as appropriate” in the chapeau of subparagraph (a) might be unnecessary.

*Subparagraph (b)*

44. It was proposed that the phrase “the carrier shall refuse delivery” in subparagraph (b) should be adjusted to read “the carrier may refuse delivery”, since there could be occasions on which the carrier might decide not to deliver even though the requirements of subparagraph (a) had been met, for example, in the case of other contractual relationships that the carrier might have. In response, it was noted that the term “shall” had been inserted to clarify and to reinforce the position of the carrier in refusing delivery of the goods in cases where the requirements of subparagraph (a) had not been met, and that the term “may” would dilute that result. The Working Group did not adopt the proposed change.

*Subparagraph (c)*

45. The Working Group was reminded that it had agreed at its nineteenth session to include in draft article 40 an additional paragraph providing that the legal effect of the carrier’s failure to include in the contract particulars the number of original negotiable transport documents when more than one was issued was that the negotiable transport document would be deemed to have stated that only one original had been issued (see A/CN.9/621, para. 296). In light of that agreement, it was proposed that in order to avoid confusion with that principle, the opening phrase of subparagraph (c) should be adjusted to read, “If the negotiable transport document states that more than one original ...” and should then continue on with the remainder of the subparagraph.

46. However, the Working Group was reminded that the practice of issuing multiple originals of the negotiable transport document was considered to be ill advised, and had been cautioned against. It was suggested that rather than include further reference to that practice in the draft convention, thereby possibly encouraging or condoning the practice, any mention of it should be deleted. There was some support for that approach. An alternative was suggested, such that if the Working Group was of the view that the provisions concerning the practice should be maintained, then draft article 36 should be adjusted to indicate that the shipper was entitled to ask for multiple originals of the negotiable transport document.

47. In reference to its previous agreement to add an additional paragraph in draft article 40 concerning the legal effect of the carrier’s failure to include the number of original bills of lading in the contract particulars, the Working Group was invited to

consider the policy underlying such a decision. In particular, it was noted that a failure to include the number of originals in the contract particulars was the fault of the carrier, yet a provision that, in such cases, would deem that only one original had been issued would be to the advantage of the carrier and would be contrary to cargo interests. Further, such a provision would require the reconsideration of certain other provisions of the draft convention, such as the requirement to produce all originals in order to demonstrate the right of control under draft article 53 (2) (b).

48. In light of these concerns, the Working Group considered four possible options regarding the proposed addition to subparagraph (c) and its decision at its nineteenth session regarding the legal effect of the carrier's failure to include the number of original negotiable transport documents in the contract particulars:

(a) To confirm the decision taken at its nineteenth session and to include the proposed text in subparagraph (c);

(b) To retain subparagraph (c) as drafted and to reverse the decision taken at its nineteenth session;

(c) To include the proposed text in subparagraph (c) to exclude its application in those cases where numbers of originals are not stated on the negotiable transport document, but to reverse the decision taken at its nineteenth session; or

(d) To delete all references in the draft convention to the use of multiple originals of the negotiable transport document.

49. There was some support in the Working Group for the first option listed in paragraph 48 above. It was noted that there was no sanction in the draft convention for a failure to include the other contract particulars required pursuant to draft article 37, and that the proposed inclusion in draft article 40 of such a provision in the case of a failure to provide the number of originals of the negotiable transport document would be unique in that regard.

50. However, the Working Group strongly supported the third option set out in paragraph 48 above, to include the text proposed with respect to subparagraph (c), but to reverse the decision taken at its nineteenth session to include a sanction for failing to include the number of multiple originals of the negotiable transport document in the contract particulars.

*Conclusions reached by the Working Group regarding draft article 49, subparagraphs (a), (b) and (c):*

51. The Working Group was in agreement that:

- The text of subparagraph (a) should remain in the text as drafted;
- The text of subparagraph (b) should remain in the text as drafted;
- The text of subparagraph (c) should be adjusted by changing its opening phrase to, "If the negotiable transport document states that more than one original ..."; and
- It reversed the decision it took during its nineteenth session (see A/CN.9/621, para. 296) and decided not to include an additional paragraph in draft article 40 concerning the legal effect of the carrier's failure to include the number of original bills of lading in the contract particulars.

*Subparagraphs (d), (e), (f) and (g)*

52. It was observed that the scheme set out in subparagraphs (d), (e), (f) and (g) of draft article 49 was intended to address the current problem of delivery of the goods without presentation of the negotiable transport document or electronic transport record. It was noted that, as discussed in previous sessions, the problem was a structural one arising from the requirements of the underlying sales contract and the length of modern voyages, and that it was frequently encountered in certain trades, such as in the oil industry. It was said that the entire scheme of subparagraphs (d), (e), (f) and (g) was based on the modern ability of the carrier to communicate with the holder regardless of the location of either, and that the onus was thus on the carrier to search for the controlling party or the shipper in order to obtain delivery instructions.

53. There was some support for the view that the establishment of such a system undermined the traditional bill of lading system by institutionalizing the undesirable practice of delivery without presentation of the negotiable transport document or electronic transport record. However, a contrary view was expressed that rather than undermining the bill of lading system, the approach in the provisions in issue was intended to restore to as great an extent as possible the value and the integrity of the traditional bill of lading system.

54. It was generally recognized that the system established by subparagraphs (d), (e), (f) and (g) of draft article 49 intended to protect in such cases both the carrier and the third party acquirer of the negotiable transport document or electronic transport record. There was some support in the Working Group for the text of subparagraphs (d), (e), (f) and (g) of draft article 49 as it appeared in A/CN.9/WG.III/WP.94. However, there were also various proposals to shorten the draft article or amend its subparagraphs, which the Working Group proceeded to consider.

*Proposed deletion*

55. In support of a proposal to delete subparagraphs (d), (e), (f) and (g) of draft article 49, it was observed that subparagraphs (d), (e) and (f) read together allowed the carrier, in certain circumstances, to deliver the goods to a person other than the holder of a negotiable transport document or electronic transport record. It was suggested that that possibility, while perhaps not ideal, fulfilled a significant practical need in modern shipping. Support was expressed for the system established by those three subparagraphs, but it was noted that an equally pressing concern was the protection of third party holders of a negotiable transport document or electronic transport record who acted in good faith, such as those protected through the operation of subparagraph (g) of draft article 49. It was suggested that a conflict was created between subparagraphs (d), (e) and (f) on one hand, and subparagraph (g) on the other, not only in terms of the interests protected, but in the actual wording of the provisions as well.

56. As a consequence, it was suggested that subparagraphs (d), (e), (f) and (g) of draft article 49 should be deleted in their entirety, and that the matter of delivery of the goods without presentation of the negotiable transport document or electronic transport record should be left entirely to national law (see A/CN.9/WG.III/WP.99). There was some support in the Working Group for that suggestion.



*Deletion of subparagraph (g) and addition to subparagraph (f)*

57. Another proposal in respect of subparagraphs (f) and (g) of draft article 49 was made, such that subparagraph (g) would be deleted, and the phrase “or compensation for the failure to deliver the goods” would be added after the phrase “other than the right to claim delivery of the goods” in subparagraph (f) (see A/CN.9/WG.III/WP.87). The rationale given for the addition to subparagraph (f) was that the proposed text would protect carriers from claims for losses or damages for failure to deliver the goods. Further, the deletion of subparagraph (g) was intended to protect carriers from becoming liable in possible cases of so-called “second delivery”, such that the third party holder in good faith that became a holder after delivery acquired all of the rights incorporated in the negotiable transport document or electronic transport record, including the right to claim delivery. Some support was expressed for that proposal, although it was observed that the simple elimination of subparagraph (g) might not be sufficient to eliminate the exposure of the carrier, since it could still be held liable as a result of delivering according to the instructions received from the controlling party or the shipper under subparagraphs (d) and (e).

*Additions to subparagraph (g) and draft article 50 (2)*

58. An additional proposal was made to the Working Group that aimed at protecting carriers from potential exposure to liability in the case of so-called “second deliveries” demanded by good faith acquirers of negotiable transport documents or electronic transport records (see A/CN.9/WG.III/WP.95). It was observed that the current practice of carriers faced with demands for delivery despite the absence of the negotiable transport document or electronic transport record was for carriers to demand from consignees a letter of indemnity often accompanied by a bank guarantee. It was noted that that procedure was a nuisance for the carrier, and an expensive one for the consignee, particularly since the bank guarantee must often be for a large sum. Although it was thought that the system established in draft article 49 for dealing with situations of non-presentation was a positive development, reluctance was expressed to expose the carrier, who was without blame, to potential liability in the face of third party holders.

59. The solution proposed for that problem was twofold:

- To add the following as a second sentence to subparagraph (g) of draft article 49:

When the contract particulars state the expected time of arrival of the goods, or include a statement on how to obtain information about whether or not delivery of the goods has taken place, it is presumed that the holder at the time that it became a holder had or could reasonably have had knowledge of the delivery of the goods.

- And to add the following new subparagraph (f) to draft article 50 (2):

No security as reasonably required by the carrier is provided for the purpose of protecting the carrier against the risk that it must deliver the goods to a person other than to whom it is instructed to deliver them under article 49, paragraph (d).

60. Support was expressed in the Working Group for that proposal.

*Refinement to the proposal concerning subparagraph (g) and draft article 50 (2)*

61. While the proposal outlined above in paragraph 59 was thought to be a positive step in terms of solving the problem of non-presentation while protecting the carrier and the third party, it was suggested that it should be refined in two ways. First, since the instructions that the carrier would seek from the controlling party or the shipper in accordance with subparagraphs (d) and (e) would give rise to the potential liability of the carrier under subparagraphs (f) and (g), it was thought that a specific right for the carrier to take a recourse action against the controlling party or the shipper should be included in draft article 49. Secondly, it was felt that once such a right to a recourse action was established on behalf of the carrier, it could be combined in draft article 49 with an obligation on the consignee to establish reasonable security with the carrier. Finally, it was thought that the inclusion of provisions on indemnity and security in draft article 49 would be better-placed than in draft article 50, and that it would obviate the need for a new subparagraph (f) in draft article 50 (2) as set out in paragraph 59 above.

62. The Working Group expressed support for the proposal set out in paragraphs 59 above as refined by the above suggestion.

*An additional proposal*

63. An additional proposal was made to the Working Group that the problem with which it was grappling might be dealt with by a means similar to that employed in the case of draft article 47 non-negotiable documents requiring surrender. In particular, it was suggested that the operation of subparagraphs (d), (e), (f) and (g) could be limited to those situations where a negotiable transport document or electronic transport record had been issued that stated on the document or electronic record itself that the goods to which it related could be delivered without presentation of the negotiable transport document or electronic transport record. It was thought that such an approach would give sufficient warning to the holder that, in some cases, delivery could be made to another person. A mechanism proposed for the implementation of that suggestion was that a phrase could be inserted prior to subparagraphs (d), (e), (f) and (g) along the following lines: "If a negotiable transport document or electronic transport record that states on its face that the goods may be delivered without presentation of the document or electronic record, the following rules apply:".

64. Some interest was expressed in exploring the suggestion, although caution was advised in embracing an additional document or electronic record that did not strictly meet the negotiable and non-negotiable categorization of the draft convention, and that might create a secondary category of lesser-valued negotiable documents and electronic records. However, to facilitate future discussions, the Working Group agreed to include the substance of the proposal in a footnote to the text of the draft convention, in order to allow delegations to consider its implications.

*Further drafting suggestions to subparagraph (d)*

65. It was observed that, pursuant to subparagraphs (d) and (e), it was not clear whether the carrier may refuse to execute the instructions of the controlling party or the shipper. It was suggested that the carrier's requirement to execute those instructions should be subject to the same requirements as set out in draft article 54:

- That such instructions could reasonably be executed according to their terms; and
- That there would be no interference with the normal operations of the carrier.

66. It was also suggested that the text of the draft convention should be reviewed to ensure consistency in the usage of the terms “controlling party” and “holder”. There was support for that suggestion.

*Conclusions reached by the Working Group regarding draft article 49, subparagraphs (d), (e), (f) and (g):*

67. After discussion, the Working Group agreed:

- The text of subparagraphs (d), (e), (f) and (g) of draft article 49 should be retained;
- The proposal set out in paragraph 59 above and in A/CN.9/WG.III/WP.95 should be implemented into the text of the draft convention, but for its suggestion to add subparagraph (f) to draft article 50 (2);
- The refinement to the above proposal set out in paragraph 61 above should be implemented into the text of the draft convention by the Secretariat; and
- The proposal outlined in paragraphs 63 to 64 above should appear as a footnote to the text in the draft convention.

#### **Draft article 50. Goods remaining undelivered**

68. The Working Group was reminded that former draft article 50, set out in A/CN.9/WG.III/WP.56, had been deleted and its substance incorporated into draft article 50 in A/CN.9/WG.III/WP.81, in light of the Working Group’s deliberations at the 17th session (A/CN.9/594, paras. 90-93).

#### *Paragraphs 1 and 2*

69. It was suggested that the right of the carrier to cause the goods to be sold under subparagraph (c) had the potential to cause significant damage to cargo interests. For that reason, there was some support for a proposal to add a time requirement of sixty days before a carrier could exercise its rights to sell the goods except in case of perishable goods, or where the goods were otherwise unsuitable for preservation.

70. There was general agreement within the Working Group as to the importance of safeguards to ensure that any measures involving disposal of the goods that the carrier might take pursuant to the draft article were carried out properly. However, it was pointed out that subparagraph 1 (c) already made express reference to the requirements of domestic law. Those requirements could not be fully reproduced in the draft convention, and the Working Group was cautioned against including one particular safeguard, such as a time bar, without including other safeguards contained in some national laws. The Working Group agreed not to introduce a specific time limit into subparagraph 1 (c).

71. The question was asked as to whether the carrier should be free to decide when the circumstances warranted the destruction of the goods or whether such action should only be authorized in specific circumstances to be mentioned in the draft convention. In response, it was noted that draft paragraph 1 already subjected the actions of the carrier to a test of reasonableness and that it would be preferable to leave the possible consequences of unreasonable measures by the carrier entirely to national law rather than attempt to encompass all imaginable circumstances where destruction of the goods might be warranted.

72. A proposal was made to delete the words “unless otherwise agreed and” from paragraph 1 for the reason that it opened the potential for abuse, and small shippers would rarely have an opportunity to enter into a contrary agreement with carriers. It was suggested that it was more important to expressly state the situation in which a carrier might sell or destroy the goods. The contrary view was, as an instrument concerned with commercial relations, rather than consumer protection, the draft convention should respect freedom of contract on the matter. Nevertheless, after having considered those views, the Working Group agreed to delete the words “unless otherwise agreed and” in the draft paragraph.

73. The Working Group accepted a proposal to reverse the order of paragraphs 1 and 2, so as to place the definition on when goods could be deemed to be undeliverable, before the operative provision.

74. It was noted that the term “undelivered” was used in paragraph 1, whereas the term “undeliverable” was used in paragraph 2. It was suggested that the text should be reviewed to determine whether the same term should be used in both paragraphs.

*Conclusions reached by the Working Group regarding paragraphs 1 and 2 of draft article 50:*

75. The Working Group was in agreement that the text of draft article 50 should be retained subject to the following:

- The order of paragraphs 1 and 2 be reversed;
- The words “unless otherwise agreed and” be deleted from the chapeau of paragraph 1; and
- The Secretariat should examine the use of the term “undelivered” in paragraph 1 as compared to “undeliverable” in paragraph 2, to determine whether one term should be used in both cases.

*Paragraphs 3 to 5*

76. A proposal was made to include “the notify party” before the consignee in the list of persons to be notified of the arrival of the goods at the place of destination. That proposal did not receive support.

77. There was strong support for a proposal to include a requirement of 14 days in relation to the advance notice to be given under paragraph 3, instead of merely requiring a reasonable advance notice. However, very strong objections were raised against that proposal. It was pointed out that the inclusion of a fixed time period which might be appropriate to longer sea legs but less appropriate in short sea legs, some of which might be covered within a few days only. It was also said that requiring the carrier to retain undelivered goods for 14 days prior to disposing of them might generate considerable cost and even cause a congestion of stored goods in port terminals.

78. In the context of that discussion, it was noted that it was not clear whether draft paragraph 3 envisaged a notice following the arrival of the goods or a notice anticipating their arrival at the place of destination. It was explained that, in the context in which it was placed, the notice in paragraph 3 should logically refer to the notice that the goods had arrived as distinct from an advance notice which was sent prior to the arrival of the goods. It was suggested that the nature of the notice intended to be covered could be further clarified.

79. It was suggested that paragraph 5 should be amended to more clearly delimit the carrier's liability and ensure that the carrier would not be under a continuing liability where destruction or sale of the goods was not open to the carrier. It was suggested that the carrier should be relieved of continuing liability for damage to the goods or other loss or damage which was a consequence of the goods not being received by the consignee, provided the goods were handed over to a suitable terminal authority, public authority or other independent person or authority that took care of the goods. That proposal did not receive support.

80. It was suggested that the words "and that the carrier knew or ought to have known that the loss or damage to the goods would result from its failure to take such steps" be deleted. There was not sufficient support for that proposal, as it was felt that the provision applied where the cargo interest had defaulted on its obligations and therefore an overly onerous burden should not be placed on the carrier in such circumstances.

*Conclusions reached by the Working Group regarding paragraphs 3 to 5 of draft article 50:*

81. The Working Group was in agreement that the text of paragraphs 3 to 5 of draft article 50 should be retained subject to clarifying that the notice referred to in paragraph 3 was to notice that the goods had arrived at destination.

*Paragraph 4*

82. It was suggested that a time limit should be specified in paragraph 4 with respect to the period during which the carrier should keep the proceeds.

83. The Working Group was in agreement that the paragraph should be retained and that the matter of the time limit should be determined by national law.

**Draft article 51. Retention of goods**

84. The Working Group was reminded that it had agreed to include a provision that dealt with the retention of goods in the draft instrument at its seventeenth session (see A/CN.9/594, paras. 114-117).

*Conclusions reached by the Working Group regarding draft article 51:*

85. The Working Group agreed that the text of draft article 51 as contained in A/CN.9/WG.III/WP.81 was acceptable.

**Chapter 11 – Rights of the controlling party**

86. It was suggested that the heading of the chapter should be replaced with "Right of Control", because the current heading did not fully reflect the essence of the chapter.

87. The Working Group agreed to consider the heading after completing the discussions on the draft articles in this chapter.

**Draft article 52. Exercise and extent of right of control**

88. The Working Group was reminded that draft article 52 was revised text after the provision was last considered by the Working Group at its seventeenth session (see A/CN.9/594, paras. 10-16).

89. The Working Group agreed that the text of draft article 52 was acceptable.

**Draft article 53. Identity of the controlling party and transfer of the right of control**

*Paragraph 1 (b)*

90. The Working Group proceeded to consider the text in draft article 53 as contained in A/CN.9/WG.III/WP.81. A concern was expressed that paragraph 1 (b) of draft article 53 did not specify the party to whom notification should be given. It was noted that the word “its” in paragraph 1 (b) already indicated that the carrier was the party to be given notification.

*Paragraph 2 “[provides] [indicates] [specifies]”*

91. The Working Group next considered the three alternatives presented in the chapeau of paragraph 2 of draft article 53. There was broad consensus that the approach decided upon by the Working Group with regard to the alternatives in the chapeau of draft article 47 should also be applied in this draft article to maintain consistency in the draft convention.

*Paragraph 3*

92. It was suggested that, for reasons of consistency, the approach adopted in subparagraph (c) of draft article 49 regarding the issuance of multiple originals of negotiable transport documents should also be reflected in subparagraphs 3 (b) and 3 (c) of draft article 53. It was suggested that the operation of subparagraphs 3 (b) and 3 (c) of draft article 53, too, should be limited to cases where the negotiable transport document expressly stated that more than one original had been issued. In response to that suggestion, it was observed that the two provisions in question had different purposes. Under draft article 49, subparagraph (c), if more than one original of the negotiable transport document has been issued, the carrier who delivered the goods to the holder of one original transport document would be discharged from liability vis-à-vis the possible holders of the other transport document. In the context of paragraph 3 of draft article 53, however, the transfer of the right of control to a third party might adversely affect the rights of the holder of the remaining transport documents, as the holders who acquired rights in good faith were generally protected under the draft convention. The Working Group was therefore urged to carefully consider the desirability of aligning entirely draft article 49, subparagraph (c), with paragraph 3 of draft article 53.

*Paragraph 5*

93. A proposal was made to delete the words “in accordance with the Convention” from paragraph 5 of draft article 53, as those words suggested that the right of control would not cease, despite the fact that the goods had actually been delivered, if for whatever reason, the actual delivery was not strictly in conformity with the contract of carriage. The continuation of a right of control despite actual delivery was said to be an anomalous situation, and inconsistent with paragraph 2 of draft article 52, which limited the duration of the right of control for “the entire period of responsibility of the carrier”. There was support for that proposal, as well as for an alternative proposal to delete the paragraph 5 in its entirety, since it was said to be redundant in the light of paragraph 2 of draft article 52.

94. In response to those proposals, it was pointed out that in practice there might be situations where the rights of a controlling party needed to be preserved even after delivery had actually taken place. The carrier might deliver the goods against a letter of indemnity, for instance, because the person claiming delivery could not surrender the negotiable transport document. Such a delivery was not provided for in the draft convention, and the legitimate holder of the transport document should not be deprived of the right of control in such a case, since that might affect the remedies available to it. The Working Group was urged to carefully consider those possible situations before agreeing to delete either the words “in accordance with the Convention” or paragraph 5 of draft article 53 in its entirety.

#### *Paragraph 6*

95. The Working Group was reminded that paragraph 6 of draft article 53 was slightly revised following the decision of the Working Group when it last considered the provision at its seventeenth session (see A/CN.9/594, paras. 42-45). After discussion on the interplay between paragraph 6 of draft article 53 and draft article 60, as well as the entire chapter 12, it was agreed to postpone discussion on paragraph 6 until draft article 60 and chapter 12 were examined (see paragraphs 122 to 124 below).

#### *Conclusions reached by the Working Group regarding draft article 53:*

96. The Working Group was in agreement that:
- The text of paragraph 1 of draft article 53 as contained in A/CN.9/WG.III/WP.81 was acceptable;
  - The alternatives “[provides]” and “[indicates]” should be retained in the chapeau in square brackets for future consideration, while the third alternative, “[specifies]”, should be deleted;
  - The Secretariat should review the text of paragraphs 3 (b) and (c) of draft article 53 with subparagraph (c) of draft article 49 and consider the desirability of aligning those provisions and the extent to which that should be done;
  - The text of paragraph 5 of draft article 53 should be put into square brackets until it can be verified that deletion of this paragraph does not harm the substance of the draft instrument. In addition, it should be examined whether deletion of only the last words “in accordance with this Convention” of paragraph 5 would be feasible.

#### **Draft article 54. Carrier’s execution of the instructions**

##### *Paragraph 2*

97. It was suggested that the word “diligently” should be added before “executing any instruction” in paragraph 2 of draft article 54, in order to balance the rights of the parties concerned. It was noted that there was a need to qualify the execution of the instructions in some way, so that the controlling party would not be liable for additional expenses or damage that was attributable to the carrier’s lack of diligence in executing the controlling party’s instructions. Broad support was expressed for the suggestion.

98. It was proposed that the text in square brackets in paragraph 2 of draft article 54 should be deleted, because the Working Group, at its nineteenth session, had decided to delete all reference to the shipper’s liability for delay (see A/CN.9/621, paras. 177 to 184). Consistency with that earlier decision also required the deletion of the text in

square brackets in paragraph 2 of draft article 54, since the shipper and the controlling party would often be the same. The proposal of deletion was widely accepted. Some expressions of support for the deletion, however, were qualified by the observation that the deletion of references to liability for delay in paragraph 2 of draft article 54 did not mean that such liability would not arise, since paragraph 2 of draft article 54 dealt with redress of the carrier against the controlling party, and the carrier was itself subject to liability for delay under the draft convention.

99. In the course of that discussion, the view was expressed that paragraph 2 of draft article 54 exposed the controlling party to a potentially substantial liability. It was, therefore, suggested that the Working Group should consider ways to limit the controlling party's exposure, for instance by limiting its liability under paragraph 2 of draft article 54 to foreseeable additional expenses or liability. There was general agreement within the Working Group that the controlling party could indeed be protected against exorbitant reimbursement claims by inserting the word "reasonable" before "additional expenses". However, the Working Group was divided in respect of a possible limitation of the controlling party's obligation to indemnify the carrier against loss or damage that the carrier might suffer as a result of executing the controlling party's instructions.

100. The Working Group was invited to consider possible means to achieve the proposed limitation. Proposals to that effect included adding words such as "reasonably foreseeable" before the words "loss or damage", or requiring the carrier to give notice or warn the controlling party about the possible magnitude of loss or damage that the carrier might suffer in carrying out the instructions received from the controlling party. However, in the course of the Working Group's discussions, a number of objections were voiced to those proposals. It was said that inserting any such limitation would be contrary to the nature of paragraph 2 of draft article 54, which contemplated a recourse indemnity obligation, rather than an independent liability, for the controlling party. It was also noted in that connection, that to the extent that the controlling party would be asked to indemnify the carrier for compensation that the carrier had to pay to other shippers under the draft convention, those payments by the carrier could not be regarded as being entirely unforeseeable to the controlling party. Furthermore, it was said that any limitation by means of a foreseeability requirement would mean that the carrier would have to bear the loss or damage that exceeded the amount originally foreseen by the controlling party, which was not felt to be an equitable solution. By the same token, the carrier should not have the burden of anticipating all possible types of loss or damage that might arise from the controlling party's instruction and should not be penalized with a duty to absorb loss or damage actually sustained only because the carrier was unable to foresee the loss or damage when considering the instructions received from the controlling party.

101. Having considered the various views that were expressed, the Working Group agreed that it would be preferable to refrain from introducing a requirement of foreseeability as a condition for the controlling party's obligation to indemnify the carrier under paragraph 2 of draft article 54.

#### *Paragraph 4*

102. It was proposed that the text in square brackets in paragraph 4 of draft article 54 should be retained and the square brackets removed. This difference in approach, as compared to the decision taken by the Working Group in respect of the same phrase in paragraph 2 was justified on the grounds that paragraph 4 referred to the carrier's own liability for delay, whereas paragraph 2 was conceived to indirectly make the controlling



party liable for delay. Broad support was expressed to remove the square brackets and retain the text, as it would provide greater legal certainty by making it clear that articles 17 to 23 also apply to the carrier's liability under paragraph 4 of draft article 54.

*Conclusions reached by the Working Group regarding draft article 54:*

103. The Working Group was in agreement that:

- The word "reasonable" should be inserted before or after "additional" in paragraph 2;
- The word "diligently" should be inserted before "executing any instructions pursuant ..." in paragraph 2;
- The text in square brackets in paragraph 2 should be deleted; and
- The text in square brackets in paragraph 4 should be retained and the square brackets should be deleted.

#### **Draft article 55. Deemed Delivery**

104. A concern was expressed regarding the reference to chapter 10 in draft article 55. It was questioned whether requirements to give notice of arrival should apply in cases where delivery was made under the instructions of the controlling party. The Working Group agreed that the text of draft article 55 was acceptable in substance.

#### **Draft article 56. Variations to the contract of carriage**

105. It was observed that paragraph 2 of draft article 56 provided that variations to the contract of carriage were required to be stated in negotiable transport documents or incorporated into negotiable electronic transport records, but that their inclusion in non-negotiable transport documents or electronic transport records was at the option of the controlling party. Some concern was raised regarding the clarity of the term "at the option of", and a suggestion was made that it should be deleted so as to treat negotiable and non-negotiable transport documents and electronic transport records in similar fashion. That proposal was not accepted, however, since non-negotiable transport documents and electronic transport records were only one means of proving the contract of carriage, rather than the only means, to treat them the same way as negotiable transport documents and electronic transport records would be to unnecessarily elevate their status, as well as to invite practical difficulties in recovering the non-negotiable documents and records to incorporate the changes. Further, it was pointed out that the carrier always had the option of issuing new non-negotiable transport documents and electronic transport records if it so desired. However, the suggestion to replace the term "at the option of" with "upon the request of" was supported by the Working Group.

106. In response to the question whether non-negotiable transport documents that required surrender should also be included in paragraph 2 of draft article 56, the Working Group agreed that they should be included, and that they should be treated in a similar fashion to that of negotiable transport documents.

*Conclusions reached by the Working Group regarding draft article 56:*

107. The Working Group agreed that:

- The same treatment should be given to non-negotiable transport documents that required surrender as that given to negotiable transport documents in

paragraph 2 of draft article 56, and requested the Secretariat to make the appropriate adjustments to the text; and

- In paragraph 2, the phrase “at the option of the controlling party” should be substituted with “upon the request of the controlling party”.

**Draft article 57. Providing additional information, instructions or documents to carrier**

108. The Working Group was reminded that its most recent consideration of draft article 57 on the provision of additional information, instructions or documents to the carrier was at its seventeenth session (see A/CN.9/594, paras. 60 to 64).

109. It was explained that the purpose of draft article 57 was not to create an additional obligation with respect to cargo interests, but to provide a mechanism whereby the carrier could obtain additional information, instructions and documents that became necessary during the course of the carriage. It was noted that while draft article 29 appeared to be similar, it concerned a different obligation, that is, the obligation of the shipper to provide information, instructions and documents as a pre-condition for the transport of the goods.

110. By way of further explanation, the Working Group heard that the intention of draft article 57 was to create a system whereby the carrier not only received instructions from the controlling party pursuant to draft articles 52 and 53, but that the carrier could also request information, instructions or documents from the controlling party further to draft article 57. Should such a need for instructions, information or documents arise during the carriage, the provision was intended to place some onus on the controlling party to recognize that its obligation to the carrier in this regard was an important one.

111. While it was thought by some that the consequences of a failure to fulfil the obligation in draft article 57 would be left to national law, it was suggested that the practical approach under the draft convention if any loss or damage was caused as a result of a failure of the controlling party to provide such information, instructions or documents, the carrier could resort to draft article 17 (3) (h) to relieve itself of liability for the loss or damage.

112. It was observed that draft article 29 contained similar obligations to those contained in draft article 57, but that article 29 concerned the obligations of the shipper rather than the controlling party. It was suggested that, in order to clarify the difference in the intended application of draft article 57 as compared with draft article 29, the obligation that the controlling party “shall provide such information, instructions or documents” should be reduced, such as by rephrasing the provision instead to allow the carrier to request the information, instructions or documents from the controlling party. That proposal was not taken up by the Working Group. Further, while it was recognized that the contexts of draft articles 29 and 57 were different, it was suggested that the Secretariat should review the two provisions in order to align the approach taken in draft article 57 with that taken in draft article 29, such as, for example, with respect to the timely provision of information. There was support in the Working Group for that proposal.

*Conclusions reached by the Working Group regarding draft article 57:*

113. The Working Group was in agreement that:

- The text of draft article 57 should remain in the text as drafted; and

- The Secretariat should be requested to consider aligning the text with that of draft article 29 on the shipper's obligation to provide information, instructions and documents, bearing in mind the different contexts of draft articles 29 and 57.

#### **Draft article 58. Variation by agreement**

114. While there was general agreement in the Working Group with the text of the provision as it appeared in A/CN.9/WG.III/WP.81, it was observed that should the Working Group decide to amend or delete draft article 53 (5), a correction would have to be made to draft article 58. It was further observed that, if draft article 53 (5) were deleted, it might not be sufficient in the context of draft article 58 to merely change the reference from "article 53, paragraph 5" to "article 52, paragraph 2". The Secretariat was requested to take note of those drafting concerns.

### **Chapter 12 – Transfer of rights**

115. The Working Group was reminded that its most recent consideration of chapter 12 on transfer of rights was at its seventeenth session (see A/CN.9/594, paras. 77 to 78), when it had agreed that its consideration of chapter 12 on transfer of rights should be deferred for future discussion, following consultations. The Working Group had not considered the text since that time, and it was recalled that a decision on the disposition of chapter 12 was necessary.

116. To that end, the Working Group heard a proposal intended to facilitate discussion regarding the disposition of chapter 12 as presented in A/CN.9/WG.III/WP.96. It was suggested that it would be a mistake for the Working Group to eliminate the entire chapter from the draft convention as a result of some of its provisions being perceived as too difficult, too contentious or not yet mature enough for inclusion in the draft convention. Instead, it was thought that some of the provisions in the chapter should be retained in the draft convention as useful and necessary. It was proposed that draft article 59 be retained as having been non contentious in previous readings, but being of great technical importance for the purposes of electronic commerce in order to achieve functional equivalence with paper documents. In terms of draft article 60, it was suggested that paragraphs 1 and 3 were important to retain in the draft convention, since they had been relatively non-contentious in previous readings, and given their importance in terms of clarifying the legal position of intermediate holders such as banks. However, it was thought that paragraph 2 of draft article 60 could be deleted since it concerned the sensitive matter of transfer of liabilities, which was an issue not yet considered ripe for inclusion in the draft convention. Finally, it was proposed that draft article 61 should not be retained in the draft convention, as being a problematic provision combining applicable law with substantive legal provisions.

117. There was strong support in the Working Group for the retention of portions of chapter 12 in the draft convention. While there was general agreement with the proposal set out in A/CN.9/WG.III/WP.96 regarding which provisions should be retained, a number of delegations felt that it was also important to retain draft article 60 (2) in the draft convention for further consideration.

*Conclusions reached by the Working Group regarding the disposition of chapter 12:*

118. The Working Group was in agreement that:

- Draft article 59 should be retained in the text for further discussion;
- All three paragraphs of draft article 60 should be retained in the text for further discussion; and
- Draft article 61 should be deleted from the draft convention.

**Draft article 59. When a negotiable transport document or negotiable electronic transport record is issued**

119. While a question was raised regarding the appropriateness in paragraph 2 of the use of the terms “made out to order or to the order of a named person” in respect of negotiable electronic transport records, the Working Group approved the text of draft article 59.

**Draft article 60. Liability of the holder**

*Paragraph 1*

120. In considering the text of paragraph 1 of article 60, it was suggested that, while not inaccurate, the phrase “and that does not exercise any right under the contract of carriage” might be perceived in a negative fashion, and should be deleted. In response, the view was expressed that the provision would become too vague if that phrase were deleted. Another view was that the provision could have the unintended consequence of broadly pre-empting the application of national law with respect to the liability of holders if the phrase were deleted. An additional proposal was suggested that in order to satisfy the concerns aimed at through the suggested deletion, the title of the provision could instead be changed to “position of the holder”, or a similar, more neutral term.

121. The Working Group generally approved of the text of paragraph 1 as it appeared in A/CN.9/WG.III/WP.81.

*Paragraph 1 and relationship with draft article 53 (6)*

122. It was observed that, while paragraph 1 of draft article 60 provided that the holder did not assume any liability under the contract of carriage solely by reason of being a holder, draft article 53 (6) provided that a person that transferred the right of control without having exercised it was, upon such transfer, discharged from the liabilities imposed on the controlling party. It was thought that the text of paragraph 1 of draft article 60 was more precise than that of draft article 53 (6).

123. It was suggested that paragraph 6 of draft article 53 could be amended by following the more precise approach of paragraph 1 of article 60. That suggestion was not taken up, as the Working Group decided to delete draft article 53 (6) in its entirety.

*Conclusions reached by the Working Group regarding draft articles 60 (1) and 53 (6):*

124. The Working Group was in agreement that:

- The text of draft article 60 (1) should remain in the text as drafted;
- The Secretariat should consider the advisability of changing the title of the provision to “position of the holder”, or a similar term; and
- Draft article 53 (6) should be deleted.

*Paragraph 2*

125. It was clarified that, although A/CN.9/WG.III/WP.96 suggested the deletion of paragraph 2 of draft article 60 with a view to expediting the negotiation of the draft convention, the view of the delegation presenting that document was that paragraph 2 nonetheless had a useful substantive role to play and should be retained. It was also indicated that the issues treated in paragraph 2 provided for greater harmonization in the draft convention. Since the draft had achieved harmonization regarding transfer of rights, it was thought to be appropriate that harmonization regarding the transfer of liabilities such as that set out in paragraph 2 should also be sought. For those reasons, there was support in the Working Group for the retention of paragraph 2.

126. However, there was also support in the Working Group for the deletion of paragraph 2 as being too controversial for its content to be agreed upon in a timely fashion for completion of the draft convention. In particular, it was noted that the concept in the draft provision that the liabilities were incorporated into the transport document or electronic transport record did not exist in all legal systems, and that seeking acceptable harmonization on this point could be very difficult. The view was expressed that incorporating paragraph 2 into the draft convention could cause some countries to hesitate in ratifying the draft convention, and that this would be an unfortunate price to pay for a relatively unimportant provision. There was some support for that strongly held view.

127. In response, it was suggested that paragraph 1 of draft article 60 already indicated that the holder was subject to a certain amount of liability, and that paragraph 2 actually operated to limit that potential liability to the obligations contained in the transport document or electronic transport record. In a similar vein, it was observed that simple deletion of paragraph 2 would not necessarily remove all liability on the holder pursuant to the draft convention, and that if the Working Group decided to delete the provision, the draft convention should be very carefully reviewed to ensure that there were no lingering rules placing liability on the holder.

128. Despite differing views regarding how best to deal with paragraph 2, both those in the Working Group in favour of its retention and those in favour of its deletion were unanimous in concluding that, whatever the fate of the provision, the first alternative text in square brackets was preferable. As such, the first variant should be retained and the brackets around it deleted, and the second alternative text in square brackets should be deleted in its entirety. Further, a drafting question was raised whether the phrase in the first alternative, "liabilities imposed on it", would be better recast as, "liabilities provided for", in order to reflect that the document or record would not operate to impose liabilities on the holder.

*Conclusions reached by the Working Group regarding draft articles 60 (2):*

129. The Working Group was in agreement that:

- The text of draft article 60 (2) should remain in the text but square brackets should be placed around it to indicate the divided views of the Working Group; and
- The first alternative text in square brackets should be retained and the brackets around it deleted, and the second alternative text should be deleted.

*Paragraph 3*

130. While there was general approval in the Working Group for the text of draft paragraph 3 as it appeared in A/CN.9/WG.III/WP.81, a question was raised regarding whether the opening phrase of the paragraph, “For the purposes of paragraphs 1 and 2 of this article [and article 44]”, was necessary. There was some support for the view that the phrase did not appear to be necessary, but that the draft convention should be examined in order to ensure that there were no additional provisions in the text to which this paragraph should not apply, thus paving the way for the deletion of the opening phrase.

*Conclusions reached by the Working Group regarding draft articles 60 (3):*

131. The Working Group was in agreement that:

- The text of paragraph 3 should remain in the text without square brackets but including the text retained therein; and
- The draft convention should be examined to see whether the opening phrase, “For the purposes of paragraphs 1 and 2 of this article [and article 44]”, could be safely deleted.

**Draft article 61. When no negotiable transport document or negotiable electronic transport record is issued**

132. While there was general agreement in the Working Group that draft article 61 should be deleted from the draft convention, it was observed that, while subparagraphs (a), (b) and (c) were applicable law provisions that were problematic, subparagraph (d) was a substantive legal provision. The question was raised whether subparagraph (d) could be retained in the draft convention, since it dealt with substantive aspects of the transfer of rights and liabilities. In response, it was indicated that, while subparagraph (d) did not concern private international law, it was nonetheless quite contentious, particularly subparagraph (iii) thereof concerning the transferor and the transferee’s joint and several liability for liabilities attached to the right transferred. Consequently, it was thought that subparagraph (d) should also be deleted from the draft convention, and possibly considered for future work.

**Chapter 13 – Limits of liability****Draft article 62. Limits of liability**

133. The Working Group proceeded to consider the text of draft article 62 as contained in document A/CN.9/WG.III/WP.81.

*General comments*

134. The Working Group was reminded that it had thus far had general exchanges of view on the limits of liability. The exploratory nature of those earlier discussions was reflected by the fact that paragraph 1 of the draft article did not yet indicate a proposed figure for the carrier’s limits of liability.

135. By way of general comment, the Working Group was reminded of its earlier understanding at which it had arrived at its eighteenth session (Vienna, 6-17 November 2006), that any decision on the limit of liability was to be treated as an element of the overall balance in the liability regime provided in the draft convention

(A/CN.9/616, para. 171). There was support for the suggestion that the consideration of the limit of the carrier's liability under draft article 62, paragraph 1, should not be dissociated from certain other provisions in the draft convention, including: the special amendment procedure for the level of the limitation on the carrier's liability (draft article 99); the number of countries required for the convention to enter into force (paragraph 1 of draft article 97); the provisions allowing for the application of other international treaties and of domestic law to govern the liability of the carrier in case of localized damage (draft articles 26 and the envisaged text of new draft article 26 bis (see A/CN.9/621, paras. 189 to 192)) and the special rule for non-localized loss or damage (paragraph 2 of draft article 62).

*Arguments in favour of liability limits closer to those in the Hamburg Rules*

136. There was wide and strong support for the view that the draft convention should increase the limits for the carrier's liability, as compared to the limits provided for under the Hague-Visby Rules, and that the new limits should not be lower than those set forth in the Hamburg Rules (i.e. 835 Special Drawing Rights ("SDR") per package or 2.5 SDR per kilogram of gross weight of the goods lost or damaged). There were also expressions of support for the view that, nearly thirty years after their adoption, the liability limits in the Hamburg Rules themselves no longer reflected the realities of commerce and international transport, so that the draft convention should envisage a substantial increase over and above the amounts set forth in the Hamburg Rules, ideally by raising the per package limitation to 1,200 SDR, or at least to the level provided for in the 1980 United Nations Convention on International Multimodal Transport of Goods (i.e. 920 units of account per package of other shipping unit or 2.75 units of account per kilogram of gross weight of the goods lost or damaged).

137. As a further argument in favour of an increase in the liability limits, it was pointed out that the limits of liability in the context of a multimodal transport were considerably higher than the maritime limits established in the Hague and Hague Visby Rules. It was explained that carriers engaging in multimodal transport were usually exposed to different limits of liability (ranging from 8.33 SDR per kilogram for road transport to even 17 SDR per kilogram for air transport). As the draft convention had door-to-door coverage, the liability limits established in draft article 62, paragraph 1, should not be significantly lower than the liability limits applicable to other modes of transport. Failure to set the limits for the carrier's liability at an acceptable level, as compared to other modes of transportation, might prevent some countries from joining the draft convention, unless they were given the possibility to apply higher limits for domestic or non-localized incidents of loss or damage, a result which was recognized as being contrary to the objective of achieving a high degree of uniformity.

138. It was noted that broad containerization had meant that cheaper goods could be transported in containers more economically than in the past. Thus, the claim that the limits of liability provided for under the Hague-Visby Rules would suffice to cover most cargo claims, the average value of which would be lower than the Hague-Visby limits, could be misleading in attempting to decide upon an equitable limit for the liability of the carrier. Instead, it was pointed out that the value of high-value cargo had increased over time, and that inflation had also clearly affected the value of goods and depreciated the limitation amounts since the adoption of existing maritime transport conventions, which had been negotiated decades ago. The possibility to increase the carrier's liability by declaring the actual value of cargo was said not to constitute a viable option, since ad valorem freight rates were in some cases prohibitively expensive and in any event too high for most shippers in developing countries.

139. It was further observed that in today's world a significant volume of high-value goods was carried by sea, which for many countries was the only feasible route for foreign trade. A large portion of those goods (such as paper rolls, automobiles, heavy machinery and components of industrial plants) was not packed for transportation purposes, so that the liability limits for gross weight of carried goods under the Hague-Visby Rules were far from ensuring adequate compensation. Anecdotal evidence obtained from cargo insurers suggested that they would in most cases absorb the cost of insurance claims without seeking recourse from the carrier's insurers because the amounts recoverable would be insignificant when compared to the payments made to the cargo owners. Besides an increase in the per package limitation, the Working Group was invited to consider a substantial increase in the limits per gross weight of cargo, so as to align them to the higher limits currently applicable to road transport under the Convention on the Contract for the International Carriage of Goods by Road, 1956 ("CMR") (i.e. 8.33 SDR per kilogram of gross weight).

140. It was also argued that an increase of liability limits would not likely have a dramatic effect on carriers' liability insurance given the small relative weight of insurance in freight costs. It was pointed out that studies that had been conducted at the time the Hamburg Rules entered into force had suggested that the increase in the liability limits introduced with the Hamburg Rules would influence liner freight rates only by 0.5 per cent of the total freight rate, at the most. In some countries, the liability limits for domestic carriage by sea had in the meantime been raised to 17 SDR per kilogram of gross weight, without any adverse effect being felt by the transport industry.

141. It was also said that an increase in the carrier's liability would shift to their insurers part of the risks for which cargo owners currently purchased cargo insurance. It was argued that this by itself might prevent an increase in transportation costs to be eventually borne by consumers, since mutual associations offering protection and indemnity insurance ("P&I clubs") were known for working efficiently and might offer extended coverage to their associates at lower rates than commercial insurance companies offered to cargo owners.

142. The Working Group was further reminded that the principle of monetary limitation of carrier's liability had been introduced in the early 20th century as a compromise to ban the practice of carriers unilaterally excluding their liability for cargo loss or damage, at a time when such liability was not subject to a monetary ceiling under most domestic laws. Apart from the transport industry, very few other economic activities enjoyed the benefit of statutory limits of liability. Besides, sea carriers already enjoyed a double limitation of liability. Indeed, the value of the goods already set the limit for the overall liability of the carrier, including for consequential loss or damage caused by loss of or damage to the goods. For higher-value goods, the carrier's liability was further limited by the monetary ceiling set forth in the applicable laws or international conventions. The combination of those rules already placed carriers in a privileged position, as compared to other business enterprises, and that circumstance should be taken into account when considering adequate monetary liability limits, which should not be allowed to stagnate at a level detrimental to cargo owners.

143. In addition to the historical and commercial issues discussed by the Working Group in its consideration of the factors involved in choosing an appropriate level for the limitation of the carrier's liability, the Working Group was encouraged to take into account certain additional factors. In particular, it was said that regard should be had to the need to ensure broad acceptability of the draft convention, such as through careful consideration of the level of the limitation on the carrier's liability in relation to earlier maritime transport conventions. There was support for the view that it was preferable to



strike a middle ground in choosing an appropriate limitation level, which might require an increase from levels in historical maritime conventions. Thus far, 33 countries had ratified the Hamburg Rules and a number of other countries had aligned the limits of liability provided in their domestic laws with the limits provided for in the Hamburg Rules. It was said that it would be extremely difficult to persuade domestic legislators and policy makers in those countries to accept, in an instrument to be finalized in the year 2008, liability limits that were lower than those introduced by the Hamburg Rules in 1978. Concern was expressed that anything other than a substantial increase in the level of the limitation from previous maritime conventions might be perceived as a move backwards rather than forwards.

*Arguments in favour of liability limits closer to those in the Hague-Visby*

144. In response to calls for a substantive increase in the liability limits, there was also strong support for the view that the draft convention should aim at setting the limits for the carrier's liability in the vicinity of the limits set forth in the Hague-Visby Rules (i.e. 666.67 SDR per package or 2 SDR per kilogram of gross weight of the goods lost or damaged, whichever is the higher), possibly with a moderate increase.

145. The Working Group was reminded of the general principle for which a limitation on the carrier's liability was included in the draft convention and in other transport conventions. It was said the primary purpose of such provisions on limitation of liability was to regulate the relationship between two commercial parties in order to entitle each of them to obtain a benefit. It was recalled that, without the benefit of a limitation on liability, the carrier would be fully liable for all loss or damage, and that where such goods were in containers, the carrier would have no knowledge regarding their contents, thus potentially exposing the carrier to very high and unexpected risks. Rather than pay expensive insurance costs, and in order to share the burden of that potentially very high risk, the carrier would have to apportion it to every shipper through an increase in freight rates. By allowing for a limitation of the carrier's liability, this allocation of risk allowed the costs of both shippers and carriers to be reduced, with the trade-off that full compensation for high-level losses would not be possible. It was further observed that the aim of an appropriate limitation on liability would reduce the level of recovery for some claims to the limitation amount, but that it would not so limit too many claims. It was also noted that the optimal limitation level would be high enough to provide carriers with an incentive to take proper care of the goods, but low enough to cut off excessive claims, yet to provide for a proper allocation of risk between the commercial parties.

146. The view was expressed that the limits of liability provided in the Hague or Hague-Visby Rules have proven to be satisfactory. It was observed that the limitation on the carrier's liability that appeared in paragraph 1 allowed for a limitation level on a per package or a per kilogram basis, whichever was higher. It was recalled that the Hague Rules contained only a per package limitation, while the Hague-Visby and Hamburg Rules contained both per package and per kilo limitation provisions, but that each of those conventions predated the advent of modern container transport. The importance of this was said to be that prior to widespread containerization, most goods were shipped in a crate or a large wooden box that counted as one package, while with the widespread use of containers, the per package limitation level was instead based on the number of packages inside the container. This development in practice increased the amounts recoverable from the carrier, as compared with the per kilogram limitation level or pre-container per package limitation would have allowed. It was further observed that, through the method in which the goods were packed for

shipment, the shipper could essentially unilaterally choose whether any claim for loss or damage would be on the basis of a per package or a per kilogram calculation.

147. The essential purpose of limitation of liability, it was stated, was to ensure predictability and certainty. It was observed that even under the liability limits set out in the Hague-Visby Rules, about 90 per cent of cargo loss was fully compensated on the basis of either the limitation per package or the limitation per kilogram, since the value of most cargo carried by sea was lower than the Hague-Visby limits. By way of explanation, it was stated that packages in the practice of modern containerized transport had generally become smaller and that it was generally recognized that, in containerized transport, the notion of “package” applied to the individual packages inside the container and not to the container itself. From a similar perspective, it was stated that, since the adoption of the Visby protocol, the freight rates in maritime trade had decreased and that such decrease had made shipments of very low value cargo feasible.

148. It was also observed that it would be incorrect to expect that the liability limits should ensure that any conceivable shipment would result in the value of the goods being compensated in case of damage or loss. It was recalled that paragraph 1 provided for an exception when the “nature and value” of the goods lost or damaged had been declared by the shipper before shipment and included in the contract particulars, or when a higher amount had been agreed upon by the parties to the contract of carriage. Shippers who delivered high value cargo for shipment were expected to be aware of the applicable liability limits and had the option to declare the actual value of the goods against payment of a commensurate higher freight, or to purchase additional insurance to supplement the amounts not covered by the carrier.

149. In addition, it was reiterated that the liability limits in the Hague-Visby Rules were often much higher in practice than might appear at first sight, and that given the volume of container traffic and the “per package” liability limit set out therein, they were often much higher than those in the unimodal transport regimes, where the liability limits for recovery were based only on weight. By way of example, it was said that given the typically higher value of cargo carried by air, the liability limits set forth in the Convention for the Unification of Certain Rules for the International Carriage by Air, Montreal 1999 (Montreal Convention) (i.e. 17 SDR per kilogram of gross weight) only covered some 60 per cent of the claims for loss or damage to air cargo. The portion of cargo claims covered by the liability limits set forth in the CMR (i.e. 8.33 SDR per kilogram of gross weight) was said to be probably even less than 60 per cent.

150. In further support of the view that the limits of liability provided in the Hague or Hague-Visby Rules were satisfactory, it was said that the limitation levels of other transport conventions, such as the CMR or the Uniform Rules concerning the Contract for International Carriage of Goods by Rail, Appendix to the Convention concerning International Carriage by Rail, as amended by the Protocol of Modification of 1999 (“CIM-COTIF”) conventions, were not directly comparable to those in the maritime transport conventions, since several of the unimodal transport conventions included only per kilogram limitation levels. Thus, it was said, while the per kilogram limitation level was much higher than the Hague-Visby level, in fact, the level of recovery was much greater under those conventions that allowed for a per package calculation of the limitation level. It was also said that certain other conventions, such as the Montreal Convention, set a high limitation level in comparison with other transport conventions, but that they also contained provisions rendering their limitation on liability incapable of being exceeded, even in the case of intentional acts or theft, and that the freight payable for the mode of transport covered by those other transport conventions was much higher than under the maritime transport conventions. Further, it

was observed that it could be misleading to compare the regimes from unimodal transport conventions, since each convention contained provisions that were particularly geared to the conditions of that type of transport. In this regard, it was noted that it would be helpful to obtain actual figures with respect to recovery in cases of loss or damage to the goods, and to what extent the per package and per kilogram limits had been involved in those recoveries, but that such information had been sought from various sources and was difficult to obtain.

151. In further support of the adequacy of the liability limits of the Hague-Visby Rules, it was suggested that, in the bulk trade, the average value of cargo had not increased dramatically since the time of earlier maritime conventions, and that, in the liner trade, the average value of the cargo inside containers had not increased dramatically either. A note of caution was voiced that setting the limitation level for the carrier's liability at the level set forth in the Hamburg Rules, which currently governed only a relatively small fraction of the world's shipping, would represent a significant increase for the largest share of the cargo in world trade, which was currently governed by the lower limits of the Hague-Visby Rules, or even lower limits, as was the case in some of the world's largest economies. The need to absorb and spread the higher costs generated by an increase in the liability limits would be that lower-value cargo would be expected to pay a higher freight, even though it would not benefit from the increased liability limits, which would mean that shippers of lower-value cargo, such as commodities, would effectively subsidize the shippers of highest value cargo.

*Scope of paragraph 1*

152. Concern was expressed with respect to the application of the limit on liability in paragraph 1 to "the carrier's liability for breaches of its obligations under this Convention." It was observed that this phrase had replaced the phrase "the carrier's liability for loss of or damage to or in connection with the goods" throughout the text of the draft convention when it had been consolidated as A/CN.9/WG.III/WP.56. The phrase "loss of or damage to or in connection with the goods", which had been used in the Hague-Visby Rules, had been considered vague, and as giving rise to uncertainty, and it was thought that the use of the phrase "breaches of its obligations under this Convention" was a drafting improvement that lent the draft convention greater clarity.

153. However, it was pointed out that while there may have been no intention in replacing the phrase to change the scope of the provision, it appeared that the limit on liability in paragraph 1 of the draft convention was broader than that of the Hague-Visby Rules, in that it applied to all breaches of the carrier's obligations under the draft convention rather than simply relating to the loss or damage to or in connection with the goods. The Working Group was cautioned against over estimating the difference in scope suggested by the two terms, and it was noted that the main additional obligation that was covered by both phrases was liability for misdelivery, which was also included in the Hague-Visby Rules, although not expressly. In addition, it was noted that the main additional obligation now included in the draft convention that had not been included in the Hague-Visby Rules was the liability of the carrier for misinformation. In regard to the different phrases, the question was raised whether the Working Group intended to limit the carrier's liability with respect to all of the apparently broader category, or whether the limit on liability in paragraph 1 was intended to be confined to loss or damage related to the goods. The Secretariat was requested to review the drafting history of paragraph 1 with a view to making appropriate proposals to reflect the policy choice made by the Working Group.

*Further consideration of draft article 62*

154. The Working Group noted that, among the views expressed during the debate, there was a preponderance of opinion for using the liability limits set forth in the Hamburg Rules, with a more or less substantial increase, as a parameter for finding adequate liability limits for the draft convention. However, the Working Group also noted that there was a strongly supported preference for liability limits in the vicinity of the liability limits provided for in the Hague-Visby Rules. The Working Group therefore agreed that no decision on the limits of liability could be made at the present stage.

155. The Working Group further noted the interconnection between its consideration of the limit of liability and other aspects of the draft convention, including the special amendment procedure for the level of the limitation on the carrier's liability (draft article 99); the number of countries required for the convention to enter into force (paragraph 1 of draft article 97); the provisions allowing for the application of other international treaties and of domestic law to govern the liability of the carrier in case of localized damages (draft articles 26 and the envisaged text of new draft article 26 bis (see A/CN.9/621, paras. 189 to 192)) and the special rule for non-localized loss or damage (paragraph 2 of draft article 62).

156. The Working Group therefore agreed to revert to the issue of limits of liability after it had had an opportunity to examine chapter 20 (Final clauses).

**Further consideration of the limits of liability**

157. Following its earlier exploration of views, the Working Group proceeded to consider further paragraph 1 of draft article 62 on limits of liability, as well as related provisions, with a view to making progress in terms of arriving at figures that could be provisionally inserted into that article for the carrier's limitation of liability.

*Associated issues*

158. In keeping with its earlier discussion, the Working Group was reminded that there was support for the view expressed at that time that a discussion of the proposed limits of liability for insertion into paragraph 1 of article 62 should not be dissociated from a group of provisions, including: paragraph 2 of draft article 62, as well as to the envisaged text of new draft article 26 bis (see A/CN.9/621, paras. 189 to 192), and draft articles 97 and 99 (see paragraph 135 above). The view was also expressed that other issues with respect to the overall balance of liabilities in the draft convention could be said to be associated with a discussion of the level of the carrier's limitation on liability, such as the period of responsibility of the carrier (draft article 11); the basis of liability of the draft convention (draft article 17); delay in delivery of the goods (draft article 21); the period for notice of loss, damage, or delay (draft article 23); the limitation of the carrier's liability for delay in delivery (draft article 63); and the special rules for volume contracts (draft article 89).

*Domestic considerations*

159. The Working Group was reminded that a number of States could face strong domestic opposition to changes in the existing limitation level for the carrier's liability in those States. For some, it was thought that although the limitation on liability in the Hague-Visby Rules was currently in force domestically, a small increase of that level would likely be acceptable, while with respect to others, there was some expectation that an increase of the limitation levels to those contained in the Hamburg Rules might

be acceptable, but that no amount higher than that would be accepted. In that respect, there was some concern expressed regarding the overall increase that a specific domestic regime might undergo with such an increase in the limitation amounts, and it was observed that a large amount of world trade was currently conducted using limitation levels on the lower end of the scale. On the other end of the spectrum, it was recalled that it could be problematic for many States to accept any limitation level lower than that set out in the Hamburg Rules, and that previous increases in the limitation amounts set out in other international conventions had not caused major problems for States implementing them. Further, it was noted that there was some expectation that the limitation levels agreed in the draft convention might be slightly higher than those in the Hamburg Rules, given the passage of time since the adoption of the Hamburg Rules.

160. However, the Working Group also recognized that the attainment of a level of harmony between States currently party to the Hague Rules or the Hague-Visby Rules and those that were Contracting States to the Hamburg Rules would be desirable, and would contribute greatly to the overall harmonization of the current regimes covering the international carriage of goods by sea. Concern was expressed that a failure to reach agreement in this regard could lead to renewed efforts toward the development of regional and domestic rules regarding the carriage of goods by sea, thus causing further fragmentation of the international scheme. There was support in the Working Group for the pursuit of productive discussions that would lead to a harmonized result.

#### *Specific figures*

161. In light of the considerations set out in paragraphs 157 to 160 above, and in light of the previous discussion in the Working Group on this subject during its current session (see, also, paragraphs 133 to 156 above), a number of specific proposals for the limitation of the carrier's liability were made. Those proposals, which received varying amounts of support, could be described as:

(a) A proposal to adopt slightly higher limitation amounts than those set out in the Hague-Visby Rules, i.e. slightly higher than 666.67 SDR per package and 2 SDR per kilogram of weight of the goods lost or damaged;

(b) A proposal to adopt the limitation amounts in the Hamburg Rules, i.e. 835 SDR per package and 2.5 SDR per kilogram;

(c) A proposal to adopt slightly higher limitation amounts than those in the Hamburg Rules, with no specific amount named;

(d) A proposal to adopt the 835 SDR per package limitation amount of the Hamburg Rules, but to slightly increase the per kilogram limitation;

(e) A proposal to adopt higher limitation amounts than those in the Hamburg Rules, i.e. 920 SDR per package and 8.33 SDR per kilogram; and

(f) A proposal to adopt still higher limitation amounts than those in the Hamburg Rules, i.e. 1,200 SDR per package and 8.33 per kilogram.

162. In addition to the proposal of specific figures for inclusion in paragraph 1 of draft article 62, there was support for treating the provisions listed in paragraph 135 in a manner such as to achieve an overall balance in the draft convention. In particular, if limitation levels on the higher end of the spectrum were chosen, there was support for the view that it would be appropriate to delete certain of those provisions, since the higher limitation amounts would provide sufficient protection for cargo interests.

*Compromise proposal*

163. In light of the thorough discussion of the issue that had taken place in the Working Group, and the possibility of an emerging consensus regarding the limitation of the carrier's liability in the draft convention, a compromise proposal was made. The elements of the proposal, which were to be treated as parts of an entire package, were as follows:

(a) The level of the carrier's limitation of liability to be inserted into paragraph 1 of draft article 62 should be the amounts set out in the Hamburg Rules, i.e. 835 SDR per package and 2.5 SDR per kilogram;

(b) The level of the carrier's limitation of liability for delay in delivery inserted into draft article 63 should be the same as that of the Hamburg Rules, i.e. 2.5 times the freight payable on the goods delayed;

(c) Paragraph 2 of article 62 with respect to non-localized damage to the goods was said to be in conflict with the limited network principle in draft article 26 and should be deleted;

(d) Draft article 99 should be deleted since the operation of the so-called "tacit amendment procedure" would require a State to denounce the Convention in cases where an amendment was agreed to which the State did not wish to be bound and since its operation could require as long as nine years to accomplish; and

(e) The Working Group should reverse its decision from its nineteenth session to include in the draft convention a provision on national law in proposed new draft article 26 bis (see A/CN.9/621, paras. 189 to 192).

164. There was a positive overall reception in the Working Group for the compromise package set out in the paragraph above, in recognition of the fact that a strong preference had been expressed in the Working Group for using the limits in the Hamburg Rules as a maximum or a minimum basis for further negotiations. A few concerns were raised with respect to some of its constituent elements as follows:

(a) Given the decision of the Working Group at its nineteenth session to subject the carrier's liability for delay in the delivery of goods to freedom of contract of the parties (see A/CN.9/621, paras. 177 to 184), it was thought that raising the limitation of the carrier's liability for delay to 2.5 times the freight from the current "one times the freight" currently in draft article 63 was not a meaningful bargaining chip in the overall compromise, since the carrier would have either excluded its liability for delay altogether, or would have, by implication, agreed to that amount in any event;

(b) A view was expressed that paragraph 2 of draft article 62 should be retained on the basis that, if the limitations on liability in the draft convention were high enough to allow for adequate compensation for damaged cargo, there would be no need to resort to the use of the higher liability limits set out in unimodal transport regimes pursuant to that provision. However, that same argument was also suggested as a reason for which to delete the provision, and it was observed that the prevailing preference during the nineteenth session of the Working Group had been in favour of its deletion (see A/CN.9/621, para. 200); and

(c) There was some support for the retention for the time being of the draft article 99 tacit amendment procedure, since it was thought to allow for a faster amendment process than a protocol to the convention. In this respect, a proposal was made that if draft article 99 were deleted, a so-called "sunset" clause should be included

in the text in its stead, so as to provide that the draft convention would no longer be in force after a certain time.

165. While not considered as part of the overall compromise package, the Working Group was reminded that, as observed earlier in the session (see paragraphs 152 and 153 above), it should take into consideration concerns regarding the possible change in the scope of paragraph 1 of draft article 62, brought about by the current phrase in the text “the carrier’s liability for breaches of its obligations under this Convention.”

*Provisional conclusions regarding the limitation on the carrier’s liability:*

166. It was provisionally decided that, pending further consideration of the compromise proposal on limitation of the carrier’s liability:

- The limitation amounts of the Hamburg Rules would be inserted into the relevant square brackets in paragraph 1 of draft article 62, i.e. 835 SDR per package and 2.5 SDR per kilogram;
- A figure of “2.5 times” would be inserted into the remaining square brackets of draft article 63, and “one times” would be deleted;
- Square brackets would be placed around draft article 99 and paragraph 2 of draft article 62 pending further consideration of their deletion as part of the compromise package, and a footnote describing that approach would be inserted into the text of the draft convention duly noting that draft article 99 could cause constitutional problems in some states regardless of whether the Hamburg Rules limits or the Hague-Visby Rules limits were adopted;
- A footnote would be inserted to draft article 26 indicating that the Working Group was considering reversing the decision that it had taken during its nineteenth session to include an article provision regarding national law tentatively to be called article 26 bis; and
- The Secretariat was requested to review the drafting history of paragraph 1 with a view to making appropriate proposals with respect to the phrase “the carrier’s liability for breaches of its obligations under this Convention.”

## **Chapter 14 – Time for suit**

167. The Working Group was reminded that all provisions in chapter 14 had been revised to reflect the deliberations by the Working Group at its eighteenth session (see A/CN.9/616, paras. 119-160).

### **Draft article 65. Limitation of actions**

168. The Working Group agreed that the text of draft article 65 as contained in A/CN.9/WG.III/WP.81 was acceptable.

### **Draft article 66. Extension of limitation period**

169. The view was expressed that the substance of draft article 66 was inconsistent with the principle of a limitation period, at least as that principle was understood in some legal systems. It was pointed out that some legal systems distinguished between ordinary limitation periods (“prescription” or “prescripción”) and peremptory limitation periods (“déchéance” or “caducidad”). Among other differences, the first type of limitation

period was generally capable of being suspended or interrupted for various causes, whereas the second type of limitation period ran continuously without suspension or interruption. It was observed that, in some language versions, the draft article used terms suggesting an ordinary limitation period (“prescription”, in the French version, and “prescripción” in the Spanish), but the provision itself stated that the period was not subject to suspension or interruption. That, it was said, might give rise to confusion and incorrect interpretation under domestic law. It was therefore proposed that the first sentence of the draft article should be amended by deleting the entire first clause and the word “but” at the beginning of the second clause.

170. In response, it was noted that the Working Group was aware of the lack of uniformity among legal systems as to the nature and effect of a limitation period, in particular of the different types of limitation period that had been mentioned. The Working Group was also mindful of the diversity of domestic laws on the question of suspension or interruption of limitation periods, but was generally of the view that the draft convention should offer a uniform rule on the matter, rather than leave it to domestic law. The general agreement within the Working Group was that the draft convention should expressly exclude any form of suspension or interruption of the limitation period, except where such suspension or interruption had been agreed by the parties under the draft article (see A/CN.9/616, para. 132). At the same time, the Working Group had agreed that the limitation period would be automatically extended, under the circumstances referred to in draft article 68, because the limitation period might otherwise expire before a claimant had identified the bareboat charterer that was the responsible “carrier” (see A/CN.9/616, para. 156).

171. The limitation period provided for in the draft convention was an autonomous rule that, according to draft article 2, should be understood in the light of the draft convention’s international character, and not in accordance to categories particular to any given legal system. Nonetheless, the Working Group agreed that, to avoid misunderstandings, the term “limitation period” should be replaced through the text of the draft convention with a reference to “the period provided in article 65”.

172. Apart from that amendment, the Working Group agreed that the text of draft article 66 as contained in A/CN.9/WG.III/WP.81 was acceptable.

#### **Draft article 67. Action for indemnity**

173. It was observed that the rule contained in subparagraph (b) of draft article 67 had caused some practical problems in jurisdictions that followed a similar system to that set out in the provision. It was noted that a person who was served with process might not necessarily be liable for the claim, but would nevertheless be forced to initiate an indemnity action within 90 days. It was therefore suggested to either delete the second possibility set out in subparagraph (b), retaining only the reference to the date of settlement of the claim, or to refer instead to the date of notification of the final judgement.

174. In response, it was recalled that the Working Group had already discarded a rule that referred to the date of the final judgement (see A/CN.9/616, para. 152). In any event, a reference to the final judgement would have been impractical, as judicial proceedings might take several years until reaching final judgement, and the person against whom an indemnity action might be brought had a legitimate interest in not being exposed to unexpected liabilities for an inordinate amount of time. It was recognized that at the time a party was served with process it might not be apparent whether the suit would succeed, and, as such, the amount of the judgement would remain



unclear. However, at least the party would know that a claim existed and would have a duty to act so that the party that might be ultimately liable under the indemnity claim would be put on notice at an early stage.

175. In that connection, there was no support in the Working Group for elaborating the rule in subparagraph (b) so as to provide that the period for the indemnity claim should run from the date of the final judgement, provided that the indemnity claimant had notified the other party, within three months from the time when the recovery claimant had become aware of the damage and the default of the indemnity debtor. It was felt that such elaboration would render the provision overly complicated and that it would be preferable to keep the provision in line with article 24, paragraph 5 of the Hamburg Rules, on which the draft article was based.

176. Having noted that the draft article should cover all indemnity actions under the draft convention, but not indemnity actions outside the draft convention, the Working Group agreed to request the Secretariat to review the need for, and appropriate placement of, the phrase “under this Convention”, in the chapeau of the draft article.

177. Subject to that request, the Working Group agreed that the text of draft article 67 as contained in A/CN.9/WG.III/WP.81 was acceptable.

#### **Draft article 68. Actions against the person identified as the carrier**

178. It was suggested that subparagraph (b) could be shortened by deleting the reference to the bareboat charterer, since the identification of the carrier was the way by which the bareboat charterer would rebut the presumption of being the carrier under that provision. The Working Group agreed to request the Secretariat to review the interplay between the two provisions and to suggest any amendments that might be appropriate for the Working Group’s consideration.

179. Apart from that observation, the Working Group agreed that the text of draft article 68 as contained in A/CN.9/WG.III/WP.81 was acceptable.

### **Chapter 15 – Jurisdiction**

180. The Working Group proceeded to consider draft chapter 15 on jurisdiction, which it had last considered during its eighteenth session (see A/CN.9/616, paras. 245 to 266).

#### **Draft article 69. Actions against the carrier**

181. The Working Group agreed that the text of draft article 69 as contained in A/CN.9/WG.III/WP.81 was acceptable as currently drafted.

#### **Draft article 70. Choice of court agreements**

182. There was not sufficient support for a proposal to add the word “exclusive” to the title of the draft article.

##### *Subparagraph 2 (c)*

183. It was suggested that the draft paragraph 2 (c) requirement of timely and adequate notification of a third party to a volume contract in order for a choice of court agreement to be binding on that party was insufficient, and it was proposed that the consent of such third parties should be required in order for an exclusive choice of court agreement in the volume contract to be binding on them. It was also noted that the special rules for

volume contracts set out in draft article 89 (1) and (5) provided that a third party could only be bound by the terms of the volume contract that derogated from the draft convention when that party gave its express consent to be so bound. A proposal was made to revise subparagraph 2 (c) of draft article 70 to provide greater protection to third parties to volume contracts by adding the following phrase to the end of the subparagraph before the word “and”: “and that person gives its express consent to be bound by the exclusive choice of court agreement”. That proposal received some support.

184. However, opposition was expressed to that proposal. It was said that the paragraph had already been debated at length and that subparagraph 2 (c) represented one part of the larger bundle of issues agreed by the Working Group with respect to volume contracts and to jurisdiction. It was observed that for third parties to be bound at all by a volume contract pursuant to draft article 89, they had to give their consent, thus providing for additional protection for such parties. Moreover, it was said that binding a third party to a provision in a contract to which it was not a party was not unique in international trade, for example, in the insurance industry. It was further suggested that it was essential to bind third parties, provided they were adequately protected, in order to provide commercial predictability in knowing where litigation would take place.

*Subparagraph 2 (d)*

185. The Working Group proceeded to consider paragraph 2 of draft article 70, which set out the requirements pursuant to which a third party to a volume contract could be bound by an exclusive choice of court agreement in the volume contract. The fourth requirement set out in subparagraph 2 (d) was that the law must recognize that such a person could be bound by the exclusive choice of court agreement. The Working Group had before it four bracketed options contained in subparagraph 2 (d) concerning how best to articulate which applicable law should be consulted in making that determination.

186. To address the concern expressed in footnote 209 of A/CN.9/WG.III/WP.81 that the “court seized” might not necessarily be a competent court, another possible option was added to the four set out in draft subparagraph 2 (d) along the following lines: “the law of the place of the court designated by article 69, paragraph (b)”. A preference was expressed by some for this additional option, as the reference therein was to a competent court and it was felt that the revised text would aid certainty and predictability.

187. Some support was expressed for the second option, including the words in square brackets as follows: “The law of the agreed place of delivery of the goods”. However, there were objections to that option on the grounds that cargo interests might not always wish to refer to the law of the place of delivery, for instance, in cases where they preferred to sue the carrier at another location, such as one where the carrier had assets. For the same reasons, there were also objections to the third option in subparagraph 2 (d).

188. Some support was also expressed for the fourth option which referred to “the applicable law pursuant to the rules of private international law of the law of the forum”, provided that the words following “applicable law” were omitted. It was proposed that the words following “applicable law” were unnecessary. Further, it was observed that the term “applicable law” was used elsewhere in the draft convention without those additional words, and it was suggested that for the sake of consistency in the draft convention, these words should be omitted from the fourth option.

189. Support was expressed in the Working Group for the first option, which referred to “the law of the court seized”.

190. An additional proposal was made to delete paragraph (d) altogether as complicated and unnecessary, since the court in issue would have regard to the applicable law in any event. Further, it was observed that such deletion would not give States the flexibility to have other requirements in order for exclusive choice of court agreements to bind third parties. The proposal for deletion was not supported.

191. The Working Group was reminded that the entire text of paragraphs 3 and 4 of article 70 had been placed in square brackets pending a decision to be made by the Working Group on whether the application of Chapter 15 to Contracting States should be made subject to a general reservation, or whether the chapter should apply on an “opt-in” or an “opt-out” basis as set out in the three variants in draft article 77. Discussion of paragraphs 3 and 4 was thus deferred until that decision had been made (see paragraph 205 below).

*Conclusions reached by the Working Group regarding draft article 70:*

192. The Working Group agreed that the text of draft article 70 should be retained as contained in A/CN.9/WG.III/WP.81 and:

- To retain the text of subparagraph 2 (c) as drafted;
- Notwithstanding that a number of delegations also supported the deletion of paragraph (d), decided to retain paragraph (d);
- To retain the first bracketed text in paragraph 2 (d) as the preferred option; and
- To defer any discussion of paragraphs 3 and 4 until draft article 77 had been discussed.

**Draft article 71. Actions against the maritime performing party**

193. The Working Group agreed that the text of draft article 71 as contained in A/CN.9/WG.III/WP.81 was acceptable, subject to the deletion of the terms “initially” and “finally” in paragraph (b) to reflect similar drafting changes made in respect of draft article 19 (1).

**Draft article 72. No additional bases of jurisdiction**

194. The Working Group agreed that the text of draft article 72 as contained in A/CN.9/WG.III/WP.81 was acceptable although the fate of the bracketed text at the end of the draft article could only be determined following discussions on draft article 77 (see paragraph 205 below).

**Draft article 73. Arrest and provisional or protective measures**

195. The Working Group agreed that the text of draft article 73 as contained in A/CN.9/WG.III/WP.81 was acceptable.

**Draft article 74. Consolidation and removal of actions**

196. The Working Group agreed that the text of draft article 74 as contained in A/CN.9/WG.III/WP.81 was acceptable, although the fate of the bracketed text in paragraphs 1 and 2 could only be determined following discussions on draft article 77 (see paragraph 205 below).

**Draft article 75. Agreement after dispute has arisen and jurisdiction when the defendant has entered an appearance**

197. Support was expressed for the text of draft article 75 as currently drafted. It was noted that the words in paragraph 2 of draft article 75, “in a Contracting State” should be deleted as being otiose given that the definition of “competent court” in draft article 1 (30) already included those words.

*Conclusions reached by the Working Group regarding draft article 75:*

198. The Working Group agreed that the text of draft article 75 as contained in A/CN.9/WG.III/WP.81 was acceptable subject to the deletion of the words “in a Contracting State”.

**Draft article 76. Recognition and enforcement**

199. Support was expressed for the text of draft article 76 as currently drafted. A concern was expressed that the requirement that a Contracting State “shall” recognize and enforce a decision made by a court having jurisdiction under the Convention could be too inflexible and should be changed to a less mandatory term such as “may”. In response, it was said that the provisions on recognition and enforcement were not harmonized in the draft convention, in particular with respect to the grounds for refusal of recognition and enforcement by a state under paragraph 2. It was observed that the intention of the draft article was mainly to provide a treaty obligation for those countries that required such an obligation, and on that basis, it was agreed that the word “shall” should be retained. However, it was recognized that the draft article also offered States the possibility to refuse to recognize and enforce judgements subject to their national laws.

200. It was suggested that the opening words in paragraph 2 (c) of draft article 76 which refer to “If a court of that Contracting State”, could be too narrow and might suggest that only two states were concerned in the application of that paragraph when in some situations it might be necessary to give recognition in respect of decisions of a court in a third Contracting State. For that reason, it was suggested that paragraph 2 (c) be redrafted along the following lines: “if a court of that or other Contracting State had exclusive jurisdiction”. It was also observed that the text of paragraph 2 (c) would depend upon the outcome of the discussion on draft article 77.

*Conclusions reached by the Working Group regarding draft article 76:*

201. The Working Group agreed that the text of draft article 76 as contained in A/CN.9/WG.III/WP.81 was acceptable subject to a revision of paragraph 2 (c) in accordance with the proposal made in paragraph 200 above, and with the Working Group’s decision regarding draft article 77.

**Draft article 77. Application of chapter 15**

202. It was explained that the Variants A, B and C, respectively, of draft article 77 corresponded to the options for the Working Group regarding the three alternatives to the application of chapter 15 to Contracting States that the Working Group had decided at its eighteenth session should be considered: a reservation approach, an “opt-in” approach and a “partial opt-in” approach (see A/CN.9/616, paras. 246 to 252).

203. There was very strong support in the Working Group for the “opt-in” approach of Variant B. Due to institutional reasons regarding competencies within a regional

economic grouping, it was explained that if Variant A, the reservation approach, were chosen, the grouping would have to ratify the draft convention on behalf of its member States. It was thought that that approach could be very lengthy and could be subject to potential blockages in approval. However, it was agreed that Variant B, or the “opt-in” approach, would allow the member States of that grouping to ratify the draft convention independently, thus allowing for greater speed and efficiency in the ratification process, and avoiding the possibility that the chapter on jurisdiction could become an obstacle to broad ratification. Further, upon additional reflection since its eighteenth session, the Working Group was of the view that, while offering some advantages in terms of increased harmonization, the “partial opt-in” approach of Variant C was considered too complex an approach to retain in the text.

204. Having decided upon the retention of Variant B of draft article 77 and the deletion of Variants A and C, the Working Group next considered the alternative text in square brackets in Variant B. It was suggested that Contracting States should be allowed to opt in to the chapter on jurisdiction at any time, thus it was proposed that the text contained in both sets of square brackets be retained and the brackets deleted, and that the word “or” be inserted between the two alternatives. There was widespread approval for that proposal.

*Conclusions reached by the Working Group regarding draft article 77:*

205. The Working Group agreed that:

- Variant B of the text of draft article 76 as contained in A/CN.9/WG.III/WP.81 should be retained, and Variants A and C deleted;
- That the two sets of alternative text in Variant B should be retained and an “or” inserted between them, and the brackets that surrounded the text should be deleted; and
- That due to the adoption of Variant B of draft article 77:
  - o Paragraphs 3 and 4 of draft article 70 should be deleted;
  - o Subparagraph 2 (c) of draft article 76 should be deleted;
  - o The phrase “or pursuant to rules applicable due to the operation of article 77, paragraph 2” should be deleted and the word “or” retained in draft articles 72 and 74 (1) and (2).

## **Chapter 16 – Arbitration**

206. The Working Group proceeded to consider draft chapter 16 on arbitration, which it had last considered during its eighteenth session (see A/CN.9/616, paras. 267 to 279).

### **Draft article 78. Arbitration agreements**

207. The view was expressed that draft article 78 (1) and (2), as currently drafted, could create uncertainty in the use of arbitration in the liner trade and could lead to forum shopping. It was suggested that it would be preferable to give full effect to an arbitration agreement, even though arbitrations were not common in the liner trade, and that the inclusion of subparagraph 2 (b) would create uncertainty and lead to forum shopping in that trade. There was some sympathy for that view expressed in the Working Group, but it was acknowledged that there had been thorough discussion of these aspects in past

sessions, and that the text of paragraphs 1 and 2 had been agreed upon by the Working Group as part of a compromise approach (see A/CN.9/616, paras. 267 to 273; see A/CN.9/591, paras. 85 to 103).

208. The Working Group was reminded of the goal to create in the arbitration chapter provisions that paralleled those of the jurisdiction chapter so as to avoid any circumvention of the jurisdiction provisions by way of the use of an arbitration clause, and thereby protect cargo interests. In regard to subparagraph 4 (b), currently in square brackets in the text, it was proposed that it should receive the same treatment as that granted the same text in draft article 70 (2) (b), that is, that the text should be retained and the square brackets around it deleted. There was agreement in the Working Group for that proposal.

209. It was suggested that subparagraph 4 (b) should only apply to negotiable transport documents and electronic transport records, since they were subject to reliance. It was proposed that drafting adjustments should be made so as to ensure that non-negotiable transport records and electronic transport documents were not included in subparagraph 4 (b). That suggestion was not taken up by the Working Group.

210. The view was expressed that the reference to “applicable law” in subparagraph 4 (d) was too vague and that, in the interest of ensuring uniform application of the draft convention, it would be better to specify which law was meant. One possibility, it was said, might be to reinsert the words “for the arbitration agreement” which had appeared in earlier versions of the text. In response it was explained that, after many consultations with experts in the fields of maritime law and commercial arbitration, the Secretariat had arrived at the conclusion that it would be preferable to include only a general reference to “applicable law” in subparagraph 4 (d), without further qualification. There was no uniformity in the way domestic laws answered the question as to which law should be looked at in order to establish the binding effect of arbitration clauses on parties other than the original parties to a contract. In some jurisdictions, that issue was regarded as a matter of procedural law, whereas in other jurisdictions that question was treated as a substantive contract law question. Different answers might therefore be given, depending on the forum before which the question might be adjudicated in the course, for instance, of an application to set aside an arbitral award or to recognize and enforce a foreign award. It was explained that, in light of those considerations, harmonization of the law in the draft convention on a point that had repercussions well beyond the confines of maritime law, would have been far too difficult, and that the decision was made to retain the more flexible concept of “applicable law”.

*Conclusions reached by the Working Group regarding draft article 78:*

211. The Working Group agreed that the text of draft article 78 as contained in A/CN.9/WG.III/WP.81 was acceptable, subject to the deletion of the square brackets surrounding subparagraph 4 (b) and the retention of the text therein.

**Draft article 79. Arbitration agreement in non-liner transportation**

212. A drafting suggestion was made that where reference in draft article 79 (1) was made to “article 7”, consideration should also be given to making reference to “article 6, paragraph 2”.

213. Some potential difficulties were noted in the text of subparagraphs 2 (a) and (b) as they currently appeared in A/CN.9/WG.III/WP.81. While there were difficulties understanding the whole of paragraph 2, subparagraph 2 (a) raised questions regarding how a claimant would know that the terms of the arbitration clause were the same as

those in the charterparty once arbitration had started. In addition, concerns were cited regarding subparagraph 2 (b) regarding the specificity of the prerequisites in order to bind a third party to the arbitration agreement, since those prerequisites might not meet with practical concerns and current practice. While it was suggested that the whole of paragraph 2 be placed in square brackets pending further consultations with experts, it was agreed that the provision should be identified for further consideration by some other means, such as perhaps by means of a footnote in the text.

*Conclusions reached by the Working Group regarding draft article 79:*

214. The Working Group agreed that:

- The text of draft article 79 (1) should be retained as contained in A/CN.9/WG.III/WP.81, with consideration of possible additional references to article 6 (2); and
- Further consultations should be had regarding the operation of draft article 79 (2).

**Draft article 80. Agreements for arbitration after the dispute has arisen**

215. The Working Group agreed that the text of draft article 80 as contained in A/CN.9/WG.III/WP.81 was acceptable.

**Draft article 81. Application of chapter 16**

216. The Working Group was reminded that it had decided previously to take an approach to the application of chapter 16 to Contracting States parallel to the approach that it had taken with respect to the application of chapter 15 (see A/CN.9/616, paras. 268 and 272 to 273). It was recalled that the purpose of adopting a parallel approach to that of the jurisdiction chapter was to ensure that, with respect to the liner trade, the right of the cargo claimant to choose the place of jurisdiction for a claim pursuant to jurisdiction provisions was not circumvented by way of enforcement of an arbitration clause. The Working Group agreed that Variant B of draft article 81 should be retained, and Variant A deleted, and that, in keeping with its earlier decision regarding draft article 77, both sets of alternative text in Variant B of draft article 81 should be retained and the word “or” inserted between the two phrases.

217. A further proposal was made that the ability to opt in to chapter 16 should be tied to opting in to the chapter on jurisdiction as well, but it was confirmed that, while perhaps desirable, that approach would not be possible due to the differing competencies for the two subject matters as between a major regional economic grouping and its Member States.

*Conclusions reached by the Working Group regarding draft article 81:*

218. The Working Group agreed that:

- Variant B of the text of draft article 81 as contained in A/CN.9/WG.III/WP.81 should be retained, and Variant A deleted; and
- The two sets of alternative text in Variant B should be retained and an “or” inserted between them, and the brackets that surrounded the text should be deleted.

## Chapter 17 – General average

### Draft article 82. Provisions on general average

219. A suggestion was made that draft article 16 (2) should be considered in conjunction with the Working Group's consideration of draft article 82. However, it was pointed out that the Working Group had decided at its nineteenth session to retain paragraph 2 of draft article 16 as a separate provision, possibly draft article 16 bis, and to delete the square brackets surrounding it (see A/CN.9/621, paras. 60 to 62). The Working Group confirmed its earlier decision in that regard.

220. The Working Group agreed that the text of draft article 82 as contained in A/CN.9/WG.III/WP.81 was acceptable and should be retained.

## Chapter 18 – Other conventions

### Draft article 83. Denunciation of other conventions

221. The Working Group proceeded to consider the text of draft article 83 as contained in document A/CN.9/WG.III/WP.81. The Working Group was reminded that the text of paragraph 1 had been corrected through the deletion of the phrase "or, alternatively, to the United Nations Convention on the Carriage of Goods by Sea concluded at Hamburg on 31 March 1978," (see A/CN.9/WG.III/WP.81/Corr.1, para. 3).

222. A concern was expressed with respect to a possible lack of harmonization that could be caused by the rule in draft article 83 requiring that a Contracting State denounce any previous convention concerning the international carriage of goods by sea when that State ratified the new convention. By way of explanation, there was no problem perceived if two potential Contracting States had each been party to a different convention for the international carriage of goods by sea, and only one of them ratified the new convention, as that would not alter the existing disharmony between them. However, in the case where two potential Contracting States had each been party to the same international regime for the carriage of goods by sea, and only one of them ratified the new convention, the concern was that a lack of harmonization would actually be created by that ratification and the requisite denunciation of the previous convention, and could lead to parties to a dispute racing to one jurisdiction or the other to obtain more favourable treatment under the applicable convention. There was some sympathy in the Working Group for that concern and some interest was expressed in considering a written proposal suggesting a solution to the problem described, but it was acknowledged that it was a very complex issue and should therefore be carefully considered. For example, the question was raised regarding what the recommended outcome would be if a third State through which trans-shipment was required were added to the hypothetical situation, and only two of the three States concerned were Contracting States of the draft convention.

223. In response, it was pointed out that it would be unusual for a convention to allow a State that had ratified one convention to continue to be a party to another convention on the same subject matter. Further, it was thought that the problem described was less a problem of a State denouncing the previous regime to which it had been a party, and more of an issue of reciprocity, and that if reciprocity regarding other potential Contracting States was a concern, it would be better considered pursuant to the provisions in the draft convention on the scope of application. For example, if reciprocity was sought, draft article 5 could be adjusted such that both the place of



receipt and the place of delivery had to be in Contracting States, and not merely one of those locations, and the solution should not be sought pursuant to draft article 83. There was some support for that view, and caution was expressed regarding any possible narrowing of the broad scope of application of the draft convention that had been previously agreed by the Working Group.

224. Further, it was pointed out that a solution along the lines of article 31 of the Hamburg Rules might be of assistance in regard to the concern expressed. It was suggested that an approach could be adopted similar to the approach in article 31 (1) whereby a Contracting State was allowed to defer denunciation of previous conventions to which it was a party until the Hamburg Rules entered into force. It was thought that any problem concerning which rules would apply in the case of a State that had ratified the draft convention and denounced previous conventions to which it had been a party could be regulated by way of an approach similar to that of paragraphs 1 and 4 of article 31 of the Hamburg Rules. Another possible solution for the concerns raised regarding potential disharmony created by the ratification of the draft convention by a Contracting State and its denunciation of previous conventions was that a high number of States could be required pursuant to draft article 97 for entry into force of the draft convention.

225. By way of further consideration of the issue, the concern was expressed that a legal vacuum could be created when a State ratified the draft convention and denounced any previous convention to which it was a party in accordance with draft article 83, but when the draft convention had not yet entered into force. It was noted that paragraph 3 did not seem to provide a clear rule in that regard. However, it was observed that this was a policy matter, on which the Working Group had to make a decision. While the draft convention took the approach to the issue that it should be open to States to decide on how best to achieve a smooth transition in terms of the conventions to which it was party, the Hamburg Rules set out another approach by providing express rules for States in that regard.

226. A view was expressed that the text as drafted solved the problem of any perceived legal vacuum in the same manner as previous practice with respect to a number of other conventions: it left the decision open to a State to decide how best to avoid a legal vacuum in its transition from one international legal regime to another, but that the rule requiring denunciation of previous conventions on ratification of a new convention was rightfully preserved in the text. However, there was support in the Working Group for the view that the more explicit procedure laid down in article 31 of the Hamburg Rules should be considered, and that it should be incorporated into the text of this draft convention, since it would provide a clear rule with which States already had some experience. One issue in paragraph 4 of article 31 of the Hamburg Rules which was not considered entirely satisfactory was that it allowed Contracting States to defer the denunciation of previous conventions for up to five years from the entry into force of the new convention. It was suggested that allowing the deferral of a denunciation of a previous convention for such a length of time should not be allowed under the draft convention.

*Conclusions reached by the Working Group regarding draft article 83:*

227. The Working Group agreed that:

- The Secretariat should review the text of draft article 83, with a view to taking a similar approach to that in paragraph 1 of article 31 of the Hamburg Rules.

**Draft article 84. International conventions governing the carriage of goods by air**

228. A concern was raised that conflicts might arise between the draft convention and other unimodal transport conventions not addressed in draft article 84, because that provision only ensured that the draft convention would not conflict with international conventions governing the carriage of goods by air. It was suggested that, to the extent that conventions such as the CMR or CIM-COTIF also contained a certain multimodal dimension, those conventions should also be included in draft article 84 in order to avoid any conflicts. A suggestion was made that, to remedy that perceived problem, draft article 84 could be redrafted along the following lines:

“Nothing in this Convention prevents a contracting State from applying the provisions of any other international convention regarding the carriage of goods to the contract of carriage to the extent that such international convention according to its provision applies to the carriage of goods by different modes of transport.”

229. Whereas some support was expressed for that proposal, there was also firm opposition to it. Moreover, the Working Group was reminded that at its eighteenth and nineteenth sessions (see A/CN.9/616, paras. 225 and 234-235, and A/CN.9/621, paras. 204 to 206), it had decided to include a provision such as draft article 84 only with respect to international conventions regarding the carriage of goods by air, and that it had approved draft article 84 as it appeared in the text. It was noted that the Working Group had considered the concerns noted above in paragraph 228 at its previous sessions, and that it had decided to include a text like that found in draft article 84 only with respect to international conventions regarding the carriage of goods by air. It was recalled that the reason for limiting the provision to those conventions was due to the fact that they were unique in their expansive inclusion of multimodal transport in their scope of application to such an extent that a conflict between those conventions and the draft convention was inevitable. It was also noted that draft article 84 could be expected to have only a minor application, as multimodal transport contracts seldom combined transport by sea with transport by air. Support was expressed for that previous decision in the Working Group.

230. Notwithstanding the broad support to retain draft article 84 as drafted, it was noted that a very specific area of possible conflict could also arise with respect to the CMR and CIM-COTIF. In particular, concern was raised regarding ferry traffic, and the specific situation in which goods being transported by road or rail would remain loaded on the vehicle or railroad cars during the ferry voyage. It was said that provision should be made in the draft convention in order to ensure that it did not conflict with the CMR and CIM-COTIF in those very specific situations so as to ease the concerns of States Parties to those instruments regarding possible conflicts, but that there should not be a broader exception for unimodal transport as such. While some doubt was expressed regarding whether there was a conflict with respect to such ferry transport, the Working Group expressed some willingness to consider resolutions that were set out in written proposals regarding those perceived conflicts with unimodal transport conventions. It was also pointed out that some concerns with respect to the treatment of ferry transport under the draft convention had also been mentioned in previous sessions (see A/CN.9/526, paras. 222 to 224, and A/CN.9/621, paras. 137 to 138, and 144 to 145), but that no specific solution had been proposed at that time. It was further suggested that, if such a proposal were taken up by the Working Group, it might be better to treat it in the context of draft article 26, or by way of the scope of application provisions in chapter 2, rather than in draft article 84.

*Conclusions reached by the Working Group regarding draft article 84:*

231. The Working Group agreed that:

- The text of draft article 84 as contained in A/CN.9/WG.III/WP.81 should be maintained; and
- The Working Group would consider written proposals intended to avoid specific conflicts with unimodal transport conventions, and that did not markedly change draft article 84.

**Further consideration of draft article 84 conflict of convention issues**

232. With reference to the Working Group's willingness to consider proposals for a text to resolve possible issues regarding a conflict between the draft convention and existing unimodal conventions that were raised earlier in the session (see paragraphs 228 to 231 above), two written proposals were submitted to the Working Group as follows:

**“Article 5, para. 1 bis**

“Notwithstanding article 5, para. 1, if the goods are carried by rail or road under an international convention and where the goods for a part of the voyage are carried by sea, this Convention does not apply, provided that during the sea carriage the goods remain loaded on the railroad car or vehicle.”

**“International conventions governing the carriage of goods**

“Nothing in this Convention prevents a Contracting State from applying the provisions of any of the following conventions in force at the time this Convention enters into force:

“(a) Any convention regarding the carriage of goods by air to the extent such convention according to its provisions applies to the carriage of goods by different modes of transport;

“(b) Any convention regarding the carriage of goods by land to the extent such convention according to its provisions applies to the carriage of land transport vehicles by a ship; or

“(c) Any convention regarding the carriage of goods by inland waterways to the extent such international convention according to its provisions applies to a carriage without trans-shipment both on inland waterways and on sea.”

233. By way of explanation, it was noted that the first proposal had taken the approach of slightly narrowing the scope of application of the draft convention through adding a paragraph 1 bis, and that it had focused on the CMR and CIM-COTIF issue of ferry transport of railroad cars and vehicles on which the goods remained loaded through the transport. In contrast, the second proposal had focused on a conflict of conventions approach that enlarged upon the existing provision with respect to air transport in draft article 84, and that also referred to possible sources of conflict with the CMR and CIM-COTIF, and with the Convention on the Contract for the Carriage of Goods by Inland Waterway (“CMNI”). It was explained that, in both cases, the proposals were intended to eliminate only a very narrow and unavoidable conflict of convention between the relevant unimodal transport conventions and the draft convention.

234. The Working Group expressed its support for finding a resolution to the very narrow issue of possible conflict of laws outlined in the proposals presented. A slight

preference was expressed for the approach to the problem taken by the second proposal in paragraph 232 above, although paragraph (a) was thought to require some adjustment, and paragraph (b) was thought to be drafted slightly too widely. The Working Group requested the Secretariat to consider the two approaches, and to prepare draft text along the lines of the proposals aimed at meeting the concerns expressed. By way of further clarification, in response to a question, it was noted that the first proposal in paragraph 232 above contemplated that the draft convention would govern the relationship between the road carrier and the ferry operator.

235. A view was expressed that a third alternative could be pursued to avoid even narrow conflicts of convention, such as that taken in the United Nations Convention on Contracts for the International Sale of Goods (“Vienna Sales Convention”), in which article 3 (2) excludes contracts in which the “preponderant part” consists of the supply of labour or other services. It was suggested that a similar methodology could be used in the draft convention to exclude transport for which the preponderant part was non-maritime. That suggestion was not taken up by the Working Group.

*Conclusions reached by the Working Group regarding proposals on draft article 84 conflict of convention issues:*

236. The Working Group agreed that a resolution to the very narrow issue of possible conflict of laws outlined in the proposals in paragraph 232 above should be sought, and requested the Secretariat to prepare a draft based on the proposals as set out.

#### **Draft article 85. Global limitation of liability**

237. It was observed that draft article 85 might be too narrowly drafted and needed clarification. In particular, it was proposed that the phrase “or inland navigation vessels” should be inserted after “applicable to the limitation of liability of owners of seagoing ships” and that the last part “or the limitation of liability for maritime claims” should be deleted. The first part of the proposal found broad support, however, it was noted that appropriate wording should be found to cover all vessels, whether seagoing or inland. With regard to the second part of the proposal, the question was raised whether the deletion of the final phrase was necessary, and it was suggested that the final phrase should be retained. The Working Group was reminded that the phrase “for maritime claims” had been added in order to reflect the terminology of the Convention on Limitation and Liability for Maritime Claims, 1976 and its 1996 Protocol. It was suggested that it should not be deleted hastily.

*Conclusions reached by the Working Group regarding draft article 85:*

238. The Working Group agreed that:

- Appropriate wording should be found to cover all vessels in the provision; and
- The Secretariat should review the matter and, if necessary, suggest amendment to the text to reflect the subject matter of the conventions in question, including whether it was necessary to retain the final phrase “or the limitation of liability for maritime claims” in the text.

**Draft article 86. Other provisions on carriage of passengers and luggage***General comments*

239. The Working Group proceeded to consider the text of draft article 86 as contained in document A/CN.9/WG.III/WP.81. The Working Group was reminded of its understanding that the draft convention should not apply to luggage of passengers. It was suggested, however, that draft article 86 was formulated too narrowly. In its present form, the draft article could imply that a carrier could become liable under this draft convention, as long as it was not at the same time liable under any convention or national law applicable to the carriage of passengers and their luggage. In order to reflect that concern, it was suggested that the phrase “for which the carrier is liable” should be replaced with the word “covered”.

240. Another proposal was to explicitly exclude passengers’ luggage from the definition of “goods” in paragraph 25 of draft article 1, so as to clarify the draft convention’s scope of application. However, it was pointed out that excluding passengers’ luggage from the definitions in the draft convention would mean a complete exclusion of passengers’ luggage from the draft convention. That result would be substantially different from excluding only the carrier’s liability in respect of passengers’ luggage otherwise covered by domestic law or another international convention. Under the latter approach, there could be instances where the draft convention would still apply to passengers’ luggage.

241. There was strong agreement in the Working Group to indicate in the draft convention that it did not apply to the passengers’ luggage. Such an exclusion should not only apply to the liability of the carrier, since the treatment of transport documents and right of control clearly indicated that the draft convention focused on commercial shipments of goods and not on passengers’ luggage. Whether the best way to effect such an exclusion should be by means of amendments of the definition of goods under draft article 1, paragraph 25, or by means of an expansion of draft article 86 was a matter that the Working Group could consider at a later stage on the basis of recommendations to be made by the Secretariat after review of the implications of the available options.

242. It was further noted that the title of draft article 86 would also need to be amended to fully reflect the understanding of the Working Group with respect to the provision, since the current wording could imply that the draft convention applied to personal loss or injury of passengers.

*Conclusions reached by the Working Group regarding draft article 86:*

243. The Working Group agreed that the Secretariat should review the possible ways of resolving the matter of passengers’ luggage and suggest amendments to the text of draft article 86 either by excluding them from the definition or making amendments to the text of draft article 86 as well as the title of the article.

**Draft article 87. Other provisions on damage caused by nuclear incident**

244. The Working Group proceeded to consider the text of draft article 87 as contained in document A/CN.9/WG.III/WP.81. It was observed that draft article 87 raised the same concerns as draft article 86 because the chapeau contained a similar phrase, “if the operator of a nuclear installation is liable”. There was broad support to address this concern with the same approach to be taken as with respect to draft article 86. It was noted that the draft convention should make it clear that liability for damage caused by a nuclear incident is outside its scope of application.

*Conclusions reached by the Working Group regarding draft article 87:*

245. The Working Group agreed that the Secretariat should make the necessary amendments to the text of draft article 87 following the same approach taken in draft article 86.

## **Chapter 20 – Final clauses**

### **Draft article 91. Depositary**

246. The Working Group agreed that the text of draft article 91 as contained in A/CN.9/WG.III/WP.81 was acceptable and should be retained.

### **Draft article 92. Signature, ratification, acceptance, approval or accession**

247. The Working Group proceeded to consider the text of draft article 92 as contained in document A/CN.9/WG.III/WP.81.

248. The Working Group was informed that after it completed its review of the draft convention at its twenty-first session, scheduled to take place in Vienna from 14 to 25 January 2008, the Working Group would be expected to formally approve the draft, which would be circulated to Governments for written comments within the first quarter of 2008, and submitted for consideration by the Commission at its 41st annual session (New York, 16 June to 11 July 2008). It was pointed out that no recommendation would be made for convening a special diplomatic conference for the final act of adoption of the convention. Instead, it was envisaged that the draft approved by UNCITRAL would be submitted to the General Assembly, which would be requested to adopt the final text of the convention at its 63rd annual session, acting as a conference of plenipotentiaries, likely during the last quarter of 2008. Thereafter, some time should be allowed for the depositary to establish the original text of the convention, which would not likely be capable of being opened for signature before the first quarter of 2009.

249. There was general agreement that it was premature to insert specific dates in the square brackets at the present stage of the negotiations. In response to a question, it was pointed out that paragraph 1 of draft article 92 currently made possible either to have the convention opened for signature during a certain period at the United Nations Headquarters in New York only, or to open the convention for signature at a given date at a different location prior to the ordinary signature period at the United Nations Headquarters. The latter alternative had been left open, for the time being, in the event that a State might wish to host a diplomatic conference or a signing event.

250. In response to another question, it was pointed out that a signing ceremony would not have the character of a diplomatic conference, since the convention at that time would already have been formally adopted by the General Assembly. Nevertheless, anyone signing the convention at a signing ceremony would be requested to produce the adequate full powers in accordance with the depositary's practice.

*Conclusions reached by the Working Group regarding draft article 92:*

251. The Working Group agreed that the text of draft article 92 as contained in A/CN.9/WG.III/WP.81 was acceptable and would be supplemented as needed.

#### **Draft article 93. Reservations**

252. It was noted that the text of draft article 93 as contained in document A/CN.9/WG.III/WP.81 had been revised to accommodate the possible inclusion of reservations in chapters 15 and 16. However, as the Working Group had decided to adopt an opt-in approach by way of declarations (see paras. 202 to 205 and 216 to 218 above), it was proposed to delete from draft article 93 the phrase “except those expressly authorized.”

253. One view was expressed that further discussion of draft article 83, which might include a proposal on a reservation model, could actually require maintaining the text of draft article 93 as contained in A/CN.9/WG.III/WP.81, as the draft convention would need to be open for reservations. It was clarified that the approach envisaged to resolve the problem of possible disharmony regarding article 83 involved declarations, which the draft convention allowed under draft article 94 and which were different in character from reservations.

*Conclusions reached by the Working Group regarding draft article 93:*

254. The Working Group agreed that the text of draft article 93 should be amended to read, “No reservation may be made to this Convention.”

#### **Draft article 94. Procedure and effect of declaration**

255. The Working Group proceeded to consider the text of draft article 94 as contained in document A/CN.9/WG.III/WP.81. It was first suggested that the reference to “modify” or “modification” in paragraph 4 of draft article 94 should be deleted because the only declarations contemplated by the draft convention (i.e. the opt-in declarations to chapter 15 on jurisdiction, and chapter 16 on arbitration) were not, by their nature, susceptible of being modified. In response it was noted, however, that if the Working Group decided in the future to insert a provision allowing declarations for the application of domestic laws under the circumstances envisaged in draft article 26 (see A/CN.9/621, paras. 189-192), there might be circumstances where States would need to modify their declarations. To address that concern, the Working Group agreed to put the reference to “modification” in square brackets until draft article 26 bis was decided upon.

256. A concern was raised that the text of paragraph 4 of draft article 94 was too general and might be interpreted to the effect that States were allowed to make any kind of declaration. It was suggested that the language of paragraph 4 should be aligned with the text of draft article 93 as contained in document A/CN.9/WG.III/WP.81. Some States also expressed their concerns as they were not familiar with declarations as instruments in international law.

257. In response, it was pointed out that in the area of private international law and uniform commercial law, it had become the practice to distinguish between declarations pertaining to the scope of application, which were admitted in uniform law instruments without being subject to a system of acceptances and objections by Contracting States, on the one hand, and reservations, on the other hand, which triggered a formal system

of acceptances and objections under international treaty practice, for instance, as provided in articles 20 and 21 of the Vienna Convention on the Law of Treaties, of 1969.

258. As the draft convention dealt with law that would apply not to the mutual relations between States, but to private business transactions, it was suggested that declarations would serve the purpose of the draft convention better than reservations in the way that term was understood under international treaty practice. Recent provisions in UNCITRAL instruments supported those conclusions, such as articles 25 and 26 of the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995) and articles 19 and 20 of the United Nations Convention on the use of Electronic Communications in International Contracts (New York, 2005), in the same way as final clauses in private international law instruments prepared by other international organizations, such as articles 54 to 58 of the Unidroit Convention on International Interests in Mobile Equipment (Cape Town, 2001) and articles 21 and 22 of the Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary (The Hague, 2002) concluded by the Hague Conference on Private International Law.

259. However, in the practice of UNCITRAL and other international organizations, such as Unidroit and the Hague Conference, States were not free to submit declarations, which as a matter of principle were only possible where explicitly permitted. If a declaration was used without explicit permission, it would be treated as a reservation. Accordingly, it was suggested that there was no stringent need to make a general reference in draft article 94 that no declarations other than those expressly allowed were admitted, but such a qualifying provision could be inserted, if the Working Group wished.

260. The question was raised whether paragraph 3 of draft article 94 implied that declarations could be made at any time whereas paragraph 1 seemed to only allow declarations at the time of signature. It was clarified that paragraph 3 only provided a general procedure for declarations and that provisions in the draft convention permitting its use would state the specific time for declarations to be made. In particular, it was recalled that the draft convention in chapters 15 and 16 permitted declarations to be made with regard to jurisdiction and arbitration at any time.

*Conclusions reached by the Working Group regarding draft article 94:*

261. The Working Group agreed that the text of draft article 94 as contained in A/CN.9/WG.III/WP.81 was acceptable in substance. However, the Secretariat was requested to examine paragraph 4 of draft article 94 to ensure that the text was aligned with the practice and interpretation of international private law.

**Draft article 95. Effect in domestic territorial units**

262. The Working Group agreed that the text of draft article 95 as contained in A/CN.9/WG.III/WP.81 was acceptable and should be retained.

**Draft article 96. Participation by regional economic integration organizations**

263. The Working Group agreed that the text of draft article 96 as contained in A/CN.9/WG.III/WP.81 was acceptable and should be retained, subject to the addition of a footnote, to assist the Working Group in its further consideration of the draft article, indicating in which UNCITRAL or other international instruments a similar provision had already been used.



**Draft article 97. Entry into force***General comments*

264. The Working Group proceeded to consider the text of draft article 97 as contained in document A/CN.9/WG.III/WP.81. It was observed that the draft provision contained two sets of alternatives in square brackets: the time period from the last date of deposit of the ratification to the entry into force of the convention, and the number of ratifications, acceptances, approvals or accessions required for the convention to enter into force.

*Number of ratifications required*

265. In the interests of avoiding further disunification of the international regimes governing the carriage of goods by sea, it was suggested that a high number of ratifications, such as thirty, should be required in draft article 97. In support of that suggestion, it was stated that a high number of ratifications would be more likely to reduce any disconnection created by the ratification by some but not all the States Parties to any of the existing regimes, as set out in paragraph 222 above. Furthermore, reference was made to the desire that the convention be as global as possible, and it was suggested that a higher number of required ratifications would make that outcome more likely. There was some support for that proposal. However, it was observed that thirty ratifications could take a long time to achieve, and that a large number of required ratifications was unlikely to create any sort of momentum toward ratification for a State.

266. It was observed that the number of ratifications required for entry into force was thought to be affected by the final outcome with respect to the compromise package on limitation levels of the carrier's liability (see paragraphs 135 and 158 above), and that, as such, no final number could yet be decided upon by the Working Group. In any event, it was said that thirty ratifications was too high a requirement, and that a lower number closer to 3 or 5 would be preferable, both for reasons of allowing the convention to enter into force quite quickly, and of affording States that were anxious to ratify the convention and modernize their law the opportunity to do so as quickly as possible. Speed in terms of entry into force was also considered by some to be a factor in averting the development of regional or domestic instruments. However, concerns were also expressed regarding the adoption of a very low number of required ratifications, since it would not be advantageous to have yet another less than successful regime in the area of the international carriage of goods by sea. In that connection, a view was again expressed in favour of the adoption of a so-called "sunset" clause that provided that the draft convention would no longer be in force after a certain time. However, there were strong objections to the adoption of such a clause as being extremely unusual in a convention, and contrary to the spirit of such international instruments. In any event, it was noted that any State could make the decision to denounce the convention at any time, thus making a "sunset" clause unnecessary should the convention enter into force with only a small number of ratifications.

267. In response to concerns regarding the length of time that it would take to achieve thirty ratifications to the convention, it was noted that the Montreal Convention required thirty ratifications, and that it had entered into force very quickly, despite that fact. However, it was cautioned that instruments covering different transport modes could not necessarily be compared, as the industries were quite different in each case.

268. Some support was expressed in the Working Group for twenty ratifications to be required prior to entry into force. A further nuance was suggested in that a calculation could be added to the provision so that a minimum amount of world trade was required

by the ratifying countries prior to entry into force, or a minimum percentage of the world shipping fleet. However, that calculation was thought to be rather difficult to make with precision.

269. It was observed that perhaps three or five ratifications would be too low a number for any sort of uniformity to be achieved but that a number of other maritime conventions tended to adopt an average of ten required ratifications for entry into force, which seemed to be an optimal number. The proposal of a requirement of ten ratifications received some support.

*Time for entry into force*

270. The Working Group did not have a strong view with respect to the time period that should be required prior to entry into force following the deposit of the last required ratification.

*Conclusions reached by the Working Group regarding draft article 97:*

271. The Working Group agreed that, in paragraphs 1 and 2:

- The word “[fifth]” should be substituted for the word “[third]” and the word “[twentieth]” should be kept as an alternative in the text;
- The alternatives “[one year]” and “[six months]” should both be retained; and
- The text of draft article 97 as contained in A/CN.9/WG.III/WP.81 was otherwise acceptable.

**Draft article 98. Revision and amendment**

*General comments*

272. The Working Group proceeded to consider the text of draft article 98 as contained in document A/CN.9/WG.III/WP.81. The statement in footnote 255 that amendment procedures were not common in UNCITRAL texts was noted, and the suggestion was made that resort could simply be had to normal treaty practice to amend the text pursuant to the Vienna Convention on the Law of Treaties, if necessary.

273. However, it was observed that the lack of an amendment provision in a convention could be considered unusual, since despite the Vienna Convention on the Law of Treaties, it was standard practice for conventions to have provisions for amendment. It was thought that failure to include one in this case could mistakenly induce the conclusion that no amendment was possible. Support was expressed for keeping the draft provision.

*Conclusions reached by the Working Group regarding draft article 98:*

274. The Working Group agreed that the text of draft article 98 as contained in A/CN.9/WG.III/WP.81 was acceptable.

**Draft article 99. Amendment of limitation amounts**

*General comments*

275. In spite of its earlier decision to place square brackets around draft article 99 as part of the provisional consensus on the limitation on liability of the carrier in the draft convention (see paragraphs 135 and 158 above), the Working Group heard some

technical remarks on the text of draft article 99 as contained in document A/CN.9/WG.III/WP.81. In particular, it was suggested that the phrase “Contracting States” in paragraph 2 be replaced with “States Parties” because of the definition in the Vienna Convention on the Law of Treaties, and so that the text refers to States that are bound by the text and not just those that have ratified it. Secondly, it was suggested that, in order to shorten the time required for the operation of the procedure, the phrase “may be considered” should be deleted in paragraph 6, and replaced with the phrase “may take effect”.

276. It was also observed that an alternative proposal for an amendment procedure had been submitted at a previous session (A/CN.9/WG.III/WP.77), but that further comment in that regard would be reserved, pending an outcome of the decision on the fate of draft article 99.

*Conclusions reached by the Working Group regarding draft article 99:*

277. The Working Group agreed that the text of draft article 99 should be put in square brackets (see paragraph 166 above).

#### **Draft article 100. Denunciation of this Convention**

*General comments*

278. The Working Group agreed that the text of draft article 100 was acceptable as contained in document A/CN.9/WG.III/WP.81.

#### **Further comment on draft article 89 volume contracts**

279. Regret was expressed by a delegation that there was insufficient time on the agenda to consider further draft article 89 on volume contracts, and the definition of volume contracts in draft article 1 (2). Concern on that point was reiterated that the volume contract provisions in the draft convention allowed for too broad a derogation from the mandatory provisions of the draft convention. An express reservation to the provisions on volume contracts was made by that delegation, as was a wish for further consideration of the matter, which that delegation did not recognize as being the subject of a consensus.

280. The Working Group took note of that statement. It was observed that the issue of volume contracts had been considered during the third reading of the draft convention at its last session (see A/CN.9/621, paras. 161 to 172), and that the topic was not on the agenda for the current session of the Working Group.

### **III. Other business**

#### **Planning of future work**

281. The Working Group took note that its twenty-first session was scheduled for 14 to 25 January 2008 in Vienna, and that a final review of the draft convention would take place at that session, with a view to presenting to the Commission at its 41st session in 2008 a text that had been the subject of approval by the Working Group.

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**B. Note by the Secretariat on the preparation of a draft convention on the carriage of goods [wholly or partly] [by sea] – Comments and Proposals of the Government of Nigeria**

**(A/CN.9/WG.III/WP.93) [Original: English]**

**CONTENTS**

In preparation for the twentieth session of Working Group III (Transport Law), the Government of Nigeria submitted to the Secretariat the attached document indicating that it reflected the results of consultations between Central and West African Countries.

The document in the attached annex is reproduced in the form in which it was received by the Secretariat.

**Annex**

**NIGERIA'S POSITION ON THE UNCITRAL DRAFT TRANSPORT LAW, SUBMITTED TO UNCITRAL SECRETARIAT, AUGUST, 2007.**

1. Nigeria is pleased to submit the following comments and suggested amendments to the Draft Convention on the Carriage of Goods (wholly or partly by Sea) as contained in the working paper A/CN.9/WG.III/WP.81.

CHAPTER 1: GENERAL PROVISIONS.

ARTICLE 1

2. Action: The definitions section should have the word “*Sub-contractor*” defined separately and reflect freight forwarders, warehouse, terminal and inland depot operators, in order to introduce the door-to-door transportation concept, envisaged by the Convention.

ARTICLE 4

3. Action: The applicability of defences and limits of liability, should be reviewed to cover shippers' liability also.

CHAPTER 2: SCOPE OF APPLICATION.

ARTICLE 6

4. Action: Specific exclusions should be redrafted in line with the provisions of Article 2 section 3 of the Hamburg Rules, without prejudice to Articles 6 and 7 of the Hamburg Rules, for clarity.

CHAPTER 4: PERIOD OF RESPONSIBILITY.

ARTICLE 12

5. Action: Transport not covered by the contract of carriage has two variants; but variant B of the Draft Article is preferred. Variant ‘A’ should therefore be deleted.

CHAPTER 6: LIABILITY OF THE CARRIER FOR LOSS, DAMAGE OR DELAY.

## ARTICLE 17

6. Action: Basis of liability of the carrier, paragraph 5 should be deleted in its entirety.

## ARTICLE 20

7. Action: Paragraph 3 of this Article should be deleted as being of no importance.

## ARTICLE 21

8. Action: The provision should read thus: "*Delay in delivery occurs when the goods are not delivered at the place of destination provided for in the contract of carriage within the time agreed upon*" (by deleting the last three lines and the word expressly).

## ARTICLE 23

9. Action: The period contained therein, for the notice to be given, should be 15 working days instead.

CHAPTER 8: OBLIGATIONS OF THE SHIPPERS TO THE CARRIER.

## ARTICLE 28:

10. Action: Should be extended to cover the consignee by including sentence like this "*The rule stated above as it relates to the shipper and the carrier shall also apply in relation to the consignee*".

## ARTICLE 30:

11. The variant "*B*" should be adopted, while the words "*or delay*" in square brackets should be deleted.

## ARTICLE 31:

12. Action: The position in New York deleting paragraph 2 should be maintained, as being acceptable.

## ARTICLE 32:

13. Action: The deletion of the words "*or become*" as agreed in New York be maintained.

## ARTICLE 34:

14. Action: Paragraph 2 of this Article (in brackets) should be deleted.

CHAPTER 9: TRANSPORT DOCUMENTS AND ELECTRONIC TRANSPORT RECORDS.

## ARTICLE 38:

15. Action: Paragraph 1, is a new and welcome idea, while on paragraph 2, variant B should be adopted instead of variant A, because variant B is reasonable and best suits our interests as shippers.

## ARTICLE 42:

16. Action: Paragraph C should be expunged as it derogates from the position in the Hamburg Rules which protects a consignee acting in good faith.

## ARTICLE 44:

17. Action: Retain contents of first brackets and delete second bracket and its contents.

## ARTICLE 47 AND 48:

18. Comment: “*Provides*” is the preferred option for the English text. Therefore, “*indicates*” and “*specified*” should be deleted in the English version of the Draft Convention. However, the word “*indiquant*” is the preferred option for the French text.

19. Action: Therefore, the words, “*disposant*” and “*precisant*” should be deleted in the French version of the draft convention.

## ARTICLE 50:

20. Action: (1) Delete “*unless otherwise agreed and*” (3) deleted “*given reasonable*” and insert “*14 working days*”. Create a new Art 50 bis by transferring the contents of Art 23 to create the 50 bis.

CHAPTER 11: RIGHTS OF THE CONTROLLING PARTY.

21. Amend the heading to read RIGHT OF CONTROL

## ARTICLE 52:

22. Action: Delete “*Exercise and*” from the title.

## ARTICLE 53:

23. Comments: “*Provides*” is the preferred option for the English text, while the word “*indiquant*” is the preferred option for the French Text.

24. Action: Delete “*indicates*” and “*specified*” in the English text and delete “*disposant*” and “*persisant*” in the French text.

## ARTICLE 53 (6):

25. Action: Expunge the entire paragraph (paragraph 6)

## ARTICLE 54 (2):

26. Action: On the 3rd line insert “*diligently*” after “*of*” and delete the contents of the brackets.

## ARTICLE 54 (4):

27. Action: Delete the brackets but retain the contents.

CHAPTER 12: TRANSFER OF RIGHTS.

## ARTICLE 59 (b), (c):

28. Action: Delete “*without endorsement*”. Insert “*duly endorsed*”.

## ARTICLE 60 (2):

29. Comments/Action: Remove the first brackets but retain the contents. Delete contents of second brackets.

## ARTICLE 60 (3):

30. Action: Delete brackets but not the contents.

CHAPTER 13: LIMITS OF LIABILITY.

31. Action: Amend title to read “*Limits of Carriers Liability*”.

## ARTICLE 62 (1):

32. Action: Limits of liability provided by the Hamburg Rules should be used. Insert 835 in the first brackets and 2.5 units in the second.

## ARTICLE 62 (2) Variant A:

33. Action: Redraft according to suggestion made by Nigeria as follows:

“*Notwithstanding*” the Paragraph 1 of this Article;

(a) *The carrier cannot establish whether the goods were lost or damaged or whether the delay in delivery was caused during the sea carriage or during the carriage proceeding or subsequent to the sea carriage; and*

(b) *Provisions of an international instrument or national law would be applicable pursuant to Article 26 if the loss, damage or delay occurred during the carriage preceding or subsequent to the sea carriage, the sea carrier’s liability for such loss, damage or delay shall be limited pursuant to the limitation provisions of such applicable international instrument, national law or this convention whichever is higher”.*

## ARTICLE 62 (2) VARIANT B:

34. Action: Expunge, variant B of paragraph 2.

## ARTICLE 62 (4):

35. Action: Delete “*or the date agreed upon by the parties*”

## ARTICLE 63:

36. Action: Delete the brackets but not the contents. Delete “*One*” and insert “*five*”.

## ARTICLE 64:

37. Action: delete “*personal*” in both paragraph 1 and 2.

CHAPTER 14: TIME FOR SUIT.

## ARTICLE 66:

38. Action: Delete the first line and part of the second line up to “*but*” on the third line delete “*during the running*” and insert after the *expiration*” insert “*limitation*” before “*period*”.

39. The amended clause should read as follows:

*“The person against whom a claim is made may at any time **after the expiration of the limitation period** extend that period by a declaration to the claimant. This period may be further extended by another declaration or declarations”.*

ARTICLE 68:

40. Action: Delete “bareboat charterer”

#### CHAPTER 15: JURISDICTION.

ARTICLE 69:

41. Action: Delete “*unless the contract of carriage contains an exclusive choice of court agreement that complies with Art 70 or 75*”.

ARTICLE 70:

42. Action: Delete the word “*exclusive*” in Article 70 (1)

ARTICLE 72:

43. Action: Delete the first bracket but retrain the contents (“*or*”) and delete the second bracket and it contents.

ARTICLE 74 (1) AND 74 (2):

44. Action: Delete the first bracket but retain the contents (“*or*”) and delete the second bracket and it contents (“*or pursuant to the rules applicable due to the operation of Article 77 paragraph 2*”).

ARTICLE 76 (1):

45. Action: Delete “*when both states have made a declaration in accordance with Article 77*”.

ARTICLE 76 (2)(b):

46. Action: Delete the word “*exclusive*”.

ARTICLE 76 (2)(c):

47. Action: Expunge, the whole of subparagraph c.

ARTICLE 77:

48. Action: Expunge, the entire article.

#### CHAPTER 16: ARBITRATION.

ARTICLE 78:

49. Action: The heading should be amended to read “*Arbitration agreements before the dispute has arisen*”.

ARTICLE 79:

50. Action: End the clause at “*Transportation*” on the second line and delete the rest of the clause.



51. The clause should read as follows: “*Nothing in this convention affects the enforceability of an arbitration agreement in a contract of carriage in non liner transportation*”.

ARTICLE 81:

52. Action: Expunge the entire Article.

#### CHAPTER 18 – OTHER CONVENTIONS.

ARTICLE 83 (1):

53. Action: Delete reference to Hamburg Rules i.e. “*or alternatively to the United Nations convention on Carriage of Goods by Sea concluded at Hamburg on 31st March 1978*”.

#### CHAPTER 19: VALIDITY OF CONTRACTUAL TERMS.

ARTICLE 88 (2) 8:

54. Action: Delete brackets but not contents.

ARTICLE 89 AND 90:

55. Action: These Articles should be retained as they are. The contents of chapter 19 should come before Chapter 18.

56. Nigeria wishes to request that discussions be re-opened on Articles 1-41 especially with regards to areas where amendments and modifications are suggested by this paper.

57. This is in spite of the fact that conclusions have been reached on the majority of issues covered by these Articles. It is in the interest of all parties that this convention, when finally concluded should enjoy world wide acceptability, and ratification, which, in turn would ensure its efficient, effective and universal implementation by contracting parties.

58. We thank you for your kind consideration of our position on the draft convention on carriage of goods (wholly or partly) by sea.

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**C. Note by the Secretariat on the preparation of a draft convention on the carriage of goods [wholly or partly] [by sea] – Revised text of articles 42, 44 and 49 of the draft convention on the carriage of goods [wholly or partly] [by sea]**

**(A/CN.9/WG.III/WP.94)**

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<sup>1</sup>*

Except to the extent that the contract particulars have been qualified in the circumstances and in the manner set out in article 41:<sup>2</sup>

(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;<sup>3</sup>

(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

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<sup>1</sup> The drafting adjustments to the text are made to the provision as it appeared in para. 58 of A/CN.9/616.

<sup>2</sup> 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.

<sup>3</sup> 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.

(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.<sup>4</sup>

(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 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 be 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.

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<sup>4</sup> 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.

*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<sup>5</sup> 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 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<sup>6</sup>*

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

<sup>5</sup> 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.

<sup>6</sup> 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.

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 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.
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**D. Note by the Secretariat on the preparation of a draft convention  
on the carriage of goods [wholly or partly] [by sea] – Proposal by  
the delegations of Denmark and the Netherlands**

**(A/CN.9/WG.III/WP.95) [Original: English]**

In preparation for the twentieth session of Working Group III (Transport Law), the delegations of Denmark and the Netherlands submitted to the Secretariat their proposal in the attached annex.

The document in the attached annex is reproduced in the form in which it was received by the Secretariat.

**Annex**

**Proposal by the delegations of Denmark and the Netherlands**

**Delivery of the goods – articles 49 and 50**

1. Every day, goods arrive at their place of destination without someone appearing who is entitled to receive them. In particular, when a negotiable transport document has been issued, this constitutes a great practical problem to the industry. In this light, the sponsors of this proposal welcome that the draft convention addresses the important issue of delivery as set out in article 49.
2. Currently, in order to protect itself against the risk of being required to deliver the cargo a second time, the carrier takes various precautionary steps including, in particular, requiring an indemnity (letter of indemnity) from the shipper or from the party requesting delivery of the cargo. The letter of indemnity is most often backed by a bank guarantee. In this manner, the carrier can reasonably manage the risk. While this is neither a perfect nor a desirable solution, it does give the carrier the possibility of arranging for its own protection. This is, of course, so, because the carrier is completely without fault and does not have the means to remedy the consequences when a negotiable transport document is unavailable at the moment of delivery and the carrier has to ascertain the rightful consignee. This situation is always attributable to a default on the part of the cargo interest. This proposal is intended to clarify that the carrier will continue to be able to request such protection under article 49.
3. Under article 49 as currently drafted, the carrier is obliged to deliver the cargo in accordance with an instruction under article 49 (d). It is appreciated that the provision of article 49 (e) is intended to make the issuance of letters of indemnity superfluous in, hopefully, a great majority of cases. However, these new rules should not imply that the carrier is deprived of its option to require protection, such as a letter of indemnity, as a condition for delivering the goods in accordance with the instruction pursuant to article 49 (d). It is believed that such an implication is not the intention of the draft because, in accordance with article 49 (g), the risk remains that the carrier is met by a legitimate demand for a second delivery by a good faith holder of a negotiable transport document. Therefore, it must be made clear that the letter of indemnity protection remains available to the carrier.
4. Further, article 49 (g) as presently drafted does not give any indication of which circumstances must exist for a holder to be considered a “holder that did not have or

could not reasonably have had knowledge” of a delivery subject to an instruction given under (d). It is in the interest of consignees, shippers and carriers to clarify this in order to achieve greater legal certainty. Thus, the consignee and shipper will have better knowledge of when and how to safeguard its interests, and the carrier will have better knowledge of what protection it can avail itself in order to avoid the risks connected with delivering in accordance with the given instruction.

5. In light of the above, it is proposed that the following amendments be made to articles 49 (g) and 50 (2):

**Article 49**

6. To add a second sentence to article 49 (g) as follows:

“When the contract particulars state the expected time of arrival of the goods, or include a statement on how to obtain information about whether or not delivery of the goods has taken place, it is presumed that the holder at the time that it became a holder had or could reasonably have had knowledge of the delivery of the goods.”

**Article 50 (2)**

7. Add a new subparagraph (f) as follows:

“No security as reasonably required by the carrier is provided for the purpose of protecting the carrier against the risk that it must deliver the goods to a person other than to whom it is instructed to deliver them under article 49, paragraph (d).”

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**E. Note by the Secretariat on the preparation of a draft convention on the carriage of goods [wholly or partly] [by sea] – Proposal on Chapter 12 “Transfer of Rights” submitted by the Delegation of the Netherlands (A/CN.9/WG.III/WP.96) [Original: English]**

In preparation for the twentieth session of Working Group III (Transport Law), the delegation of the Netherlands submitted to the Secretariat their proposal on Chapter 12 “Transfer of Rights” in the attached annex.

The document in the attached annex is reproduced in the form in which it was received by the Secretariat.

**Annex**

**Proposal on Chapter 12 on “Transfer of Rights” submitted by The Netherlands**

1. During the first reading of the draft convention on the carriage of goods [wholly or partly] [by sea] (the “draft convention”), a full discussion was held on the chapter on “Transfer of Rights”.<sup>1</sup> This discussion was based on the drafts in A/CN.9/WG.III/WP.21. Thereafter, the Secretariat made a new draft of the chapter in A/CN.9/WG.III/WP.56. Subsequently, informal consultations were held on this draft, with respect to which the Swiss delegation reported in A/CN.9/WG.III/WP.52. However, that report and the substance of the new drafts were not discussed during the second reading of the draft convention. Instead, the whole chapter was placed between brackets and the further consideration of it was deferred “for future discussion, following consultations”.<sup>2</sup> This means that during the third reading of the draft convention, the Working Group must decide on the fate of this chapter. This note will try to provide some guidance thereon.

2. The chapter consists of three articles dealing with different subjects. Some of these are non-contentious, while others certainly are contentious. Some subjects are related to other provisions of the draft convention, while other matters are exclusively dealt with in this chapter. Furthermore, some provisions are not likely to need much further discussion and may be decided upon fairly quickly, while others require further attention and discussion. Generally, the chapter is not free of complications. However, a simple deletion of the whole chapter might unnecessarily discard useful provisions that could be retained relatively easily.<sup>3</sup> The following paragraphs consider each provision

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<sup>1</sup> See paragraphs 127-148 of A/CN.9/526.

<sup>2</sup> See paragraphs 77 and 78 of A/CN.9/594. In addition, in paragraph 72 of the same document, the issues of ‘the position of third parties to the contract of carriage’ and ‘transfer of liabilities’ were mentioned as examples of items that are possibly better suited for inclusion in another instrument, such as a model law.

<sup>3</sup> See also: Alexander von Ziegler, “Transfer of Rights and Transport Documents”, paper delivered at UNCITRAL Congress “Modern Law for Global Commerce”, 9-12 July, 2007, Vienna, available at [www.uncitral.org/uncitral/en/about/congresspapers.html](http://www.uncitral.org/uncitral/en/about/congresspapers.html).



separately, along with the view whether the particular provision should be deleted or retained in the draft convention.

#### **Draft article 59**

3. The first paragraph of draft [article 59](#) provides that, with regard to negotiable documents, rights embodied in the document are transferable and it sets out the mechanics of a transfer of these rights. This is a non-contentious rule, the retention of which received strong support in the first reading.<sup>4</sup> The draft article is of great particular importance for electronic commerce purposes, because, within the scope of the functional equivalence of an electronic document, the rule first must be determined for the paper document before the equivalence can be established. In other words, the key provision on electronic transport records, draft article 8 (b), builds on the contents of draft article 59. Also, in view of the fact that electronic commerce and liability were regarded as the core provisions of the draft convention,<sup>5</sup> it may be fairly obvious that draft article 59 should be retained as it stands.

#### **Draft article 60**

4. As to draft [article 60](#), a distinction must be made between the first paragraph (which is supplemented by the third one) and the second paragraph of this article. The second paragraph deals with the subject of transfer of liabilities, which in many jurisdictions is a notoriously difficult issue. A related matter is the question of whether the third party holder of the negotiable document is bound by the terms of the contract of carriage, a question with respect to which there are a variety of doctrines under national law.<sup>6</sup> Another related issue is the question if, and to what extent, a transferor of a liability is relieved from its obligations. Often, these matters cause much difficulty under national law. Therefore, not surprisingly, during the first reading, the second paragraph caused much discussion in the Working Group and views were rather divided. More harmony can already be seen in the Swiss report on the informal consultations. However, this report also shows a certain desire in the Working Group to leave these matters to national law.

5. It may safely be concluded that the issue raised in the second paragraph of draft article 60 is not sufficiently mature for inclusion in the draft convention. It requires more thought and discussion and the subject itself is probably more suitable for a model law than for a binding convention.

6. The first and third paragraphs of draft article 60 are different matters. At issue in those paragraphs is the position of intermediate holders: commodity traders in a string of sales and, in particular, banks that hold a negotiable document for security purposes only. Because of the uncertainties referred to in paragraph 4 above, at present, the legal position of these intermediate holders are insufficiently clear. However, the perception of these holders may be different because they often feel themselves “safe” as long as they do not interfere with the carriage.

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<sup>4</sup> See paragraph 134 of A/CN.9/526. The concerns about the nominative transport document are dealt with in the second reading by the inclusion of the new provisions of the articles 42 (b) (ii), 47, 48 and 53, paragraph 2.

<sup>5</sup> See paragraph 72 of A/CN.9/594.

<sup>6</sup> See also the somewhat cumbersome discussion the Working Group had on the same issue within the scope of the subject ‘jurisdiction and arbitration’.

7. In the first reading of the draft convention, the first and third paragraphs of draft article 60 were not considered to be contentious. Some concerns were raised that the first paragraph might be interpreted too extensively, although it was precisely for this reason that it was drafted in a negative manner and was confined to a specific situation. This specific situation refers to a common practice, which explains why this first paragraph may play a very useful role for commercial actors. It provides highly desirable certainty for banks financing the flow of goods<sup>7</sup> and will, therefore, enhance the acceptability of the draft convention as a whole to these important stakeholders.

8. The third paragraph of draft article 60 is of explanatory nature only and may also play a similar role in respect of draft article 44 (relating to delivery). In the past, it appeared that the contents of this third paragraph was non-contentious in the Working Group. Therefore, if the first paragraph of draft article 60 is retained, it is recommended that the third paragraph should also be retained.

#### **Draft article 61**

9. Draft article 61 is partly an applicable law provision and partly a provision that provides for substantive rules. In the first reading in the Working Group, the provision raised so many concerns that it was decided to place the whole article between brackets. From the Swiss report, it appears that the new draft as revised by the Secretariat in A/CN.9/WP.III/WP.56, was regarded as much clearer. Nevertheless, fundamental questions remain. Is an applicable law provision appropriate in a substantive law convention? Is there a need for a provision on transfer of rights other than under a negotiable document, in particular when the matter of transfer of liabilities will not be dealt with in the draft convention? Furthermore, in this respect, it must be noted that the transfer of the most important right under a contract of carriage, the right of control (including its notification to the carrier) is already dealt with specifically in Chapter 11. In conclusion, it may be better to leave article 61 out of the convention and to deal with its content, to the extent desirable, in a model law.

10. To summarise, it is proposed:

- to delete draft article 60, paragraph 2, and draft article 61<sup>8</sup> from the convention, and
- to retain draft article 59 and article 60, paragraphs 1 and 3 in the draft convention.

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<sup>7</sup> This may also apply to a comparable provision: article 53, paragraph 6, which is also a non-contentious provision that relates to a specific situation. When an intermediate holder of the right of control has transferred this right, is there any liability connected with the right of control left with the transferor? Article 53, paragraph 6, makes it clear that there is not, which is primarily in the interest of banks that finance the flow of goods.

<sup>8</sup> Because within the European Union, the EU Commission is competent with respect of the subject of conflict of law in matters of contract, informal consultation took place with the Commission services on this part of the proposal. They gave a clear indication of support for the deletion of draft article 61 from the convention.

**F. Note by the Secretariat on the preparation of a draft convention on the carriage of goods [wholly or partly] [by sea] – Comments from Non-Governmental Organizations**

**(A/CN.9/WG.III/WP.97) Original: English]**

In preparation for the twentieth session of Working Group III (Transport Law), the International Federation of Freight Forwarders Associations (FIATA) and the International Multimodal Transport Association (IMMTA) submitted to the Secretariat their comments on the draft convention on the carriage of goods [wholly or partly] [by sea] (the draft convention) in the attached annex.

The document in the attached annex is reproduced in the form in which it was received by the Secretariat.

**Annex**

**Comments from the International Federation of Freight Forwarders Associations (FIATA) – Scope of the draft convention**

1. Freight forwarders need to know to what extent mandatory legal regimes become applicable when they act as contracting carriers. At present, this does not present any major difficulties, but the situation will become significantly different with any expansion of a contemplated convention on carriage by sea to cover carriage “door-to-door”.
2. This explains why FIATA, as has been earlier stated, opposes such expansion, which it believes would lead to confusion with respect to the required transport document, and applicable liability rules. In particular, it is thought to be inappropriate to apply a maritime liability to cases where customers expect the traditional liability for road and/or rail and/or air transport. For example, in the case of a contract for transport from northern Scandinavia to southern Italy by road and/or rail combined with a short sea transit by ferry to Germany, or, for a transport from Poland to Japan by the Trans Siberian railway to Vladivostok with a sea carriage from there to Japan, it would not seem logical to apply the contemplated convention.
3. With any expansion of the contemplated convention to cover more than the carriage by sea, it is necessary to clearly delimit the applicability, so that the contemplated convention does not apply when the preponderant part of the carriage is non-maritime. Such delimitation would, for all practical purposes, solve the much-debated issue of conflict of conventions and, indeed, conform with the methodology used in the most successful of the UNCITRAL conventions, namely the 1980 Convention on Contracts for the International Sale of Goods, which delimits the applicability of the convention when goods and services are included in the same contract (Art.3(2)) and services constitute the preponderant part. A failure to use such methodology for the contemplated convention, where it is particularly required, would expose UNCITRAL to criticism for not having used the same delimitation technique as it has used in its most successful convention to date.

### Comments from the International Multimodal Transport Association (IMMTA)

4. At the IMMTA International Conference on Multimodal Transport (the IMMTA Conference), held in Karachi, on 3rd April 2007, discussions focused on various aspects of multimodal transportation, including operational, legal and insurance aspects. In relation to legal issues, IMMTA members considered in some detail the UNCITRAL Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea]. This note reflects the relevant outcome of the Conference for consideration of the Working Group at its 19th session.

5. In relation to the legal framework governing multimodal transport, it was recalled at the IMMTA Conference that presently there was no widely acceptable international regime in force. The United Nations Convention on the International Multimodal Transport 1980 had not received the required number of ratifications to enter into force and the UNCTAD/ICC Rules for Multimodal Transport Documents 1992 was a set of contractual rules and as such its usefulness in achieving international uniformity was limited. The present international legal framework consisted of various unimodal conventions, diverse regional, subregional and national laws and standard term contracts. As a result, the applicable liability rules greatly varied from case to case, giving rise to uncertainty as to the extent of a carrier's liability in a given situation.

6. It was generally agreed at the IMMTA Conference that with the development of containerisation, multimodal transport was becoming increasingly important and there was a need for a uniform, simple and transparent legal framework to govern liability for loss, damage and delay arising from this type of transportation. In this context, the UNCITRAL Draft Convention was examined at the IMMTA Conference. It was generally agreed by participants at the IMMTA Conference that the UNCITRAL Draft Convention merely extended a maritime liability regime to all contracts for multimodal transport, which included a sea leg.

7. Indeed, concerns were expressed by the participants at the IMMTA Conference regarding a number of provisions of the Draft Convention having a direct impact in relation to multimodal transport. Under existing laws and regulations governing multimodal transport, a multimodal transport operator (MTO) is responsible throughout the entire transportation. It was the view at the IMMTA Conference that this may not, however, be the case under the Draft Convention. Provisions of the Draft Convention dealing with the carrier's period of responsibility,<sup>1</sup> allow the possibility for the carrier to determine contractually the time and location of receipt and delivery of the goods. Furthermore, the Draft envisages situations in which a carrier may not be responsible for parts of the transport, acting as agent only,<sup>2</sup> or that some functions such as loading or discharging may be carried out by the shipper.<sup>3</sup> Thus, under the Draft Convention, it was the view at the IMMTA Conference that there may not be one person responsible during the whole transportation period. While these provisions attempt to accommodate maritime practices, the participants at the IMMTA Conference believe that they create uncertainty and confusion in the context of multimodal transport.

8. As for the liability system, it is the view of the IMMTA Conference that article 26 takes the existing uncertainty concerning the legal regime applicable to multimodal transport one step further. By introducing a minimal network system, in cases of localized loss, it gives precedence to certain mandatory provisions of any

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<sup>1</sup> Article 11, paras. (2) and (4).

<sup>2</sup> Article 12.

<sup>3</sup> Article 14, para. (2).

international convention applicable to the segment of transport where loss or damage occurred. Thus, if loss can be localized and if there is a mandatory international regime applicable to that particular stage, then provisions dealing with liability, limitation of liability and time for suit of this international regime will apply, together with remaining provisions of the Draft Convention. In the view of the IMMTA Conference, a patchwork of two different regimes, which were not designed to work together, will apply to multimodal transport. It is also believed by the IMMTA Conference that national courts may have difficulty in determining which provisions of each convention should apply, hampering uniform interpretation and application of the convention.

9. In cases of non-localized loss or if no mandatory convention is applicable, then the complex maritime liability regime of the Draft Convention will apply to the entire multimodal transport, even if only a short sea carriage is involved. It is believed by the IMMTA Conference that this will often be the case, bearing in mind the difficulty in localizing a loss in relation to goods carried in containers and the fact that unimodal conventions are mainly European conventions and do not have global application.

10. It is the view of the IMMTA Conference that the Draft Convention does not seem to provide any advantage over the existing system. While it may be desirable to have a single and transparent convention to govern all contracts for international transport of goods, whether port-to-port or door-to-door, the extension of one unimodal regime to govern other transport modes does not seem to the participants at the IMMTA Conference to be an appropriate solution. Out of one hundred articles of the Draft Convention, only three relate to multimodal transport.<sup>4</sup> The IMMTA Conference believes that there is a need to give serious consideration to the possible implications of the Draft Convention on multimodal transport. Overall, it is the view of the IMMTA Conference the Draft Convention is extremely lengthy and complex, which we believe is not conducive to achieving international uniformity.

11. In view of the above, the IMMTA Conference questioned the suitability of the UNCITRAL Draft Convention to govern modern multimodal transportation. In conclusion, the IMMTA Conference was of the view that the Draft Convention “did not address the particular challenges and problems of the multimodal transportation and it was unlikely that it would improve the current unsatisfactory situation. The [IMMTA] Conference expressed strong reservations concerning the suitability of the UNCITRAL Draft Convention to govern multimodal transport and requested that these concerns be transmitted to the UNCITRAL Working Group on Transport Law.”

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<sup>4</sup> Articles 1(1), 26 and [62(2)].

**G. Note by the Secretariat on the preparation of a draft convention on the carriage of goods [wholly or partly] [by sea] – Proposal by the Government of China on Jurisdiction**

**(A/CN.9/WG.III/WP.98) [Original: English]**

In preparation for the twentieth session of Working Group III (Transport Law), the Government of China submitted to the Secretariat the attached document.

The document in the attached annex is reproduced in the form in which it was received by the Secretariat.

**Annex**

**Proposal by China on Jurisdiction**

**Introduction to the issue of jurisdiction**

1. Working Group III discussed and revised the jurisdiction chapter of the draft convention several times, and framed the current text as set out in document A/CN.9/WG.III/WP.81. The choice of court agreements of draft article 70 in the text has the focus among the delegations throughout that discussion. We have expressed strong concern in past sessions regarding whether a person that is not a party to the volume contract should be bound by an exclusive choice of court agreement.

2. Working Group III will proceed with the third reading of the chapter on jurisdiction at its twentieth session. We believe that the above-mentioned matter should be further discussed, and propose alternative text for the consideration of the Working Group.

**Review of the current provisions (draft article 70)**

3. The issue of the validity of an exclusive jurisdiction agreement was not involved in the earlier chapter on jurisdiction as found in document A/CN.9/WG.III/WP.32.

4. The Delegation of the United States suggested in its proposal<sup>1</sup> at the twelfth session of the Working Group that a competent court as agreed by the carrier and the shipper should have exclusive jurisdiction for contractual disputes between them in an action regarding the proposed Ocean Liner Service Agreement.

5. In the fifteenth session of the Working Group, the delegations had a pivotal debate as to whether to recognize the validity of exclusive jurisdiction agreements. In the end, the Working Group decided to take a compromise approach, with a minimum accepted standard being established for the validity of exclusive jurisdiction agreements, and jurisdiction agreements which fulfilled certain conditions would be allowed to be exclusive.

6. At the following sessions, the Working Group further amended the provisions of the exclusive jurisdiction agreement by drafting provisions regarding a choice of court agreement and limiting the validity of the exclusive choice of court agreements solely

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<sup>1</sup> See paragraph 34 in A/CN.9/WG.III/WP.34.

to volume contracts that were permitted to derogate from the draft convention, and thus framed the text of draft article 70 (1) as contained in A/CN.9/WG.III/WP.81.

7. That decision was justified mainly on the grounds that Governments would not be able to reach consensus as to the validity of exclusive choice of court agreement; and by limiting it to sophisticated parties to the contract of carriage who were of equal bargaining power, i.e. between the parties to volume contracts, it would both support the validity of exclusive jurisdiction agreements, and by setting out certain conditions, it would basically meet the requirement which a number of delegations believed would be strictly held.

8. At the fifteenth session of the Working Group, there was also a striking divergence between the delegations regarding whether third parties to the volume contract could be bound by the exclusive jurisdiction clause.

9. The existing draft article 70 (2) as it appeared in A/CN.9/WG.III/WP.81 is the special provision setting out the conditions for a person that is not a party to the volume contract to be bound by an exclusive choice of court agreement. In this regard, we have expressed our strong concern throughout the discussion.

#### **Analysis of the current provisions (article 70)**

10. In our view, firstly, the approach of applying an exclusive choice of court agreement to a third party to a volume contract would prejudice that party's right of choosing a competent court as conferred by the draft article 69.

11. Secondly, the limitation of exclusive choice of court agreements solely to volume contracts was justified mainly on the ground that the parties to a volume contract would, in general, be in an equal bargaining position and would freely negotiate contracts, and that it would seldom occur that a carrier "forced" a shipper to accept the contract clauses by making use of its strong bargaining power. But a third party to a volume contract is not a contracting party to the volume contract, thus to extend the validity of exclusive choice of court agreement to such a third party would without doubt to force that party to accept such agreement. This would be unfair to the third party, and would not reflect the consensus between the parties, and would also contradict the original intention of limiting exclusive choice of court agreements to volume contracts.

12. Thirdly, although the current text sets out some conditions for third parties to be bound, which include the provisions in the subparagraph 2 (d) of the draft article 70 regarding applicable law, it is still far from sufficient protection for third parties to such contracts, and cannot solve our concern in essence, as well as causing inconvenience in practical application. Fourthly, with reference to the provisions of the draft article 89 (5)<sup>2</sup> in the draft convention with regard to special rules for volume contracts, only when a third party gives its express consent to be bound, can the terms of the volume contract that derogate from this Convention bind him.

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<sup>2</sup> See the paragraph 5 of draft article 89 with regard to special rules for volume contracts:

"5. The terms of the volume contract that derogate from this Convention, if the volume contract satisfies the requirements of paragraph 1 of this article, apply between the carrier and any person other than the shipper provided that:

(a) Such person received information that prominently states that the volume contract derogates from this Convention and gives its express consent to be bound by such derogations; and

(b) Such consent is not solely set forth in a carrier's public schedule of prices and services, transport document, or electronic transport record."

13. Therefore, with respect to the matter of whether a third party to a volume contract should be bound by an exclusive choice of court agreement concluded therein, the equivalent or higher protective standard shall be adopted, which would better achieve consistency throughout the draft convention.

**Suggestions and a proposal for amendment to the related item of the draft Convention**

14. We suggest that the subparagraph 2 (c) of the draft article 70 in document A/CN.9/WG.III/WP.81 could be revised as follows:

“(c) That person is given timely and adequate notice of the court where the action shall be brought and that the jurisdiction of that court is exclusive, and that person gives its express consent to be bound by the exclusive choice of court agreement; and”

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**H. Note by the Secretariat on the preparation of a draft convention on the carriage of goods [wholly or partly] [by sea] – Proposal by the Government of China on Delivery of the Goods when a Negotiable Transport Document or a Negotiable Electronic Transport Record has been issued and on Goods Remaining Undelivered**

**(A/CN.9/WG.III/WP.99) [Original: English]**

In preparation for the twentieth session of Working Group III (Transport Law), the Government of China submitted to the Secretariat the attached document.

The document in the attached annex is reproduced in the form in which it was received by the Secretariat.

**Annex**

**Proposal by China on Delivery of the Goods when a Negotiable Transport Document or a Negotiable Electronic Transport Record has been issued and on Goods Remaining Undelivered**

**Comments on Article 49, Paragraphs (d)-(g) of the draft convention**

1. Article 49, paragraphs (d)-(g) of the draft convention aim to solve the problem that arises when the holder of negotiable transport document does not claim delivery of the goods after their arrival at the place of destination, which frequently puzzled the carrier at the port of destination. It was noted that in the mechanism designed in paragraph (d)-(g), the function of the bill of lading as a document of title is ensured and the carrier is not also obliged to deliver the goods against negotiable transport documents. In other words, the carrier with due diligence, is allowed to deliver the goods without negotiable transport documents. Thus, a reasonable balance could be achieved among different parties such as the carrier and the consignee and so on.

2. However, the Chinese delegation considers that, firstly, with reference to paragraphs (d) and (e), the carrier is endowed with the right to deliver the goods pursuant to the instructions of the controlling party or the shipper, however, as paragraph (g) prescribes, an innocent third party holder of a bill of lading still possesses the right of claiming delivery from the carrier. In addition, no rules in the present provisions are available for carriers to judge whether an innocent third party bill of lading holder is likely to appear in the future or not. Therefore, the present stipulations do not currently provide clear directions for the carrier about when it can deliver the goods upon instruction of the controlling party or the shipper without concern.

3. Secondly, the entitlement of this right on the part of the shipper and the documentary shipper is likely to increase fraud, and may damage the interests of the holder and thus implicate the carrier as well. Furthermore, the pledge and guarantee effect of the bill of lading would be reduced and thus the bank as an intermediary could have its interests jeopardized. Besides, when the shipper and the documentary shipper fail to give these kinds of instructions, they may claim against the carrier for compensation, which is different from the practice of current international trade.

4. In conclusion, the present stipulation of Article 49 may not assist the carrier to solve effectively the problem of a failure to claim the delivery of the goods under the negotiable transport document and also seems to differ greatly from widely-used international trading laws and customs, which may bring a number of uncertainties and great impact to the current international trade system and practice. Therefore, it should be done with great caution and carefulness.

#### **Comments on Article 50 of the draft convention**

5. With respect to Article 50 of the draft convention, it was suggested in the process of deliberations that although a system similar to that proposed in Article 50 had been implemented in the maritime realm for many years, it proved futile in eradicating this problem.

6. However, the Chinese delegation considers that Article 50 of the draft convention concerning how to deal with undelivered goods should assist the carrier in solving this problem effectively. In our opinion, obviously, the reason for such failure is related to the fact that there is no explicit adoption of such a system in any international convention. It is positive and foreseeable that, through the improvement and express stipulation of such a system in the draft convention, the merchant would perform its duty of taking delivery of the goods more actively.

#### **Suggestions and a proposal for amendment to the related items of the draft Convention**

7. Based on the above discussion, we suggest deleting sub-paragraphs (d)-(g) of Article 49.

8. In addition, we suggest amending the related items of Article 50 as follows:

##### *“Article 50. Goods remaining undelivered*

“1. Unless otherwise agreed and without prejudice to any other rights that the carrier may have against the shipper, controlling party or consignee, if the goods have remained undelivered, the carrier may, at the risk and expense of the person entitled to the goods, take such action in respect of the goods as circumstances may reasonably require, including:

(a) To store the goods at any suitable place;

(b) To unpack the goods if they are packed in containers, or to act otherwise in respect of the goods, including by moving the goods or causing them to be destroyed;

(c) To, after 60 days from the day that the carrier give notice of arrival of the goods in accordance with paragraph (3) of this article and the day of the goods’ arrival at the port of destination, cause the goods to be sold in accordance with the practices, or pursuant to the law or regulations of the place where the goods are located at the time. Whereas, if the goods are perishable or other unsuitable cases of preservation are in existence, the carrier may cause the goods to be sold earlier.

“2. For the purposes of this article, goods shall be deemed to have remained undeliverable if, after their arrival at the place of destination:

(a) The consignee does not accept delivery of the goods pursuant to this chapter at the time and location referred to in article 11, paragraph 2;

(b) When no negotiable transport document or no negotiable electronic transport record has been issued, the controlling party or the shipper cannot be found or does not give the carrier adequate instructions pursuant to articles 46, 47 and 48;

(c) When a negotiable transport document or a negotiable electronic transport record has been issued, the holder does not claim delivery of the goods from the carrier within a reasonable time after the carrier giving notice of arrival of the goods to the notify party, if any, and to one of the consignee, the controlling party or the shipper in accordance with paragraph (3) of this article;

(d) The carrier is entitled or required to refuse delivery pursuant to articles 46, 47, 48 and 49;

(e) The carrier is not allowed to deliver the goods to the consignee pursuant to the law or regulations of the place at which delivery is requested;

(f) The goods are otherwise undeliverable by the carrier.

3. The carrier may exercise these rights only after it has given reasonable advance notice of arrival of the goods at the place of destination to the person stated in the contract particulars as the person if any, to be notified of the arrival of the goods at the place of destination, and to one of the following persons in the order indicated, if known to the carrier: the consignee, the controlling party or the shipper.

4. ....

5. ....”

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**I. Report of the Working Group on Transport Law on the work of its  
twenty-first session (Vienna, 14-25 January 2008)  
(A/CN.9/645) [Original: English]**

**Contents**

	<i>Paragraphs</i>
Introduction . . . . .	1-8
I. Deliberations and decisions . . . . .	9-10
II. Preparation of a draft convention on the carriage of goods [wholly or partly] [by sea] . . . . .	11-289
Chapter 1 – General provisions . . . . .	12-15
Draft article 1. Definitions . . . . .	12
Draft article 2. Interpretation of this Convention . . . . .	13
Draft article 3. Form requirements . . . . .	14
Draft article 4. Applicability of defences and limits of liability . . . . .	15
Chapter 2 – Scope of application . . . . .	16-25
Draft article 5. General scope of application . . . . .	16-17
Draft article 6. Specific exclusion . . . . .	18-19
Draft article 7. Application to certain parties . . . . .	20-25
Chapter 3 – Electronic transport records . . . . .	26-29
Draft article 8. Use and effect of electronic transport records . . . . .	27
Draft article 9. Procedures for use of negotiable electronic transport records or the electronic equivalent of a non-negotiable transport document that requires surrender . . . . .	28
Draft article 10. Replacement of negotiable transport document or negotiable electronic transport record . . . . .	29
Chapter 4 – Obligations of the carrier . . . . .	30-53
Draft article 11. Carriage and delivery of the goods . . . . .	30
Draft article 12. Period of responsibility of the carrier . . . . .	31-38
Draft article 13. Transport beyond the scope of the contract of carriage . . . . .	39-43
Draft article 14. Specific obligations . . . . .	44-49
Draft article 15. Specific obligations applicable to the voyage by sea . . . . .	50-51
Draft article 16. Goods that may become a danger . . . . .	52
Draft article 17. Sacrifice of the goods during the voyage by sea . . . . .	53
Chapter 5 – Liability of the carrier for loss, damage or delay . . . . .	54-71
Draft article 18. Basis of liability . . . . .	54-58

---

Draft article 19. Liability of the carrier for other persons . . . . .	59
Draft article 20. Liability of maritime performing parties . . . . .	60-62
Draft article 21. Joint and several liability . . . . .	63
Draft article 22. Delay . . . . .	64-67
Draft article 23. Calculation of compensation . . . . .	68
Draft article 24. Notice of loss, damage or delay . . . . .	69-71
Chapter 6 – Additional provisions relating to particular stages of carriage . . . . .	72-87
Draft article 25. Deviation during sea carriage. . . . .	72
Draft article 26. Deck cargo on ships. . . . .	73-82
Draft article 27. Carriage preceding or subsequent to sea carriage . . . . .	83-87
Chapter 7 – Obligations of the shipper to the carrier . . . . .	88-108
Draft article 28. Delivery for carriage . . . . .	88-93
Draft article 29. Cooperation of the shipper and the carrier in providing information and instructions . . . . .	94-95
Draft article 30. Shipper’s obligation to provide information, instructions and documents . . . . .	96
Draft article 31. Basis of shipper’s liability to the carrier. . . . .	97
Draft article 32. Information for compilation of contract particulars . . . . .	98-99
Draft article 33. Special rules on dangerous goods. . . . .	100-101
Draft article 34. Assumption of shipper’s rights and obligations by the documentary shipper. . . . .	102-103
Draft article 35. Liability of the shipper for other persons . . . . .	104-106
Draft article 36. Cessation of shipper’s liability . . . . .	107-108
Chapter 8 – Transport documents and electronic transport records . . . . .	109-144
Draft article 37. Issuance of the transport document or the electronic transport record . . . . .	109-130
Draft article 38. Contract particulars . . . . .	131
Draft article 39. Identity of the carrier . . . . .	132
Draft article 40. Signature . . . . .	133
Draft article 41. Deficiencies in the contract particulars. . . . .	134
Draft article 42. Qualifying the information relating to the goods in the contract particulars . . . . .	135-139
Draft article 43. Evidentiary effect of the contract particulars . . . . .	140-142
Draft article 44. “Freight prepaid” . . . . .	143-144
Chapter 9 – Delivery of the goods. . . . .	145-167
Draft article 45. Obligation to accept delivery . . . . .	145-151

Draft article 46. Obligation to acknowledge receipt . . . . .	152
Draft article 47. Delivery when no negotiable transport document or negotiable electronic transport record is issued . . . . .	153
Draft article 48. Delivery when a non-negotiable transport document that requires surrender is issued . . . . .	154-156
Draft article 49. Delivery when the electronic equivalent of a non-negotiable transport document that requires surrender is issued . . . . .	157
Draft article 50. Delivery when a negotiable transport document or negotiable electronic transport record is issued . . . . .	158-161
Draft article 51. Goods remaining undelivered . . . . .	162-165
Draft article 52. Retention of goods . . . . .	166-167
Chapter 10 – Rights of the controlling party . . . . .	168-177
Draft article 53. Exercise and extent of right of control . . . . .	168-170
Draft article 54. Identity of the controlling party and transfer of the right of control . . . . .	171-172
Draft article 55. Carrier’s execution of instructions . . . . .	173
Draft article 56. Deemed delivery . . . . .	174
Draft article 57. Variations to the contract of carriage . . . . .	175
Draft article 58. Providing additional information, instructions or documents to carrier . . . . .	176
Draft article 59. Variation by agreement . . . . .	177
Chapter 11 – Transfer of rights . . . . .	178-182
Draft article 60. When a negotiable transport document or negotiable electronic transport record is issued . . . . .	178
Draft article 61. Liability of the holder . . . . .	179-182
Chapter 12 – Limits of liability . . . . .	183-208
Draft article 62. Limitation of liability . . . . .	183-195
Further consideration of draft articles 62, 63 and 27 . . . . .	196-204
Draft article 63. Limits of liability for loss caused by delay . . . . .	205-207
Draft article 64. Loss of the benefit of limitation of liability . . . . .	208
Chapter 13 – Time for suit . . . . .	209-213
Draft article 65. Period of time of suit . . . . .	209-210
Draft article 66. Extension of time of suit . . . . .	211
Draft article 67. Action for indemnity . . . . .	212
Draft article 68. Actions against the person identified as the carrier . . . . .	213
Chapter 14 – Jurisdiction . . . . .	214-225

---

Draft article 69. Actions against the carrier . . . . .	214-215
Draft article 70. Choice of court agreements . . . . .	216-218
Draft article 71. Actions against the maritime performing party . . . . .	219
Draft article 72. No additional bases of jurisdiction . . . . .	220
Draft article 73. Arrest and provisional or protective measures . . . . .	221
Draft article 74. Consolidation and removal of actions . . . . .	222
Draft article 75. Agreement after dispute has arisen and jurisdiction when the defendant has entered an appearance . . . . .	223
Draft article 76. Recognition and enforcement. . . . .	224
Draft article 77. Application of chapter 14. . . . .	225
Chapter 15 – Arbitration . . . . .	226-232
Draft article 78. Arbitration agreements. . . . .	226-227
Draft article 79. Arbitration agreement in non-liner transportation . . . . .	228-230
Draft article 80. Agreements for arbitration after the dispute has arisen. . . . .	231
Draft article 81. Application of chapter 15. . . . .	232
Chapter 16 – Validity of contractual terms . . . . .	233-255
Draft article 82. General provisions . . . . .	233-234
Draft article 83. Special rules for volume contracts . . . . .	235-253
Draft article 84. Special rules for live animals and certain other goods . . . . .	254-255
Chapter 17 – Matters not governed by this Convention. . . . .	256-264
Draft article 85. International conventions governing the carriage of goods by other modes of transport . . . . .	257-258
Draft article 86. Global limitation of liability. . . . .	259
Draft article 87. General average . . . . .	260
Draft article 88. Passengers and luggage . . . . .	261
Draft article 89. Damage caused by nuclear incident . . . . .	262-264
Chapter 18 – Final clauses . . . . .	265-289
Draft article 90. Depositary . . . . .	265
Draft article 91. Signatures, ratification, acceptance, approval or accession. . . . .	266-267
Draft article 92. Denunciation of other conventions. . . . .	268-269
Draft article 93. Reservations . . . . .	270
Draft article 94. Procedure and effect of declarations. . . . .	271-272
Draft article 95. Effect in domestic territorial units . . . . .	273

Draft article 96. Participation by regional economic integration organizations. . . . .	274
Draft article 97. Entry into force . . . . .	275-278
Draft article 98. Revision and amendment. . . . .	279-280
Draft article 99. Amendment of limitation amounts. . . . .	281
Draft article 100. Denunciation of this Convention . . . . .	282
Title of the draft convention . . . . .	283-289
III. Other business. . . . .	290
Planning of future work . . . . .	290

#### Annex

Draft convention on contracts for the international carriage of goods wholly or partly by sea

### Introduction

1. At its thirty-fourth session, in 2001, the Commission established Working Group III (Transport Law) and entrusted it with the task of preparing, in close cooperation with interested international organizations, a legislative instrument on issues relating to the international carriage of goods such as the scope of application, the period of responsibility of the carrier, obligations of the carrier, liability of the carrier, obligations of the shipper and transport documents.<sup>1</sup> The Working Group commenced its deliberations on a draft convention on the carriage of goods [wholly or partly] [by sea] at its ninth session in 2002. The most recent compilation of historical references regarding the legislative history of the draft convention can be found in document A/CN.9/WG.III/WP.100.

2. Working Group III (Transport Law), which was composed of all States members of the Commission, held its twenty-first session in Vienna from 14 to 25 January 2008. The session was attended by representatives of the following States members of the Working Group: Algeria, Australia, Austria, Belarus, Benin, Bolivia, Bulgaria, Cameroon, Canada, Chile, China, Czech Republic, Egypt, El Salvador, France, Gabon, Germany, Greece, India, Iran (Islamic Republic of), Italy, Japan, Lebanon, Mexico, Namibia, Nigeria, Norway, Poland, Republic of Korea, Russian Federation, Senegal, Singapore, South Africa, Spain, Switzerland, Thailand, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

3. The session was also attended by observers from the following States: Angola, Argentina, Brazil, Burkina Faso, Congo, Côte d'Ivoire, Croatia, Democratic Republic of the Congo, Denmark, Finland, Ghana, Indonesia, Netherlands, Niger, Portugal, Romania, Saudi Arabia, Slovakia, Slovenia, Sweden, Tunisia and Turkey.

<sup>1</sup> *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), para. 345.



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

(a) *United Nations system*: United Nations Conference on Trade and Development (UNCTAD);

(b) *Intergovernmental organizations*: European Commission, the Intergovernmental Organisation for International Carriage by Rail (OTIF) and the League of Arab States;

(c) *International non-governmental organizations invited by the Working Group*: Association of American Railroads (AAR), BIMCO, Comité Maritime International (CMI), European Shippers' Council (ESC), International Chamber of Commerce (ICC), International Chamber of Shipping (ICS), International Federation of Freight Forwarders Associations (FIATA), International Group of Protection and Indemnity (P&I) Clubs, European Law Students' Association (ELSA) and the World Maritime University (WMU).

5. The Working Group elected the following officers:

*Chairman*: Mr. Rafael Illescas (Spain)

*Rapporteur*: Mr. Walter de Sá Leitão (Brazil)

6. The Working Group had before it the following documents:

(a) Annotated provisional agenda (A/CN.9/WG.III/WP.100);

(b) The draft convention on the carriage of goods [wholly or partly] [by sea] (A/CN.9/WG.III/WP.101);

(c) A proposal by the Government of the Netherlands (A/CN.9/WG.III/WP.102); and

(d) A proposal by the delegations of Italy, the Republic of Korea and the Netherlands (A/CN.9/WG.III/WP.103).

7. The Working Group adopted the following agenda:

1. Opening of the session.

2. Election of officers.

3. Adoption of the agenda.

4. Preparation of a draft convention on the carriage of goods [wholly or partly] [by sea].

5. Other business.

6. Adoption of the report.

8. The Working Group decided to establish a drafting group to assist the Secretariat in the preparation of a revised version of the draft Convention, for approval by the Working Group together with the adoption of its report. The revised text should implement in all official languages of the United Nations, the amendments that the Working Group might decide to make in the text. The Working Group expressed its gratitude to a number of delegations that had the official languages of the United Nations as their domestic working languages for their willingness to participate in the meetings of the drafting group.

## **I. Deliberations and decisions**

9. The Working Group commenced its final review of the draft convention on the carriage of goods [wholly or partly] [by sea] (“the draft convention”) on the basis of the text contained in A/CN.9/WG.III/WP.101. The Working Group was again reminded that the text contained in A/CN.9/WG.III/WP.101 was the result of negotiations within the Working Group since 2002. The Working Group agreed that while the provisions of the draft convention could be further refined and clarified, to the extent that they reflected consensus already reached by the Working Group, the policy choices should only be revisited if there was a strong consensus to do so. Those deliberations and conclusions are reflected in section II below (see paras. 11 to 289 below). The Working Group further agreed to review the definitions in draft article 1 in the context of the relevant articles.

10. At the closing of its deliberations, the Working Group approved the text of the draft convention on contracts for the international carriage of goods wholly or partly by sea, as contained in the annex to this report.

## **II. Preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea]**

### **General comments**

11. By way of general comment, it was said that a number of States had expressed concerns with regard to paragraph 2 of draft article 1, draft article 18 and draft article 62. It was suggested that revision of these draft articles would render the draft convention more equitable and should be considered as a package in the final process of the negotiation. The Working Group was encouraged to seek some improvement in those areas with a view to achieving a fairer set of rules for both parties to the contract of carriage. This, it was said, would enhance the political acceptability of the draft convention and would prevent a number of States from seeking a regional alternative for dealing with the international carriage of goods. The Working Group took note of those views.

### **Chapter 1 – General provisions**

#### **Draft article 1. Definitions**

12. The Working Group agreed to defer its discussion of the specific paragraphs of draft article 1 until agreement had been reached on the relevant articles regarding the terms defined in draft article 1. The Working Group was also reminded that it had not yet finalized the title of the draft convention and agreed to consider it following its deliberations on the text.

#### **Draft article 2. Interpretation of this Convention**

13. The Working Group approved the substance of draft article 2 and referred it to the drafting group.

**Draft article 3. Form requirements**

14. It was noted that the reference to paragraph 3 of draft article 20 as contained in draft article 3 was incorrect and should be to paragraph 2 of draft article 20. The Working Group approved the substance of draft article 3, with the above-mentioned correction, and referred it to the drafting group.

**Draft article 4. Applicability of defences and limits of liability**

15. Noting that draft article 4 had received ample discussion in previous meetings, the Working Group approved the substance of draft article 4 and referred it to the drafting group.

**Chapter 2 – Scope of application****Draft article 5. General scope of application**

16. The Working Group approved the substance of draft article 5 and referred it to the drafting group.

*Paragraphs 1, 5, 8 and 24 of draft article 1*

17. With regard to the terms “contract of carriage”, “carrier”, “shipper” and “goods” relevant to draft article 5, the Working Group approved the substance of the definitions respectively provided for in paragraphs 1, 5, 8 and 24 of draft article 1 and referred them to the drafting group.

**Draft article 6. Specific exclusion**

18. A concern was expressed that paragraph 2 (a) of draft article 6 did not clarify whether the contract referred to a contract concluded between or applicable between the parties. It was also observed that the draft provision referred to a contract “between the parties”, whereas draft article 7 referred to a contract between the carrier and a party “that is not an original party to the charterparty or other contract of carriage excluded from the application of this Convention.” In response, it was pointed out that the parties referred to in paragraph 2 (a) of draft article 6 included the carrier and any party making a claim under the draft convention and to whom the charterparty or other contract referred to in that provision might apply, for instance as a result of succession. Draft article 7, in turn, was intended to make it clear that draft article 6 would not prevent the application of the draft convention to parties that had not themselves been involved in the negotiation of a contract to which the convention did not apply, such as the holder of a bill of lading issued pursuant to the terms of a charterparty and who had not themselves adhered to the charterparty. It was said that a time charter is an example of a charterparty that may not affect the relationship between the parties. The Working Group approved the substance of draft article 6 and referred it to the drafting group.

*Paragraphs 3 and 4 of draft article 1*

19. With regard to the terms “liner transportation” and “non-liner transportation” used in draft article 6, the Working Group approved the substance of the definitions respectively provided for in paragraphs 3 and 4 of draft article 1 and referred them to the drafting group.

**Draft article 7. Application to certain parties**

20. The Working Group approved the substance of draft article 7 with the deletion of the reference to “consignor” and referred it to the drafting group.

*Paragraphs 10, 11 and 12 of draft article 1*

21. With regard to the term “consignor” used in draft article 7, it was proposed that the concept of “consignor” as defined in paragraph 10 of draft article 1 should be deleted so as to make the draft convention less complicated (see A/CN.9/WG.III/WP.103). It was further suggested that any reference to “consignor” in the draft convention should be deleted accordingly. The rationale for the proposal was the following: (i) the consignor did not have any obligations and had only one right under the draft convention, which was the right to obtain a receipt upon its delivery of the goods to the carrier pursuant to subparagraph (a) of draft article 37; (ii) there were no practical difficulties reported regarding the issuance of a receipt for the consignor that might require it to be dealt with on a uniform basis in the draft convention; (iii) confusion with other transport conventions and some national laws could be avoided; and (iv) the term “transport document” could also be simplified and be aligned with actual maritime practice. Broad support was expressed for this proposal.

22. A contrary suggestion was made that the definition of “consignor” should be retained and that additional provisions on the rights and obligations of the consignor should be added to the draft convention. It was explained that the rights and obligations of the contractual shipper and the consignor (the actual shipper) should be dealt differently, as the rights and obligations of the latter only arose upon the delivery of the goods to the carrier. It was further explained that the relationship between the contractual shipper and the consignor had raised substantial legal issues in certain national legal systems. More specifically, under FOB trade, it would not always be the case that there would be a documentary shipper and, thus it would be impossible for the consignor to be deemed a documentary shipper. However, the prevailing view was that the aforementioned concern should be dealt with most appropriately by domestic law, especially sales law, and the sales contract itself, which would determine to what extent the consignor would be entitled to receive documents.

23. Although broad support was expressed for the deletion of the reference to “consignor” in the draft convention, it was suggested that subparagraph (a) of draft article 37 should be retained in some form so as to protect the right of the FOB seller to obtain non-negotiable transport documents.

24. With regard to the term “consignor” used in draft article 7, the Working Group agreed that the definition provided for in paragraph 10 of draft article 1 should be deleted, as well as any other reference to “consignor” in the draft convention. However, the Working Group further agreed to discuss the suggestion made with regard to subparagraph (a) of draft article 37 at a later stage in its deliberations.

25. With regard to the terms “holder” and “consignee” used in draft article 7, the Working Group approved the substance of the definitions respectively provided for in paragraphs 11 and 12 of draft article 1, and referred them to the drafting group.

### **Chapter 3 – Electronic transport records**

*Paragraphs 15, 16, 17, 19, 20, 21 and 22 of draft article 1*

26. With regard to the terms “transport document”, “negotiable transport document”, “non-negotiable transport document”, “electronic transport record”, “negotiable electronic transport record”, “non-negotiable electronic transport record” and the “issuance” and the “transfer” of a negotiable electronic transport record used in draft Chapter 3, the Working Group agreed to discuss the definitions of these terms during its consideration of draft Chapter 8.

#### **Draft article 8. Use and effect of electronic transport records**

27. The Working Group approved the substance of draft article 8 and referred it to the drafting group.

#### **Draft article 9. Procedures for use of negotiable electronic transport records or the electronic equivalent of a non-negotiable transport document that requires surrender**

28. It was noted that reference to “the electronic equivalent of a non-negotiable transport document that requires surrender” in the title and in paragraph 1 of draft article 9 might require deletion should the Working Group in its further deliberation decide to delete or revise draft article 49. The Working Group noted that references to “the consignee” in subparagraphs (c) and (d) of paragraph 1 had been added so as to accurately include in draft article 9 coverage of an electronic equivalent of a non negotiable transport document that requires surrender. The Working Group agreed that those subparagraphs should be revised if draft article 49 were to be deleted. Subject to those deliberations, the Working Group approved the substance of draft article 9 and referred it to the drafting group.

#### **Draft article 10. Replacement of negotiable transport document or negotiable electronic transport record**

29. The Working Group approved the substance of draft article 10 and referred it to the drafting group.

### **Chapter 4 – Obligations of the carrier**

#### **Draft article 11. Carriage and delivery of the goods**

30. The Working Group approved the substance of draft article 11 and referred it to the drafting group.

#### **Draft article 12. Period of responsibility of the carrier**

*Proposal to re-insert a revised version of draft article 11 (2) from A/CN.9/WG.III/WP.81*

31. In considering the text of draft article 12 as contained in A/CN.9/WG.III/WP.101, it was observed that the Secretariat had revised the text of the draft provision following its consideration by the Working Group at its 19th session (see A/CN.9/621, paras. 28-33). Support was expressed for the drafting changes that had been made in order to clarify the relationship between paragraphs 1 and 2 of the provision as it

appeared in article 11 of A/CN.9/WG.III/WP.81, by moving aspects of paragraph 2 regarding the ascertainment of the time and location of delivery for insertion into draft article 45 in chapter 9 on delivery of the goods. However, some concern was expressed that certain aspects of paragraph 2, as it had appeared in article 11 of A/CN.9/WG.III/WP.81, regarding the actual time and location of receipt and delivery should be retained in article 12 of the current text. To that end, it was proposed that former paragraph 11 (2) of A/CN.9/WG.III/WP.81 should be reinserted in the current text as paragraph 1 bis, with the following revised first sentence substituted for the first sentence of the chapeau: “For the purposes of paragraph 1, receipt or delivery shall be receipt or delivery as defined in the contract of carriage, or, failing such agreement, as defined by the customs, practices, or usages of the trade.”

32. While some sympathy was expressed for the concerns raised regarding the determination of the time and place of receipt and delivery in the period of responsibility in draft article 12 in order to avoid any possible gap in the period of responsibility, it was observed that the proposal would render the provision too detailed, such that it would be necessary to set out every possible combination of contractual and actual receipt and delivery. It was suggested that such a precise solution would be unworkable in the context of the draft convention. As such, there was agreement in the Working Group that the more general approach taken in the current text of draft article 12 (1) was preferable to such a specific enumeration of possibilities, and the proposal was not accepted.

33. Another proposal made to consider the adoption of the period of responsibility provisions as set out in article 4 of the Hamburg Rules was not taken up by the Working Group.

*Deletion of “and subject to article 14, paragraph 2” in paragraph 3*

34. Concerns were raised regarding the interaction of the phrase “and subject to article 14, paragraph 2” in the chapeau of paragraph 3, and the phrase “and without prejudice to the other provisions in chapter 4” in draft article 14, paragraph 2. In particular, it was suggested that the presence of both phrases in the draft convention could raise a conflict between the two provisions that would have unintended consequences. In order to ensure that draft articles 12 (3) and 14 (2) operated as intended, so as not to allow for the period of loading or unloading pursuant to draft article 14 (2) to be outside the carrier’s period of responsibility, as currently the case in some jurisdictions, it was proposed that the phrase “and subject to article 14, paragraph 2” in the chapeau of paragraph 12 (3) be deleted. The Working Group agreed with that proposal.

*Reference to the “consignor” in draft article 12 (2) (a)*

35. In light of the decision of the Working Group to delete the concept of the “consignor” from the text of the draft convention (see paras. 21 to 24 above), it was suggested that the term “consignor” should be deleted from draft article 12 (2) (a) and replaced with another term. Strong support was expressed in the Working Group for that proposal, and there was support for the suggestion that the phrase “the consignor” could be replaced with the phrase “the shipper or the documentary shipper”. However, concerns were raised that the alternative terms suggested might create additional complications, and could cause confusion in some jurisdictions. An additional proposal was made that the reference to the “consignor” could be dealt with by adjusting the text to delete the phrase “require the consignor to hand over the goods” and to insert in its stead the phrase “requires the goods to be handed over”. There was support in the Working Group for that suggestion.

36. Another concern was raised that further refinement of the provision might be necessary in order to define the start of the period of responsibility, for example, in cases where the carrier had received the goods for transport, but was required to turn the goods over to an authority for inspection prior to having them returned to the carrier for transport. It was suggested that in such a situation, it might be unclear when the carrier's period of responsibility began. While there was some support for that concern, it was generally felt that the clarification was not necessary and that a sensible reading of the draft article would affirm the carrier's responsibility whenever it had actual custody of the goods, but not when they were in the custody of an authority.

*“under ship's tackle” clause*

37. No affirmative responses were received to a query whether delegations were of the view that “under ship's tackle” clauses would still be admissible given the current text of the draft convention.

*Conclusions reached by the Working Group regarding draft article 12*

38. Subject to the following adjustments, the Working Group approved the substance of draft article 12 and referred it to the drafting group:

- The substitution of the phrase “requires the goods to be handed over” for the phrase “require the consignor to hand over the goods” in draft article 12 (2) (a); and
- The deletion of the phrase “and subject to article 14, paragraph 2” in the chapeau of paragraph 12 (3).

**Draft article 13. Transport beyond the scope of the contract of carriage**

39. Concerns were raised regarding the clarity of the text of draft article 13, particularly with respect to the phrase in the first sentence “and in respect of which it is therefore not the carrier”, and regarding the whole of the second sentence and the meaning of the phrase “the period of the contract of carriage”. Although some support was expressed for the provision as drafted, there was strong support for the view that the current text was unclear, and several proposals were made with the goal of addressing those concerns.

40. Some support was expressed for the suggestion that draft article 13 should simply be deleted from the text. In support of that view, it was suggested that the provision could result in a situation where the carrier would not be responsible for the additional transport, thus potentially causing harm to a third party holder or consignee in good faith.

41. However, the Working Group supported the retention of draft article 13 in order to provide for current practice in the industry whereby at the shipper's request, the carrier agreed to issue to the shipper a transport document for the entire transport of the goods, notwithstanding that the carrier had arranged on behalf of the shipper for a portion of the transport to be carried out by another carrier. In such cases, the carrier had no obligation regarding the goods for that portion of the transport that was performed by another carrier.

42. With a view to retaining such a provision in the text, the Working Group agreed with a proposal that the first sentence of draft article 13 could be clarified by substituting the phrase “and in respect of which it does not assume the obligation to carry the goods”

for the phrase “and in respect of which it is therefore not the carrier”. Further, it was agreed that the second sentence should be replaced with the following clearer text: “In such event, the carrier’s period of responsibility is only the period covered by the contract of carriage”. Although there was some support for the retention of the principle in the third sentence that, in such cases, the carrier acted on behalf of the shipper, so as to ensure that the carrier used appropriate care in choosing a carrier for the additional transport, there was agreement in the Working Group that improved drafting was not possible, and that the best alternative was simply to delete the third sentence.

*Conclusions reached by the Working Group regarding draft article 13*

43. Subject to the following adjustments, the Working Group approved the substance of draft article 13 and referred it to the drafting group:

- The phrase “and in respect of which it is therefore not the carrier” in the first sentence should be substituted for the phrase “and in respect of which it does not assume the obligation to carry the goods”;
- The second sentence should be replaced with: “In such event, the carrier’s period of responsibility is only the period covered by the contract of carriage.”; and
- The third sentence should be deleted.

**Draft article 14. Specific obligations**

44. There were expressions of concern that paragraph 2 of draft article 14 was too broad in scope and would eventually shift to the shipper or the consignee the responsibility for the performance of obligations that traditionally had to be performed by the carrier under existing international instruments and domestic laws on carriage of goods by sea. That paragraph, it was noted, deviated for instance from the Hague-Visby Rules, where only the carrier had the obligation of loading, handling, stowing or unloading of the goods. It was also said that such an innovative provision should be amended so as to preclude carriers from routinely disclaiming liability for damage to the goods that occurred during the operations contemplated in the draft article. The potential risk involved in abuse of those clauses was said to be significant, as experience showed that most damage in international maritime carriage occurred during loading or unloading. Another concern raised in connection with paragraph 2 was that it was not clear whether and to what extent the types of clauses it contemplated would affect the carrier’s period of responsibility. There was strong support for the deletion of paragraph 2 so as to solve those problems.

45. Another concern was that draft paragraph 2 allowed for clauses that would require the consignee to unload the goods. There was support for the suggestion that the reference to the consignee should be deleted from paragraph 2 of the draft article, so as to protect the consignee, who was not a party to the contract of carriage, from the effects of clauses that it had not negotiated. At the very least, it was said, the draft article should require the consignee’s consent in order to be bound by those clauses.

46. In response, it was noted that paragraph 2 of the draft article contained a useful provision that clarified an area of the law where there were significant discrepancies among legal systems in a manner that adequately took into account commercial practice. In practice, shippers often undertook, through “free in and out” or “free-in-and-out, stowed” clauses (“FIO(S)” clauses), to undertake some or all of the carrier’s responsibilities in respect of loading, handling, stowing and unloading goods. It was noted that FIO(S) clauses were most commonly used in non-liner carriage, which fell



outside the scope of application of the draft convention, but that the draft convention could be applicable to contracts of carriage in non-liner transport by way of the operation of draft articles 6, paragraph 2, and 7. It was observed that in some jurisdictions FIO(S) clauses were understood as merely allocating the liability for the cost incurred with loading and unloading cargo, whereas in other jurisdictions they were regarded as a contractual limitation to the period of the responsibility of the carrier. In addition, it was observed that paragraph 2 was not meant to create any obligations on the part of the consignee.

47. There was wide support for the view that, as the Working Group had agreed to delete the words “subject to article 14, paragraph 2” from paragraph 3 of draft article 12 (see above, para. 34), it was now sufficiently clear that under the draft convention a FIO(S) clause did not reduce the carrier’s period of responsibility for the goods. It was explained that the combined effect of these provisions was to clarify the responsibilities of the shipper and the carrier who agreed that the loading, stowing and discharging of the goods would be carried out by the shipper. In that case, the shipper would be liable for any loss due to its failure to effectively fulfil those obligations, and the carrier would retain responsibility for other matters during loading and discharge, such as a duty of care regarding the goods, since the carrier’s period of responsibility would be governed by the contract of carriage. Furthermore, article 18, subparagraph 3 (i) expressly provided that the carrier would only be released of liability for damage that occurred during loading or unloading under a FIO(S) clause if it was not the carrier itself that had performed those functions. Another reason for retaining the text, it was said, was that the responsibility for loading and unloading of cargo and the liability for costs incurred as a result of those activities, was a matter that the parties were free to allocate through the sales contract, a freedom which the draft convention should not curtail.

48. During the discussion, three proposals were suggested to achieve a compromise regarding the different views: (i) to add the requirement of the consent of the consignee to the agreement mentioned in paragraph 2 of draft article 14; (ii) to delete “or the consignee”; and (iii) to revise the last sentence of paragraph 2 of draft article 14 to specify that it referred to an agreement that had been negotiated separately and that was not part of the original contract.

#### *Conclusions reached by the Working Group regarding draft article 14*

49. Notwithstanding the proposals to revise or delete paragraph 2 of draft article 14, the Working Group decided to retain draft article 14 in its current form as there was not enough support for such modification. The Working Group, therefore, approved the substance of draft article 14 and referred it to the drafting group.

#### **Draft article 15. Specific obligations applicable to the voyage by sea**

50. It was pointed out that, by making the carrier’s obligation to provide a seaworthy ship a continuous one, the draft convention had made a significant step as compared to the Hague-Visby Rules, where such obligation only applied up to the beginning of the voyage. There was very wide support for the draft article, which was said to reflect the Working Group’s recognition that present technological developments warranted a modernization of principles on responsibility. It was also noted, at the same time, that such a result had been the subject of some controversy and had only been achieved as a result of the spirit of compromise of those who had initially advocated the retention of the traditional rules on seaworthiness of the Hague-Visby Rules.

51. The Working Group approved the substance of draft article 15 and referred it to the drafting group.

**Draft article 16. Goods that may become a danger**

52. The draft article did not elicit comments. The Working Group approved its substance and referred it to the drafting group.

**Draft article 17. Sacrifice of the goods during the voyage by sea**

53. There was not sufficient support for a suggestion to re-insert the phrase “or inland waterways” following the phrase “at sea” in the draft article. Accordingly, the Working Group approved the substance of draft article 17 and referred it to the drafting group. One delegation renewed its concerns regarding draft article 17 and its relationship with draft article 87.

## **Chapter 5 – Liability of the carrier for loss, damage or delay**

**Draft article 18. Basis of liability**

*Proposal to revise draft article 18*

54. There were several expressions of support for the view that draft article 18 still required some amendment in order to ensure that it preserved an equitable balance between carrier and cargo interests. In particular, the following revisions were proposed:

(a) Paragraph 3 (e) of draft article 18 should be deleted, because paragraph 2 of draft article 18 already provided sufficient protection to the carrier, and strikes, lock-outs, stoppages or restraints of labour should not diminish the responsibilities of the carrier;

(b) Paragraph 3 (g) of draft article 18 should be deleted, because it was said to be unfair to make the cargo owner liable for any latent defects of the goods;

(c) Paragraph 5 of draft article 18 should be deleted and paragraph 4 should be amended to the effect that the carrier would be liable for all or part of the loss, damage, or delay if the claimant proved that the event set forth is subsequent to a fault of the carrier or a maritime performing party. Such an amendment, it was said would better protect the interests of shippers and remove from them the heavy burden to have to prove the unseaworthiness of the ship whenever the carrier invoked one of the defences mentioned in paragraph 3 of the draft article.

55. Although not all of the above proposals received an equal level of support, some sympathy was expressed for improving the draft article so as to achieve a better balance of interests, in particular with regard to the burden of proof on cargo claimants, who were said to have little means of proving the unseaworthiness of the ship. Instead, it was said, it should be for the carrier to prove that it had complied with draft article 15.

56. The Working Group took note of those views, but did not consider that there was sufficient consensus for reopening the debate on draft article 18. It was widely felt that draft article 18 was one of the most important articles in the draft convention with significant practical implications. In response to the proposal above to revise draft article 18, the Working Group was reminded that draft article 18 was a well-balanced compromise which the Working Group had been able to achieve through serious deliberations during the previous sessions. In addition, concerns were raised that the

deletion of subparagraphs 3 (e) and (g) would lead to a substantial increase in the carrier's liability, in certain cases even to an absolute liability. It was also noted that caution should be taken when revising a text which had been fully considered and approved by the Working Group, especially because draft article 18 was a central element in the whole package of rights and obligations.

57. It was noted that the term "the consignee" in subparagraph 3 (h) of draft article 18 should be deleted, as reference to "the consignee" was unnecessary.

*Conclusion reached by the Working Group regarding draft article 18*

58. The Working Group approved the substance of draft article 18 with the deletion of "the consignee" in subparagraph 3 (h) and referred it to the drafting group.

**Draft article 19. Liability of the carrier for other persons**

59. The Working Group recalled that at its nineteenth session, it agreed, inter alia, to review the treatment of "agents" in the draft convention, as the definition of "performing party" included agents (see A/CN.9/621, paras. 141, 150 and 153). Consequently, the Working Group approved the substance of draft article 19 with the deletion of "or agent" in subparagraph (c) and referred it to the drafting group.

**Draft article 20. Liability of maritime performing parties**

60. A question was raised with regard to paragraph 4 of draft article 20 whether liability would be imposed on the "master or crew of the ship". The Working Group recalled that the draft convention had previously defined "maritime performing party" to include employees and that paragraph 4 of draft article 20 was drafted in order to exempt employees from liability. It was pointed out that if the intent of the draft convention was to exempt individual masters or crew from liability as can be implied from subparagraph (b) of draft article 19, a separate exemption for those parties should be provided accordingly in paragraph 4 of draft article 20. After discussion, the Working Group approved the substance of draft article 20 with the inclusion of reference to "master or crew of the ship" in paragraph 4 and referred it to the drafting group.

*Paragraphs 6, 7 and 25 of draft article 1*

61. With regard to the terms "performing party" and "maritime performing party" used in draft article 20, the Working Group approved the substance of the definitions respectively provided for in paragraphs 6 and 7 of draft article 1 and referred them to the drafting group.

62. With regard to the term "ship" used in draft article 20, it was suggested that the term should be changed to "seagoing vessel"["any vessel designed to be used to carry goods by sea"], in order to differentiate it from inland navigation vessels and that "vessel" in paragraph 2 of draft article 5 should be changed to "ship". In response, it was pointed out that this could lead to confusion, as vessels designed for inland navigation could also be used for sea. After discussion, the Working Group approved the substance of the definition provided for in paragraph 25 of article 1 and agreed that the drafting group should look at the aforementioned issues to make sure that vessel and ship were used consistently and that the appropriate terms were used in the various language versions.

**Draft article 21. Joint and several liability**

63. The Working Group approved the substance of draft article 21 and referred it to the drafting group.

**Draft article 22. Delay***Proposal to reconsider the issue of delay*

64. The Working Group was reminded that it had last considered the issue of liability for delay in the delivery of the goods at its 19th session (see A/CN.9/621, paras. 177-184). At that time, and in light of previous discussions in the Working Group regarding liability for delay in delivery (see A/CN.9/616, paras. 101-113), a number of proposals were presented and considered with a view to coming to an agreement regarding the treatment of delay in the draft convention (see A/CN.9/621, para. 180). The compromise agreed upon by the Working Group following those discussions at its 19th session was reflected in the text of the draft convention in draft articles 22 and 63, and in the deletion of the shipper's liability for delay in the draft convention. However, it was suggested that that compromise had been made hastily, that there did not seem to be a common understanding of its effects, and that it was thought to have produced the undesirable result of requiring the carrier to agree to be liable for delay in delivery by way of the text in draft article 22 that delay occurred when the goods were not delivered within the time agreed in the contract of carriage. Since the legal regime in a number of jurisdictions already set out mandatory liability on the part of the carrier for delay, whether by way of the Hamburg Rules or through national law, it was suggested that now subscribing to a regime such as that of the draft convention where there was no mandatory liability for delay on the part of the carrier would place those States in a politically untenable situation. Further, it was suggested that where draft article 27 allowed the operation of unimodal regimes that provided for mandatory liability of the carrier for delay, such as the Convention on the Contract for the International Carriage of Goods by Road, 1956 ("CMR") or the Uniform Rules concerning the Contract for International Carriage of Goods by Rail, Appendix to the Convention concerning International Carriage by Rail, as amended by the Protocol of Modification of 1999 ("CIM-COTIF"), it would be illogical to have such mandatory liability only for certain portions of the transport. As such, it was suggested that, since past experience had shown that it was not possible to reach consensus on how to deal with the issue of delay in the draft convention, the best option would be to simply delete draft articles 22 and 63, as well as all other references to delay in the draft convention, and to leave the matter entirely to applicable law. There was some sympathy expressed for the concerns raised, and the proposal met with some support.

65. However, the Working Group was generally of the view that, after the lengthy and numerous discussions that had taken place in previous sessions with respect to the treatment of delay pursuant to the draft convention, the compromise reached as reflected in the text was genuine and that it formed part of the delicate balance of rights and obligations in the text as a whole. The proposal to delete draft articles 22 and 63, as well as all other references to delay, was not accepted by the Working Group, nor was the suggestion that resort could be had to a "reasonableness" approach in terms of the time required for delivery, such as had been deleted pursuant to the compromise made at the 19th session, as reflected in footnote 49 of A/CN.9/WG.III/WP.101.

66. Some concerns were raised in the Working Group regarding the interpretation of draft article 22. Specifically, there seemed to be some confusion regarding whether express or implied agreement with respect to the time for delivery was required for the

operation of the provision. However, it was noted that the requirement for “express” agreement had been deleted as part of the compromise agreed to at the 19th session of the Working Group (see A/CN.9/616, paras. 184), and that the phrase “unless otherwise agreed” with respect to the limitation on the amount of compensation for loss or damage due to delay in draft article 63 had also been deleted as part of that compromise (see A/CN.9/616, paras. 180 (b) and 184). A number of delegations agreed with the view that draft article 18 set out the carrier’s general obligation in respect of delay, that that obligation could not be contracted out of pursuant to draft article 82, that the date of delivery was not a required element of the contract particulars, that the carrier’s agreement to deliver by a certain date might be inferred from the communications exchanged by the parties, including the carrier’s public schedule of arrivals and departures, and that draft article 22 only determined when delay had occurred. The Working Group declined to take a definitive position regarding that, or any other, interpretation of the draft provisions on delay.

*Conclusions reached by the Working Group regarding draft article 22*

67. The Working Group approved the substance of draft article 22 and referred it to the drafting group.

**Draft article 23. Calculation of compensation**

68. The Working Group approved the substance of draft article 23 and referred it to the drafting group.

**Draft article 24. Notice of loss, damage or delay**

*Paragraph 4*

69. Although the Working Group was generally of the view that draft article 24 was acceptable, a drafting issue was raised with respect to the reference in paragraph 4 to “articles 22 and 63”. It was observed that compensation for loss due to delay was not actually payable pursuant to those provisions, but rather that it was payable pursuant to draft article 18, and that reference to draft articles 22 and 63 could create ambiguity. The Working Group agreed with a suggestion that paragraph 4 should be made more accurate in that respect, and a proposal to simply delete the reference to articles 22 and 63 received considerable support. However, it was pointed out that care had to be taken in the reformulation of the remainder of the paragraph, such that it did not require that the notice contain the specific amount of the loss claimed, which would be difficult to quantify, but rather provided notice that loss resulting from the delay had occurred. While a precise formulation was not agreed upon, the Working Group agreed that the drafting group should consider text for paragraph 4 along the following lines: “No compensation [due to] [arising from] [resulting from] delay is payable unless notice of loss due to delay was given to the carrier within twenty-one consecutive days of delivery of the goods.”

*Title of draft article 24*

70. It was observed that the drafting group should consider whether the title of draft article 24 was appropriate, given the agreement in the Working Group that the notice should concern the loss due to the delay, and not the delay itself. There was some support for that suggestion.

*Conclusions reached by the Working Group regarding draft article 24*

71. Subject to the following adjustments, the Working Group approved the substance of draft article 24 and referred it to the drafting group:

- the title of the draft provision should be considered with a view to adjusting it to reflect that the notice should be of the loss rather than of the delay; and
- the text of paragraph 4 should be amended along the lines noted in the final sentence of paragraph 69 above.

## **Chapter 6 – Additional provisions relating to particular stages of carriage**

### **Draft article 25. Deviation during sea carriage**

72. It was suggested that the title of the provision would better reflect its placement in chapter 6 if the phrase “during sea carriage” were deleted. Subject to that adjustment, the Working Group approved the substance of draft article 25 and referred it to the drafting group.

### **Draft article 26. Deck cargo on ships**

*Proposal for expanding the definition of “containers”*

73. The Working Group was reminded that a proposal had been made regarding a suggested improvement to be made to the definition of “container” currently in draft article 1 (26) (see A/CN.9/WG.III/WP.102), and that it would seem logical to discuss that proposal in connection with draft article 26. It was explained that the proposal was to adjust the definition of “container” in the draft convention by adding to it the term “road cargo vehicle”, and that that change would primarily have an effect on draft articles 26 (1) and (2) and 62 (3). It was noted that road cargo vehicles were often carried overseas in large numbers, usually on specialized trailer carrying vessels that were designed to carry both such vehicles and containers either on or below deck. It was explained that the current text of the draft convention treated road cargo vehicles pursuant to draft article 26 (1) (c), rather than grouping them with containers pursuant to draft article 26 (1) (b), such that the carrier might not be liable for damage to the goods in road cargo vehicles due to the special risk of carrying them on deck as part of the category in paragraph (c). It was suggested that road cargo vehicles should instead be treated in the same fashion as containers, such that the normal liability rules would apply to them regardless of whether they were carried on or below deck.

74. By way of further explanation, it was noted that adjusting the definition of “container” so as to include road cargo vehicles would ensure that it would not be possible to consider a road cargo vehicle as one unit pursuant to draft article 62 (3), but that, as in the case of containers, each package in the road cargo vehicle could be enumerated for the purposes of the per package limitation on liability. It was noted that that particular problem had been raised by the International Road Transport Union (IRU) (see A/CN.9/WG.III/WP.90) as being of particular concern. Further, it was suggested that adjusting the definition of “container” as proposed could have the additional benefit of treating containers and road cargo vehicles in an equitable fashion.

75. An additional proposal was made to extend the definition of “container” to include not only “road cargo vehicles”, but to include “railroad cars” as well. While it was noted that railroad cars were seldom carried on deck, it was suggested that the inclusion of

that term in the definition of “container” could have certain advantages, for example, in respect of the shipper’s obligation to properly and carefully stow, lash and secure the contents of containers pursuant to draft article 28.

76. Broad support was expressed for both proposals, as they entailed practical benefits, reflected the current practice and were especially reasonable from the viewpoint of the industry. It was observed that the proposal did not cause any change in the conflict of conventions provision of the draft convention and that there would be in particular no conflict with the CMR. It was further noted that if the proposals were to be approved, the drafting group should review the entire draft convention on the use of the terms “container” and “trailer”.

77. However, some concerns were raised with regard to extending the definition of “containers”. From the viewpoint of carriers, it was said, the expanded definition might result in an increase of the carrier’s level of liability, thus upsetting the balance currently reflected in the draft convention.

78. From the viewpoint of shippers, the concern was expressed that an expanded definition of “containers” might have undesirable implications on draft article 62 on limitation of liability especially with regard to sea transport of a road cargo vehicle. For example, if the bill of lading did not include the enumeration of the goods on the vehicle, the vehicle and its contents would be regarded as a single package and thus all the owners of the goods on the truck would lose the per package limitation. This danger would also be a matter of concern for road haulers. It was pointed out that the CMR provided for a higher weight limitation of liability than currently contemplated in the draft convention. Thus, in case of cargo loss or damage during a sea journey while the goods were loaded on a truck, the road carrier might be liable to compensate cargo owners at an amount higher than it could recover from the sea carrier. Another concern was the possible implication that the inclusion of road vehicles in the definition of containers might have for loss or damage to a road cargo vehicle which was transported by sea without any goods loaded on it. For those reasons, rather than amending the definition of “containers” it was suggested that it would be preferable to take an article-by-article approach and add the words “road cargo vehicles” and “railroad cars” whenever the context so required.

79. In response to those concerns, it was stated that goods in “road cargo vehicles” would need to be enumerated to benefit from the per package limitation and that that was already the practice, especially under the CMR. As regards damage to the vehicle itself, it was pointed out that the definition of “goods” as provided in paragraph 24 of draft article 1 addressed that issue as it included containers not supplied with cargo. Furthermore, from a practical point of view, it was noted that an amendment in the definition of containers had the advantage of avoiding the need for adding the expressions “road cargo vehicles” and “railroad cars” every time the term “container” was used (draft articles 1 (25), 1 (26), 15 (c), 18 (5) (a), 26 (1) (b), 28 (3), 42 (3), 42 (4), 42 (4) (a)(i), 42 (4) (b)(i), 42 (4) (b)(ii), 43 (c)(ii), 51 (2) (b), 62 (3)).

80. In view of the concerns that had been raised, and noting the relationship between some of the arguments and the notion of “package” in draft article 62, paragraph 3, the Working Group agreed that it should postpone its deliberations on the matter until it had examined that other provision.

#### *Fitness for carriage on deck*

81. It was pointed out that, regardless of whether or not the definition of “container” in the draft convention was to include “road cargo vehicles” and “railroad cars”, they

would in any event need to be fit for carriage on deck and this should be reflected in paragraph 1 (b) of draft article 26. There was general agreement in the Working Group that the carrier should only be allowed to carry on deck road cargo vehicles and railroad cars that were fit for such carriage and that the ship's deck should be specially fitted to carry them.

*Conclusions reached by the Working Group regarding draft article 26*

82. The Working Group approved the substance of draft article 26, subject to inclusion of reference to "road cargo vehicles" and "railroad cars" in subparagraph 1 (b). The Working Group agreed to revert to the proposed amendment to the definition of containers after it had examined draft article 62, paragraph 3.

**Draft article 27. Carriage preceding or subsequent to sea carriage**

83. Some concern was raised that draft article 27 did not provide for a declaration provision whereby a contracting State might declare that it would apply mandatory provisions of its domestic law in essentially the same circumstances under which a contracting State could apply an international instrument in accordance with paragraph 1 of draft article 27. In response, the Working Group was reminded that at its nineteenth session it had requested the inclusion of such a draft article (see A/CN.9/621, paras. 125-126) and that, at its twentieth session, it had decided, as part of its provisional decision pending further consideration of the compromise proposal on the level of the limitation of the carrier's liability, to reverse that decision (see A/CN.9/642, paras. 163 and 166), which is why the text before the Working Group did not contain any such provision.

84. A question was raised whether the use of the different terms "international instruments" in draft article 27 and "international convention" in draft article 85 was intentional. It was clarified that the differentiation was intentional, because not all relevant international instruments in this context were regarded as international conventions, for example, a regulation issued by a regional economic integration organization.

85. With regard to paragraph 3 of draft article 27, it was suggested that the paragraph should be deleted entirely, in light of the Working Group's decision at its nineteenth session to choose the Variant B approach with regard to limits of liability (see A/CN.9/621, para. 191). The Working Group was reminded that draft paragraph 3 had been added for greater clarity regarding the applicability of inland transport conventions when the only approach in subparagraph 1 (a) of the text was the conflict of laws approach set out in Variant A. It was pointed out that, since the draft article currently reflected a different approach, namely the "hypothetical contract" approach, draft paragraph 3 had become superfluous and might even interfere with the operation of subparagraph 1 (a).

86. In response, there was some support for retaining paragraph 3 as it had been part of a compromise arrived at after extensive debate. The Working Group was invited to consider carefully possible implications of deleting draft paragraph 3, in particular in connection with draft article 62, paragraph 2, before making final decision on the matter.

*Conclusions reached by the Working Group regarding draft article 27*

87. After discussion, the Working Group approved the substance of draft article 27 and referred it to the drafting group. The Working Group agreed to postpone a decision



on paragraph 3 of draft article 27 until it had further deliberated on matters relating to limits of liability in paragraph 2 of draft article 62 (see below, para. 204).

## **Chapter 7 – Obligations of the shipper to the carrier**

### **Draft article 28. Delivery for carriage**

88. As noted in footnotes 62 and 101 of A/CN.9/WG.III/WP.101, the obligation to properly and carefully unload the goods had been deleted from paragraph 2 of draft article 28 and moved to paragraph 2 of draft article 45 in the chapter on delivery of the goods, since it was thought that the obligation to unload the goods under an agreement pursuant to draft article 14 (2) would usually be performed by the consignee and was not an obligation of the shipper. However, a concern was raised that there might be a gap in the draft convention with regard to the obligation to unload the goods, since under draft article 45, the consignee only had obligations pursuant to the draft convention when it had exercised its rights under the contract of carriage. It was thought that if the obligation to unload the goods was no longer one of the shipper's obligations, and if the consignee had not exercised any of its rights under the contract of carriage, no party would be required to perform this obligation. Therefore, two proposals were put forward: (a) to re-insert "unload" into paragraph 2 of draft article 28; or (b) to replace "load, handle or stow the goods" with "perform its obligations under that agreement".

89. A contrary view was expressed that there was in fact no gap with regard to the obligation to unload the goods. Although the consignee might have this obligation as a result of an agreement pursuant to draft article 14 (2), it was traditionally not the obligation of the shipper to discharge the goods. It was further pointed out that the only situation where the shipper would be under an obligation to discharge the goods would be in an FOB sale, in which case the shipper would also be the consignee. Therefore, the obligation to unload the goods should not be dealt with in draft article 28 in any event.

90. However there was recognition that the discrepancy between the obligations listed in draft article 14 (2) and those listed in draft article 28 (2) might cause confusion, and the Working Group agreed with the proposal to replace "load, handle or stow the goods" with a phrase along the lines of "perform its obligations under that agreement" in order to avoid such concerns.

91. In addition, a preference was expressed in the Working Group for the clarity that would be lent draft article 28 (2) by deleting the phrase "the parties", and by reinserting the terms "the carrier and the shipper". Further, it was proposed that, in the interests of consistency, such an amendment would require a similar amendment to the provision in draft article 14 (2). The Working Group supported those proposals, and agreed that further discussion regarding what would trigger the consignee's obligation to unload the goods could be considered under draft article 45.

92. Further, the Working Group was reminded that paragraph 3 of draft article 28, contained the phrase "container or trailer", which would require amendment depending on the Working Group's decision whether to include "road and rail cargo vehicles" in the definition of "container" in draft article 1 (26), or whether to make the necessary adjustments to the substantive provisions in the draft convention (see above, paras. 73 to 80).

93. Subject to the implementation of the above changes, the Working Group approved the substance of draft article 28 and referred it to the drafting group.

**Draft article 29. Cooperation of the shipper and the carrier in providing information and instructions**

94. It was noted that the reference to “article 31” in the opening phrase of draft article 29 appeared to be inaccurate, and that the reference should be amended to “article 30”. Following further discussion, it was suggested that the entire opening phrase “Without prejudice to the shipper’s obligations in article 31,” was unnecessary and could be deleted. There was strong support in the Working Group for that suggestion.

95. Subject to the deletion of the opening phrase, the Working Group approved the substance of draft article 29 and referred it to the drafting group.

**Draft article 30. Shipper’s obligation to provide information, instructions and documents**

96. The Working Group approved the substance of draft article 30 and referred it to the drafting group.

**Draft article 31. Basis of shipper’s liability to the carrier**

97. The Working Group approved the substance of draft article 31 and referred it to the drafting group.

**Draft article 32. Information for compilation of contract particulars**

98. The Working Group approved the substance of draft article 32 and referred it to the drafting group.

*Paragraph 23 of draft article 1*

99. With regard to the term “contract particulars” used in draft article 32, the Working Group approved the substance of the definition of that term provided in paragraph 23 of draft article 1 and referred it to the drafting group.

**Draft article 33. Special rules on dangerous goods**

100. It was observed that the term “consignor” was used in paragraph (a) of draft article 33, and that the Working Group had agreed to delete all references to the consignor (see above, paras. 21 to 24). It was proposed that the draft provision could be adjusted by deleting the phrase “the consignor delivers them” and replacing it with text along the lines of: “they are delivered”. The Working Group agreed with that general approach.

101. Subject to that adjustment to the text in order to delete the reference to the “consignor”, the Working Group approved the substance of draft article 33 and referred it to the drafting group.

**Draft article 34. Assumption of shipper’s rights and obligations by the documentary shipper**

102. The Working Group approved the substance of draft article 34 and referred it to the drafting group.

*Paragraph 9 of draft article 1*

103. With regard to the term “documentary shipper” used in draft article 34, the Working Group approved the substance of the definition of that term provided in paragraph 9 of draft article 1 and referred it to the drafting group.

**Draft article 35. Liability of the shipper for other persons**

104. It was observed that the term “the consignor” appeared in draft article 35, and that the Working Group had agreed to delete all references to the consignor (see above, paras. 21 to 24). The Working Group agreed that the phrase “the consignor or” should simply be deleted.

105. Some concerns were raised in the Working Group regarding the clarity of the text since the phrase “as if such acts and omissions were its own” had been deleted as redundant as noted in footnote 76 in A/CN.9/WG.III/WP.101. It was suggested that the text was unclear regarding whether the provision concerned fault-based or strict liability, and regarding on whose part that liability ought to be considered. In response, it was noted that the provision simply stated the general principle of vicarious liability, rendering the shipper responsible for the acts of its employees, agents, subcontractors and the like, and that the liability standard would depend upon the particular obligation breached pursuant to the terms of the draft convention. In addition, it was observed that the re-insertion of a phrase such as that suggested could be rather complicated, since it could raise questions regarding the attribution of fault of the shipper under draft article 31, and since similar treatment would have to be given to draft article 19 regarding the liability of the carrier for other persons, which could raise significant complications throughout the text. After discussion, the Working Group decided that the provision was sufficiently clear, particularly in light of the well-known principle that was enunciated therein.

106. The Working Group approved the substance of draft article 35 and referred it to the drafting group.

**Draft article 36. Cessation of shipper’s liability**

107. The view was expressed that draft article 36 should be deleted, since it was felt that the liability provision in paragraph (a) had been dealt with under other articles of the draft convention, and that the freight provision in paragraph (b) was inappropriate in the context of the draft convention. While there was support for that view with respect to paragraph (b), and a remaining question regarding the underlying rationale of the provision, the Working Group declined to change its existing consensus and agreed to maintain the provision.

108. The Working Group approved the substance of draft article 36 and referred it to the drafting group.

**Chapter 8 – Transport documents and electronic transport records****Draft article 37. Issuance of the transport document or the electronic transport record**

109. It was observed that the term “consignor” was used in paragraph (a) of draft article 37, and that the text of that provision would have to be adjusted following the Working Group’s agreement to delete all references to the consignor (see above, paras. 21 to 24).

A suggestion that the appropriate amendment could be accomplished by deletion of the chapeau of draft article 37 and of the whole of paragraph (a), but it was noted that while paragraph (a) could be deleted, the content of the chapeau of the text should be retained in order to cover the situation in some trades where no transport document or electronic transport record was issued.

110. The Working Group agreed to delete paragraph (a) and to request the drafting group to make such consequential changes to the remaining text as were necessary. The Working Group was also reminded that simple deletion of paragraph (a) might not be sufficient to implement the decision to delete the notion of the consignor from the text, and that further regard might have to be had to additional consequential changes throughout the text.

111. Subject to the deletion of paragraph (a) containing the reference to the “consignor” and to any necessary further adjustments to the text to effect that deletion, the Working Group approved the substance of draft article 37 and referred it to the drafting group.

112. After having concluded its deliberations on the substance of draft article 37, the Working Group proceeded to examine a number of related definitions.

*Definition of “transport document” (draft article 1, paragraph 15)*

113. It was pointed out that, in light of the deletion of paragraph (a) of draft article 37 (see above, paras. 109 to 110) and of the decision of the Working Group to delete all references to the consignor (see above, paras. 21 to 24), certain adjustments would also have to be made to the definition of “transport document” in paragraph 15 of draft article 1.

114. It was suggested that the “or” between paragraphs (a) and (b) of draft article 1 (15) should be replaced with an “and” in order to reflect the Working Group’s agreement that a mere receipt would not constitute a transport document for the purposes of the draft convention. Therefore, the Working Group agreed that the two conditions set forth in paragraph 15 of draft article 1 should be made conjunctive rather than disjunctive. The Working Group was satisfied that such adjustments to the definition of “transport document” would not have adverse implications for other provisions in the draft convention, except for a minor redrafting of paragraph (a) of draft article 43.

115. Subject to those amendments, the Working Group approved the substance of paragraph 15 of draft article 1 and referred it to the drafting group.

*Consequential amendments to draft article 6 (2) (b)*

116. An additional consequential change proposed in light of the deletion of the concept of the “consignor” and of the amendments to the definition of “transport document” was to delete the text of paragraph 2 (b) of draft article 6 and replace it with the phrase “a transport document or an electronic transport record is issued”.

117. The Working Group agreed to amend paragraph 2 (b) of draft article 6 accordingly and referred it to the drafting group.

*Definition of “negotiable transport document” (draft article 1, paragraph 16)*

118. With regard to the term “negotiable transport document” used in draft article 37, a suggestion was made to replace “to the order of the consignee” with “to the order of the specified/named person”, as the consignee would be the endorsee of an order bill of lading and it would be important to indicate who the endorser would be, in particular, if

the bank was the consignee. Further, it was stated that such a change would not be a change in substance and would solve the perceived inconsistency that lay between paragraphs 12 and 16 of draft article 1.

119. In response, it was pointed out that that would introduce a new term, “specified/named person”, which would in turn need to be defined and could be inconsistent with the definition of “holder” in paragraph 11 of draft article 1. The term, it was also said, would introduce greater uncertainty and would be less advantageous for banks financing foreign trade contracts. Under current practice, transport documents usually contained space for inserting the name of the “consignee”, so that banks already had the opportunity to protect their rights by seeing to it that they were named as consignees in transport documents. The draft convention not only accommodated that practice, but also offered additional protection for banks that might be reluctant to accept being named as consignees out of concerns over possible liability or burden in respect of the goods by providing, in draft article 45, that the consignee was only obliged to take delivery of the goods if it had exercised its rights under the contract of carriage.

120. In response to a question as to what law was meant by the expression “the law applicable to the document” in paragraph 16 of draft article 1, it was observed that the draft convention refrained from determining which law should govern the instrument, a question to which domestic systems of private international law offered conflicting answers. In any event, it was also pointed out that the scope of the reference to applicable law was limited to the question of which expressions might legally be equivalents of words such as “to order” or “negotiable”.

121. The Working Group agreed to retain the definition provided for in paragraph 16 of draft article 1 and referred it to the drafting group.

*Definition of “non-negotiable transport document” (draft article 1, paragraph 17)*

122. The Working Group approved the substance of the definition provided for in paragraph 17 of draft article 1 and referred it to the drafting group.

*Definition of “electronic communication” (draft article 1, paragraph 18)*

123. In response to a question concerning the rationale for the differences between the definition of “electronic communication” in paragraph 18 of draft article 1 and the definition provided in the United Nations Convention on the Use of Electronic Communication in International Contracts (ECC), it was pointed out that the definition used in the draft conventions combined elements of the definitions of “electronic communication” and “data messages” as contained in the ECC with the criteria for functional equivalence of electronic communications set forth in the ECC.

124. The Working Group approved the substance of the definition provided for in paragraph 18 of draft article 1 and referred it to the drafting group.

*Definition of “electronic transport record” (draft article 1, paragraph 19)*

125. The Working Group approved the substance of the definition of “electronic transport record”, subject to the necessary amendments to align it with the revised version of the definition of “transport document” (see above, paras. 113 to 114), and referred it to the drafting group.

*Definition of “negotiable electronic transport record” (draft article 1, paragraph 20)*

126. With regard to the term “negotiable electronic transport record” used in draft article 37, the Working Group took note of the concern that had been expressed with regard to paragraph 16 of draft article 1 (see above, paras. 118 to 120). Nevertheless, the Working Group approved the substance of the definition provided for in paragraph 20 of draft article 1 and referred it to the drafting group.

*Definition of “non-negotiable electronic transport record” (draft article 1, paragraph 21)*

127. With regard to the term “non-negotiable electronic transport record” used in draft article 37, the Working Group approved the substance of the definition provided for in paragraph 18 of draft article 1 and referred it to the drafting group.

*Definition of “issuance” and “transfer” of negotiable electronic transport records (draft article 1, paragraph 22)*

128. With regard to draft article 1, paragraph 22, a question was raised whether this paragraph did in fact provide definitions of “issuance” and “transfer” and whether it dealt with a matter of substance. It was further noted that the provision was not clear, because whereas it was possible to transfer exclusive control, it was impossible to “issue” exclusive control.

129. Suggestions made in the contexts of the definition were: (i) to delete “issuance” entirely from the definition; and (ii) to refer to the “creation” of exclusive control. Other suggestions were made that paragraph 22 of draft article 1 should be moved to the other chapters of the draft convention, as it was a substantive issue. Proposals were made to move paragraph 22 to draft articles 8 or 9 or as a separate article in chapter 3.

130. The Working Group agreed to the suggestion that the concepts mentioned in paragraph 22 of draft article 1 would be more clearly understood if “issuance” and “transfer” of a negotiable electronic transport record were to be defined separately and if the definition of “issuance” of a negotiable electronic transport record would refer to the requirement that such a record must be created in accordance with procedures that ensured that the electronic record was subject to exclusive control throughout its life cycle. The Working Group referred paragraph 22 of draft article 1 to the drafting group with the request to formulate appropriate wording to that effect.

**Draft article 38. Contract particulars**

131. Draft article 38 did not elicit comments. The Working Group approved its substance and referred it to the drafting group.

**Draft article 39. Identity of the carrier**

132. The draft article did not elicit comments. The Working Group approved the substance of draft article 39 and referred it to the drafting group.

**Draft article 40. Signature**

133. Draft article 40 did not elicit comments. The Working Group approved its substance and referred it to the drafting group.

**Draft article 41. Deficiencies in the contract particulars**

134. The Working Group agreed that paragraph 3 of the draft article needed some adjustment to reflect the decision of the Working Group not to use the term “the consignor” in the draft convention (see above, paras. 21 to 24). Subject to the required amendments, the Working Group approved the substance of draft article 40 and referred it to the drafting group.

**Draft article 42. Qualifying the information relating to the goods in the contract particulars**

*Proposal to deal with certain situations regarding inspection or actual knowledge of goods in a closed container*

135. It was noted that draft article 42 set up a system through which the carrier could qualify information referred to in draft article 38 in the contract particulars. It was further noted that paragraph 3 addressed the context of goods delivered for shipment in a non-closed container, whereas paragraph 4 addressed goods delivered in a closed container.

136. In that connection, the view was expressed that draft article 42 left a possible gap, namely, in situations where the goods were delivered in a closed container but the carrier had actually inspected them, albeit not fully, for example when the carrier opened a container to ascertain that it indeed contained the goods declared by the shipper but was not able to verify their quantity. Such a situation, it was said, would be similar to the situations contemplated in paragraph 3 and deserved to be treated in essentially the same manner. Thus, it was suggested that the following additional paragraph should be inserted after paragraph 4:

When the goods are delivered for carriage to the carrier or a performing party in a closed container, but either the carrier or a performing party has in fact inspected the goods inside the container or the carrier or a performing party has otherwise actual knowledge of its contents before issuing the transport document or the electronic transport record, paragraph 3 shall apply correspondingly in respect of the information referred to in article 38, subparagraphs 1 (a), (b), and (c).

137. In response, some concerns were expressed. In a situation where the carrier or a performing party had actual knowledge of the goods in a closed container, paragraph 2 of draft article 42 would apply and the carrier or a performing party would not be able to qualify the information. Another concern was that the relationship between the suggested additional paragraph and paragraph 1 was not clear. However, broad support was expressed for the rationale behind the proposal with regard to the situation in which the carrier or a performing party had actually inspected the goods. Therefore, it was suggested that a more appropriate and efficient way of addressing that situation was to add the phrase “or are delivered in a closed container but the carrier or the performing party has in fact inspected the goods” after the phrase “in a closed container” in the chapeau of paragraph 3. That proposal found broad support.

*Proposal to clarify the conditions for the carrier to qualify the information in paragraph 4 (a)*

138. A proposal was made to replace the word “or” at the end of paragraph 4 (a)(i) with the word “and” in order to clarify the conditions of the carrier to qualify the information relating to the goods in the contract particulars. It was widely felt that paragraph 4 in its current form was not clear and caused confusion. The Working Group was in agreement

that with regard to the situation in paragraph 4, the carrier would not be able to qualify the information referred to in draft article 38, subparagraphs 1 (a), (b) or (c), if the carrier or a performing party had inspected the goods or if the carrier or a performing party otherwise had actual knowledge of the goods.

*Conclusions reached by the Working Group regarding draft article 42*

139. Subject to the following adjustments, the Working Group approved the substance of draft article 42 and referred it to the drafting group:

- the phrase along the lines of “or are delivered in a closed container but the carrier or the performing party has in fact inspected the goods” should be inserted in the chapeau of paragraph 3 after “in a closed container”; and
- paragraph 4 (a) should be drafted more clearly in order to reflect the cumulative approach, in which the carrier may not qualify the information referred to in draft article 38, subparagraphs 1 (a), (b) or (c) if the carrier or the performing party had in fact inspected the goods inside the container [and/or] had otherwise actual knowledge of its contents before issuing the transport document or the electronic transport record.

**Draft article 43. Evidentiary effect of the contract particulars**

140. A concern was raised with respect to the estoppel rules in subparagraphs (b) and (c) of draft article 43, because the respective requirements of a third party and a consignee were different. Subparagraph (b) required a third party to act in good faith only, whereas subparagraph (c) required the consignee acting in good faith to also have acted in reliance on any of the contract particulars mentioned in subparagraph (c). A question was raised whether that discrepancy was the intention of the Working Group. In order to address that discrepancy, it was suggested that the requirements of subparagraph (b)(i) and (ii) should be aligned with subparagraph (c) following the approach taken in paragraph 3 of article 16 of the Hamburg Rules.

141. Despite some sympathy expressed for that proposal, the Working Group was reminded that draft article 43 had been the subject of intense negotiations during the second reading of the draft convention and that the draft article in the current form reflected the compromise reached. That compromise led to a distinction between the holder of a negotiable transport document and the holder of a non-negotiable transport document. While in the first case it had been accepted that the holder acting in good faith should generally be protected, in the second case the protection should only be available for a holder who in good faith had acted on reliance on the information contained in the non-negotiable transport document. It was further observed that an additional reliance requirement to subparagraph (b) with regard to a negotiable transport document or a negotiable electronic transport record would result in a substantial change to that common understanding.

142. The Working Group approved the substance of draft article 43, subject to the deletion of the phrase “that evidences receipt of the goods” following the revision of the definitions of “transport document” and “electronic transport record” (see above, paras. 113 to 114 and 125), and referred it to the drafting group.

**Draft article 44. “Freight prepaid”**

143. In response to a question whether draft article 44 was intended to be a substantive provision or an evidentiary rule, it was noted that the provision was intended as a



substantive one. In response to a further question regarding the meaning of the phrase “or a statement of a similar nature”, it was explained that the precise phrase “freight prepaid” need not appear in the contract particulars for the provision to apply, but that an equivalent term, such as “freight paid in advance” or a similar phrase, would suffice.

144. The Working Group approved the substance of draft article 44 and referred it to the drafting group.

## **Chapter 9 – Delivery of the goods**

### **Draft article 45. Obligation to accept delivery**

145. The Working Group recalled its decision in relation to draft article 28 (2) to entertain further discussion under draft article 45 (2) regarding the necessary trigger for the consignee’s obligation to unload the goods pursuant to an agreement made by the parties to the contract of carriage under draft article 14 (2) (see above, para. 91). In that context, two proposals were made: first, that, in keeping with the changes made to draft articles 14 (2) and 28 (2), the phrase “the parties” should be replaced with “the carrier and the shipper”, and secondly, that the phrase “and the consignee provides its consent” should be inserted before the phrase “the consignee shall do so properly and carefully.” Strong support was expressed for the first part of that proposal, and some support was expressed for the second part of the proposal. Some concern was expressed regarding what the result would be if the consignee did not consent, but it was suggested that the solution to that problem could be found in the carrier’s rights with respect to undelivered goods pursuant to draft article 51 (2). Further, support for the two proposals was urged, since the situation at issue in paragraph 2 was thought to be rather exceptional, and that requiring the consent of the consignee was thought to have a neutral effect in practice, while assuaging some of the broader concerns expressed in the Working Group with respect to agreements made pursuant to draft article 14 (2).

146. It was observed that the requirement for the “consent” of the consignee might be too onerous, since, for example, if a provision in the bill of lading required the consignee to unload the goods at its own risk and expense, it would be unnecessary for the consignee to provide a separate consent. As such, it was suggested that any revision to paragraph 2 should instead focus on the agreement under draft article 14 (2) “binding” the consignee, rather than requiring its “consent”. There was some support for that suggested approach.

147. However, strong concerns were raised regarding both the proposal to insert an element of “consent” into the draft provision, and to focus on “binding” the consignee. In particular, it was observed that in some jurisdictions, the contract of carriage was a three party contract, and the consignee was bound by its terms. It was further noted that any additional requirement for “consent” on the part of the consignee could have very serious consequences in respect of commercial practices or customs of a particular trade. For example, it was observed that in the bulk trades, a provision requiring the consent of the consignee regarding an obligation to unload the goods would constitute a marked change from existing practice. As a result, a strong preference was expressed for leaving the text of paragraph 2 as drafted in the text, or for the deletion of the paragraph altogether, leaving the matter of the consignee’s obligations to national law. Strong support was expressed for that perspective.

148. It was observed that paragraph 2 should be considered in two respects: first, with respect to any consent that should be required from the consignee prior to it being

subject to the obligation to unload the goods pursuant to an agreement between the parties to the contract of carriage, and secondly, with respect to the standard of care that should be required of the consignee in unloading the goods. It was suggested that the focus of the draft provision should be on the standard of care rather than on whether the consignee had given its consent, and that the text of paragraph 2 should be adjusted in order to reflect that. It was suggested, in particular, that draft article 45 (2) could be amended along the following lines: “When the consignee unloads the goods, it shall do so properly and carefully.” If that approach were taken, it was thought that it would be clear that the issue of whether or not the consignee had to consent to any obligation on it pursuant an agreement under draft article 14 (2) would be subject to national law.

149. As a further clarification, it was noted that the Working Group should consider specifically whether the standard of care required of the consignee in unloading the goods would be with respect to the goods themselves, with respect to the goods of others, or with respect to the ship. If the standard of care was intended to be focused on the goods, it was observed that the consignee was likely the owner of the goods, and that it would seem illogical to set out a standard of care with respect to one’s own goods.

150. Given the strongly-held views expressed in the Working Group, an attempt to form consensus on the basis of the proposal that the paragraph should focus on the standard of care and not on whether the consignee had given its consent was not successful. There was agreement with the view expressed that setting out a standard of care in that limited sense was somewhat redundant, since all obligations undertaken pursuant to the contract of carriage ought to be carried out properly and carefully. Rather than maintain the text of paragraph 2 as drafted, the Working Group decided to delete paragraph 2 of draft article 45 in order to make it abundantly clear that the matter of the consignee’s obligation resulting from any agreement between the carrier and the shipper was left to national law.

151. Having decided to delete paragraph 2, the Working Group approved the substance of paragraph 1 of draft article 45 and referred it to the drafting group.

**Draft article 46. Obligation to acknowledge receipt**

152. The Working Group approved the substance of draft article 46 and referred it to the drafting group.

**Draft article 47. Delivery when no negotiable transport document or negotiable electronic transport record is issued**

153. The Working Group approved the substance of draft article 47 and referred it to the drafting group.

**Draft article 48. Delivery when a non-negotiable transport document that requires surrender is issued**

154. The Working Group was reminded that alternative text remained in the chapeau of draft article 48 in square brackets, “[provides] [indicates]”, and that a decision should be made as to the preferred term to be retained in the text. It was recalled that the Working Group had last considered the issue of which term to use at its 20th session, when it had a lengthy discussion regarding the merits of each alternative (see A/CN.9/642, paras. 31 to 33). Mindful of that discussion, the view was reiterated that the provision had been inserted in the text to preserve existing law regarding a particular type of document, and that in some jurisdictions, the applicable law provided that the

simple title “bill of lading” meant that surrender of the document was required upon delivery of the goods. Thus, it was suggested, the only acceptable term to preserve that body of existing law was the term “indicates”.

155. In response, the Working Group was reminded that the particular type of document for which draft article 48 was created was still intended to fall within the existing taxonomy of documents in the draft convention, and that to preserve the clarity of that categorization, the word “indicates” should be avoided as potentially importing uncertainty into the system. As such, a preference was expressed that the word “provides” be chosen instead. There were strongly held views in support of each of those positions, with a slight preference expressed for the term “indicates”.

156. Subject to the deletion of the alternative “[provides]” and the deletion of the square brackets surrounding the word “indicates”, the Working Group approved the substance of draft article 48 and referred it to the drafting group. Further, it was observed that in the interests of consistency, the word “indicates” should be retained in the other provisions in the text in which the two alternatives were present, in particular, in draft articles 43 (b)(ii), 49 and 54 (2).

**Draft article 49. Delivery when the electronic equivalent of a non-negotiable transport document that requires surrender is issued**

157. It was proposed that draft article 49 should be deleted, since unlike the document provided for in draft article 48, there was no existing practice of using the electronic equivalent of a non-negotiable transport document that required surrender that required support in the text of the draft convention. In light of that absence, the Working Group agreed to delete draft article 49 and requested the drafting group to make consequential amendments to the draft convention, in particular, to draft article 9 and 43 (b)(ii).

**Draft article 50. Delivery when a negotiable transport document or negotiable electronic transport record is issued**

158. The view was expressed that the opening phrase “without prejudice to article 45” in paragraph (a) of draft article 50 was unnecessary and should be deleted as potentially misleading, as there was another reference to draft article 45 at the end of paragraph (a). In response, it was noted that the first reference helped readers understand the relationship between draft article 45, which stated the obligation of the consignee, and draft article 50, which stated the right of the holder. However, after discussion, the Working Group agreed to delete that phrase from draft article 50 (a).

159. A proposal was made to delete all reference to “the controlling party” in paragraphs (d) and (e), because those paragraphs would not make sense in the following situations: (i) when one or more original negotiable transport documents were issued and one person held all the originals, the holder would be the same person as the controlling party; and (ii) when more than one original were issued and several persons held each of them, there would be no controlling party, because there would be no one holding all the originals. Although some support was expressed for that proposal, the Working Group agreed to defer deliberation of it until draft article 54 was under consideration, which had a more direct bearing on the meaning of “controlling party” in paragraph 14 of draft article 1.

*Paragraph 11 of draft article 1*

160. In light of the Working Group's decision to amend the definitions of "issuance" and "transfer" in draft article 1 (22) (see above, paras. 128 to 130), it was suggested that the phrase "and that has exclusive control of that negotiable electronic transport record" in paragraph 11 (b) of the definition of the "holder" was no longer necessary, as the new definitions of "issuance" and "transfer" prepared by the drafting group both included the concept of exclusive control. The Working Group approved that suggestion.

161. With regard to the term "holder" used in draft article 50, the Working Group approved the substance of the definition of that term provided in paragraph 11 of draft article 1, subject to the above amendment, and referred it to the drafting group.

**Draft article 51. Goods remaining undelivered**

162. A question was raised to the meaning and purpose of the phrase "otherwise undeliverable" in paragraph 1 (e) of draft article 51. It was suggested in response that that subparagraph could be deleted entirely, since subparagraphs 1 (a) to (d) sufficiently covered all of the possible circumstances in which goods could remain undelivered, and that there could be potential for abuse by the carrier if subparagraph 1 (e) were retained.

163. However, it was pointed out that subparagraph 1 (e) was useful, as it would apply to situations, for instance, where weather conditions caused the goods to be undeliverable. It was also noted that there might be additional situations where paragraphs 1 (a) to (d) would not be applicable, for example if the consignee simply did not claim delivery, and that an open clause such as paragraph 1 (e) would be helpful. In support of that view, it was pointed out that the term "undeliverable" would likely be interpreted narrowly in any event. Broad support was expressed to retain subparagraph 1 (e) of draft article 51.

164. A suggestion was made that it would be preferable to require a specific period of time to pass before the carrier could destroy the goods pursuant to paragraph 2 (b) of draft article 51. Although there was sympathy for that suggestion, it was noted that the "reasonable notice" requirement in paragraph 3 of draft article 51 was sufficient to address any concern regarding abuse of that right.

*Conclusions reached by the Working Group regarding draft article 51*

165. The Working Group approved the substance of draft article 51 subject to the deletion of reference to draft article 49 in paragraph 1 (b) and (c) and referred it to the drafting group.

**Draft article 52. Retention of goods**

166. A proposal was made to include the "shipper" in draft article 52 between "the carrier" and "a performing party", because there were instances when the shipper might want a right of retention, such as when faced with the draft article 28 obligation to deliver the goods to a carrier, when the ship was in particularly bad condition. In order to address that concern, a more neutral proposal was made to delete the reference to the "the carrier or performing party" and simply refer to "a right that may exist pursuant to the contract of carriage ...". Although some support was expressed for that proposal, doubts were expressed regarding the need to grant the shipper a right of retention, and that, in any event, the inclusion of the shipper in draft article 52 would be misplaced since the provision was located in chapter 9 on delivery.

167. After discussion, the Working Group approved the substance of draft article 52 and referred it to the drafting group.

## **Chapter 10 – Rights of the controlling party**

### **Draft article 53. Exercise and extent of right of control**

168. The Working Group approved the substance of draft article 53 and referred it to the drafting group.

#### *Paragraph 13 of draft article 1*

169. With regard to the term “right of control”, the Working Group approved the substance of the definition, subject to correcting the reference to “chapter 11” to “chapter 10” provided for in paragraph 13 of draft article 1 and referred it to the drafting group.

#### *Paragraph 14 of draft article 1*

170. With regard to the term “controlling party”, the Working Group approved the substance of the definition provided for in paragraph 14 of draft article 1 and referred it to the drafting group.

### **Draft article 54. Identity of the controlling party and transfer of the right of control**

171. A question that had been deferred for discussion under draft article 54 (see above, para. 159) was reiterated regarding whether the reference to the “controlling party” could be deleted in draft articles 50 (d) and (e), since, in the case of a negotiable transport document or electronic transport record, the holder and the controlling party were the same person. In response, it was noted that simply deleting that term would alter the meaning of the provisions because it would omit the current practice requiring the notification of the holder of the arrival of the goods, even if the holder did not appear to take delivery. It was thought that that change would not be desirable.

172. Subject to retaining the word “indicates” in paragraph 2 and deleting the alternative “provides”, the Working Group approved the substance of draft article 54 and referred it to the drafting group.

### **Draft article 55. Carrier’s execution of instructions**

173. The Working Group approved the substance of draft article 55 and referred it to the drafting group.

### **Draft article 56. Deemed delivery**

174. The Working Group approved the substance of draft article 56 and referred it to the drafting group.

### **Draft article 57. Variations to the contract of carriage**

175. Subject to the deletion of paragraph 3 as superfluous as suggested in footnote 159, the Working Group approved the substance of draft article 57 and referred it to the drafting group.

**Draft article 58. Providing additional information, instructions or documents to carrier**

176. The Working Group approved the substance of draft article 58 and referred it to the drafting group.

**Draft article 59. Variation by agreement**

177. The Working Group approved the substance of draft article 59 and referred it to the drafting group.

**Chapter 11 – Transfer of rights****Draft article 60. When a negotiable transport document or negotiable electronic transport record is issued**

178. The Working Group approved the substance of draft article 60 and referred it to the drafting group.

**Draft article 61. Liability of the holder**

179. A question was raised with regard to the reference “without prejudice to article 58” at the beginning of paragraph 1 of draft article 61 and its meaning, as the reference seemed irrelevant. It was observed that it left the consequence unclear if the controlling party did not provide the information as requested in draft article 58. It was further noted that the reference created problems of interpretation and it was thus suggested to delete the reference entirely.

180. In response, it was explained that draft article 61 established the obligation of the holder qualified by draft article 58, as the holder was in fact the only person in possession of the information mentioned in draft article 58. Further, it was noted that the reference to draft article 58 should be retained in paragraph 1 of draft article 61, as it served the purposes of clarity. Broad support was expressed for the retention of the reference to draft article 58 in paragraph 1 of draft article 61.

181. With respect to paragraph 2 of draft article 61, the Working Group was reminded that, at its 20th session, no definite decision had been taken and that paragraph 2 had been put into square brackets because of divergences in the Working Group. Subsequently, some support was expressed for the deletion of paragraph 2, in particular because the concern was raised that the phrase “exercise any rights” might be interpreted in a way that minor action would be deemed as an exercise of rights and would thus cause liability. However, broad support was expressed to retain paragraph 2, as it was desirable for the carrier to ascertain if the holder had assumed any liabilities under the contract of carriage and to which extent it had done so. It was noted that that approach also reflected the current practice and it was viewed as clear that minor actions would not be seen as an exercise of rights.

*Conclusions reached by the Working Group regarding draft article 61*

182. Despite the proposal to delete the phrase “without prejudice to article 58” in paragraph 1, the Working Group approved the substance of draft article 61, subject to the deletion of the square brackets around paragraph 2 and subject to the deletion of the square brackets in the phrase “for the purpose of paragraph[s] 1 [and 2] of this article” in the chapeau of paragraph 3, and referred it to the drafting group.

## Chapter 12 – Limits of liability

### Draft article 62. Limitation of liability

#### *Proposal regarding the limitation on the carrier's liability*

183. The Working Group was reminded that draft article 62 on limitation of liability had been subject to intense discussion at its previous session (see paras. 136 ff. of A/CN.9/642). It was further reminded that in light of the possibility of an emerging consensus regarding the limitation of the carrier's liability in the draft convention, a provisional compromise proposal had been made, which was to be treated as an entire package (see para. 166 of A/CN.9/642). This package included the figures as set out in paragraph 1 of draft article 62, the deletion of paragraph 2 of draft article 62, the deletion of draft article 99, the adjustment of draft article 63 to include a figure of "2.5 times" into the remaining square brackets of draft article 63 and to delete "one times" and the reversal of the Working Group's earlier decision to draft a new provision allowing for the application of national law in situations similar to those contemplated in draft article 27.

184. There was wide support for the efforts made by the Working Group, at its twentieth session, to arrive at a consensus solution for the question of liability limits. Nevertheless, there was strong support for the view that the liability limits currently stated within square brackets in the draft article should be regarded as a starting point for further negotiation. In order to ensure that draft article 62 would preserve an equitable balance between carrier and cargo interests and to achieve a wider consensus and thus acceptability of the draft convention, a proposal was made to (i) adopt higher limitation amounts than those in the Hamburg Rules, i.e. 920 Special Drawing Rights ("SDR") per package and 8 SDR per kilogram, and (ii) the deletion of paragraph 2 of draft article 62.

185. There was support for the view that the liability limits set forth in the Hamburg Rules and included in the provisional compromise as contained in paragraph 1 of draft article 62 were out of date. It was further observed that other international conventions that also dealt with transport of goods included higher figures than the draft convention. In that light, reference was made to CIM-COTIF and CMR, of which the latter contained liability limits of 8.33 SDR per kilogram of gross weight. Moreover, it was noted that the draft convention covered not only the carriage by sea, but that it covered multimodal transport, which made the application of the limits above the Hamburg Rules necessary. In addition, it was pointed out that the current wording of paragraph 1 of draft article 62 included all breaches of obligations and was not limited to loss or damage to goods, so that the Hamburg Rules were no longer sufficient.

186. In response, it was noted that the draft convention already represented a major shift in the allocation of risks, in particular in the increase in the carrier's liability, as the carrier was now under a continuing obligation of seaworthiness and could no longer avail itself of the defence based on nautical fault. It was also noted that the figures in the provisional compromise as contained in paragraph 1 of draft article 62 had been a real compromise, as many jurisdictions had limitations according to the Hague-Visby Rules, which were below the Hamburg Rules, or even lower ones. It was added that even under the liability limits set out in the Hague-Visby Rules, about 90 per cent of cargo loss was fully compensated, since the value of most cargo carried by sea was lower than the Hague-Visby limits. Further, it was observed that, in an age of containerized transportation by larger ships, the increased figures would raise the carrier's financial exposure to a level that would make the carrier's liability nearly

incapable of being insured at acceptable rates, thus, increasing the costs for transport and ultimately for the goods. In this light, the view was expressed by several delegations that the proposal for limits higher than currently contemplated was unrealistic and only motivated by political, not trade reasons. Some delegations expressed the concern that a move beyond the Hamburg Rules could eventually impede their countries' accession to the draft convention. It was added that the increase of figures as proposed could prevent the draft convention from becoming a global, effective instrument, which harmonized international trade. The Working Group was cautioned not to destroy the important work, which they had so far reached by upsetting the previous provisional compromise.

187. In response it was observed, however, that the impact of increased liability limits on carriers' liability insurance should not be overstated, as ship owners also benefited from global limitation of liability pursuant to the London Convention on Limitation for Maritime Claims (LLMC) and several domestic regimes to the same effect. The Working Group was invited not to flatly reject any proposal for increases in liability limits, but to explore avenues for further improving its earlier compromise on the matter. It was suggested, for example, that the Working Group could consider adopting the 835 SDR per package limitation amount of the Hamburg Rules, but to slightly increase the per kilogram limitation to 8 units of account per kilogram of the gross weight of the goods that were the subject of the claim or dispute. The view was expressed that that proposal could be a bridge between the two positions, as many of the States that had favoured lower figures saw the per package limitation as the one that protected the carrier most. Alternatively, the Working Group might wish to agree on a higher limit per package, while retaining the limits per kilogram in the vicinity of the limit provided for in the Hamburg Rules.

188. In view of the different views that were expressed, the Working Group agreed to suspend its discussions on the issue of liability limits and the provisions which, according to the compromise reached at its twentieth session, were linked to a decision on liability limits, and to revert to it at a later stage of its deliberations.

*Scope of paragraph 1 of draft article 62*

189. The Working Group recalled that the phrase "for loss of or damage to [or in connection with] the goods" was deleted throughout the text of the draft convention and the phrase "for breaches of its obligations under this Convention" had been added in its stead, with appropriate footnotes (see fn. 169 of A/CN.9/WG.III/WP.101). The rationale for those changes was that the phrase deleted had caused considerable uncertainty and a lack of uniformity in interpretation following its use in the Hague and Hague-Visby Rules, particularly concerning whether or not it had been intended to include cases of misdelivery and misinformation regarding the goods. It was noted that the Secretariat had upon request reviewed the drafting history of paragraph 1, and had made the appropriate proposal as contained in A/CN.9/WG.III/WP.101, including the limitation on liability for misinformation and misdelivery.

190. In that context, some concern was voiced that misinformation should be left to national law. In response, it was stated that there should be no exception, as this would create uncertainty and unpredictability.

*Declaration of value*

191. It was proposed to move the phrase "except when the value of the good has been declared by the shipper and included in the contract particulars" to a separate provision,



in order to distinguish more clearly between a normal hypothesis and a declaration of value. Some support was expressed in favour of the proposal, but the Working Group agreed to revert to the issue when it resumed its deliberations on draft article 62, paragraph 1.

*Paragraph 2 of draft article 62*

192. The views on paragraph 2 of draft article 62 differed and were linked to the respective view taken on paragraph 1. Support was expressed on its deletion, but only if the figures in paragraph 1 increased above the Hamburg Rules according to the aforementioned proposal. Other views expressed were that paragraph 2 should be deleted with the figures in paragraph 1 as contained in A/CN.9/WG.III/WP.101, because that formed part of the provisional package compromise. Another view expressed was to increase the figures in paragraph 1 as contained in the proposal, but to keep Variant B. A different view expressed was that national law should regulate the contents of paragraph 2. The Working Group took note of those views and agreed to revert to the issue when it resumed its deliberations on draft article 62, paragraph 1.

*Paragraph 3*

193. In keeping with the Working Group's earlier decision to add road and rail cargo vehicles to draft article 26 (1) (b) on deck cargo in order to give them equivalent status with containers (see above, paras. 73 to 82), a proposal was made to include road and rail cargo vehicles in the text of paragraph 3 of draft article 62. Although some concern was reiterated from the earlier discussion that adding road and rail cargo vehicles to the text of draft article 62 (3) could have unintended consequences in terms of limiting the per package limitation (see above, paras. 78 to 82), the Working Group was of the view that such a change would constitute an improvement to the text.

194. Subject to that adjustment, the Working Group approved the substance of draft article 62 (3) and referred it to the drafting group.

*Paragraph 4*

195. The Working Group approved the substance of draft article 62 (4) and referred it to the drafting group.

**Further consideration of draft article 62**

196. Following its earlier agreement to suspend discussions on the issue of liability limits and the provisions which, according to the provisional compromise reached at its twentieth session, were linked to a decision on liability limits, and to revert to it at a later stage of its deliberations (see above, paras. 183 to 188), the Working Group resumed its consideration of draft article 62.

197. A proposal was made by a large number of delegations for the resolution of the outstanding issue of the compromise package relating to the limitation levels of the carrier's liability in the following terms:

- The limitation amounts to be inserted into paragraph 1 of draft article 62 would be 875 SDR per package and 3 SDR per kilogram and the text of that paragraph would be otherwise unchanged;
- Draft article 99 and paragraph 2 of draft article 62 would be deleted;

- No draft article 27 bis would be included in the text providing for a declaration provision to allow a Contracting State to include its mandatory national law in a provision similar to that in draft article 27 (see footnote 56, A/CN.9/WG.III/WP.101); and
- The definition of “volume contract” in paragraph 2 of article 1 would be accepted.

198. There was widespread and strong support for the terms of the proposal, which was felt to be a very positive step forward towards resolving the outstanding issues surrounding the limitation of the carrier’s liability and related issues. The Working Group was therefore urged to adopt that proposal in final resolution of those outstanding issues. There was also strong support expressed for that view.

199. Concerns were expressed that the proposed levels for the limitation of the carrier’s liability were too high, and that there was no commercial need for such high limits, which were said to be unreasonable and unrealistic. There was some support for that view, particularly given that a number of delegations felt that the level of limitation of the Hague-Visby Rules was adequate for commercial purposes, and that the provisional compromise reached at the 20th session of the Working Group to include the limitation levels of the Hamburg Rules had been acceptable but only as a maximum in order to achieve consensus. The view was also expressed that the levels proposed were so high as to be unacceptable, and it was observed that the higher levels could result in higher transportation costs for the entire industry.

200. Other concerns were expressed that, while the proposed increase in the limitation levels for the carrier’s liability was welcome, other aspects of the proposal were not acceptable. The view was expressed that the definition of “volume contract” in draft article 1 (2) should be further amended in order to provide greater protection for small shippers in light of the overall balance of the draft convention, particularly since freedom of contract provisions were thought to be destructive to provisions on mandatory protection for such shippers. Further, it was observed that the shipper was thought to bear a greater burden of proof than in previous regimes, particularly with respect to proving seaworthiness, and that, pursuant to draft article 36, the shipper was not able to restrict its liability. Other concerns were raised regarding the aspect of the compromise that would approve the text of paragraph 1 of draft article 62 as written, rather than deleting the phrase “for breaches of its obligations under this Convention” and re-inserting the phrase “for loss of or damage to the goods”, and the perceived broader ability to limit liability that that text would afford the carrier. The particular example of draft article 29 concerning the obligation of the shipper and the carrier to provide information to each other was raised, where it was suggested that a failure to fulfil that obligation could result in unlimited liability for the shipper, but only limited liability for the carrier. In addition, concern was expressed regarding the deletion of draft article 62 (2), since it was thought that the shipper would bear an unfair burden of proof by having to prove where the damage occurred, and that that provision should only have been deleted if a much higher limitation per kilogram had been agreed upon.

201. Other delegations expressed dissatisfaction with the proposal, but expressed a willingness to consider it further.

202. The Working Group, in general, expressed its broad support for the proposal, despite it not having met the expectations of all delegations. In response to concerns that the revised limitation levels should appear in square brackets in the text, since there had also been strong objections to the revised limits, it was decided that there was sufficient support to retain the revised limits in the text without square brackets. It was

noted that, according to the practice of the Working Group, provisions were kept in square brackets only when no clear support was expressed in favour of the text in brackets.

203. Subject to implementation into the text of the proposal as outlined in paragraph 197 above, the Working Group approved the substance of draft article 62, paragraph 1, and referred it to the drafting group.

**Draft article 27. Carriage preceding or subsequent to sea carriage** (*continued*)

204. Following its decision to delete paragraph 2 of draft article 62, the Working Group agreed to delete paragraph 2 of draft article 27. In addition, the Working Group agreed to delete paragraph 3 of draft article 27.

**Draft article 63. Limits of liability for loss caused by delay**

205. Since draft article 63 formed a part of the provisional agreement on the compromise package regarding the limitation on liability considered during its 20th session, the Working Group agreed to defer consideration of the provision pending agreement on that compromise package (see above, paras. 183 to 188).

206. A proposal to replace the “two and one-half times” found in square brackets in draft article 63 with the amount “three times” in order to place the provision more in line with the similar provision of CIM-COTIF was not supported.

207. Subject to the deletion of the square brackets and the retention of the text contained in them, the Working Group approved the substance of draft article 63 and referred it to the drafting group.

**Draft article 64. Loss of the benefit of limitation of liability**

208. The Working Group approved the substance of draft article 64 and referred it to the drafting group.

## **Chapter 13 – Time for suit**

**Draft article 65. Period of time of suit**

209. A concern was expressed that the Working Group might have unintentionally created a problem in the text of the draft convention by setting a two-year time period for the institution of proceedings for breaches of obligations, while at the same time failing to require that notice of the loss or damage be given to the carrier under draft article 24. It was suggested that such an approach would put the carrier at a disadvantage by allowing for the possibility that without such notice, the carrier could be surprised by a claim at any time within the two years, and that it might not have preserved the necessary evidence, even though prudent cargo interests would usually notify the carrier as soon as the loss or damage was discovered. It was noted that the Working Group had considered the operation of draft article 24 in a previous session (see, most recently, A/CN.9/621, paras. 110-114), and that it had been decided that a failure to provide the notice in draft article 24 was not intended to have a specific legal effect, but rather that it was meant to have a positive practical effect by encouraging cargo interests claiming loss or damage to provide early notice of that loss or damage. Support was expressed by the Working Group for the text as drafted.

210. The Working Group approved the substance of draft article 65 and referred it to the drafting group.

**Draft article 66. Extension of time of suit**

211. The Working Group approved the substance of draft article 66 and referred it to the drafting group.

**Draft article 67. Action for indemnity**

212. The Working Group approved the substance of draft article 67 and referred it to the drafting group.

**Draft article 68. Actions against the person identified as the carrier**

213. The Working Group approved the substance of draft article 68 and referred it to the drafting group.

## **Chapter 14 – Jurisdiction**

**Draft article 69. Actions against the carrier**

214. The Working Group approved the substance of draft article 69 and referred it to the drafting group.

*Paragraphs 28 and 29 of draft article 1*

215. With regard to the terms “domicile” and “competent court” used in draft article 69, the Working Group approved the substance of the definitions respectively provided for in paragraphs 28 and 29 of draft article 1 and referred them to the drafting group.

**Draft article 70. Choice of court agreements**

216. It was proposed that, for greater certainty, the opening phrase of draft article 70 (2) (d) “the law of the court seized” should be deleted in favour of the clearer phrase “the law of the court named in the volume contract”, or, in the alternative, that paragraph (d) should be deleted in its entirety. However, it was observed that the issue of binding third parties to the volume contract to a choice of court agreement had been the subject of considerable discussion in the Working Group, and that the consensus as represented by the current text should not be reconsidered.

217. It was observed that, following the decision of the Working Group to amend the definition of “transport document” (see above, paras. 113 to 114), the text of draft paragraph 2 (b) should be amended by deleting the phrase “that evidences the contract of carriage for the goods in respect of which the claim arises”. There was support for that suggestion.

218. Subject to the deletion of that phrase, the Working Group approved the substance of draft article 70 and referred it to the drafting group.

**Draft article 71. Actions against the maritime performing party**

219. The Working Group approved the substance of draft article 71 and referred it to the drafting group.

**Draft article 72. No additional bases of jurisdiction**

220. The Working Group approved the substance of draft article 72 and referred it to the drafting group.

**Draft article 73. Arrest and provisional or protective measures**

221. The Working Group approved the substance of draft article 73 and referred it to the drafting group.

**Draft article 74. Consolidation and removal of actions**

222. The Working Group approved the substance of draft article 74 and referred it to the drafting group.

**Draft article 75. Agreement after dispute has arisen and jurisdiction when the defendant has entered an appearance**

223. The Working Group approved the substance of draft article 75 and referred it to the drafting group.

**Draft article 76. Recognition and enforcement**

224. The Working Group approved the substance of draft article 76 and referred it to the drafting group.

**Draft article 77. Application of chapter 14**

225. The Working Group approved the substance of draft article 77 and referred it to the drafting group.

**Chapter 15 – Arbitration****Draft article 78. Arbitration agreements**

226. It was observed that following the decision of the Working Group to amend the definition of “transport document” (see above, paras. 113 to 114), it might be necessary to amend the text of paragraph 4 (b) in similar fashion to that agreed with respect to draft article 70 (2) (b). There was support for that suggestion, subject to the caveat that the drafting group should consider carefully whether such a change was recommended, since paragraph 4 (b) must in any event ensure that it referred to the transport document or electronic transport record regarding the goods in respect of which the claim arose.

227. Subject to that possible amendment, the Working Group approved the substance of draft article 78 and referred it to the drafting group.

**Draft article 79. Arbitration agreement in non-liner transportation**

228. It was observed that the Working Group had in its previous session, agreed to seek further consultation regarding the operation of draft article 79 (2) (see footnote 199 and A/CN.9/642, paras. 213 and 214). The Working Group was advised that such consultations had taken place and that the view was that paragraph 2 (a) was not logical in light of industry practice, and that it should be deleted. There was support for that suggestion.

229. A further question was raised whether the reference in draft article 2 (b)(i) should be to draft article 6 rather than 7, and it was agreed that the drafting group would consider the matter.

230. Subject to the deletion of paragraph 2 (a) and to that possible amendment to paragraph 2 (b)(i), the Working Group approved the substance of draft article 79 and referred it to the drafting group.

#### **Draft article 80. Agreements for arbitration after the dispute has arisen**

231. The Working Group approved the substance of draft article 80 and referred it to the drafting group.

#### **Draft article 81. Application of chapter 15**

232. The Working Group approved the substance of draft article 81 and referred it to the drafting group.

### **Chapter 16 – Validity of contractual terms**

#### **Draft article 82. General provisions**

233. A concern was expressed that paragraph 2 of draft article 82 had a mandatory effect on the shipper and consignee that was considered to be unsatisfactory. In particular, a shipper would be prohibited by that provision from agreeing on an appropriate limitation on its liability, and it was thought that such an agreement should be allowed pursuant to the draft convention.

234. Subject to the deletion of the references to the “consignor” in draft paragraph 2 in keeping with its earlier decision (see above, paras. 21 to 24), the Working Group approved the substance of draft article 82 and referred it to the drafting group.

#### **Draft article 83. Special rules for volume contracts**

##### *Summary of earlier deliberations*

235. The Working Group was reminded of its past deliberations on the matter and the evolution of the treatment of freedom of contract under the draft convention. It was pointed out that special rules for volume contracts and the extent to which they should be allowed to derogate from the draft convention had been under consideration by the Working Group for a number of years. Following the approach taken in previous maritime instruments, the draft convention had been originally conceived as a body of law incorporating essentially mandatory rules for all parties. Thus, the initial version of the draft convention had provided, in relevant part that “any contractual stipulation that derogates from this instrument is null and void, if and to the extent that it is intended or has as its effect, directly or indirectly, to exclude, [or] limit [, or increase] the liability for breach of any obligation of the carrier, a performing party, the shipper, the controlling party, or the consignee” (A/CN.9/WG.III/WP.21, article 17.1).

236. At the twelfth session of the Working Group (Vienna, 6-17 October 2003), however, it had been suggested that more flexibility should be given to the parties to so-called “Ocean Liner Service Agreements” in the allocation of their rights, obligations and liabilities, and that they should have the freedom to derogate from the provisions of the draft convention, under certain circumstances (A/CN.9/WG.III/WP.34, paras. 18-29). It was proposed that such freedom should be essentially granted whenever one or

more shippers and one or more carriers entered into agreements providing for the transportation of a minimum volume of cargo in a series of shipments on vessels used in a liner service, and for which the shipper or shippers agreed to pay a negotiated rate and tender a minimum volume of cargo (A/CN.9/WG.III/WP.34, para. 29). At that session, there was broad agreement that certain types of contracts either should not be covered by the draft instrument at all, or should be covered on a non-mandatory, default basis. It was considered that such contracts would include those that, in practice, were the subject of extensive negotiation between shippers and carriers, as opposed to transport contracts that did not require (or where commercial practices did not allow for) the same level of variation to meet individual situations. The latter generally took the form of contracts of adhesion, in the context of which parties might need the protection of mandatory law. The Working Group agreed, however, that the definition of the scope of freedom of contract and the types of contracts in which such freedom should be recognized needed further consideration (A/CN.9/544, paras. 78-82).

237. The Working Group considered a revised proposal on freedom of contract under “Ocean Liner Service Agreements” (A/CN.9/WG.III/WP.42) at its fourteenth session Working Group (Vienna, 29 November-10 December 2004). At that time, the Working Group heard a number of concerns regarding freedom of contract under Ocean Liner Service Agreements. In particular, it was suggested that it should not be possible for parties to OLSAs to contract out of certain mandatory provisions of the draft instrument. It was also stated that the introduction of a special regime for OLSAs could create market competition-related problems. Concerns were also expressed regarding the protection of small shippers with weak bargaining power who could be subject to potential abuse by carriers through OLSAs. However, it was also said that in current trade practice, small shippers generally preferred to resort to rate agreements, which were not contracts of carriage but which guaranteed a maximum rate without specifying volume, rather than committing to volume contracts, and that the attractiveness of rate agreements combined with market forces would minimize any potential exposure to abuses by carriers under the proposed OLSA regime. Broad support was expressed for the inclusion of OLSA provisions in the draft instrument, subject to these and other concerns (A/CN.9/572, paras. 99-101). The Working Group concluded its deliberations at that stage by deciding that it was not opposed to the inclusion of a provision on OLSAs in the draft instrument, subject to the clarification of issues relating to the scope of application of the draft instrument to volume contracts generally. The Working Group further decided that particular care should be dedicated to the definition of OLSAs and to the protection of the interests of small shippers and of third parties, and that further consideration should be given to examining which provisions, if any, of the draft convention should be of mandatory application in an OLSA. Lastly, the Working Group invited the original proponents of the OLSA proposal to work with other interested delegations on refining the OLSA definition (A/CN.9/572, para. 104).

238. The Working Group reverted to the matter of freedom of contract under “Ocean Liner Service Agreements” at its fifteenth session (New York, 18-28 April 2005). The Working Group was then informed of the outcome of the consultations that had taken place pursuant to the request made at its fourteenth session. It was then suggested that since “Ocean Liner Service Agreements” were a type of volume contract, adjustments could be made to the provisions in A/CN.9/WG.III/WP.44 and to draft articles 88 and 89 in order to subsume OLSAs into the existing approach to volume contracts in the scope of application of the draft instrument. The Working Group concurred with that suggestion (A/CN.9/576, paras. 12, and 14-16). The Working Group then proceeded to consider manners of addressing the concerns that had been expressed at its earlier session, as regards the conditions under which it should be possible to derogate from

the provisions of the draft convention. While a view was expressed that no derogation from the provisions of the draft convention should be allowed under any conditions, there was support for derogation to be allowed in some circumstances. The Working Group generally accepted that the following four conditions should be met before it would be possible for a volume contract, or individual shipments thereunder, to derogate from the draft instrument: (a) the contract should be [mutually negotiated and] agreed to in writing or electronically; (b) the contract should obligate the carrier to perform a specified transportation service; (c) a provision in the volume contract that provides for greater or lesser duties, rights, obligations, and liabilities should be set forth in the contract and may not be incorporated by reference from another document; and (d) the contract should not be [a carrier's public schedule of prices and services,] a bill of lading, transport document, electronic record, or cargo receipt or similar document but the contract may incorporate such documents by reference as elements of the contract (A/CN.9/576, paras. 17-19). The Working Group proceeded to consider the question as to whether there should be mandatory provisions of the draft convention from which derogation should never be allowed, and if so, what were they. In this respect, the Working Group decided that the seaworthiness obligation should be a mandatory provision of the draft instrument from which derogation was not allowed (A/CN.9/576, paras. 17-19).

239. The Working Group considered the matter of volume contracts again at its seventeenth session (New York, 3-13 April 2006), on the basis of a revised version of the draft convention (A/CN.9/WG.III/WP.56) and amending proposals that had been made following informal consultations (A/CN.9/WG.III/WP.61). At that session, some concerns were reiterated regarding the possible abuse of volume contracts to derogate from the provisions of the draft convention, particularly in cases where volume contracts could involve a large amount of trade. Concerns were raised that it could be seen as inconsistent to have such broad freedom of contract to derogate from a mandatory convention, and the view was expressed that a preferable approach would be instead to list specific provisions that could be subject to derogation. Another view was expressed that the combination of paragraphs 1 and 5 of draft article 95, and of the definition of volume contracts in draft article 1 had addressed earlier concerns regarding sufficient protection for the contracting parties. An additional concern was expressed that while, generally, some freedom of contract was desirable and that volume contracts as such were not necessarily objectionable, it was possible that draft paragraph (1) (b) did not provide sufficient protection for the parties to such contracts (A/CN.9/594, para. 155). Overall, however, strong support was expressed in the Working Group both for the volume contract regime in the draft convention in general, and for the redrafted text of draft paragraph 95 (1) as it appeared in paragraph 49 of A/CN.9/WG.III/WP.61. The view was expressed that the volume contract framework provided an appropriate balance between necessary commercial flexibility to derogate from the draft convention in certain situations, while nonetheless providing adequate protection for contracting parties (A/CN.9/594, para. 156). The Working Group next considered the issue of whether it was desirable to include in the volume contract regime of the draft convention a provision containing a list of absolutely mandatory provisions from which there could be no derogation regardless of any agreement, such as that set out in draft paragraph 95 (4) in paragraph 49 of A/CN.9/WG.III/WP.61. Some concern was raised regarding the inclusion of such a provision in the draft convention, since it was felt that it could be used in the later interpretation of the draft convention to reintroduce the notion of overriding obligations that had been carefully avoided in the drafting of the provisions. However, strong support was expressed for the inclusion of a provision listing the mandatory provisions from which there could never be derogation pursuant to the



volume contract regime in the draft convention. It was felt that including a provision such as draft paragraph 95 (4) was an important part of the overall compromise intended to provide sufficient protection for contracting parties under the volume contract framework (A/CN.9/594, para. 160). As regards which provisions should be included in such a list, it was agreed that all of the references in the then draft paragraph 95 (4) as set out in A/CN.9/WG.III/WP.61 should be kept in the text (A/CN.9/594, para. 161).

240. The last time that the Working Group had discussed matters related to volume contracts had been at its nineteenth session (New York, 16-27 April 2007), when it considered a proposal for amendments to the provisions dealing with volume contracts that included essentially three elements (see A/CN.9/WG.III/WP.88 and A/CN.9/612). Firstly, it was proposed to amend the definition of volume contracts in draft article 1, paragraph 2, as it appeared in A/CN.9/WG.III/WP.81, so as to provide for a minimum period and a minimum quantity of shipments, or at least require such shipments to be “significant”. Secondly, it was proposed that the substantive condition for the validity of a volume contract (that is, that it should be “individually negotiated”), and the formal condition for validity of derogations (that the derogation should be “prominently” specified), as provided in draft article 89, paragraph 1, as it appeared in A/CN.9/WG.III/WP.81, should be made cumulative, rather than alternative, so as to make it clear that both parties to the contract must expressly consent to the derogations. Thirdly, it was proposed that the list of matters on which no derogation was admitted, which currently included only the carrier’s obligation to keep the ship seaworthy and properly crew the ship (art. 16 (1)), and the loss of the right to limit liability (art. 64), should be expanded so as to cover draft article 17 (basis of the carrier’s liability), draft article 62 (limits of liability), draft article 30 (basis of the shipper’s liability to the carrier), chapter 5 (obligations of the carrier); and draft articles 28 to 30, and 33 (obligations of the shipper).

241. At that time, there were various expressions of support for the proposition that, even if the Working Group were not to accept all of those elements, at least a revision of the definition of volume contracts should be considered, so as to narrow down its scope of application and protect smaller shippers, in view of the potentially very wide share of international shipping that might, in practice, be covered by the current definition of volume contracts (A/CN.9/616, para. 163). However, the prevailing view within the Working Group was that the text of what was then draft article 89 reflected the best possible consensus solution to address those concerns in a manner that preserved a practical and commercially meaningful role for party autonomy in volume contracts (A/CN.9/616, para. 170). It was at that time noted that a number of delegations that advised against revisiting the matter had shared at least some of the concerns expressed by those who proposed amendments and had been originally inclined towards a stricter regime for freedom of contract. While those delegations did not regard the draft provisions on the matter in all respects as an ideal solution, it was said that their major concern, namely the protection of third parties, had been satisfactorily addressed by the provisions of paragraph 5 of what was then draft article 89. Furthermore, the use of the words “series of shipments” in the definition of volume contracts in draft article 1, paragraph 2, provided additional protection against the risk of unilateral imposition of standard derogations from the draft convention, since occasional or isolated shipments would not qualify as “volume contract” under the draft convention (A/CN.9/616, para. 171).

242. After extensive consideration of the various views expressed, the Working Group rejected the proposal to reopen the previously-agreed compromise and approved the text

of draft article 89 that had previously been accepted in April 2006, as it appeared in A/CN.9/WG.III/WP.81 (A/CN.9/616, para. 171).

*Deliberations at the present session*

243. The Working Group noted from its earlier deliberations that its agreement to allow the parties to volume contracts to derogate from the draft convention, under certain conditions, had been consistently reiterated every time the Working Group had discussed the issue in the past. Nevertheless, in the interest of obtaining a broader consensus in support of the issue of freedom of contract, the following revised text of draft article 83 was proposed by a number of delegations:

*“Article 83. Special rules for volume contracts*

“1. Notwithstanding article 82, as between the carrier and the shipper, a volume contract to which this Convention applies may provide for greater or lesser rights, obligations, and liabilities than those imposed by this Convention.

“2. A derogation pursuant to paragraph 1 is binding only when:

“(a) The volume contract contains a prominent statement that it derogates from this Convention;

“(b) The volume contract is (i) individually negotiated or (ii) prominently specifies the sections of the volume contract containing the derogations;

“(c) The shipper is given an opportunity and notice of the opportunity to conclude a contract of carriage on terms and conditions that comply with this Convention without any derogation under this article; and

“(d) The derogation is not (i) incorporated by reference from another document or (ii) included in a contract of adhesion that is not subject to negotiation.

“3. A carrier’s public schedule of prices and services, transport document, electronic transport record, or similar document is not a volume contract pursuant to paragraph 1 of this article, but a volume contract may incorporate such documents by reference as terms of the contract.

“4. Paragraph 1 of this article does not apply to rights and obligations provided in articles 15, paragraphs (1) (a) and (b), 30 and 33 or to liability arising from the breach thereof, nor does paragraph 1 of this article apply to any liability arising from an act or omission referred to in article 64.

“5. The terms of the volume contract that derogate from this Convention, if the volume contract satisfies the requirements of paragraphs 1 and 2 of this article, apply between the carrier and any person other than the shipper provided that:

“(a) Such person received information that prominently states that the volume contract derogates from this Convention and gives its express consent to be bound by such derogations; and

“(b) Such consent is not solely set forth in a carrier’s public schedule of prices and services, transport document, or electronic transport record.

“6. The party claiming the benefit of the derogation bears the burden of proof that the conditions for derogation have been fulfilled.”

244. It was stated that the proposal provided additional explicit protection to shippers, with the intention that the amended text would address the concerns expressed by some during the previous sessions of the Working Group (see, for example, A/CN.9/642, paras. 279-280; and A/CN.9/621, paras. 161-172). In light of the many competing interests that were balanced as part of the attempts to clarify the concepts expressed in draft article 83 in A/CN.9/WG.III/WP.101, there was strong support for the view that, at such a late stage of its deliberations, it would be highly unlikely that the Working Group would be in a position to build an equally satisfactory consensus around a different solution. The Working Group was strongly urged not to take that direction and not to revert to proposals that in that past had failed to gain broad support, since that might in turn result in a failure to find sufficient support for the improved text, with its expanded protection for shippers. With respect to the contents of the proposal, the following explanations were provided:

- paragraph 1 had been split into two paragraphs with the chapeau of the former text of draft article 83 constituting paragraph 1 of the proposal;
- paragraph 2 of the proposal enumerated the cumulative preconditions for a derogation from the draft convention;
- paragraph 2 (c) was new text that provided shippers with the opportunity, and the requirement that they be given notice of that opportunity, to conclude a contract of carriage on the terms and conditions that complied with the draft convention without any derogation;
- paragraph 2 (d) prohibited the use of a contract of adhesion in setting out such derogations; and
- the definition of “volume contracts” in paragraph 2 of draft article 1 would be maintained without amendment.

245. Strong support was expressed for the proposal as containing a number of clarifications of the previous text which were key to establishing an appropriate balance between the rights of shippers and carriers in the negotiation of volume contracts. Further, the clarifications and refinements in the revised text were said to contribute greatly to the understanding of the provision and to the overall protection offered shippers against possible abuses pursuant to the volume contract provision. In particular, delegations that had most often and consistently expressed concerns regarding the provision of adequate protections for shippers in the volume contract provisions on several previous occasions expressed complete satisfaction with the proposed refinements of the draft article. Others speaking in support of the proposed text emphasized the importance of finding an adequate and flexible means for the expression of party autonomy in order to assure the success of a modern transport convention, while at the same time ensuring that any party whose interests could be open to abuse was adequately protected.

246. However, disappointment was expressed by some delegations that, while applauding the effort to further protect shippers that resulted in the proposal for the refinement of draft article 83, felt that further efforts were needed to ensure adequate protection of those parties. Reference was made to the historical imbalance of market power which led to the gradual introduction of mandatory law that eventually became the norm for all earlier conventions regulating the carriage of goods by sea. The suggestion was made that even under the refined text it would still be possible for strong parties to impose their will on weaker interests, such as small shippers. It was suggested that the reduced freight rates that might be generated by volume contracts would be

offset by higher insurance rates for shippers, coupled with disadvantageous jurisdiction provisions and a possible lack of market choices. With a view to addressing that perceived enduring imbalance, the following suggestions, for which there was some support, were made:

- to provide a more precise definition of volume contracts in draft article 1 (2) which would require a minimum number of shipments, such as 5, or containers, such as 500;
- to make the conditions in paragraph 2 (b) conjunctive by replacing “or” between subparagraphs (i) and (ii) with “and” in the revised text;
- to revise the chapeau of paragraph 2 by changing the phrase “a derogation” to “a volume contract” in order to make certain that the entire volume contract would not be binding if the conditions for derogation from the draft convention were not met; and
- the phrase “individually” should be deleted from paragraph 2 (b)(i).

247. Some sympathy was expressed for those delegations that felt that the refined text did not go far enough in terms of protecting shippers and it was suggested that the inclusion of specific numbers in the definition of “volume contract” was dangerous, since it would lead to uncertainty. If, for example, fewer containers than stated in the volume contract were actually shipped would the volume contract be held to be retroactively void? Further, it was pointed out that any shipper that was dissatisfied with the terms of the volume contract presented always had the right to enter into a transport agreement on standard terms. In addition, it was noted that the fact that the derogation in paragraph 2 would not be binding if the conditions were not met effectively meant that the entire contract would be subject to the provisions of the draft convention, because no derogation from it would be binding. It was also pointed out that the chapter on jurisdiction would be binding only on Contracting States that declared that chapter to be binding, so that disadvantageous choice of court agreements should not be a particular problem.

248. A number of delegations were of the view that the proposed refinements to draft article 83 were a good, but somewhat insufficient, start toward satisfying their concerns regarding the possible effects of volume contracts on small shippers. However, the general view of the Working Group was that the refined text of the proposed article 83 was an improvement over the previous text and should be adopted. In addition, emphasis was placed in the Working Group on the fact that it had in previous sessions approved the policy of providing for volume contracts in the draft convention (see, most recently, A/CN.9/621, paras. 161-172), and that that decision should not be revisited in the face of insufficient consensus to do so.

249. Following a lengthy discussion on the proposal for refined text for draft article 83, the Working Group approved the substance of the text of draft article 83 set out in paragraph 243 above, and referred it to the drafting group.

*Definition of “volume contract” – Paragraph 2 of draft article 1*

250. While the proponents of the proposed refined text of draft article 83 insisted that one of the key components of that compromise was that the definition of “volume contract” in draft article 1 (2) remained unamended, a significant minority of delegations were of the view that the definition should be revised. The rationale for that position was that the existing definition was too vague, and that it would be in the interests of the parties to know precisely what would trigger the application of the volume contract

provision. Further it was thought that the threshold for the operation of volume contracts should be high enough so as to exclude small shippers, notwithstanding the additional protections built into the refined text of draft article 83.

251. In addition to the proposal for the amendment of the definition of “volume contract” noted in paragraph 246 above, other proposals for amendment were made as follows:

- instead of a “specified quantity of goods” the text should refer to a “significant quantity of goods”; and
- the specified quantity of goods referred to should be 600,000 tons and the minimum series of shipments required should be 5.

252. While there was a significant minority of delegations of the view that the definition of “volume contract” should be amended, possibly along the lines suggested in the paragraph above, there was insufficient consensus to amend the existing definition. The Working Group was urged to be realistic about what could be achieved on the matter. Proposals for amending the definition, in particular by introducing a minimum shipment volume below which no derogations to the convention could be made, it was said, had been considered and discarded at earlier occasions and there was no reason to expect that they could be accepted at the present stage.

253. The Working Group approved the substance of the definition of the term “volume contract” in paragraph 2 of draft article 1 and referred it to the drafting group.

#### **Draft article 84. Special rules for live animals and certain other goods**

254. A question was raised whether the reference to the “maritime performing party” in paragraph (a) was necessary, since the “performing party” was already included in the text by way of the reference to “a person referred to in article 19”. It was observed that maintaining the specific reference to the “maritime performing party” would signal the Working Group’s intention to narrow the application of the provision to that party, but that deletion of the phrase would broaden the application to all “performing parties”. The Working Group agreed that it intended that the provision should apply to all performing parties, and that retaining the reference to the “maritime performing party” was potentially confusing, and thus should be deleted.

255. Subject to the above deletion, the Working Group approved the substance of draft article 84 and referred it to the drafting group.

### **Chapter 17 – Matters not governed by this Convention**

256. The view was expressed that the title of the chapter “matters not governed by this convention” would be better expressed in a positive sense, such as “matters governed by other instruments”, or perhaps simply “other instruments”. The Working Group agreed that the drafting group would consider the advisability of an amended title for chapter 17.

#### **Draft article 85. International conventions governing the carriage of goods by other modes of transport**

257. It was suggested that draft article 85 should make reference to draft article 27 in terms such as, “without prejudice to article 27”, so that its relationship with draft article 27 would be clear. However, it was observed that the revised approach taken by

the Working Group in draft article 27 was no longer as a conflict of convention provision, but rather as the establishment of a network approach on the basis of a hypothetical contract. There was support for the view that, as such, a cross reference to draft article 27 was unnecessary.

258. The Working Group approved the substance of draft article 85 and referred it to the drafting group.

#### **Draft article 86. Global limitation of liability**

259. The Working Group approved the substance of draft article 86 and referred it to the drafting group.

#### **Draft article 87. General average**

260. The Working Group approved the substance of draft article 87 and referred it to the drafting group.

#### **Draft article 88. Passengers and luggage**

261. The Working Group approved the substance of draft article 88 and referred it to the drafting group.

#### **Draft article 89. Damage caused by nuclear incident**

262. A concern was expressed that subparagraph (a) of draft article 89 made reference not only to existing conventions regarding civil liability for nuclear damage, but also to later amendments of those conventions or to future conventions. It was observed that such “dynamic references” were strictly forbidden by legislators in some States, as allowing the State to be bound by future modifications or future instruments. Although some sympathy was expressed for that concern, it was observed that a similar approach had also been taken with respect to revised or amended conventions in paragraph 5 of article 25 of the Hamburg Rules, and that it had been acceptable in practice. A further observation was made that the chapeau of draft article 89 would regulate any potential problem, since it limited the operation of the provision to cases where the operator of a nuclear installation was liable for damage, and would thus require that the new or amended convention had come into force in the specific State in issue. Although possible drafting methods to resolve the potential problem were suggested, the Working Group concluded that such solutions were unnecessary.

263. In addition, it was noted that draft article 89 in its chapeau referred to “the operator of a nuclear installation.” It was suggested that the drafting group consider instead a more precise formulation, such as “if the carrier is considered the operator of a nuclear installation and is liable.”

264. Subject to that possible amendment, the Working Group approved the substance of draft article 89 and referred it to the drafting group.

### **Chapter 18 – Final clauses**

#### **Draft article 90. Depositary**

265. Draft article 90 did not elicit comments. The Working Group approved its substance and referred it to the drafting group.

**Draft article 91. Signatures, ratification, acceptance, approval or accession**

266. A question was raised with respect to the reason for having the draft convention open for signature at the same time as for accession as provided in paragraph 3 of draft article 91. It was noted that the usual practice was that a convention was only opened for accession after the time for its signature had passed. In response, it was pointed out that according to the practice of the United Nations, the final clauses had to be submitted for examination to the Treaty Section of its Office of Legal Affairs, which exercised the Secretary-General's depositary functions, and that the Secretariat would ensure that the final clauses were in accordance with the depositary's practice.

267. The Working Group approved the substance of draft article 91 and referred it to the drafting group.

**Draft article 92. Denunciation of other conventions**

268. In response to a question, the Working Group was reminded that the current text of draft article 92 had been the result of extensive discussion and that the Working Group had decided to take the same approach in paragraph 3 as that provided for in paragraph 1 of article 31 of the Hamburg Rules (see A/CN.9/642, paras. 221-227). It was recalled that the entry into force of the draft convention had been made conditional on the denunciation of previous conventions in order to prevent any legal vacuum from arising for States.

269. The Working Group approved the substance of draft article 92 and referred it to the drafting group.

**Draft article 93. Reservations**

270. Draft article 93 did not elicit comments. The Working Group approved its substance and referred it to the drafting group.

**Draft article 94. Procedure and effect of declarations**

271. A question was raised whether the reference to modification in paragraph 5 of draft article 94 was necessary. It was noted that the reference to withdraw a modification did not apply equally to the various declarations mentioned in paragraph 5 of draft article 94, as the declarations under draft articles 77 and 81 could be simply declared or withdrawn, whereas the declarations under draft articles 95 and 96 could be declared, modified or withdrawn. In this light, it was suggested to add adequate cross-references in paragraph 5 of draft article 94 with regard to declarations under draft articles 95 and 96.

272. Subject to the aforementioned amendment of paragraph 5, the Working Group approved the substance of draft article 94 and referred it to the drafting group.

**Draft article 95. Effect in domestic territorial units**

273. Draft article 95 did not elicit comments. The Working Group approved its substance and referred it to the drafting group.

**Draft article 96. Participation by regional economic integration organizations**

274. Draft article 96 did not elicit comments. The Working Group approved its substance and referred it to the drafting group.

**Draft article 97. Entry into force***General comment*

275. The Working Group was reminded of its extensive discussion of draft article 97 in its previous session (see A/CN.9/642, paras. 264-271). It was observed that draft article 97 contained two sets of alternatives in square brackets in its paragraphs 1 and 2: the time period from the last date of deposit of the ratification to the entry into force of the convention, and the number of ratifications, acceptances, approvals or accessions required for the convention to enter into force.

*Number of ratifications required*

276. The views for having a high number of ratifications, such as 30, and the views for having a lower number, closer to 3 or 5 ratifications, as discussed in the previous session of the Working Group, were reiterated (see paras. 265-269 of A/CN.9/642). In general, the rationale given for preferring a high number of ratifications was mainly to avoid further disunification of the international regimes governing the carriage of goods by sea, and the rationale given for favouring a lower number was mainly to allow the draft convention to enter into force quickly amongst those States that wished to enter rapidly into the new regime. Both positions presented suggestions aimed at achieving consensus: one suggestion was to require 20 ratifications prior to entry into force, and the other one was to require 10. The former proposal found broad support.

*Time for entry into force*

277. Virtually uniform support was given to the suggestion to retain one year as time period from the last date of deposit of the ratification to the entry into force of the draft convention.

*Conclusions reached by the Working Group*

278. The Working Group approved the substance of draft article 97 and referred it to the drafting group, subject to the following adjustments in paragraphs 1 and 2:

- the square brackets around “one year” should be deleted and the text retained;
- the words “six months” and the square brackets surrounding them should be deleted;
- the square brackets around “twentieth” should be deleted and the word retained;  
and
- the word “fifth” and the square brackets surrounding it should be deleted.

**Draft article 98. Revision and amendment**

279. The question was raised as to whether there should be an automatic time period with respect to draft article 98 to the effect that 5 years after entry into force of the draft convention, its revision or amendment would be considered. In response, it was pointed out that draft article 98 fully adopted the approach taken in article 32 of the Hamburg Rules with no need for such a requirement.

280. The Working Group approved the substance of draft article 98 and referred it to the drafting group.



**Draft article 99. Amendment of limitation amounts**

281. The Working Group deferred consideration of the substance of draft article 99 pending agreement regarding the compromise package regarding the limitation on liability (see above, paras. 183 to 188 and 196 to 203). In keeping with its agreement regarding the compromise package, the Working Group agreed to delete draft article 99.

**Draft article 100. Denunciation of this Convention**

282. Draft article 100 did not elicit comments. The Working Group approved its substance and referred it to the drafting group.

**Title of the draft convention**

283. The Working Group was reminded that the title of the draft convention still contained two sets of square brackets and that a definite decision should be taken.

284. In the subsequent discussion, there was wide support for the deletion of the square brackets around the words “by sea”, to distinguish the draft convention from transport by road or rail.

*Proposal to remove the words “wholly or partly”*

285. It was proposed to remove the words “wholly or partly” from the title of the draft convention, as the draft convention was not a true multimodal convention, but a predominantly maritime convention. It was noted that the wording “wholly or partly” sounded awkward and that no other convention, covering different transport modalities, used such wording. It was also observed that the inclusion of the words “wholly or partly” appeared to make the title cumbersome and that practical reasons required the shortest title possible. Some support was expressed for that proposal.

*Proposal to delete the square brackets around the words “wholly or partly”*

286. Another suggestion was made to retain the words “wholly or partly” and to remove the square brackets surrounding them, as the title would then better reflect the contents of the draft convention as a maritime plus convention, covering door to door transport. It was noted that the scope of application of the draft convention had been extensively debated and that the decision had been taken for a maritime plus convention. It was further emphasized that it was important to mark the difference between a unimodal and a maritime plus convention in order to distinguish the draft convention from other international instruments. It was added that the length of the title should not be given too much attention, as an international convention was usually referred to by the name of the city in which it had been formally adopted. Broad support was expressed for the proposal to delete the square brackets around the words “wholly or partly”.

*Proposal to insert the word “international”*

287. The Working Group accepted a proposal to insert the word “international” before the word “carriage”, in order to mirror the international character of the carriage.

*Proposal to include the word “contract”*

288. Another proposal was made to include the word “contract” after the words “convention on the”, in order to emphasize the essential element of the draft, which was

its focus on the contract of carriage unlike other conventions such as CIM COTIF, which also focused on harmonized technical aspects or the Hague Rules, which only governed carriage where a bill of lading had been issued. It was further noted that the inclusion of “contract” in the title would single out that the draft convention dealt with private international law and not public international law. In addition, it was stated that the inclusion of the word “contract” in the title would reflect the latest practice with respect to international transport conventions.

*Conclusions reached by the Working Group regarding the title of the draft convention*

289. Subject to the inclusion of the phrase “contract for the international” and the deletion of the square brackets around the words “wholly or partly” and “by sea”, the Working Group approved the title of the draft convention and referred it to the drafting group.

### III. Other business

#### Planning of future work

290. The Working Group took note that its work was concluded and that the draft convention that appeared in an annex to this report would be circulated to Governments for comment, and would be submitted to the Commission for possible approval at its forty-first session scheduled for 16 June to 3 July 2008 in New York.

#### Annex

### **Draft convention on contracts for the international carriage of goods wholly or partly by sea**

#### CHAPTER 1. GENERAL PROVISIONS

##### *Article 1. Definitions*

For the purposes of this Convention:

1. “Contract of carriage” means a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage.
2. “Volume contract” means a contract of carriage that provides for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time. The specification of the quantity may include a minimum, a maximum or a certain range.
3. “Liner transportation” means a transportation service that is offered to the public through publication or similar means and includes transportation by ships operating on a regular schedule between specified ports in accordance with publicly available timetables of sailing dates.
4. “Non-liner transportation” means any transportation that is not liner transportation.

5. “Carrier” means a person that enters into a contract of carriage with a shipper.

6. (a) “Performing party” means a person other than the carrier that performs or undertakes to perform any of the carrier’s obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, care, unloading or delivery of the goods, to the extent that such person acts, either directly or indirectly, at the carrier’s request or under the carrier’s supervision or control.

(b) “Performing party” does not include any person that is retained, directly or indirectly, by a shipper, by a documentary shipper, by the controlling party or by the consignee instead of by the carrier.

7. “Maritime performing party” means a performing party to the extent that it performs or undertakes to perform any of the carrier’s obligations during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship. An inland carrier is a maritime performing party only if it performs or undertakes to perform its services exclusively within a port area.

8. “Shipper” means a person that enters into a contract of carriage with a carrier.

9. “Documentary shipper” means a person, other than the shipper, that accepts to be named as “shipper” in the transport document or electronic transport record.

10. “Holder” means:

(a) A person that is in possession of a negotiable transport document; and (i) if the document is an order document, is identified in it as the shipper or the consignee, or is the person to which the document is duly endorsed; or (ii) if the document is a blank endorsed order document or bearer document, is the bearer thereof; or

(b) The person to which a negotiable electronic transport record has been issued or transferred in accordance with the procedures in article 9, paragraph 1.

11. “Consignee” means a person entitled to delivery of the goods under a contract of carriage or a transport document or electronic transport record.

12. “Right of control” of the goods means the right under the contract of carriage to give the carrier instructions in respect of the goods in accordance with chapter 10.

13. “Controlling party” means the person that pursuant to article 53 is entitled to exercise the right of control.

14. “Transport document” means a document issued under a contract of carriage by the carrier or a performing party that:

(a) Evidences the carrier’s or a performing party’s receipt of goods under a contract of carriage; and

(b) Evidences or contains a contract of carriage.

15. “Negotiable transport document” means a transport document that indicates, by wording such as “to order” or “negotiable” or other appropriate wording recognized as having the same effect by the law applicable to the document, that the goods have been consigned to the order of the shipper, to the order of the consignee, or to bearer, and is not explicitly stated as being “non-negotiable” or “not negotiable”.

16. “Non-negotiable transport document” means a transport document that is not a negotiable transport document.

17. “Electronic communication” means information generated, sent, received or stored by electronic, optical, digital or similar means with the result that the information communicated is accessible so as to be usable for subsequent reference.

18. “Electronic transport record” means information in one or more messages issued by electronic communication under a contract of carriage by a carrier or a performing party, including information logically associated with the electronic transport record by attachments or otherwise linked to the electronic transport record contemporaneously with or subsequent to its issue by the carrier or a performing party, so as to become part of the electronic transport record, that:

(a) Evidences the carrier’s or a performing party’s receipt of goods under a contract of carriage; and

(b) Evidences or contains a contract of carriage.

19. “Negotiable electronic transport record” means an electronic transport record:

(a) That indicates, by statements such as “to order”, or “negotiable”, or other appropriate statements recognized as having the same effect by the law applicable to the record, that the goods have been consigned to the order of the shipper or to the order of the consignee, and is not explicitly stated as being “non-negotiable” or “not negotiable”; and

(b) The use of which meets the requirements of article 9, paragraph 1.

20. “Non-negotiable electronic transport record” means an electronic transport record that is not a negotiable electronic transport record.

21. The “issuance” of a negotiable electronic transport record means the issuance of the record in accordance with procedures that ensure that the record is subject to exclusive control from its creation until it ceases to have any effect or validity.

22. The “transfer” of a negotiable electronic transport record means the transfer of exclusive control over the record.

23. “Contract particulars” means any information relating to the contract of carriage or to the goods (including terms, notations, signatures and endorsements) that is in a transport document or an electronic transport record.

24. “Goods” means the wares, merchandise, and articles of every kind whatsoever that a carrier undertakes to carry under a contract of carriage and includes the packing and any equipment and container not supplied by or on behalf of the carrier.

25. “Ship” means any vessel used to carry goods by sea.

26. “Container” means any type of container, transportable tank or flat, swapbody, or any similar unit load used to consolidate goods, and any equipment ancillary to such unit load.

27. “Freight” means the remuneration payable to the carrier for the carriage of goods under a contract of carriage.

28. “Domicile” means (a) a place where a company or other legal person or association of natural or legal persons has its (i) statutory seat or place of incorporation

or central registered office, whichever is applicable, (ii) central administration, or (iii) principal place of business, and (b) the habitual residence of a natural person.

29. “Competent court” means a court in a Contracting State that, according to the rules on the internal allocation of jurisdiction among the courts of that State, may exercise jurisdiction over the dispute.

#### *Article 2. Interpretation of this Convention*

In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

#### *Article 3. Form requirements*

The notices, confirmation, consent, agreement, declaration and other communications referred to in articles 20, paragraph 2; 24, paragraphs 1 to 3; 38, subparagraphs 1 (b), (c) and (d); 42, subparagraph 4 (b); 46; 50, paragraph 3; 53, subparagraph 1 (b); 61, paragraph 1; 65; 68; and 82, paragraphs 2 and 5, shall be in writing. Electronic communications may be used for these purposes, provided that the use of such means is with the consent of the person by which it is communicated and of the person to which it is communicated.

#### *Article 4. Applicability of defences and limits of liability*

1. Any provision of this Convention that may provide a defence for, or limit the liability of, the carrier applies in any judicial or arbitral proceeding, whether founded in contract, in tort, or otherwise, that is instituted in respect of loss of, damage to, or delay in delivery of goods covered by a contract of carriage or for the breach of any other obligation under this Convention against:

- (a) The carrier or a maritime performing party;
- (b) The master, crew or any other person that performs services on board the ship; or
- (c) Employees of the carrier or a maritime performing party.

2. Any provision of this Convention that may provide a defence for the shipper or the documentary shipper applies in any judicial or arbitral proceeding, whether founded in contract, in tort, or otherwise, that is instituted against the shipper, the documentary shipper, or their subcontractors, agents or employees.

## CHAPTER 2. SCOPE OF APPLICATION

#### *Article 5. General scope of application*

1. Subject to article 6, this Convention applies to contracts of carriage in which the place of receipt and the place of delivery are in different States, and the port of loading of a sea carriage and the port of discharge of the same sea carriage are in different States, if, according to the contract of carriage, any one of the following places is located in a Contracting State:

- (a) The place of receipt;

- (b) The port of loading;
- (c) The place of delivery; or
- (d) The port of discharge.

2. This Convention applies without regard to the nationality of the vessel, the carrier, the performing parties, the shipper, the consignee, or any other interested parties.

*Article 6. Specific exclusions*

1. This Convention does not apply to the following contracts in liner transportation:

- (a) Charterparties; and
- (b) Other contracts for the use of a ship or of any space thereon.

2. This Convention does not apply to contracts of carriage in non-linear transportation except when:

- (a) There is no charterparty or other contract between the parties for the use of a ship or of any space thereon; and
- (b) A transport document or an electronic transport record is issued.

*Article 7. Application to certain parties*

Notwithstanding article 6, this Convention applies as between the carrier and the consignee, controlling party or holder that is not an original party to the charterparty or other contract of carriage excluded from the application of this Convention. However, this Convention does not apply as between the original parties to a contract of carriage excluded pursuant to article 6.

CHAPTER 3. ELECTRONIC TRANSPORT RECORDS

*Article 8. Use and effect of electronic transport records*

Subject to the requirements set out in this Convention:

- (a) Anything that is to be in or on a transport document under this Convention may be recorded in an electronic transport record, provided the issuance and subsequent use of an electronic transport record is with the consent of the carrier and the shipper; and
- (b) The issuance, exclusive control, or transfer of an electronic transport record has the same effect as the issuance, possession, or transfer of a transport document.

*Article 9. Procedures for use of negotiable electronic transport records*

1. The use of a negotiable electronic transport record shall be subject to procedures that provide for:

- (a) The method for the issuance and the transfer of that record to an intended holder;

- (b) An assurance that the negotiable electronic transport record retains its integrity;
  - (c) The manner in which the holder is able to demonstrate that it is the holder; and
  - (d) The manner of providing confirmation that delivery to the holder has been effected, or that, pursuant to articles 10, paragraph 2, or 49, subparagraphs (a)(ii) and (c), the electronic transport record has ceased to have any effect or validity.
2. The procedures in paragraph 1 of this article shall be referred to in the contract particulars and be readily ascertainable.

*Article 10. Replacement of negotiable transport document or negotiable electronic transport record*

1. If a negotiable transport document has been issued and the carrier and the holder agree to replace that document by a negotiable electronic transport record:
- (a) The holder shall surrender the negotiable transport document, or all of them if more than one has been issued, to the carrier;
  - (b) The carrier shall issue to the holder a negotiable electronic transport record that includes a statement that it replaces the negotiable transport document; and
  - (c) The negotiable transport document ceases thereafter to have any effect or validity.
2. If a negotiable electronic transport record has been issued and the carrier and the holder agree to replace that electronic transport record by a negotiable transport document:
- (a) The carrier shall issue to the holder, in place of the electronic transport record, a negotiable transport document that includes a statement that it replaces the negotiable electronic transport record; and
  - (b) The electronic transport record ceases thereafter to have any effect or validity.

CHAPTER 4. OBLIGATIONS OF THE CARRIER

*Article 11. Carriage and delivery of the goods*

The carrier shall, subject to this Convention and in accordance with the terms of the contract of carriage, carry the goods to the place of destination and deliver them to the consignee.

*Article 12. Period of responsibility of the carrier*

1. The period of responsibility of the carrier for the goods under this Convention begins when the carrier or a performing party receives the goods for carriage and ends when the goods are delivered.
2. (a) If the law or regulations of the place of receipt require the goods to be handed over to an authority or other third party from which the carrier may collect them,

the period of responsibility of the carrier begins when the carrier collects the goods from the authority or other third party.

(b) If the law or regulations of the place of delivery require the carrier to hand over the goods to an authority or other third party from which the consignee may collect them, the period of responsibility of the carrier ends when the carrier hands the goods over to the authority or other third party.

3. For the purposes of determining the carrier's period of responsibility, the parties may agree on the time and location of receipt and delivery of the goods, but a provision in a contract of carriage is void to the extent that it provides that:

(a) The time of receipt of the goods is subsequent to the beginning of their initial loading under the contract of carriage; or

(b) The time of delivery of the goods is prior to the completion of their final unloading under the contract of carriage.

#### *Article 13. Transport beyond the scope of the contract of carriage*

On the request of the shipper, the carrier may agree to issue a single transport document or electronic transport record that includes specified transport that is not covered by the contract of carriage and in respect of which it does not assume the obligation to carry the goods. In such event, the period of responsibility of the carrier for the goods is only the period covered by the contract of carriage.

#### *Article 14. Specific obligations*

1. The carrier shall during the period of its responsibility as defined in article 12, and subject to article 27, properly and carefully receive, load, handle, stow, carry, keep, care for, unload and deliver the goods.

2. Notwithstanding paragraph 1 of this article, and without prejudice to the other provisions in chapter 4 and to chapters 5 to 7, the carrier and the shipper may agree that the loading, handling, stowing or unloading of the goods is to be performed by the shipper, the documentary shipper or the consignee. Such an agreement shall be referred to in the contract particulars.

#### *Article 15. Specific obligations applicable to the voyage by sea*

The carrier is bound before, at the beginning of, and during the voyage by sea to exercise due diligence to:

(a) Make and keep the ship seaworthy;

(b) Properly crew, equip and supply the ship and keep the ship so crewed, equipped and supplied throughout the voyage; and

(c) Make and keep the holds and all other parts of the ship in which the goods are carried, including any containers supplied by the carrier in or upon which the goods are carried, fit and safe for their reception, carriage and preservation.



*Article 16. Goods that may become a danger*

Notwithstanding articles 11 and 14, the carrier or a performing party may decline to receive or to load, and may take such other measures as are reasonable, including unloading, destroying, or rendering goods harmless, if the goods are, or reasonably appear likely to become during the carrier's period of responsibility, an actual danger to persons, property or the environment.

*Article 17. Sacrifice of the goods during the voyage by sea*

Notwithstanding articles 11, 14, and 15, the carrier or a performing party may sacrifice goods at sea when the sacrifice is reasonably made for the common safety or for the purpose of preserving from peril human life or other property involved in the common adventure.

## CHAPTER 5. LIABILITY OF THE CARRIER FOR LOSS, DAMAGE OR DELAY

*Article 18. Basis of liability*

1. The carrier is liable for loss of or damage to the goods, as well as for delay in delivery, if the claimant proves that the loss, damage, or delay, or the event or circumstance that caused or contributed to it took place during the period of the carrier's responsibility as defined in chapter 4.

2. The carrier is relieved of all or part of its liability pursuant to paragraph 1 of this article if it proves that the cause or one of the causes of the loss, damage, or delay is not attributable to its fault or to the fault of any person referred to in article 19.

3. The carrier is also relieved of all or part of its liability pursuant to paragraph 1 of this article if, alternatively to proving the absence of fault as provided in paragraph 2 of this article, it proves that one or more of the following events or circumstances caused or contributed to the loss, damage, or delay:

- (a) Act of God;
- (b) Perils, dangers, and accidents of the sea or other navigable waters;
- (c) War, hostilities, armed conflict, piracy, terrorism, riots, and civil commotions;
- (d) Quarantine restrictions; interference by or impediments created by governments, public authorities, rulers, or people including detention, arrest, or seizure not attributable to the carrier or any person referred to in article 19;
- (e) Strikes, lockouts, stoppages, or restraints of labour;
- (f) Fire on the ship;
- (g) Latent defects not discoverable by due diligence;
- (h) Act or omission of the shipper, the documentary shipper, the controlling party, or any other person for whose acts the shipper or the documentary shipper is liable pursuant to article 34 or 35;
- (i) Loading, handling, stowing, or unloading of the goods performed pursuant to an agreement in accordance with article 14, paragraph 2, unless the carrier or a

performing party performs such activity on behalf of the shipper, the documentary shipper or the consignee;

(j) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;

(k) Insufficiency or defective condition of packing or marking not performed by or on behalf of the carrier;

(l) Saving or attempting to save life at sea;

(m) Reasonable measures to save or attempt to save property at sea;

(n) Reasonable measures to avoid or attempt to avoid damage to the environment; or

(o) Acts of the carrier in pursuance of the powers conferred by articles 16 and 17.

4. Notwithstanding paragraph 3 of this article, the carrier is liable for all or part of the loss, damage, or delay:

(a) If the claimant proves that the fault of the carrier or of a person referred to in article 19 caused or contributed to the event or circumstance on which the carrier relies; or

(b) If the claimant proves that an event or circumstance not listed in paragraph 3 of this article contributed to the loss, damage, or delay, and the carrier cannot prove that this event or circumstance is not attributable to its fault or to the fault of any person referred to in article 19.

5. The carrier is also liable, notwithstanding paragraph 3 of this article, for all or part of the loss, damage, or delay if:

(a) The claimant proves that the loss, damage, or delay was or was probably caused by or contributed to by (i) the unseaworthiness of the ship; (ii) the improper crewing, equipping, and supplying of the ship; or (iii) the fact that the holds or other parts of the ship in which the goods are carried (including any containers supplied by the carrier in or upon which the goods are carried) were not fit and safe for reception, carriage, and preservation of the goods; and

(b) The carrier is unable to prove either that: (i) none of the events or circumstances referred to in subparagraph 5 (a) of this article caused the loss, damage, or delay; or (ii) that it complied with its obligation to exercise due diligence pursuant to article 15.

6. When the carrier is relieved of part of its liability pursuant to this article, the carrier is liable only for that part of the loss, damage or delay that is attributable to the event or circumstance for which it is liable pursuant to this article.

#### *Article 19. Liability of the carrier for other persons*

The carrier is liable for the breach of its obligations under this Convention caused by the acts or omissions of:

(a) Any performing party;

(b) The master or crew of the ship;

- (c) Employees of the carrier or a performing party; or
- (d) Any other person that performs or undertakes to perform any of the carrier's obligations under the contract of carriage, to the extent that the person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control.

*Article 20. Liability of maritime performing parties*

1. A maritime performing party is subject to the obligations and liabilities imposed on the carrier under this Convention and is entitled to the carrier's defences and limits of liability as provided for in this Convention if:

(a) The maritime performing party received the goods for carriage in a Contracting State, or delivered them in a Contracting State, or performed its activities with respect to the goods in a port in a Contracting State; and

(b) The occurrence that caused the loss, damage or delay took place: (i) during the period between the arrival of the goods at the port of loading of the ship and their departure from the port of discharge from the ship; (ii) while the maritime performing party had custody of the goods; or (iii) at any other time to the extent that it was participating in the performance of any of the activities contemplated by the contract of carriage.

2. If the carrier agrees to assume obligations other than those imposed on the carrier under this Convention, or agrees that the limits of its liability are higher than the limits specified under this Convention, a maritime performing party is not bound by this agreement unless it expressly agrees to accept such obligations or such higher limits.

3. A maritime performing party is liable for the breach of its obligations under this Convention caused by the acts or omissions of any person to which it has entrusted the performance of any of the carrier's obligations under the contract of carriage under the conditions set out in paragraph 1 of this article.

4. Nothing in this Convention imposes liability on the master or crew of the ship or on an employee of the carrier or of a maritime performing party.

*Article 21. Joint and several liability*

1. If the carrier and one or more maritime performing parties are liable for the loss of, damage to, or delay in delivery of the goods, their liability is joint and several but only up to the limits provided for under this Convention.

2. Without prejudice to article 63, the aggregate liability of all such persons shall not exceed the overall limits of liability under this Convention.

*Article 22. Delay*

Delay in delivery occurs when the goods are not delivered at the place of destination provided for in the contract of carriage within the time agreed.

*Article 23. Calculation of compensation*

1. Subject to article 61, the compensation payable by the carrier for loss of or damage to the goods is calculated by reference to the value of such goods at the place and time of delivery established in accordance with article 45.

2. The value of the goods is fixed according to the commodity exchange price or, if there is no such price, according to their market price or, if there is no commodity exchange price or market price, by reference to the normal value of the goods of the same kind and quality at the place of delivery.

3. In case of loss of or damage to the goods, the carrier is not liable for payment of any compensation beyond what is provided for in paragraphs 1 and 2 of this article except when the carrier and the shipper have agreed to calculate compensation in a different manner within the limits of chapter 16.

*Article 24. Notice in case of loss, damage or delay*

1. The carrier is presumed, in absence of proof to the contrary, to have delivered the goods according to their description in the contract particulars unless notice of loss of or damage to the goods, indicating the general nature of such loss or damage, was given to the carrier or the performing party that delivered the goods before or at the time of the delivery, or, if the loss or damage is not apparent, within seven working days at the place of delivery after the delivery of the goods.

2. Failure to provide the notice referred to in this article to the carrier or the performing party shall not affect the right to claim compensation for loss of or damage to the goods under this Convention, nor shall it affect the allocation of the burden of proof set out in article 18.

3. The notice referred to in this article is not required in respect of loss or damage that is ascertained in a joint inspection of the goods by the person to which they have been delivered and the carrier or the maritime performing party against which liability is being asserted.

4. No compensation in respect of delay is payable unless notice of loss due to delay was given to the carrier within twenty-one consecutive days of delivery of the goods.

5. When the notice referred to in this article is given to the performing party that delivered the goods, it has the same effect as if that notice was given to the carrier, and notice given to the carrier has the same effect as a notice given to a maritime performing party.

6. In the case of any actual or apprehended loss or damage, the parties to the dispute shall give all reasonable facilities to each other for inspecting and tallying the goods and shall provide access to records and documents relevant to the carriage of the goods.

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CHAPTER 6. ADDITIONAL PROVISIONS RELATING TO  
PARTICULAR STAGES OF CARRIAGE

*Article 25. Deviation*

When pursuant to applicable law a deviation constitutes a breach of the carrier's obligations, such deviation of itself shall not deprive the carrier or a maritime performing party of any defence or limitation of this Convention, except to the extent provided in article 63.

*Article 26. Deck cargo on ships*

1. Goods may be carried on the deck of a ship only if:
  - (a) Such carriage is required by law;
  - (b) They are carried in or on containers or road or railroad cargo vehicles that are fit for deck carriage, and the decks are specially fitted to carry such containers or road or railroad cargo vehicles; or
  - (c) The carriage on deck is in accordance with the contract of carriage, or the customs, usages, and practices of the trade in question.
2. The provisions of this Convention relating to the liability of the carrier apply to the loss of, damage to or delay in the delivery of goods carried on deck pursuant to paragraph 1 of this article, but the carrier is not liable for loss of or damage to such goods, or delay in their delivery, caused by the special risks involved in their carriage on deck when the goods are carried in accordance with subparagraphs 1 (a) or (c) of this article.
3. If the goods have been carried on deck in cases other than those permitted pursuant to paragraph 1 of this article, the carrier is liable for loss of or damage to the goods or delay in their delivery that is exclusively caused by their carriage on deck, and is not entitled to the defences provided for in article 18.
4. The carrier is not entitled to invoke subparagraph 1 (c) of this article against a third party that has acquired a negotiable transport document or a negotiable electronic transport record in good faith, unless the contract particulars state that the goods may be carried on deck.
5. If the carrier and shipper expressly agreed that the goods would be carried under deck, the carrier is not entitled to the benefit of the limitation of liability for any loss of, damage to or delay in the delivery of the goods to the extent that such loss, damage, or delay resulted from their carriage on deck.

*Article 27. Carriage preceding or subsequent to sea carriage*

When loss of or damage to goods, or an event or circumstance causing a delay in their delivery, occurs during the carrier's period of responsibility but solely before their loading onto the ship or solely after their discharge from the ship, the provisions of this Convention do not prevail over those provisions of another international instrument that, at the time of such loss, damage or event or circumstance causing delay:

- (a) Pursuant to the provisions of such international instrument would have applied to all or any of the carrier's activities if the shipper had made a separate and direct contract with the carrier in respect of the particular stage of carriage where the

loss of, or damage to goods, or an event or circumstance causing delay in their delivery occurred;

(b) Specifically provide for the carrier's liability, limitation of liability, or time for suit; and

(c) Cannot be departed from by contract either at all or to the detriment of the shipper under that instrument.

## CHAPTER 7. OBLIGATIONS OF THE SHIPPER TO THE CARRIER

### *Article 28. Delivery for carriage*

1. Unless otherwise agreed in the contract of carriage, the shipper shall deliver the goods ready for carriage. In any event, the shipper shall deliver the goods in such condition that they will withstand the intended carriage, including their loading, handling, stowing, lashing and securing, and unloading, and that they will not cause harm to persons or property.

2. The shipper shall properly and carefully perform any obligation assumed under an agreement made pursuant to article 14, paragraph 2.

3. When a container is packed or a road or railroad cargo vehicle is loaded by the shipper, the shipper shall properly and carefully stow, lash and secure the contents in or on the container, or road or railroad cargo vehicle, and in such a way that they will not cause harm to persons or property.

### *Article 29. Cooperation of the shipper and the carrier in providing information and instructions*

The carrier and the shipper shall respond to requests from each other to provide information and instructions required for the proper handling and carriage of the goods if the information is in the requested party's possession or the instructions are within the requested party's reasonable ability to provide and they are not otherwise reasonably available to the requesting party.

### *Article 30. Shipper's obligation to provide information, instructions and documents*

1. The shipper shall provide to the carrier in a timely manner such information, instructions and documents relating to the goods that are not otherwise reasonably available to the carrier, and that are reasonably necessary:

(a) For the proper handling and carriage of the goods, including precautions to be taken by the carrier or a performing party; and

(b) For the carrier to comply with law, regulations or other requirements of public authorities in connection with the intended carriage, provided that the carrier notifies the shipper in a timely manner of the information, instructions and documents it requires.

2. Nothing in this article affects any specific obligation to provide certain information, instructions and documents related to the goods pursuant to law, regulations or other requirements of public authorities in connection with the intended carriage.

*Article 31. Basis of shipper's liability to the carrier*

1. The shipper is liable for loss or damage sustained by the carrier if the carrier proves that such loss or damage was caused by a breach of the shipper's obligations under this Convention.

2. Except in respect of loss or damage caused by a breach by the shipper of its obligations pursuant to articles 32, paragraph 2, and 33, the shipper is relieved of all or part of its liability if the cause or one of the causes of the loss or damage is not attributable to its fault or to the fault of any person referred to in article 35.

3. When the shipper is relieved of part of its liability pursuant to this article, the shipper is liable only for that part of the loss or damage that is attributable to its fault or to the fault of any person referred to in article 35.

*Article 32. Information for compilation of contract particulars*

1. The shipper shall provide to the carrier, in a timely manner, accurate information required for the compilation of the contract particulars and the issuance of the transport documents or electronic transport records, including the particulars referred to in article 38, paragraph 1; the name of the party to be identified as the shipper in the contract particulars; the name of the consignee, if any; and the name of the person to whose order the transport document or electronic transport record is to be issued, if any.

2. The shipper is deemed to have guaranteed the accuracy at the time of receipt by the carrier of the information that is provided according to paragraph 1 of this article. The shipper shall indemnify the carrier against loss or damage resulting from the inaccuracy of such information.

*Article 33. Special rules on dangerous goods*

When goods by their nature or character are, or reasonably appear likely to become, a danger to persons, property or the environment:

(a) The shipper shall inform the carrier of the dangerous nature or character of the goods in a timely manner before they are delivered to the carrier or a performing party. If the shipper fails to do so and the carrier or performing party does not otherwise have knowledge of their dangerous nature or character, the shipper is liable to the carrier for loss or damage resulting from such failure to inform; and

(b) The shipper shall mark or label dangerous goods in accordance with any law, regulations or other requirements of public authorities that apply during any stage of the intended carriage of the goods. If the shipper fails to do so, it is liable to the carrier for loss or damage resulting from such failure.

*Article 34. Assumption of shipper's rights and obligations by the documentary shipper*

1. A documentary shipper is subject to the obligations and liabilities imposed on the shipper pursuant to this chapter and pursuant to article 57, and is entitled to the shipper's rights and defences provided by this chapter and by chapter 13.

2. Paragraph 1 of this article does not affect the obligations, liabilities, rights or defences of the shipper.

*Article 35. Liability of the shipper for other persons*

The shipper is liable for the breach of its obligations under this Convention caused by the acts or omissions of any person, including employees, agents and subcontractors, to which it has entrusted the performance of any of its obligations, but the shipper is not liable for acts or omissions of the carrier or a performing party acting on behalf of the carrier, to which the shipper has entrusted the performance of its obligations.

*Article 36. Cessation of shipper's liability*

A term in the contract of carriage according to which the liability of the shipper or the documentary shipper will cease, wholly or partly, upon a certain event or after a certain time is void:

(a) With respect to any liability pursuant to this chapter of the shipper or a documentary shipper; or

(b) With respect to any amounts payable to the carrier under the contract of carriage, except to the extent that the carrier has adequate security for the payment of such amounts.

CHAPTER 8. TRANSPORT DOCUMENTS AND  
ELECTRONIC TRANSPORT RECORDS

*Article 37. Issuance of the transport document or  
the electronic transport record*

Unless the shipper and the carrier have agreed not to use a transport document or an electronic transport record, or it is the custom, practice or usage in the trade not to use one, upon delivery of the goods for carriage to the carrier or performing party, the shipper or, if the shipper consents, the documentary shipper, is entitled to obtain from the carrier, at the shipper's option:

(a) A non-negotiable transport document or, subject to article 8, subparagraph (a), a non-negotiable electronic transport record; or

(b) An appropriate negotiable transport document or, subject to article 8, subparagraph (a), a negotiable electronic transport record, unless the shipper and the carrier have agreed not to use a negotiable transport document or negotiable electronic transport record, or it is the custom, usage, or practice in the trade not to use one.

*Article 38. Contract particulars*

1. The contract particulars in the transport document or electronic transport record referred to in article 37 shall include the following information, as furnished by the shipper:

- (a) A description of the goods as appropriate for the transport;
- (b) The leading marks necessary for identification of the goods;
- (c) The number of packages or pieces, or the quantity of goods; and



- (d) The weight of the goods, if furnished by the shipper.
2. The contract particulars in the transport document or the electronic transport record referred to in article 37 shall also include:
  - (a) A statement of the apparent order and condition of the goods at the time the carrier or a performing party receives them for carriage;
  - (b) The name and address of the carrier;
  - (c) The date on which the carrier or a performing party received the goods, or on which the goods were loaded on board the ship, or on which the transport document or electronic transport record was issued; and
  - (d) If the transport document is negotiable, the number of originals of the negotiable transport document, when more than one original is issued.
3. For the purposes of this article, the phrase “apparent order and condition of the goods” in subparagraph 2 (a) of this article refers to the order and condition of the goods based on:
  - (a) A reasonable external inspection of the goods as packaged at the time the shipper delivers them to the carrier or a performing party; and
  - (b) Any additional inspection that the carrier or a performing party actually performs before issuing the transport document or the electronic transport record.

#### *Article 39. Identity of the carrier*

1. If a carrier is identified by name in the contract particulars, any other information in the transport document or electronic transport record relating to the identity of the carrier shall have no effect to the extent that it is inconsistent with that identification.
2. If no person is identified in the contract particulars as the carrier as required pursuant to article 38, subparagraph 2 (b), but the contract particulars indicate that the goods have been loaded on board a named ship, the registered owner of that ship is presumed to be the carrier, unless it proves that the ship was under a bareboat charter at the time of the carriage and it identifies this bareboat charterer and indicates its address, in which case this bareboat charterer is presumed to be the carrier. Alternatively, the registered owner may rebut the presumption of being the carrier by identifying the carrier and indicating its address. The bareboat charterer may rebut any presumption of being the carrier in the same manner.
3. Nothing in this article prevents the claimant from proving that any person other than a person identified in the contract particulars or pursuant to paragraph 2 of this article is the carrier.

#### *Article 40. Signature*

1. A transport document shall be signed by the carrier or a person acting on its behalf.
2. An electronic transport record shall include the electronic signature of the carrier or a person acting on its behalf. Such electronic signature shall identify the signatory in relation to the electronic transport record and indicate the carrier’s authorization of the electronic transport record.

*Article 41. Deficiencies in the contract particulars*

1. The absence or inaccuracy of one or more of the contract particulars referred to in article 38, paragraphs 1 or 2, does not of itself affect the legal character or validity of the transport document or of the electronic transport record.

2. If the contract particulars include the date but fail to indicate its significance, the date is deemed to be:

(a) The date on which all of the goods indicated in the transport document or electronic transport record were loaded on board the ship, if the contract particulars indicate that the goods have been loaded on board a ship; or

(b) The date on which the carrier or a performing party received the goods, if the contract particulars do not indicate that the goods have been loaded on board a ship.

3. If the contract particulars fail to state the apparent order and condition of the goods at the time the carrier or a performing party receives them, the contract particulars are deemed to have stated that the goods were in apparent good order and condition at the time the carrier or a performing party received them.

*Article 42. Qualifying the information relating to the goods in the contract particulars*

1. The carrier shall qualify the information referred to in article 38, paragraph 1 to indicate that the carrier does not assume responsibility for the accuracy of the information furnished by the shipper if:

(a) The carrier has actual knowledge that any material statement in the transport document or electronic transport record is false or misleading; or

(b) The carrier has reasonable grounds to believe that a material statement in the transport document or electronic transport record is false or misleading.

2. Without prejudice to paragraph 1 of this article, the carrier may qualify the information referred to in article 38, paragraph 1 in the circumstances and in the manner set out in paragraphs 3 and 4 of this article to indicate that the carrier does not assume responsibility for the accuracy of the information furnished by the shipper.

3. When the goods are not delivered for carriage to the carrier or a performing party in a closed container, or when they are delivered in a closed container and the carrier or a performing party actually inspects them, the carrier may qualify the information referred to in article 38, paragraph 1, if:

(a) The carrier had no physically practicable or commercially reasonable means of checking the information furnished by the shipper, in which case it may indicate which information it was unable to check; or

(b) The carrier has reasonable grounds to believe the information furnished by the shipper to be inaccurate, in which case it may include a clause providing what it reasonably considers accurate information.

4. When the goods are delivered for carriage to the carrier or a performing party in a closed container, the carrier may qualify the information referred to in:

(a) Article 38, subparagraphs 1 (a), (b), or (c), if:

(i) The goods inside the container have not actually been inspected by the carrier or a performing party; and

(ii) Neither the carrier nor a performing party otherwise has actual knowledge of its contents before issuing the transport document or the electronic transport record; and

(b) Article 38, subparagraph 1 (d), if:

(i) Neither the carrier nor a performing party weighed the container, and the shipper and the carrier had not agreed prior to the shipment that the container would be weighed and the weight would be included in the contract particulars; or

(ii) There was no physically practicable or commercially reasonable means of checking the weight of the container.

*Article 43. Evidentiary effect of the contract particulars*

Except to the extent that the contract particulars have been qualified in the circumstances and in the manner set out in article 42:

(a) A transport document or an electronic transport record is prima facie evidence of the carrier's receipt of the goods as stated in the contract particulars;

(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 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.

(c) Proof to the contrary by the carrier shall not be admissible against a consignee that in good faith has acted in reliance on any 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 38, 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 38, paragraph 2.

*Article 44. "Freight prepaid"*

If the contract particulars contain the statement "freight prepaid" or a statement of a similar nature, the carrier cannot assert against the holder or the consignee the fact that the freight has not been paid. This article does not apply if the holder or the consignee is also the shipper.

CHAPTER 9. DELIVERY OF THE GOODS

*Article 45. Obligation to accept delivery*

When the goods have arrived at their destination, the consignee that exercises its rights under the contract of carriage 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 at which, having regard to the terms of the contract, the customs, practices and usages of the trade and the circumstances of the carriage, delivery could reasonably be expected.

*Article 46. Obligation to acknowledge receipt*

On request of the carrier or the performing party that delivers the goods, the consignee shall acknowledge receipt of the goods from the carrier or the performing party in the manner that is customary at the place of delivery. The carrier may refuse delivery if the consignee refuses to acknowledge such receipt.

*Article 47. Delivery when no negotiable transport document or negotiable electronic transport record is issued*

When neither a negotiable transport document nor a negotiable electronic transport record has been issued:

(a) The carrier shall deliver the goods to the consignee at the time and location referred to in article 45. The carrier may refuse delivery if the person claiming to be the consignee does not properly identify itself as the consignee on the request of the carrier;

(b) If the name and address of the consignee are not referred to in the contract particulars, the controlling party shall prior to or upon the arrival of the goods at the place of destination advise the carrier of such name and address;

(c) If the name or the address of the consignee is not known to the carrier or if the consignee, after having received a notice of arrival, does not claim delivery of the goods from the carrier after their arrival at the place of destination, the carrier shall so advise the controlling party, and the controlling party shall give instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the controlling party, the carrier shall so advise the shipper, and the shipper shall give instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the controlling party or the shipper, the carrier shall so advise the documentary shipper, and the documentary shipper shall give instructions in respect of the delivery of the goods;

(d) The carrier that delivers the goods upon instruction of the controlling party, the shipper or the documentary shipper pursuant to subparagraph (c) of this article is discharged from its obligations to deliver the goods under the contract of carriage.

*Article 48. Delivery when a non-negotiable transport document that requires surrender is issued*

When a non-negotiable transport document has been issued that indicates that it shall be surrendered in order to obtain delivery of the goods:

(a) The carrier shall deliver the goods at the time and location referred to in article 45 to the consignee upon the consignee properly identifying itself on the request of the carrier and surrender of the non-negotiable document. The carrier may refuse delivery if the person claiming to be the consignee fails to properly identify itself on the request of the carrier, and shall refuse delivery if the non-negotiable document is not surrendered. If more than one original of the non negotiable document has been issued,

the surrender of one original will suffice and the other originals cease to have any effect or validity;

(b) If the consignee, after having received a notice of arrival, does not claim delivery of the goods from the carrier after their arrival at the place of destination or the carrier refuses delivery because the person claiming to be the consignee does not properly identify itself as the consignee or does not surrender the document, the carrier shall so advise the shipper, and the shipper shall give instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier shall so advise the documentary shipper, and the documentary shipper shall give instructions in respect of the delivery of the goods;

(c) The carrier that delivers the goods upon instruction of the shipper or the documentary shipper pursuant to subparagraph (b) of this article is discharged from its obligation to deliver the goods under the contract of carriage, irrespective of whether the non-negotiable transport document has been surrendered to it.

*Article 49. Delivery when a negotiable transport document  
or negotiable electronic transport record is issued*

When a negotiable transport document or a negotiable electronic transport record has been issued:

(a) 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 45 to the holder:

(i) Upon surrender of the negotiable transport document and, if the holder is one of the persons referred to in article 1, subparagraph 11 (a)(i), upon the holder properly identifying itself; or

(ii) Upon demonstration by the holder, in accordance with the procedures referred to in article 9, paragraph 1, 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, and the number of originals is stated in that document, 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, paragraph 1;

(d) If the holder, after having received a notice of arrival, does not claim delivery of the goods at the time or within the time referred to in article 45 from the carrier after their arrival at the place of destination, the carrier shall so advise the controlling party, and the controlling party shall give instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the controlling party, the carrier shall so advise the shipper, and the shipper shall give instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the controlling party or the shipper, the carrier shall so advise the documentary shipper, and the documentary shipper shall give instructions in respect of the delivery of the goods;

(e) The carrier that delivers the goods upon instruction of the controlling party, the shipper or the documentary 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 negotiable electronic transport record has demonstrated, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder;

(f) The person giving instructions under subparagraph (d) of this article shall indemnify the carrier against loss arising from its being held liable to the holder under subparagraph (h) of this article. The carrier may refuse to follow those instructions if the person fails to provide adequate security as the carrier may reasonably request;

(g) 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;

(h) Notwithstanding subparagraphs (e) and (g) 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. When the contract particulars state the expected time of arrival of the goods, or indicate how to obtain information as to whether the goods have been delivered, it is presumed that the holder at the time that it became a holder had or could reasonably have had knowledge of the delivery of the goods.

#### *Article 50. Goods remaining undelivered*

1. For the purposes of this article, goods shall be deemed to have remained undelivered only if, after their arrival at the place of destination:

(a) The consignee does not accept delivery of the goods pursuant to this chapter at the time and location referred to in article 45;

(b) The controlling party, the shipper or the documentary shipper cannot be found or does not give the carrier adequate instructions pursuant to articles 47, 48 and 49;

(c) The carrier is entitled or required to refuse delivery pursuant to articles 46, 47, 48 and 49;

(d) The carrier is not allowed to deliver the goods to the consignee pursuant to the law or regulations of the place at which delivery is requested; or

(e) The goods are otherwise undeliverable by the carrier.

2. Without prejudice to any other rights that the carrier may have against the shipper, controlling party or consignee, if the goods have remained undelivered, the carrier may, at the risk and expense of the person entitled to the goods, take such action in respect of the goods as circumstances may reasonably require, including:

(a) To store the goods at any suitable place;

(b) To unpack the goods if they are packed in containers, or to act otherwise in respect of the goods, including by moving the goods or causing them to be destroyed; and

(c) To cause the goods to be sold in accordance with the practices or pursuant to the law or regulations of the place where the goods are located at the time.

3. The carrier may exercise the rights under paragraph 2 of this article only after it has given reasonable notice of the intended action under paragraph 2 of this article to the person stated in the contract particulars as the person if any, to be notified of the arrival of the goods at the place of destination, and to one of the following persons in the order indicated, if known to the carrier: the consignee, the controlling party or the shipper.

4. If the goods are sold pursuant to subparagraph 2 (c) of this article, the carrier shall hold the proceeds of the sale for the benefit of the person entitled to the goods, subject to the deduction of any costs incurred by the carrier and any other amounts that are due to the carrier in connection with the carriage of those goods.

5. The carrier shall not be liable for loss of or damage to goods that occurs during the time that they remain undelivered pursuant to this article unless the claimant proves that such loss or damage resulted from the failure by the carrier to take steps that would have been reasonable in the circumstances to preserve the goods and that the carrier knew or ought to have known that the loss or damage to the goods would result from its failure to take such steps.

#### *Article 51. Retention of goods*

Nothing in this Convention affects a right of the carrier or a performing party that may exist pursuant to the contract of carriage or the applicable law to retain the goods to secure the payment of sums due.

### CHAPTER 10. RIGHTS OF THE CONTROLLING PARTY

#### *Article 52. Exercise and extent of right of control*

1. The right of control may be exercised only by the controlling party and is limited to:

(a) The right to give or modify instructions in respect of the goods that do not constitute a variation of the contract of carriage;

(b) The right to obtain delivery of the goods at a scheduled port of call or, in respect of inland carriage, any place en route; and

(c) The right to replace the consignee by any other person including the controlling party.

2. The right of control exists during the entire period of responsibility of the carrier, as provided in article 12, and ceases when that period expires.

*Article 53. Identity of the controlling party and transfer of the right of control*

1. When no negotiable transport document or no negotiable electronic transport record is issued:

(a) The shipper is the controlling party unless the shipper, when the contract of carriage is concluded, designates the consignee, the documentary shipper or another person as the controlling party;

(b) The controlling party is entitled to transfer the right of control to another person. The transfer becomes effective with respect to the carrier upon its notification of the transfer by the transferor, and the transferee becomes the controlling party; and

(c) The controlling party shall properly identify itself when it exercises the right of control.

2. When a non-negotiable transport document has been issued that indicates that it shall be surrendered in order to obtain delivery of the goods:

(a) The shipper is the controlling party and may transfer the right of control to the consignee named in the transport document by transferring the document to that person without endorsement. If more than one original of the document was issued, all originals shall be transferred in order to effect a transfer of the right of control; and

(b) In order to exercise its right of control, the controlling party shall produce the document and properly identify itself. If more than one original of the document was issued, all originals shall be produced, failing which the right of control cannot be exercised.

3. When a negotiable transport document is issued:

(a) The holder or, if more than one original of the negotiable transport document is issued, the holder of all originals is the controlling party;

(b) The holder may transfer the right of control by transferring the negotiable transport document to another person in accordance with article 59. If more than one original of that document was issued, all originals shall be transferred to that person in order to effect a transfer of the right of control; and

(c) In order to exercise the right of control, the holder shall produce the negotiable transport document to the carrier, and if the holder is one of the persons referred to in article 1, subparagraph 11 (a)(i), the holder shall properly identify itself. If more than one original of the document was issued, all originals shall be produced, failing which the right of control cannot be exercised.

4. When a negotiable electronic transport record is issued:

(a) The holder is the controlling party;

(b) The holder may transfer the right of control to another person by transferring the negotiable electronic transport record in accordance with the procedures referred to in article 9, paragraph 1;

(c) In order to exercise the right of control, the holder shall demonstrate, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder.



*Article 54. Carrier's execution of instructions*

1. Subject to paragraphs 2 and 3 of this article, the carrier shall execute the instructions referred to in article 52 if:

(a) The person giving such instructions is entitled to exercise the right of control;

(b) The instructions can reasonably be executed according to their terms at the moment that they reach the carrier; and

(c) The instructions will not interfere with the normal operations of the carrier, including its delivery practices.

2. In any event, the controlling party shall reimburse the carrier any reasonable additional expense that the carrier may incur and shall indemnify the carrier against loss or damage that the carrier may suffer as a result of diligently executing any instruction pursuant to this article, including compensation that the carrier may become liable to pay for loss of or damage to other goods being carried.

3. The carrier is entitled to obtain security from the controlling party for the amount of additional expense, loss or damage that the carrier reasonably expects will arise in connection with the execution of an instruction pursuant to this article. The carrier may refuse to carry out the instructions if no such security is provided.

4. The carrier's liability for loss of or damage to the goods or for delay in delivery resulting from its failure to comply with the instructions of the controlling party in breach of its obligation pursuant to paragraph 1 of this article shall be subject to articles 18 to 24, and the amount of the compensation payable by the carrier shall be subject to articles 61 to 63.

*Article 55. Deemed delivery*

Goods that are delivered pursuant to an instruction in accordance with article 54, paragraph 1, are deemed to be delivered at the place of destination, and the provisions of chapter 9 relating to such delivery apply to such goods.

*Article 56. Variations to the contract of carriage*

1. The controlling party is the only person that may agree with the carrier to variations to the contract of carriage other than those referred to in article 52, subparagraphs 1 (b) and (c).

2. Variations to the contract of carriage, including those referred to in article 52, subparagraphs 1 (b) and (c), shall be stated in a negotiable transport document or in a non-negotiable transport document that requires surrender, or incorporated in a negotiable electronic transport record, or, upon the request of the controlling party, shall be stated in a non-negotiable transport document or incorporated in a non-negotiable electronic transport record. If so stated or incorporated, such variations shall be signed in accordance with article 40.

*Article 57. Providing additional information, instructions or documents to carrier*

1. The controlling party, on request of the carrier or a performing party, shall provide in a timely manner information, instructions or documents relating to the goods

not yet provided by the shipper and not otherwise reasonably available to the carrier, that the carrier may reasonably need to perform its obligations under the contract of carriage.

2. If the carrier, after reasonable effort, is unable to locate the controlling party or the controlling party is unable to provide adequate information, instructions, or documents to the carrier, the shipper shall provide them. If the carrier, after reasonable effort, is unable to locate the shipper, the documentary shipper shall provide them.

*Article 58. Variation by agreement*

The parties to the contract of carriage may vary the effect of articles 52, subparagraphs 1 (b) and (c), 52, paragraph 2, and 54. The parties may also restrict or exclude the transferability of the right of control referred to in article 53, subparagraph 1 (b).

CHAPTER 11. TRANSFER OF RIGHTS

*Article 59. When a negotiable transport document or negotiable electronic transport record is issued*

1. When a negotiable transport document is issued, the holder may transfer the rights incorporated in the document by transferring it to another person:

(a) Duly endorsed either to such other person or in blank, if an order document; or

(b) Without endorsement, if: (i) A bearer document or a blank endorsed document; or (ii) A document made out to the order of a named person and the transfer is between the first holder and the named person.

2. When a negotiable electronic transport record is issued, its holder may transfer the rights incorporated in it, whether it be made out to order or to the order of a named person, by transferring the electronic transport record in accordance with the procedures referred to in article 9, paragraph 1.

*Article 60. Liability of holder*

1. Without prejudice to article 57, a holder that is not the shipper and that does not exercise any right under the contract of carriage does not assume any liability under the contract of carriage solely by reason of being a holder.

2. A holder that is not the shipper and that exercises any right under the contract of carriage assumes any liabilities imposed on it under the contract of carriage to the extent that such liabilities are incorporated in or ascertainable from the negotiable transport document or the negotiable electronic transport record.

3. For the purpose of paragraphs 1 and 2 of this article and article 45, a holder that is not the shipper does not exercise any right under the contract of carriage solely because:

(a) It agrees with the carrier, pursuant to article 10, to replace a negotiable transport document by a negotiable electronic transport record or to replace a negotiable electronic transport record by a negotiable transport document; or

(b) It transfers its rights pursuant to article 59.

## CHAPTER 12. LIMITS OF LIABILITY

*Article 61. Limits of liability*

1. Subject to articles 62 and 63, paragraph 1, the carrier's liability for breaches of its obligations under this Convention is limited to 875 units of account per package or other shipping unit, or 3 units of account per kilogram of the gross weight of the goods that are the subject of the claim or dispute, whichever amount is the higher, except when the value of the goods has been declared by the shipper and included in the contract particulars, or when a higher amount than the amount of limitation of liability set out in this article has been agreed upon between the carrier and the shipper.

2. When goods are carried in or on a container, pallet, or similar article of transport used to consolidate goods, or in or on a road or railroad cargo vehicle, the packages or shipping units enumerated in the contract particulars as packed in or on such article of transport or vehicle are deemed packages or shipping units. If not so enumerated, the goods in or on such article of transport or vehicle are deemed one shipping unit.

3. The unit of account referred to in this article is the Special Drawing Right as defined by the International Monetary Fund. The amounts referred to in this article are to be converted into the national currency of a State according to the value of such currency at the date of judgement or award or the date agreed upon by the parties. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State that is a member of the International Monetary Fund is to be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State that is not a member of the International Monetary Fund is to be calculated in a manner to be determined by that State.

*Article 62. Limits of liability for loss caused by delay*

Subject to article 63, paragraph 2, compensation for loss of or damage to the goods due to delay shall be calculated in accordance with article 23 and liability for economic loss due to delay is limited to an amount equivalent to two and one-half times the freight payable on the goods delayed. The total amount payable pursuant to this article and article 61, paragraph 1 may not exceed the limit that would be established pursuant to article 61, paragraph 1 in respect of the total loss of the goods concerned.

*Article 63. Loss of the benefit of limitation of liability*

1. Neither the carrier nor any of the persons referred to in article 19 is entitled to the benefit of the limitation of liability as provided in article 61, or as provided in the contract of carriage, if the claimant proves that the loss resulting from the breach of the carrier's obligation under this Convention was attributable to a personal act or omission of the person claiming a right to limit done with the intent to cause such loss or recklessly and with knowledge that such loss would probably result.

2. Neither the carrier nor any of the persons mentioned in article 19 is entitled to the benefit of the limitation of liability as provided in article 62 if the claimant proves that the delay in delivery resulted from a personal act or omission of the person claiming

a right to limit done with the intent to cause the loss due to delay or recklessly and with knowledge that such loss would probably result.

## CHAPTER 13. TIME FOR SUIT

### *Article 64. Period of time for suit*

1. No judicial or arbitral proceedings in respect of claims or disputes arising from a breach of an obligation under this Convention may be instituted after the expiration of a period of two years.

2. The period referred to in paragraph 1 of this article commences on the day on which the carrier has delivered the goods, or, in cases in which no goods have been delivered, or only part of the goods have been delivered, on the last day on which the goods should have been delivered. The day on which the period commences is not included in the period.

3. Notwithstanding the expiration of the period set out in paragraph 1 of this article, one party may rely on its claim as a defence or for the purpose of set-off against a claim asserted by the other party.

### *Article 65. Extension of time for suit*

The period provided in article 64 shall not be subject to suspension or interruption, but the person against which a claim is made may at any time during the running of the period extend that period by a declaration to the claimant. This period may be further extended by another declaration or declarations.

### *Article 66. Action for indemnity*

An action for indemnity by a person held liable may be instituted after the expiration of the period provided in article 64 if the indemnity action is instituted within the later of:

(a) The time allowed by the applicable law in the jurisdiction where proceedings are instituted; or

(b) Ninety days commencing from the day when the person instituting the action for indemnity has either settled the claim or been served with process in the action against itself, whichever is earlier.

### *Article 67. Actions against the person identified as the carrier*

An action against the bareboat charterer or the person identified as the carrier pursuant to article 39, paragraph 2, may be instituted after the expiration of the period provided in article 64 if the action is instituted within the later of:

(a) The time allowed by the applicable law in the jurisdiction where proceedings are instituted; or

(b) Ninety days commencing from the day when the carrier has been identified, or the registered owner or bareboat charterer has rebutted the presumption that it is the carrier, pursuant to article 39, paragraph 2.

## CHAPTER 14. JURISDICTION

*Article 68. Actions against the carrier*

Unless the contract of carriage contains an exclusive choice of court agreement that complies with article 69 or 74, the plaintiff has the right to institute judicial proceedings under this Convention against the carrier:

(a) In a competent court within the jurisdiction of which is situated one of the following places:

- (i) The domicile of the carrier;
- (ii) The place of receipt agreed in the contract of carriage;
- (iii) The place of delivery agreed in the contract of carriage; or
- (iv) The port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship; or

(b) In a competent court or courts designated by an agreement between the shipper and the carrier for the purpose of deciding claims against the carrier that may arise under this Convention.

*Article 69. Choice of court agreements*

1. The jurisdiction of a court chosen in accordance with article 68, paragraph (b), is exclusive for disputes between the parties to the contract only if the parties so agree and the agreement conferring jurisdiction:

(a) Is contained in a volume contract that clearly states the names and addresses of the parties and either (i) is individually negotiated; or (ii) contains a prominent statement that there is an exclusive choice of court agreement and specifies the sections of the volume contract containing that agreement; and

(b) Clearly designates the courts of one Contracting State or one or more specific courts of one Contracting State.

2. A person that is not a party to the volume contract is only bound by an exclusive choice of court agreement concluded in accordance with paragraph 1 of this article if:

- (a) The court is in one of the places designated in article 68, paragraph (a);
- (b) That agreement is contained in the transport document or electronic transport record;
- (c) That person is given timely and adequate notice of the court where the action shall be brought and that the jurisdiction of that court is exclusive; and
- (d) The law of the court seized recognizes that that person may be bound by the exclusive choice of court agreement.

*Article 70. Actions against the maritime performing party*

The plaintiff has the right to institute judicial proceedings under this Convention against the maritime performing party in a competent court within the jurisdiction of which is situated one of the following places:

- (a) The domicile of the maritime performing party; or
- (b) The port where the goods are received by the maritime performing party or the port where the goods are delivered by the maritime performing party, or the port in which the maritime performing party performs its activities with respect to the goods.

*Article 71. No additional bases of jurisdiction*

Subject to articles 73 and 74, no judicial proceedings under this Convention against the carrier or a maritime performing party may be instituted in a court not designated pursuant to articles 68 or 70.

*Article 72. Arrest and provisional or protective measures*

Nothing in this Convention affects jurisdiction with regard to provisional or protective measures, including arrest. A court in a State in which a provisional or protective measure was taken does not have jurisdiction to determine the case upon its merits unless:

- (a) The requirements of this chapter are fulfilled; or
- (b) An international convention that applies in that State so provides.

*Article 73. Consolidation and removal of actions*

1. Except when there is an exclusive choice of court agreement that is binding pursuant to articles 69 or 74, if a single action is brought against both the carrier and the maritime performing party arising out of a single occurrence, the action may be instituted only in a court designated pursuant to both article 68 and article 70. If there is no such court, such action may be instituted in a court designated pursuant to article 70, subparagraph (b), if there is such a court.

2. Except when there is an exclusive choice of court agreement that is binding pursuant to articles 69 or 74, a carrier or a maritime performing party that institutes an action seeking a declaration of non-liability or any other action that would deprive a person of its right to select the forum pursuant to article 68 or 70 shall at the request of the defendant, withdraw that action once the defendant has chosen a court designated pursuant to article 68 or 70, whichever is applicable, where the action may be recommenced.

*Article 74. Agreement after dispute has arisen and jurisdiction when the defendant has entered an appearance*

- 1. After the dispute has arisen, the parties to the dispute may agree to resolve it in any competent court.
- 2. A competent court before which a defendant appears, without contesting jurisdiction in accordance with the rules of that court, has jurisdiction.

*Article 75. Recognition and enforcement*

1. A decision made by a court having jurisdiction under this Convention shall be recognized and enforced in another Contracting State in accordance with the law of that Contracting State when both States have made a declaration in accordance with article 76.

2. A court may refuse recognition and enforcement:

(a) Based on the grounds for the refusal of recognition and enforcement available pursuant to its law; or

(b) If the action in which the decision was rendered would have been subject to withdrawal pursuant to article 73, paragraph 2, had the court that rendered the decision applied the rules on exclusive choice of court agreements of the State in which recognition and enforcement is sought.

3. This chapter shall not affect the application of the rules of a regional economic integration organization that is a party to this Convention, as concerns the recognition or enforcement of judgments as between member states of the regional economic integration organization, whether adopted before or after this Convention.

*Article 76. Application of chapter 14*

The provisions of this chapter shall bind only Contracting States that declare in accordance with article 93 that they will be bound by them.

## CHAPTER 15. ARBITRATION

*Article 77. Arbitration agreements*

1. Subject to this chapter, parties may agree that any dispute that may arise relating to the carriage of goods under this Convention shall be referred to arbitration.

2. The arbitration proceedings shall, at the option of the person asserting a claim against the carrier, take place at:

(a) Any place designated for that purpose in the arbitration agreement; or

(b) Any other place situated in a State where any of the following places is located:

(i) The domicile of the carrier;

(ii) The place of receipt agreed in the contract of carriage;

(iii) The place of delivery agreed in the contract of carriage; or

(iv) The port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship.

3. The designation of the place of arbitration in the agreement is binding for disputes between the parties to the agreement if it is contained in a volume contract that clearly states the names and addresses of the parties and either

(a) Is individually negotiated; or

(b) Contains a prominent statement that there is an arbitration agreement and specifies the sections of the volume contract containing the arbitration agreement.

4. When an arbitration agreement has been concluded in accordance with paragraph 3 of this article, a person that is not a party to the volume contract is bound by the designation of the place of arbitration in that agreement only if:

(a) The place of arbitration designated in the agreement is situated in one of the places referred to in subparagraph 2 (b) of this article;

(b) The agreement is contained in the transport document or electronic transport record;

(c) The person to be bound is given timely and adequate notice of the place of arbitration; and

(d) Applicable law permits that person to be bound by the arbitration agreement.

5. The provisions of paragraphs 1, 2, 3, and 4 of this article are deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement to the extent that it is inconsistent therewith is void.

*Article 78. Arbitration agreement in non-liner transportation*

1. Nothing in this Convention affects the enforceability of an arbitration agreement in a contract of carriage in non-liner transportation to which this Convention or the provisions of this Convention apply by reason of:

(a) The application of article 7; or

(b) The parties' voluntary incorporation of this Convention in a contract of carriage that would not otherwise be subject to this Convention.

2. Notwithstanding paragraph 1 of this article, an arbitration agreement in a transport document or electronic transport record to which this Convention applies by reason of the application of article 7 is subject to this Chapter unless such an arbitration agreement:

(a) Incorporates by reference the terms of the arbitration agreement contained in the charterparty or other contract excluded from the application of this Convention by reason of the application of article 6;

(b) Specifically refers to the arbitration clause; and

(c) Identifies the parties to and the date of the charterparty or other contract.

*Article 79. Agreement to arbitrate after the dispute has arisen*

Notwithstanding the provisions of this chapter and chapter 14, after a dispute has arisen the parties to the dispute may agree to resolve it by arbitration in any place.

*Article 80. Application of chapter 15*

The provisions of this chapter shall be binding only on Contracting States that declare in accordance with article 93, that they will be bound by them.



## CHAPTER 16. VALIDITY OF CONTRACTUAL TERMS

*Article 81. General provisions*

1. Unless otherwise provided in this Convention, any term in a contract of carriage is void to the extent that it:

(a) Directly or indirectly excludes or limits the obligations of the carrier or a maritime performing party under this Convention;

(b) Directly or indirectly excludes or limits the liability of the carrier or a maritime performing party for breach of an obligation under this Convention; or

(c) Assigns a benefit of insurance of the goods in favour of the carrier or a person referred to in article 19.

2. Unless otherwise provided in this Convention, any term in a contract of carriage is void to the extent that it:

(a) Directly or indirectly excludes, limits, or increases the obligations under this Convention of the shipper, consignee, controlling party, holder, or documentary shipper; or

(b) Directly or indirectly excludes, limits, or increases the liability of the shipper, consignee, controlling party, holder, or documentary shipper for breach of any of its obligations under this Convention.

*Article 82. Special rules for volume contracts*

1. Notwithstanding article 81, as between the carrier and the shipper, a volume contract to which this Convention applies may provide for greater or lesser rights, obligations and liabilities than those imposed by this Convention.

2. A derogation pursuant to paragraph 1 of this article is binding only when:

(a) The volume contract contains a prominent statement that it derogates from this Convention;

(b) The volume contract is (i) individually negotiated or (ii) prominently specifies the sections of the volume contract containing the derogations;

(c) The shipper is given an opportunity and notice of the opportunity to conclude a contract of carriage on terms and conditions that comply with this Convention without any derogation under this article; and

(d) The derogation is not (i) incorporated by reference from another document or (ii) included in a contract of adhesion that is not subject to negotiation.

3. A carrier's public schedule of prices and services, transport document, electronic transport record, or similar document is not a volume contract pursuant to paragraph 1 of this article, but a volume contract may incorporate such documents by reference as terms of the contract.

4. Paragraph 1 of this article does not apply to rights and obligations provided in articles 15, subparagraphs (a) and (b), 30 and 33 or to liability arising from the breach thereof, nor does paragraph 1 of this article apply to any liability arising from an act or omission referred to in article 63.

5. The terms of the volume contract that derogate from this Convention, if the volume contract satisfies the requirements of paragraph 2 of this article, apply between the carrier and any person other than the shipper provided that:

(a) Such person received information that prominently states that the volume contract derogates from this Convention and gives its express consent to be bound by such derogations; and

(b) Such consent is not solely set forth in a carrier's public schedule of prices and services, transport document, or electronic transport record.

6. The party claiming the benefit of the derogation bears the burden of proof that the conditions for derogation have been fulfilled.

*Article 83. Special rules for live animals and certain other goods*

Notwithstanding article 81 and without prejudice to article 82, the contract of carriage may exclude or limit the obligations or the liability of both the carrier and a maritime performing party if:

(a) The goods are live animals, but any such exclusion or limitation will not be effective if the claimant proves that the loss of or damage to the goods, or delay in delivery resulted from an act or omission of the carrier or of a person referred to in article 19, done recklessly and with knowledge that such loss or damage, or that the loss due to delay, would probably result; or

(b) The character or condition of the goods or the circumstances and terms and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement, provided that such contract of carriage is not related to ordinary commercial shipments made in the ordinary course of trade and no negotiable transport document or negotiable electronic transport record is issued for the carriage of the goods.

CHAPTER 17. MATTERS NOT GOVERNED BY THIS CONVENTION

*Article 84. International conventions governing the carriage of goods by other modes of transport*

Nothing in this Convention affects the application of any of the following international conventions in force at the time this Convention enters into force that regulate the liability of the carrier for loss of or damage to the goods:

(a) Any convention governing the carriage of goods by air to the extent that such convention according to its provisions applies to any part of the contract of carriage;

(b) Any convention governing the carriage of goods by road to the extent that such convention according to its provisions applies to the carriage of goods that remain loaded on a vehicle carried on board a ship;

(c) Any convention governing the carriage of goods by rail to the extent that such convention according to its provisions applies to carriage of goods by sea as a supplement to the carriage by rail; or

(d) Any convention governing the carriage of goods by inland waterways to the extent that such convention according to its provisions applies to a carriage of goods without trans-shipment both by inland waterways and sea.

*Article 85. Global limitation of liability*

Nothing in this Convention affects the application of any international convention or national law regulating the global limitation of liability of vessel owners.

*Article 86. General average*

Nothing in this Convention affects the application of terms in the contract of carriage or provisions of national law regarding the adjustment of general average.

*Article 87. Passengers and luggage*

This Convention does not apply to a contract of carriage for passengers and their luggage.

*Article 88. Damage caused by nuclear incident*

No liability arises under this Convention for damage caused by a nuclear incident if the operator of a nuclear installation is liable for such damage:

(a) Under the Paris Convention on Third Party Liability in the Field of Nuclear Energy of 29 July 1960 as amended by the additional Protocol of 28 January 1964, the Vienna Convention on Civil Liability for Nuclear Damage of 21 May 1963 as amended by the Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention of 21 September 1988, and as amended by the Protocol to Amend the 1963 Vienna Convention on Civil Liability for Nuclear Damage of 12 September 1997, or the Convention on Supplementary Compensation for Nuclear Damage of 12 September 1997, including any amendment to these conventions and any future convention in respect of the liability of the operator of a nuclear installation for damage caused by a nuclear incident; or

(b) Under national law applicable to the liability for such damage, provided that such law is in all respects as favourable to persons that may suffer damage as either the Paris or Vienna Conventions or the Convention on Supplementary Compensation for Nuclear Damage.

## CHAPTER 18. FINAL CLAUSES

*Article 89. Depositary*

The Secretary-General of the United Nations is hereby designated as the depositary of this Convention.

*Article 90. Signature, ratification, acceptance, approval or accession*

1. This Convention is open for signature by all States [at [...] from [...] to [...] and thereafter] at the Headquarters of the United Nations in New York from [...] to [...].
2. This Convention is subject to ratification, acceptance or approval by the signatory States.
3. This Convention is open for accession by all States that are not signatory States as from the date it is open for signature.

4. Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

*Article 91. Denunciation of other conventions*

1. A State that ratifies, accepts, approves or accedes to this Convention and is a party to the International Convention for the Unification of certain Rules relating to Bills of Lading signed at Brussels on 25 August 1924; to the Protocol signed on 23 February 1968 to amend the International Convention for the Unification of certain Rules relating to Bills of Lading signed at Brussels on 25 August 1924; or to the Protocol to amend the International Convention for the Unification of certain Rules relating to Bills of Lading as Modified by the Amending Protocol of 23 February 1968, signed at Brussels on 21 December 1979 shall at the same time denounce that Convention and the protocol or protocols thereto to which it is a party by notifying the Government of Belgium to that effect, with a declaration that the denunciation is to take effect as from the date when this Convention enters into force in respect of that State.

2. A State that ratifies, accepts, approves or accedes to this Convention and is a party to the United Nations Convention on the Carriage of Goods by Sea concluded at Hamburg on 31 March 1978, shall at the same time denounce that Convention by notifying the Secretary-General of the United Nations to that effect, with a declaration that the denunciation is to take effect as from the date when this Convention enters into force in respect of that State.

3. For the purpose of this article, ratifications, acceptances, approvals and accessions in respect of this Convention by States parties to the instruments listed in paragraphs 1 and 2 of this article that are notified to the depositary after this Convention has entered into force are not effective until such denunciations as may be required on the part of those States in respect of these instruments have become effective. The depositary of this Convention shall consult with the Government of Belgium, as the depositary of the instruments referred to in paragraph 1 of this article, so as to ensure necessary coordination in this respect.

*Article 92. Reservations*

No reservation is permitted to this Convention.

*Article 93. Procedure and effect of declarations*

1. The declarations permitted by articles 76 and 80 may be made at any time. The declarations permitted by article 94, paragraph 1, and article 95, paragraph 2, shall be made at the time of signature, ratification, acceptance, approval or accession. No other declaration is permitted under this Convention.

2. Declarations made at the time of signature are subject to confirmation upon ratification, acceptance or approval.

3. Declarations and their confirmations are to be in writing and to be formally notified to the depositary.

4. A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the

first day of the month following the expiration of six months after the date of its receipt by the depositary.

5. Any State that makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary. The withdrawal of a declaration, or its modification where permitted by this Convention, takes effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

*Article 94. Effect in domestic territorial units*

1. If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

3. If, by virtue of a declaration pursuant to this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party is located in that State, this place of business, for the purposes of this Convention, is considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends.

4. If a Contracting State makes no declaration pursuant to paragraph 1 of this article, the Convention is to extend to all territorial units of that State.

*Article 95. Participation by regional economic integration organizations*

1. A regional economic integration organization that is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention. The regional economic integration organization shall in that case have the rights and obligations of a Contracting State, to the extent that that organization has competence over matters governed by this Convention. When the number of Contracting States is relevant in this Convention, the regional economic integration organization does not count as a Contracting State in addition to its member States which are Contracting States.

2. The regional economic integration organization shall, at the time of signature, ratification, acceptance, approval or accession, make a declaration to the depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that organization by its member States. The regional economic integration organization shall promptly notify the depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration pursuant to this paragraph.

3. Any reference to a “Contracting State” or “Contracting States” in this Convention applies equally to a regional economic integration organization when the context so requires.

*Article 96. Entry into force*

1. This Convention enters into force on the first day of the month following the expiration of one year after the date of deposit of the twentieth instrument of ratification, acceptance, approval or accession.

2. For each State that becomes a Contracting State to this Convention after the date of the deposit of the twentieth instrument of ratification, acceptance, approval or accession, this Convention enters into force on the first day of the month following the expiration of one year after the deposit of the appropriate instrument on behalf of that State.

3. Each Contracting State shall apply this Convention to contracts of carriage concluded on or after the date of the entry into force of this Convention in respect of that State.

*Article 97. Revision and amendment*

1. At the request of not less than one third of the Contracting States to this Convention, the depositary shall convene a conference of the Contracting States for revising or amending it.

2. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention is deemed to apply to the Convention as amended.

*Article 98. Denunciation of this Convention*

1. A Contracting State may denounce this Convention at any time by means of a notification in writing addressed to the depositary.

2. The denunciation takes effect on the first day of the month following the expiration of one year after the notification is received by the depositary. If a longer period is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

DONE at [...], this [...] day of [...], [...], in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed this Convention.

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**J. Note by the Secretariat on the draft convention on the carriage  
of goods [wholly or partly] [by sea]  
(A/CN.9/WG.III/WP.101) [Original: English]**

**CONTENTS**

Introduction .....	
Draft convention on the carriage of goods [wholly or partly] [by sea] .....	
Chapter 1. General provisions .....	
Article 1. Definitions .....	
Article 2. Interpretation of this Convention .....	
Article 3. Form requirements .....	
Article 4. Applicability of defences and limits of liability .....	
Chapter 2. Scope of application .....	
Article 5. General scope of application .....	
Article 6. Specific exclusions .....	
Article 7. Application to certain parties .....	
Chapter 3. Electronic transport records .....	
Article 8. Use and effect of electronic transport records .....	
Article 9. Procedures for use of negotiable electronic transport records or the electronic equivalent of a non-negotiable transport document that requires surrender .....	
Article 10. Replacement of negotiable transport document or negotiable electronic transport record .....	
Chapter 4. Obligations of the carrier .....	
Article 11. Carriage and delivery of the goods .....	
Article 12. Period of responsibility of the carrier .....	
Article 13. Transport beyond the scope of the contract of carriage .....	
Article 14. Specific obligations .....	
Article 15. Specific obligations applicable to the voyage by sea .....	
Article 16. Goods that may become a danger .....	
Article 17. Sacrifice of the goods during the voyage by sea .....	
Chapter 5. Liability of the carrier for loss, damage or delay .....	
Article 18. Basis of liability .....	
Article 19. Liability of the carrier for other persons .....	

---

Article 20. Liability of maritime performing parties . . . . .	
Article 21. Joint and several liability . . . . .	
Article 22. Delay . . . . .	
Article 23. Calculation of compensation . . . . .	
Article 24. Notice of loss, damage, or delay . . . . .	
Chapter 6. Additional provisions relating to particular stages of carriage . . . . .	
Article 25. Deviation during sea carriage . . . . .	
Article 26. Deck cargo on ships . . . . .	
Article 27. Carriage preceding or subsequent to sea carriage . . . . .	
Chapter 7. Obligations of the shipper to the carrier . . . . .	
Article 28. Delivery for carriage . . . . .	
Article 29. Cooperation of the shipper and the carrier in providing information and instructions . . . . .	
Article 30. Shipper's obligation to provide information, instructions and documents . . . . .	
Article 31. Basis of shipper's liability to the carrier . . . . .	
Article 32. Information for compilation of contract particulars . . . . .	
Article 33. Special rules on dangerous goods . . . . .	
Article 34. Assumption of shipper's rights and obligations by the documentary shipper . . . . .	
Article 35. Liability of the shipper for other persons . . . . .	
Article 36. Cessation of shipper's liability . . . . .	
Chapter 8. Transport documents and electronic transport records . . . . .	
Article 37. Issuance of the transport document or the electronic transport record . . . . .	
Article 38. Contract particulars . . . . .	
Article 39. Identity of the carrier . . . . .	
Article 40. Signature . . . . .	
Article 41. Deficiencies in the contract particulars . . . . .	
Article 42. Qualifying the information relating to the goods in the contract particulars . . . . .	
Article 43. Evidentiary effect of the contract particulars . . . . .	
Article 44. "Freight prepaid" . . . . .	
Chapter 9. Delivery of the goods . . . . .	
Article 45. Obligation to accept delivery . . . . .	
Article 46. Obligation to acknowledge receipt . . . . .	
Article 47. Delivery when no negotiable transport document or negotiable electronic transport record is issued . . . . .	



---

Article 48. Delivery when a non-negotiable transport document that requires surrender is issued . . . . .	
Article 49. Delivery when the electronic equivalent of a non-negotiable transport document that requires surrender is issued . . . . .	
Article 50. Delivery when a negotiable transport document or negotiable electronic transport record is issued . . . . .	
Article 51. Goods remaining undelivered . . . . .	
Article 52. Retention of goods . . . . .	
Chapter 10. Rights of the controlling party . . . . .	
Article 53. Exercise and extent of right of control . . . . .	
Article 54. Identity of the controlling party and transfer of the right of control . . . . .	
Article 55. Carrier's execution of instructions . . . . .	
Article 56. Deemed delivery . . . . .	
Article 57. Variations to the contract of carriage . . . . .	
Article 58. Providing additional information, instructions or documents to carrier . . . . .	
Article 59. Variation by agreement . . . . .	
Chapter 11. Transfer of rights . . . . .	
Article 60. When a negotiable transport document or negotiable electronic transport record is issued . . . . .	
Article 61. Liability of holder . . . . .	
Chapter 12. Limits of liability . . . . .	
Article 62. Limits of liability . . . . .	
Article 63. Limits of liability for loss caused by delay . . . . .	
Article 64. Loss of the benefit of limitation of liability . . . . .	
Chapter 13. Time for suit . . . . .	
Article 65. Period of time for suit . . . . .	
Article 66. Extension of time for suit . . . . .	
Article 67. Action for indemnity . . . . .	
Article 68. Actions against the person identified as the carrier . . . . .	
Chapter 14. Jurisdiction . . . . .	
Article 69. Actions against the carrier . . . . .	
Article 70. Choice of court agreements . . . . .	
Article 71. Actions against the maritime performing party . . . . .	
Article 72. No additional bases of jurisdiction . . . . .	
Article 73. Arrest and provisional or protective measures . . . . .	

---

Article 74. Consolidation and removal of actions. . . . .	
Article 75. Agreement after dispute has arisen and jurisdiction when the defendant has entered an appearance . . . . .	
Article 76. Recognition and enforcement . . . . .	
Article 77. Application of chapter 14 . . . . .	
Chapter 15. Arbitration. . . . .	
Article 78. Arbitration agreements . . . . .	
Article 79. Arbitration agreement in non-liner transportation. . . . .	
Article 80. Agreements for arbitration after the dispute has arisen . . . . .	
Article 81. Application of chapter 15 . . . . .	
Chapter 16. Validity of contractual terms . . . . .	
Article 82. General provisions . . . . .	
Article 83. Special rules for volume contracts . . . . .	
Article 84. Special rules for live animals and certain other goods . . . . .	
Chapter 17. Matters not governed by this Convention . . . . .	
Article 85. International conventions governing the carriage of goods by other modes of transport . . . . .	
Article 86. Global limitation of liability . . . . .	
Article 87. General average . . . . .	
Article 88. Passengers and luggage . . . . .	
Article 89. Damage caused by nuclear incident . . . . .	
Chapter 18. Final clauses . . . . .	
Article 90. Depositary . . . . .	
Article 91. Signature, ratification, acceptance, approval or accession. . . . .	
Article 92. Denunciation of other conventions . . . . .	
Article 93. Reservations. . . . .	
Article 94. Procedure and effect of declarations. . . . .	
Article 95. Effect in domestic territorial units . . . . .	
Article 96. Participation by regional economic integration organizations. . . . .	
Article 97. Entry into force . . . . .	
Article 98. Revision and amendment . . . . .	
Article 99. Amendment of limitation amounts . . . . .	
Article 100. Denunciation of this Convention . . . . .	

## Introduction

1. At its thirty-fourth session, in 2001, the Commission established Working Group III (Transport Law) and entrusted it with the task of preparing, in close cooperation with interested international organizations, a legislative instrument on issues relating to the international carriage of goods such as the scope of application, the period of responsibility of the carrier, obligations of the carrier, liability of the carrier, obligations of the shipper and transport documents.<sup>i</sup> The Working Group commenced its deliberations on a draft instrument on the carriage of goods [wholly or partly] [by sea] at its ninth session in 2002. The most recent compilation of historical references regarding the legislative history of the draft instrument can be found in document A/CN.9/WG.III/WP.100.

2. This document consists of a consolidation of revised provisions for the draft convention on the carriage of goods [wholly or partly] [by sea] prepared by the Secretariat for consideration by the Working Group prior to submitting the text for consideration by the Commission at its forty-first session in 2008. Changes to the consolidated text most recently considered by the Working Group (contained in documents A/CN.9/WG.III/WP.81 and A/CN.9/WG.III/WP.81/Corr.1) have been indicated in footnotes to the text indicating those changes and, where applicable, by reference to the working paper in which the revised text appeared, or to the paragraph of the report in which such text appeared.

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<sup>i</sup> *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17 and corrigendum (A/56/17 and Corr.3)*, para. 345.

## Draft convention on the carriage of goods [wholly or partly] [by sea]

### CHAPTER 1. GENERAL PROVISIONS

#### *Article 1. Definitions*

For the purposes of this Convention:

1. “Contract of carriage” means a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage.

2. “Volume contract” means a contract of carriage that provides for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time. The specification of the quantity may include a minimum, a maximum or a certain range.

3. “Liner transportation” means a transportation service that is offered to the public through publication or similar means and includes transportation by ships operating on a regular schedule between specified ports in accordance with publicly available timetables of sailing dates.

4. “Non-liner transportation” means any transportation that is not liner transportation.

5. “Carrier” means a person that enters into a contract of carriage with a shipper.

6. (a) “Performing party” means a person other than the carrier that performs or undertakes to perform any of the carrier’s obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, care, unloading or delivery of the goods, to the extent that such person acts, either directly or indirectly, at the carrier’s request or under the carrier’s supervision or control.<sup>1</sup>

(b) “Performing party” does not include any person that is retained, directly or indirectly, by a shipper, by a documentary shipper, by the consignor, by the controlling party or by the consignee instead of by the carrier.<sup>2</sup>

7. “Maritime performing party” means a performing party to the extent that it performs or undertakes to perform any of the carrier’s obligations during the period between the arrival of the goods at the port of loading of a ship and their departure from

<sup>1</sup> The final sentence, “It includes agents or subcontractors of a performing party to the extent that they likewise perform or undertake to perform any of the carrier’s obligations under a contract of carriage” has been deleted as redundant, since the parties listed are already included in the definition of “performing party” by virtue of the first sentence.

<sup>2</sup> Revised text of the provision agreed to by the Working Group (see A/CN.9/621, paras. 141, 142 and 153). The Working Group had also agreed to include the following text, “(i) an employee of the carrier or a performing party; or (ii)”, however, in considering drafting changes, that particular construction was thought to create difficulties. In particular, excluding “employees” from the definition of “performing party” could cast doubt on the responsibility of the maritime performing party for acts of its employees. Instead, the Working Group may wish to consider the suggested redrafted text of draft article 4 and the insertion of the new provision at draft article 20 (4), which are intended to implement the Working Group’s policy decision that employees of performing parties may not be held personally liable under the draft convention.

the port of discharge of a ship.<sup>3</sup> An inland carrier is a maritime performing party only if it performs or undertakes to perform its services exclusively within a port area.<sup>4</sup>

8. “Shipper” means a person that enters into a contract of carriage with a carrier.

9. “Documentary shipper” means a person, other than the shipper, that accepts to be named as “shipper” in the transport document or electronic transport record.

10. “Consignor” means a person that delivers the goods to the carrier or to a performing party for carriage.

11. “Holder” means:

(a) A person that is in possession of a negotiable transport document; and (i) if the document is an order document, is identified in it as the shipper or the consignee, or is the person to which the document is duly endorsed; or (ii) if the document is a blank endorsed order document or bearer document, is the bearer thereof; or

(b) The person to which a negotiable electronic transport record has been issued or transferred and that has exclusive control of that negotiable electronic transport record in accordance with the procedures in article 9, paragraph 1.

12. “Consignee” means a person entitled to delivery of the goods under a contract of carriage or a transport document or electronic transport record.

13. “Right of control” of the goods means the right under the contract of carriage to give the carrier instructions in respect of the goods in accordance with chapter 11.

14. “Controlling party” means the person that pursuant to article 54 is entitled to exercise the right of control.

15. “Transport document” means a document issued under a contract of carriage by the carrier or a performing party that satisfies one or both of the following conditions:

(a) Evidences the carrier’s or a performing party’s receipt of goods under a contract of carriage; or

(b) Evidences or contains a contract of carriage.

16. “Negotiable transport document” means a transport document that indicates, by wording such as “to order” or “negotiable” or other appropriate wording recognized as having the same effect by the law applicable to the document, that the goods have been consigned to the order of the shipper, to the order of the consignee, or to bearer, and is not explicitly stated as being “non-negotiable” or “not negotiable”.

17. “Non-negotiable transport document” means a transport document that is not a negotiable transport document.

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<sup>3</sup> The phrase “, but, in the event of a trans-shipment, does not include a performing party that performs any of the carrier’s obligations inland during the period between the departure of the goods from a port and their arrival at another port of loading” has been deleted as a drafting improvement, since it was thought that the final sentence of the definition included the cases of trans-shipment covered by the deleted phrase.

<sup>4</sup> Revised text of the provision agreed to by the Working Group (see A/CN.9/621, paras. 141, 144, 145 and 153). It is thought that the existing text includes inland waterways. Further, the definition of “non-maritime performing party” has been deleted as agreed by the Working Group (see A/CN.9/621, para. 139).

18. “Electronic communication” means information generated, sent, received or stored by electronic, optical, digital or similar means with the result that the information communicated is accessible so as to be usable for subsequent reference.

19. “Electronic transport record” means information in one or more messages issued by electronic communication under a contract of carriage by a carrier or a performing party, including information logically associated with the electronic transport record by attachments or otherwise linked to the electronic transport record contemporaneously with or subsequent to its issue by the carrier or a performing party, so as to become part of the electronic transport record, that satisfies one or both of the following conditions:

(a) Evidences the carrier’s or a performing party’s receipt of goods under a contract of carriage; or

(b) Evidences or contains a contract of carriage.

20. “Negotiable electronic transport record” means an electronic transport record:

(a) That indicates, by statements such as “to order”, or “negotiable”, or other appropriate statements recognized as having the same effect by the law applicable to the record, that the goods have been consigned to the order of the shipper or to the order of the consignee, and is not explicitly stated as being “non-negotiable” or “not negotiable”; and

(b) The use of which meets the requirements of article 9, paragraph 1.

21. “Non-negotiable electronic transport record” means an electronic transport record that is not a negotiable electronic transport record.

22. The “issuance” and the “transfer” of a negotiable electronic transport record means the issuance and the transfer of exclusive control over the record.

23. “Contract particulars” means any information relating to the contract of carriage or to the goods (including terms, notations, signatures and endorsements) that is in a transport document or an electronic transport record.

24. “Goods” means the wares, merchandise, and articles of every kind whatsoever that a carrier undertakes to carry under a contract of carriage and includes the packing and any equipment and container not supplied by or on behalf of the carrier.

25. “Ship” means any vessel used to carry goods by sea.

26. “Container” means any type of container, transportable tank or flat, swapbody, or any similar unit load used to consolidate goods, and any equipment ancillary to such unit load.

27. “Freight” means the remuneration payable to the carrier for the carriage of goods under a contract of carriage.

28. “Domicile” means (a) a place where a company or other legal person or association of natural or legal persons has its (i) statutory seat or place of incorporation

or central registered office, whichever is applicable,<sup>5</sup> (ii) central administration, or (iii) principal place of business, and (b) the habitual residence of a natural person.

29. “Competent court” means a court in a Contracting State that, according to the rules on the internal allocation of jurisdiction among the courts of that State, may exercise jurisdiction over the dispute.

#### *Article 2. Interpretation of this Convention*

In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

#### *Article 3. Form requirements<sup>6</sup>*

The notices, confirmation, consent, agreement, declaration and other communications referred to in articles 20, paragraph 3; 24, paragraphs 1 to 3; 38, subparagraphs 1 (b), (c) and (d); 42, subparagraph 4 (b); 46; 51, paragraph 3; 54, paragraph 1;<sup>7</sup> 62, paragraph 1; 66; 69; and 83, paragraphs 1 and 5 shall be in writing. Electronic communications may be used for these purposes, provided the use of such means is with the consent of the person by which it is communicated and of the person to which it is communicated.

#### *Article 4. Applicability of defences and limits of liability*

1. Any provision of this Convention that may provide a defence for, or limit the liability of, the carrier applies in any judicial or arbitral proceeding, whether founded in contract, in tort, or otherwise, that is instituted in respect of loss of, damage to, or delay in delivery of goods covered by a contract of carriage or for the breach of any other obligation under this Convention against:

- (a) The carrier or a maritime performing party;
- (b) The master, crew or any other person that performs services on board the ship; or
- (c) Employees of the carrier or a maritime performing party.<sup>8</sup>

2. Any provision of this Convention that may provide a defence for the shipper or the documentary shipper applies in any judicial or arbitral proceeding, whether

<sup>5</sup> “Whichever is applicable” has been inserted instead of the less specific “as appropriate”.

<sup>6</sup> The Working Group may wish to consider whether it is advisable to include with the final text an explanatory note to the effect that any notices contemplated in this convention that are not included in art. 3 may be made by any means including orally or by exchange of data messages that do not meet the definition of “electronic communication”. It is implicit in the definition of “electronic communication” that it must be capable of replicating the function of written documents (see *supra*, note to definition of “electronic communication”).

<sup>7</sup> Given the decision of the Working Group to delete draft article 61 (see A/CN.9/642, paras. 116 and 118), the following reference has been deleted from draft article 3: “61, subparagraph (d);”.

<sup>8</sup> Drafting clarification of text in A/CN.9/WG.III/WP.81 (considered by the Working Group A/CN.9/621, para. 149). The Working Group may wish to note that this text is slightly different from that considered in A/CN.9/621, paras. 141 and 149, in order to achieve the policy goals of the Working Group using a more precise drafting technique, as also noted in the above footnote to para. (b) of the definition of “performing party”. The subparagraphs of this revised text of paragraph 1, and the inclusion of the phrase “whether founded in contract, in tort, or otherwise”, are intended as improved drafting to include the content of the suggested new paras. 2 and 3 that had been agreed by the Working Group (A/CN.9/621, paras. 141, 149 and 153).

founded in contract, in tort, or otherwise, that is instituted against the shipper, the documentary shipper, or their subcontractors, agents or employees.<sup>9</sup>

## CHAPTER 2. SCOPE OF APPLICATION

### *Article 5. General scope of application*

1. Subject to article 6, this Convention applies to contracts of carriage in which the place of receipt and the place of delivery are in different States, and the port of loading of a sea carriage and the port of discharge of the same sea carriage are in different States, if, according to the contract of carriage, any one of the following places is located in a Contracting State:

- (a) The place of receipt;
- (b) The port of loading;
- (c) The place of delivery; or
- (d) The port of discharge.

2. This Convention applies without regard to the nationality of the vessel, the carrier, the performing parties, the shipper, the consignee, or any other interested parties.

### *Article 6. Specific exclusions*

1. This Convention does not apply to the following contracts<sup>10</sup> in liner transportation:

- (a) Charterparties; and
- (b) Other contracts<sup>11</sup> for the use of a ship or of any space thereon.<sup>12</sup>

2. This Convention does not apply to contracts of carriage in non-liner transportation except when:

(a) There is no charterparty or other contract between the parties<sup>13</sup> for the use of a ship or of any space thereon; and

(b) The evidence of the contract of carriage is a transport document or an electronic transport record that also evidences the carrier's or a performing party's receipt of the goods.

<sup>9</sup> Draft paragraph 2 is new text intended to respond to the decision of the Working Group (A/CN.9/621, para. 17) to extend the protection of draft article 4 to shippers, to the extent that shipper liability was covered in the draft convention.

<sup>10</sup> The phrase "of carriage" has been deleted, since charterparties and similar contracts are contracts of carriage in some jurisdictions, but not in others, and it is suggested that a reference to "the following contracts" without further specification would allow for a consistent approach in all jurisdictions, regardless of the treatment allotted charterparties.

<sup>11</sup> Drafting clarification of text in A/CN.9/WG.III/WP.81 (considered by the Working Group A/CN.9/621, para. 21), not intended to change meaning of paragraph. With a view to improved drafting, the word "contracts" has been substituted for the phrase "contractual arrangements".

<sup>12</sup> With a view to improving the drafting, the phrase "whether or not they are charterparties" has been deleted as redundant.

<sup>13</sup> Drafting clarification of text in A/CN.9/WG.III/WP.81 (considered by the Working Group A/CN.9/621, para. 21), not intended to change meaning of paragraph. Again, the word "contract" has been substituted for the phrase "contractual arrangement".



*Article 7. Application to certain parties*

Notwithstanding article 6, this Convention applies as between the carrier and the consignor, consignee, controlling party or holder that is not an original party to the charterparty or other contract of carriage excluded from the application of this Convention. However, this Convention does not apply as between the original parties to a contract of carriage excluded pursuant to article 6.

## CHAPTER 3. ELECTRONIC TRANSPORT RECORDS

*Article 8. Use and effect of electronic transport records*

Subject to the requirements set out in this Convention:

- (a) Anything that is to be in or on a transport document under this Convention may be recorded in an electronic transport record, provided the issuance and subsequent use of an electronic transport record is with the consent of the carrier and the shipper; and
- (b) The issuance, exclusive<sup>14</sup> control, or transfer of an electronic transport record has the same effect as the issuance, possession, or transfer of a transport document.

*Article 9. Procedures for use of negotiable electronic transport records or the electronic equivalent of a non-negotiable transport document that requires surrender<sup>15</sup>*

1. The use of a negotiable electronic transport record or the electronic equivalent of a non-negotiable transport document that requires surrender shall be subject to procedures that provide for:

- (a) The method for the issuance and the transfer of that record to an intended holder;
- (b) An assurance that the negotiable electronic transport record retains its integrity;
- (c) The manner in which the holder or the consignee<sup>16</sup> is able to demonstrate that it is the holder or the consignee; and
- (d) The manner of providing confirmation that delivery to the holder or the consignee<sup>17</sup> has been effected, or that, pursuant to articles 10, paragraph 2, 49,

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<sup>14</sup> The word “exclusive” has been added as a drafting improvement intended to achieve greater precision.

<sup>15</sup> Reference has been added to “or the electronic equivalent of a non-negotiable transport document that requires surrender” in both the title and the text of this article to address an omission from the earlier text.

<sup>16</sup> Reference to “the consignee” has been added to this subparagraph so as to accurately include in this provision coverage of an electronic equivalent of a non-negotiable transport document that requires surrender.

<sup>17</sup> Ibid.

subparagraph (a),<sup>18</sup> or 50, subparagraphs (a)(ii) and (c), the<sup>19</sup> electronic transport record has ceased to have any effect or validity.

2. The procedures in paragraph 1 of this article shall be referred to in the contract particulars and be readily ascertainable.<sup>20</sup>

*Article 10. Replacement of negotiable transport document or negotiable electronic transport record*

1. If a negotiable transport document has been issued and the carrier and the holder agree to replace that document by a negotiable electronic transport record:

(a) The holder shall surrender the negotiable transport document, or all of them if more than one has been issued, to the carrier;

(b) The carrier shall issue to the holder a negotiable electronic transport record that includes a statement that it replaces the negotiable transport document; and

(c) The negotiable transport document ceases thereafter to have any effect or validity.

2. If a negotiable electronic transport record has been issued and the carrier and the holder agree to replace that electronic transport record by a negotiable transport document:

(a) The carrier shall issue to the holder, in place of the electronic transport record, a negotiable transport document that includes a statement that it replaces the negotiable electronic transport record; and

(b) The electronic transport record ceases thereafter to have any effect or validity.

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<sup>18</sup> Reference to “article 49, subparagraph (a)” has been added to this subparagraph so as to accurately include in this provision coverage of an electronic equivalent of a non-negotiable transport document that requires surrender.

<sup>19</sup> The word “negotiable” has been deleted to correct the text, since reference to draft article 49 (a) has been added.

<sup>20</sup> As set out in footnote 34 in A/CN.9/WG.III/WP.47, and as agreed in paras. 198-199 of A/CN.9/576, the term “readily ascertainable” was used to indicate without excessive detail that the necessary procedures must be available to those parties who have a legitimate interest in knowing them prior to entering a legal commitment based upon the validity of the negotiable electronic transport record. It was further noted that the system envisaged would function in a manner not dissimilar to the current availability of terms and conditions of bills of lading. The Working Group may wish to consider whether related detail should be specified in a note or a commentary accompanying the draft convention.

## CHAPTER 4. OBLIGATIONS OF THE CARRIER

*Article 11. Carriage and delivery of the goods*

The carrier shall, subject to this Convention and in accordance with the terms of the contract of carriage, carry the goods to the place of destination and deliver them to the consignee.

*Article 12. Period of responsibility of the carrier*

1. The period of responsibility of the carrier for the goods under this Convention begins when the carrier or a performing party receives the goods for carriage and ends when the goods are delivered.<sup>21</sup>

2. (a) If the law or regulations of the place of receipt require the consignor to hand over the goods to an authority or other third party from which the carrier may collect them, the period of responsibility of the carrier begins when the carrier collects the goods from the authority or other third party.<sup>22</sup>

(b) If the law or regulations of the place of delivery require the carrier to hand over the goods to an authority or other third party from which the consignee may collect them, the period of responsibility of the carrier ends when the carrier hands the goods over to the authority or other third party.<sup>23</sup>

3. For the purposes of determining the carrier's period of responsibility and subject to article 14, paragraph 2, the parties may agree on the time and location of receipt and delivery of the goods, but a provision in a contract of carriage is void to the extent that it<sup>24</sup> provides that:

(a) The time of receipt of the goods is subsequent to the beginning of their initial loading under the contract of carriage; or

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<sup>21</sup> In order to clarify the relationship between paras. 1 and 2 as they appeared in draft article 11 in A/CN.9/WG.III/WP.81 as agreed by the Working Group (A/CN.9/621, paras. 32 and 33), and to clarify this provision's focus on the period of responsibility of the carrier, former para. 2 as it appeared in A/CN.9/WG.III/WP.81 has been deleted and its content with respect to ascertaining the time and location of delivery has been inserted into draft article 45 (1). Further, the opening phrase "Subject to article 12" has been deleted as a suggested correction to the text, since that provision, which is now draft article 13, is no longer the same in substance as it was when the reference was added.

<sup>22</sup> Given the deletion of the former paragraph 2 from draft article 11 as it appeared in A/CN.9/WG.III/WP.81, consequential changes have been made to the latter part of this provision in order to render it consistent with the revised text. Thus, former subparagraphs (a) and (b) have been deleted, and their content retained to the extent that they offered supplementary rules to determine the period of responsibility in the context described. In addition, the remaining text of this draft paragraph has been split into two subparagraphs, (a) and (b), in order to provide an accurate rendering in all language versions of the text, but there was no change intended to the content of the text.

<sup>23</sup> The remaining text of this draft paragraph has been split into two subparagraphs, (a) and (b), in order to provide an accurate rendering in all language versions of the text, but there was no change intended to the content of the text.

<sup>24</sup> Given the deletion of the former paragraph 2 from draft article 11 as it appeared in A/CN.9/WG.III/WP.81, consequential changes have been made to the latter part of this provision in order to render it consistent with the revised text. Further, the phrase "the parties may agree on the time and location of receipt and delivery of the goods, but" has been retained in draft paragraph 3 in order to include that element of flexibility in former paragraph 11 (2).

(b) The time of delivery of the goods is prior to the completion of their final unloading under the contract of carriage.

*Article 13. Transport beyond the scope of the contract of carriage*

On the request of the shipper, the carrier may agree to issue a single transport document or electronic transport record that includes specified transport that is not covered by the contract of carriage and in respect of which it is therefore not the carrier. In such event, the period of responsibility of the carrier for the goods is the period of the contract of carriage. If the carrier arranges the transport that is not covered by the contract of carriage as provided in such transport document or electronic transport record, the carrier does so on behalf of the shipper.<sup>25</sup>

*Article 14. Specific obligations*

1. The carrier shall during the period of its responsibility as defined in article 12, and subject to article 27, properly and carefully receive, load, handle, stow, carry, keep, care for, unload and deliver the goods.

2. Notwithstanding paragraph 1 of this article, and without prejudice to the other provisions in chapter 4 and to chapters 5 to 7, the parties may agree that the loading, handling, stowing or unloading of the goods is to be performed by the shipper, the documentary shipper<sup>26</sup> or the consignee. Such an agreement shall be referred to in the contract particulars.

*Article 15. Specific obligations applicable to the voyage by sea*

The carrier is bound before, at the beginning of, and during the voyage by sea to exercise due diligence to:

- (a) Make and keep the ship seaworthy;
- (b) Properly crew, equip and supply the ship and keep the ship so crewed, equipped and supplied throughout the voyage; and
- (c) Make and keep the holds and all other parts of the ship in which the goods are carried, including any containers supplied by the carrier in or upon which the goods are carried, fit and safe for their reception, carriage and preservation.

*Article 16. Goods that may become a danger*

Notwithstanding articles 11 and 14,<sup>27</sup> the carrier or a performing party may decline to receive or to load, and may take such other measures as are reasonable, including unloading, destroying, or rendering goods harmless, if the goods are, or

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<sup>25</sup> Clarification of the text in A/CN.9/WG.III/WP.81 (agreed by the Working Group A/CN.9/621, paras. 44, 47 and 49, with slight modification for improved drafting).

<sup>26</sup> Further to the Working Group's request to make the necessary drafting adjustments to draft articles 14 (2), 28 (2), 18 (3)(h) and 35 in order to render consistent the treatment of the shipper's responsibility for the acts of the consignee and the controlling party (see A/CN.9/621, para. 260), the documentary shipper has been added to this provision, while the controlling party and any person referred to in draft article 35 have been deleted as unnecessary in this context.

<sup>27</sup> The reference to article 15, formerly article 16, has been deleted as irrelevant to this provision. The reference had originally been inserted in the text since the obligation of due diligence had been made an ongoing obligation.

reasonably<sup>28</sup> appear likely to become during the carrier's period of responsibility, an actual danger to persons, property or the environment.

*Article 17. Sacrifice of the goods during the voyage by sea*<sup>29</sup>

Notwithstanding articles 11, 14, and 15, the carrier or a performing party may sacrifice goods at sea<sup>30</sup> when the sacrifice is reasonably made for the common safety or for the purpose of preserving from peril human life or other property involved in the common adventure.

CHAPTER 5. LIABILITY OF THE CARRIER FOR LOSS, DAMAGE OR DELAY

*Article 18. Basis of liability*

1. The carrier is liable for loss of or damage to the goods, as well as for delay in delivery, if the claimant proves that the loss, damage, or delay, or the event or circumstance that caused or contributed to it took place during the period of the carrier's responsibility as defined in chapter 4.

2. The carrier is relieved of all or part of its liability pursuant to paragraph 1 of this article if it proves that the cause or one of the causes of the loss, damage, or delay is not attributable to its fault or to the fault of any person referred to in article 19.

3. The carrier is also relieved of all or part of its liability pursuant to paragraph 1 of this article if, alternatively to proving the absence of fault as provided in paragraph 2 of this article, it proves that one or more of the following events or circumstances caused or contributed to the loss, damage, or delay:

- (a) Act of God;
- (b) Perils, dangers, and accidents of the sea or other navigable waters;
- (c) War, hostilities, armed conflict, piracy, terrorism, riots, and civil commotions;
- (d) Quarantine restrictions; interference by or impediments created by governments, public authorities, rulers, or people including detention, arrest, or seizure not attributable to the carrier or any person referred to in article 19;
- (e) Strikes, lockouts, stoppages, or restraints of labour;
- (f) Fire on the ship;
- (g) Latent defects<sup>31</sup> not discoverable by due diligence;

<sup>28</sup> The word "reasonably" was added to the text as set out in A/CN.9/WG.III/WP.81 as agreed by the Working Group (see A/CN.9/621, paras. 55 and 57).

<sup>29</sup> Draft article 16 (2) of the text as it appeared in A/CN.9/WG.III/WP.81 has been retained in a separate provision and the brackets surrounding it have been deleted as agreed by the Working Group (see A/CN.9/621, paras. 61 and 62).

<sup>30</sup> It is suggested that the phrase "at sea" be added following the phrase "sacrifice goods" in order to clarify that sacrifice of the goods is restricted to the sea leg of the transport.

<sup>31</sup> The phrase "in the [ship][means of transport]" as it appeared in A/CN.9/WG.III/WP.81 was deleted as agreed by the Working Group (see A/CN.9/621, paras. 70 and 71).

(h) Act or omission of the shipper, the documentary shipper, the controlling party, the consignee, or any other person for whose acts the shipper or the documentary shipper is liable pursuant to article 34 or 35;<sup>32</sup>

(i) Loading, handling, stowing, or unloading of the goods performed pursuant to an agreement in accordance with article 14, paragraph 2, unless the carrier or a performing party<sup>33</sup> performs such activity on behalf of the shipper, the documentary shipper or the consignee;

(j) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;

(k) Insufficiency or defective condition of packing or marking not performed by or on behalf of<sup>34</sup> the carrier;

(l) Saving or attempting to save life at sea;

(m) Reasonable measures to save or attempt to save property at sea;

(n) Reasonable measures to avoid or attempt to avoid damage to the environment;

(o) Acts of the carrier in pursuance of the powers conferred by articles 16 and 17.

4. Notwithstanding paragraph 3 of this article, the carrier is liable for all or part of the loss, damage, or delay:

(a) If the claimant proves<sup>35</sup> that the fault of the carrier or of a person referred to in article 19 caused or contributed to the event or circumstance on which the carrier relies; or

(b) If the claimant proves that an event or circumstance not listed in paragraph 3 of this article contributed to the loss, damage, or delay, and the carrier cannot prove that this event or circumstance is not attributable to its fault or to the fault of any person referred to in article 19.

5. The carrier is also liable, notwithstanding paragraph 3 of this article, for all or part of the loss, damage, or delay if:

(a) The claimant proves that the loss, damage, or delay was or was probably caused by or contributed to by (i) the unseaworthiness of the ship; (ii) the improper

<sup>32</sup> Further to the Working Group's request to make the necessary drafting adjustments to draft articles 14 (2), 28 (2), 18 (3)(h) and 35 in order to render consistent the treatment of the shipper's responsibility for the acts of the consignee and the controlling party (see A/CN.9/621, para. 260), the documentary shipper has been added to this provision, and reference to "the consignee" has been deleted as unnecessary, despite the Working Group having agreed to retain the phrase "the consignee" as it appeared in A/CN.9/WG.III/WP.81 (see A/CN.9/621, paras. 69 and 71). In addition, reference to draft article 34 has been added in order to include those persons for whom the documentary shipper is liable.

<sup>33</sup> The phrase "or a performing party" as it appeared in A/CN.9/WG.III/WP.81 was retained and the brackets around it deleted as agreed by the Working Group (see A/CN.9/621, paras. 69 and 71).

<sup>34</sup> The phrase "or on behalf of" as it appeared in A/CN.9/WG.III/WP.81 was retained and the brackets around it deleted as agreed by the Working Group (see A/CN.9/621, paras. 69 and 71).

<sup>35</sup> The phrase "if the claimant proves" has been moved from the chapeau to the beginning of subparagraphs (a) and (b) in order to ensure correct reading of the burden of proof with respect to the latter portion of subparagraph (b).

crewing, equipping, and supplying of the ship; or (iii) the fact that the holds or other parts of the ship in which the goods are carried (including any containers supplied by the carrier in or upon which the goods are carried) were not fit and safe for reception, carriage, and preservation of the goods; and

(b) The carrier is unable to prove either that: (i) none of the events or circumstances referred to in subparagraph 5 (a) of this article caused the loss, damage, or delay; or (ii) that it complied with its obligation to exercise due diligence pursuant to article 15.<sup>36</sup>

6. When the carrier is relieved of part of its liability pursuant to this article, the carrier is liable only for that part of the loss, damage or delay that is attributable to the event or circumstance for which it is liable pursuant to this article.

*Article 19. Liability of the carrier for other persons*

The carrier is liable for the breach of its obligations under this Convention caused by the acts or omissions of:

- (a) Any performing party;
- (b) The master or crew of the ship;
- (c) Employees or agents of the carrier or a performing party; or

(d) Any other person that performs or undertakes to perform any of the carrier's obligations under the contract of carriage, to the extent that the person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control.<sup>37</sup>

*Article 20. Liability of maritime performing parties*

1. A maritime performing party is subject to the obligations and liabilities imposed on the carrier under this Convention and is entitled to the carrier's defences and limits of liability as provided for in this Convention if:

(a) The maritime performing party received<sup>38</sup> the goods for carriage in a Contracting State, or delivered them in a Contracting State, or performed its activities with respect to the goods in a port in a Contracting State; and<sup>39</sup>

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<sup>36</sup> In order to clarify that subparagraph 5 (a) required the claimant to prove the probable cause of the loss, damage or delay, while subparagraph 5 (b) provided the carrier with the possibility of counterproof (see A/CN.9/621, para. 73), there has been a slight drafting adjustment to this provision, without intending to change the meaning of the text.

<sup>37</sup> Revised text of the provision agreed to by the Working Group (see A/CN.9/621, paras. 141, 150 and 153). Draft paragraph 2 of the text as it appeared in A/CN.9/WG.III/WP.81 was deleted as agreed by the Working Group (see A/CN.9/621, paras. 77 and 78).

<sup>38</sup> The word "initially" has been deleted from before the word "received" and the word "finally" has been deleted from before the word "delivered" because, while the terms were intended to clarify which maritime performing parties were included in a trans-shipment (see A/CN.9/594, para. 142), the words "initially" and "finally" were, in fact, confusing, and could be misread to mean only the initial receipt of the goods under the contract of carriage and their final delivery. A similar deletion of the terms is recommended in draft article 71 (b).

<sup>39</sup> The brackets that appeared around the text following the phrase "a maritime performing party" as it appeared in A/CN.9/WG.III/WP.81 were deleted and the text retained as agreed by the Working Group (see A/CN.9/621, paras. 83 and 84).

(b) The occurrence that caused the loss, damage or delay took place: (i) during the period between the arrival of the goods at the port of loading of the ship and their departure from the port of discharge from the ship; (ii) when it had custody of the goods; or (iii) at any other time to the extent that it was participating in the performance of any of the activities contemplated by the contract of carriage.<sup>40</sup>

2. If the carrier agrees to assume obligations other than those imposed on the carrier under this Convention, or agrees that the limits of<sup>41</sup> its liability are higher than the limits specified<sup>42</sup> under this Convention,<sup>43</sup> a maritime performing party is not bound by this agreement unless it expressly agrees to accept such obligations or such higher limits.

3. A maritime performing party is liable for the breach of its obligations under this Convention caused by the acts or omissions of any person to which it has entrusted the performance of any of the carrier's obligations under the contract of carriage under the conditions set out in paragraph 1 of this article.

4. Nothing in this Convention imposes liability on an employee of the carrier or of a maritime performing party.<sup>44</sup>

*Article 21. Joint and several liability*

1. If the carrier and one or more maritime performing parties are liable for the loss of, damage to, or delay in delivery of the goods, their liability is joint and several<sup>45</sup> but only up to the limits provided for under this Convention.<sup>46</sup>

<sup>40</sup> Revised text of the provision agreed to by the Working Group (see A/CN.9/621, paras. 141, 150 and 153), as slightly revised and reordered by the Secretariat for improved drafting. Draft paragraph 2 of the text as it appeared in A/CN.9/WG.III/WP.81 was deleted as agreed by the Working Group (see A/CN.9/621, paras. 77 and 78). Former subparagraph 1 (b) is now paragraph 3.

<sup>41</sup> The phrase "the limits of" have been added for greater drafting clarity.

<sup>42</sup> The word "specified" has been substituted for the word "imposed" for greater drafting clarity.

<sup>43</sup> Reference to "under this Convention" has been substituted for the phrase "pursuant to articles 63, 62 and 25, paragraph 5" as they appeared in A/CN.9/WG.III/WP.81 in order to simplify the text and to eliminate the possibility that inaccurate or incomplete references are listed.

<sup>44</sup> Although the Working Group had initially agreed to make drafting adjustments to draft article 19 (4) as it appeared in A/CN.9/WG.III/WP.81 (see A/CN.9/621, paras. 92 to 95 and 97), the revised text of draft article 19 as it appeared in paragraph 141 of A/CN.9/621 intended to delete the paragraph in its entirety as a consequence to adjustments made elsewhere in the text. As such, paragraph 4 of draft article 19 as it appeared in A/CN.9/WG.III/WP.81 has been deleted and replaced with text intended to replace the now-deleted portion of the definition of "performing party" formerly found in draft article 1 (6)(b)(i), in order to provide protection to individual employees.

<sup>45</sup> The phrase "[, such that each such party is liable for compensating the entire amount of such loss, damage or delay, without prejudice to any right of recourse it may have against other liable parties,]" as it appeared in A/CN.9/WG.III/WP.81 was deleted as agreed by the Working Group (see A/CN.9/621, paras. 98 and 100).

<sup>46</sup> As was the case in draft article 20 (2) above, reference to "under this Convention" has been substituted for the phrase "pursuant to articles 25, 62 and 63" as they appeared in A/CN.9/WG.III/WP.81 in order to simplify the text and to eliminate the possibility that inaccurate or incomplete references are listed.



2. Without prejudice to article 64, the aggregate liability of all such persons shall not exceed the overall limits of liability under this Convention.<sup>47</sup>

*Article 22. Delay*

Delay in delivery occurs when the goods are not delivered at the place of destination provided for in the contract of carriage within the time<sup>48</sup> agreed.<sup>49</sup>

*Article 23. Calculation of compensation*

1. Subject to article 62, the compensation payable by the carrier for loss of or damage to the goods is calculated by reference to the value of such goods at the place and time of delivery established in accordance with article 45, paragraph 1.

2. The value of the goods is fixed according to the commodity exchange price or, if there is no such price, according to their market price or, if there is no commodity exchange price or market price, by reference to the normal value of the goods of the same kind and quality at the place of delivery.

3. In case of loss of or damage to the goods, the carrier is not liable for payment of any compensation beyond what is provided for in paragraphs 1 and 2 of this article except when the carrier and the shipper have agreed to calculate compensation in a different manner within the limits of chapter 16.

*Article 24. Notice of loss, damage, or delay*

1. The carrier is presumed, in absence of proof to the contrary, to have delivered the goods according to their description in the contract particulars unless notice of loss of or damage to the goods, indicating the general nature of such loss or damage, was given to the carrier or the performing party that delivered the goods before or at the time of the delivery, or, if the loss or damage is not apparent, within seven working days at the place of delivery<sup>50</sup> after the delivery of the goods.

2. Failure to provide the notice referred to in this article to the carrier or the performing party shall not affect the right to claim compensation for loss of or damage to the goods under this Convention, nor shall it affect the allocation of the burden of proof set out in article 18.<sup>51</sup>

3. The notice referred to in this article is not required in respect of loss or damage that is ascertained in a joint inspection of the goods by the person to which they

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<sup>47</sup> Draft paragraph 3 of the text as it appeared in A/CN.9/WG.III/WP.81 was deleted as agreed by the Working Group (see A/CN.9/621, paras. 104 to 105).

<sup>48</sup> The word “expressly” as it appeared in A/CN.9/WG.III/WP.81 has been deleted as agreed by the Working Group (see A/CN.9/621, para. 184).

<sup>49</sup> The phrase “upon or, in the absence of such agreement, within the time it would be reasonable to expect of a diligent carrier, having regard to the terms of the contract, the customs, practices and usages of the trade, and the circumstances of the journey” as it appeared in A/CN.9/WG.III/WP.81 has been deleted from the latter portion of the draft provision as agreed by the Working Group (see A/CN.9/621, paras. 180 (b) and 183 to 184).

<sup>50</sup> The option of “seven working days at the place of delivery” in the provision as it appeared in A/CN.9/WG.III/WP.81 was retained and the brackets around it deleted, and the other bracketed text was deleted as agreed by the Working Group (see A/CN.9/621, paras. 113 to 114).

<sup>51</sup> Draft paragraph 2 of the text was added to clarify the effect of draft paragraph 1, as agreed by the Working Group (see A/CN.9/621, paras. 111, 112 and 114).

have been delivered and the carrier or the maritime performing party against which liability is being asserted.<sup>52</sup>

4. No compensation is payable pursuant to articles 22 and 63 unless notice of loss due to delay was given to the carrier within twenty-one consecutive days of delivery of the goods.

5. When the notice referred to in this article is given to the performing party that delivered the goods, it has the same effect as if that notice was given to the carrier, and notice given to the carrier has the same effect as a notice given to a maritime performing party.

6. In the case of any actual or apprehended loss or damage, the parties to the dispute shall give all reasonable facilities to each other for inspecting and tallying the goods and shall provide access to records and documents relevant to the carriage of the goods.

#### CHAPTER 6. ADDITIONAL PROVISIONS RELATING TO PARTICULAR STAGES OF CARRIAGE

##### *Article 25. Deviation during sea carriage*

When pursuant to national law, a deviation constitutes a breach of the carrier's obligations, such deviation of itself shall not deprive the carrier or a maritime performing party of any defence or limitation of this Convention, except to the extent provided in article 64.

##### *Article 26. Deck cargo on ships*

1. Goods may be carried on the deck of a ship only if:

- (a) Such carriage is required by law;
- (b) They are carried in or on containers on decks that are specially fitted to carry such containers; or
- (c) The carriage on deck is in accordance with the contract of carriage, or the customs, usages, and practices of the trade in question.

2. The provisions of this Convention relating to the liability of the carrier apply to the loss of, damage to or delay in the delivery of goods carried on deck pursuant to paragraph 1 of this article, but the carrier is not liable for loss of or damage to such goods, or delay in their delivery, caused by the special risks involved in their carriage on deck when the goods are carried in accordance with subparagraphs 1 (a) or (c) of this article.

3. If the goods have been carried on deck in cases other than those permitted pursuant to paragraph 1 of this article, the carrier is liable for loss of or damage to the goods or delay in their delivery that is exclusively caused by their carriage on deck, and is not entitled to the defenses provided for in article 18.

4. The carrier is not entitled to invoke subparagraph 1 (c) of this article against a third party that has acquired a negotiable transport document or a negotiable electronic

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<sup>52</sup> Draft paragraph 3 of the text was formerly the final sentence of draft paragraph 1 as it appeared in A/CN.9/WG.III/WP.81. The draft paragraphs that follow have been renumbered accordingly.

transport record in good faith, unless the contract particulars state that the goods may be carried on deck.

5. If the carrier and shipper expressly<sup>53</sup> agreed that the goods would be carried under deck, the carrier is not entitled to the benefit of the limitation of liability<sup>54</sup> for any loss of, damage to or delay in the delivery of the goods to the extent that such loss, damage,<sup>55</sup> or delay resulted from their carriage on deck.

*Article 27. Carriage preceding or subsequent to sea carriage*<sup>56</sup>

1. When loss of or damage to goods, or an event or circumstance causing a delay in their delivery, occurs during the carrier's period of responsibility but solely before their loading onto the ship or solely after their discharge from the ship, the provisions of this Convention do not prevail over those provisions of another international instrument that, at the time of such loss, damage or event or circumstance causing delay:

(a) Pursuant to the provisions of such international instrument would have applied to all or any of the carrier's activities if the shipper had made a separate and direct contract with the carrier in respect of the particular stage of carriage where the loss of, or damage to goods, or an event or circumstance causing delay in their delivery occurred;<sup>57</sup>

(b) Specifically provide for the carrier's liability, limitation of liability, or time for suit; and

(c) Cannot be departed from by contract either at all or to the detriment of the shipper under that instrument.

[2. Paragraph 1 of this article does not affect the application of article 62, paragraph 2.]<sup>58</sup>

3. Except when otherwise provided in paragraph 1 of this article [and] article[s] 85<sup>59</sup> [and 62, paragraph 2], the liability of the carrier and the maritime performing party

<sup>53</sup> The brackets that appeared around the word "expressly" as it appeared in A/CN.9/WG.III/WP.81 were deleted and the word retained as agreed by the Working Group (see A/CN.9/621, paras. 125 and 126).

<sup>54</sup> This phrase has been adjusted to "not entitled to the benefit of the limitation of liability" to be consistent with draft article 64, as agreed by the Working Group (see A/CN.9/621, paras. 124 and 126).

<sup>55</sup> The option of "to the extent that such damage" in the provision as it appeared in A/CN.9/WG.III/WP.81 was retained and the brackets around it deleted, and the other bracketed options were deleted as agreed by the Working Group (see A/CN.9/621, paras. 125 to 126).

<sup>56</sup> The Working Group at its nineteenth session had requested the inclusion in the text of a draft article 26 bis to provide for a declaration provision allowing a Contracting State to include in what is now draft article 27 (1) its mandatory national law (see A/CN.9/621, paras. 189 to 192). However, at its twentieth session, the Working Group decided, as part of its provisional decision pending further consideration of the compromise proposal on the level of the limitation of the carrier's liability, to reverse that decision (see A/CN.9/642, paras. 163 and 166).

<sup>57</sup> The phrase "[or national law]" has been deleted from the chapeau of draft paragraph 1 and subparagraph 1 (a) and (c) as they appeared in A/CN.9/WG.III/WP.81 and Variant B has been retained and Variant A deleted as agreed by the Working Group (see A/CN.9/621, paras. 190 to 192).

<sup>58</sup> If para. 62 (2) is deleted, this paragraph should also be deleted.

<sup>59</sup> If draft paragraph 3 is retained, for greater accuracy, reference has been added to draft article 85, and the square bracket around "paragraph 1 of this article" has been moved so that it

for loss of or damage to the goods, or for delay in delivery, shall be solely governed by the provisions of this Convention.<sup>60</sup>

## CHAPTER 7. OBLIGATIONS OF THE SHIPPER TO THE CARRIER

### *Article 28. Delivery for carriage*

1. Unless otherwise agreed in the contract of carriage, the shipper shall deliver the goods ready for carriage. In any event, the shipper shall deliver the goods in such condition that they will withstand the intended carriage, including their loading, handling, stowing, lashing and securing, and unloading, and that they will not cause harm to persons or property.

2. When the parties<sup>61</sup> have made an agreement referred to in article 14, paragraph 2, the shipper shall properly and carefully load, handle or stow the goods.<sup>62</sup>

3. When a container or trailer is packed by the shipper, the shipper shall properly and carefully stow, lash and secure the contents in or on the container or trailer and in such a way that they will not cause harm to persons or property.

### *Article 29. Cooperation of the shipper and the carrier in providing information and instructions*<sup>63</sup>

Without prejudice to the shipper's obligations in article 31, the carrier and the shipper shall respond to requests from each other to provide information and instructions required for the proper handling and carriage of the goods if the information is in the requested party's possession or the instructions are within the requested party's reasonable ability to provide and they are not otherwise reasonably available to the requesting party.

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brackets only the reference to "articles 62, paragraph 2".

<sup>60</sup> The brackets around the draft paragraph as it appeared in A/CN.9/WG.III/WP.81 have been removed and the paragraph retained as agreed by the Working Group (see A/CN.9/621, paras. 201 and 203). However, the Working Group may wish to consider whether this paragraph is necessary at all in light of its decision to choose the 'hypothetical contract' approach of Variant B of subparagraph 1 (a) rather than the conflict of laws approach of Variant A (see A/CN.9/621, para. 191). As noted in footnote 93 of A/CN.9/WG.III/WP.81, draft paragraph 3 had been added to the text for greater clarity regarding the applicability of inland transport conventions when the only approach in subparagraph 1 (a) of the text was the conflict of laws approach set out in Variant A. In light of the decision of the Working Group to choose the Variant B approach, the Working Group may wish to consider the deletion of draft paragraph 3.

<sup>61</sup> "Parties" has been substituted for "carrier and the shipper" as a drafting improvement and to render the text consistent with draft article 14.

<sup>62</sup> The brackets around the draft paragraph as it appeared in A/CN.9/WG.III/WP.81 have been removed and the paragraph retained as agreed by the Working Group (see A/CN.9/621, paras. 209 and 212). Further, the obligation regarding "discharge" of the goods has been deleted from this paragraph and moved to draft article 45 (2), in order to clarify that discharging or unloading the goods would be an obligation of the consignee at delivery and not of the shipper.

<sup>63</sup> The title of the draft article has been adjusted in order to differentiate it from the obligation of the shipper to provide information in draft article 30 as agreed by the Working Group (see A/CN.9/621, paras. 215 and 216).

*Article 30. Shipper's obligation to provide information, instructions and documents*

1. The shipper shall provide to the carrier in a timely manner such information, instructions and documents relating to the goods that are not otherwise reasonably available to the carrier, and that are reasonably necessary:

(a) For the proper handling and carriage of the goods, including precautions to be taken by the carrier or a performing party; and

(b) For the carrier to comply with law, regulations or other requirements of public authorities in connection with the intended carriage, provided that the carrier notifies the shipper in a timely manner of the information, instructions and documents it requires.

2. Nothing in this article affects any specific obligation to provide certain information, instructions and documents related to the goods pursuant to law, regulations or other requirements of public authorities in connection with the intended carriage.

*Article 31. Basis of shipper's liability to the carrier*

1. The shipper is liable for loss or damage sustained by the carrier if the carrier proves that such loss or damage was caused by a breach of the shipper's obligations under this Convention.<sup>64</sup>

2. Except in respect of loss or damage caused by a breach by the shipper of its obligations pursuant to articles 32, paragraph 2 and 33, the shipper is relieved of all or part of its liability if the cause or one of the causes of the loss or damage is not attributable to its fault or to the fault of any person referred to in article 35.

3. When the shipper is relieved of part of its liability pursuant to this article, the shipper is liable only for that part of the loss or damage<sup>65</sup> that is attributable to its fault or to the fault of any person referred to in article 35.

*Article 32. Information for compilation of contract particulars*

1. The shipper shall provide to the carrier, in a timely manner, accurate information required for the compilation of the contract particulars and the issuance of the transport documents or electronic transport records, including the particulars referred to in article 38, paragraph 1;<sup>66</sup> the name of the party to be identified as the shipper in the contract particulars; the name of the consignee, if any; and the name of the person to whose order the transport document or electronic transport record is to be issued, if any.

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<sup>64</sup> Revised text of draft article 31 (1) of the provision as it appeared in A/CN.9/WG.III/WP.81, which has been adjusted to comprise paragraphs 1 and 2, and the former paragraph 2 has been amended to become paragraph 3, as agreed by the Working Group (see A/CN.9/621, paras. 241 to 243). Reference in draft paragraph 1 to "pursuant to articles 27, [and] 29, subparagraphs 1 (a) and (b) [and 31, paragraph 1]" as they appeared in A/CN.9/WG.III/WP.81 has been replaced with the phrase "under this Convention" in order to meet a drafting suggestion made by the Working Group (see A/CN.9/621, para. 242 (a)).

<sup>65</sup> The reference in this provision to delay has been deleted as agreed by the Working Group (see A/CN.9/621, paras. 180 (b), 183 and 184).

<sup>66</sup> Correction to the text to ensure that draft article 38 (1) is included in its entirety (see A/CN.9/621, paras. 245 to 246).

2. The shipper is deemed to have guaranteed the accuracy at the time of receipt by the carrier of the information that is provided according to paragraph 1 of this article. The shipper shall indemnify the carrier against loss<sup>67</sup> or damage<sup>68</sup> resulting from the inaccuracy of such information.

*Article 33. Special rules on dangerous goods*

When goods by their nature or character are,<sup>69</sup> or reasonably appear likely to become, a danger to persons, property or the environment:

(a) The shipper shall inform the carrier of the dangerous nature or character of the goods in a timely manner before the consignor delivers them to the carrier or a performing party. If the shipper fails to do so and the carrier or performing party does not otherwise have knowledge of their dangerous nature or character, the shipper is liable to the carrier for loss<sup>70</sup> or damage<sup>71</sup> resulting from such failure to inform;<sup>72</sup> and

(b) The shipper shall mark or label dangerous goods in accordance with any law, regulations or other requirements of public authorities that apply during any stage of the intended carriage of the goods. If the shipper fails to do so, it is liable to the carrier for loss<sup>73</sup> or damage<sup>74</sup> resulting from such failure.

*Article 34. Assumption of shipper's rights and obligations by the documentary shipper*

1. A documentary shipper is subject to the obligations and liabilities imposed on the shipper pursuant to this chapter and pursuant to article 58, and is entitled to the shipper's rights and defences provided by this chapter and by chapter 13.

2. Paragraph 1 of this article does not affect the obligations, liabilities, rights or defences of the shipper.

<sup>67</sup> As in draft article 33 (a) and (b) below, the word "all" has been deleted from before the word "loss" as a drafting improvement, since it does not assist in the understanding of the provision, and could be mistakenly construed to include damages for delay on the part of the shipper, which are not intended to be covered in the draft convention.

<sup>68</sup> The reference in this provision to delay has been deleted as agreed by the Working Group (see A/CN.9/621, paras. 180 (b), 183 and 184).

<sup>69</sup> The phrase "[or become]" has been deleted as agreed by the Working Group (see A/CN.9/621, paras. 250, 251 and 253).

<sup>70</sup> As in draft article 32 (2) above and subparagraph (b) below, the word "all" has been deleted from before the word "loss" as a drafting improvement, since it does not assist in the understanding of the provision, and could be mistakenly construed to include damages for delay on the part of the shipper, which are not intended to be covered in the draft convention.

<sup>71</sup> The reference in this provision to delay has been deleted as agreed by the Working Group (see A/CN.9/621, paras. 180 (b), 183 and 184). In addition, the phrase "and expenses" has been deleted as redundant to improve drafting, and to avoid the possibility that the "damage" in this provision could be construed more broadly than elsewhere in the draft convention.

<sup>72</sup> The phrase "[the carriage of such goods]" has been deleted and the phrase "such failure to inform" has been retained as agreed by the Working Group (see A/CN.9/621, paras. 252 and 253).

<sup>73</sup> As in draft articles 32 (2) and 33 (a) above, the word "all" has been deleted from before the word "loss" as a drafting improvement, since it does not assist in the understanding of the provision, and could be mistakenly construed to include damages for delay on the part of the shipper, which are not intended to be covered in the draft convention.

<sup>74</sup> The reference in this provision to delay has been deleted as agreed by the Working Group (see A/CN.9/621, paras. 180 (b), 183 and 184).

*Article 35. Liability of the shipper for other persons*

The shipper is liable for the breach of its obligations under this Convention caused by the acts or omissions of the consignor or any other person,<sup>75</sup> including employees, agents and subcontractors, to which it has entrusted the performance of any of its obligations,<sup>76</sup> but the shipper is not liable for acts or omissions of the carrier or a performing party acting on behalf of the carrier, to which the shipper has entrusted the performance of its obligations.<sup>77</sup>

*Article 36. Cessation of shipper's liability*

A term in the contract of carriage according to which the liability of the shipper or the documentary shipper<sup>78</sup> will cease, wholly or partly, upon a certain event or after a certain time is void:<sup>79</sup>

(a) With respect to any liability pursuant to this chapter of the shipper or a documentary shipper;<sup>80</sup> or

(b) With respect to any amounts payable to the carrier under the contract of carriage, except to the extent that the carrier has adequate security for the payment of such amounts.<sup>81</sup>

## CHAPTER 8. TRANSPORT DOCUMENTS AND ELECTRONIC TRANSPORT RECORDS

*Article 37. Issuance of the transport document or the electronic transport record*

Unless the shipper and the carrier have agreed not to use a transport document or an electronic transport record, or it is the custom, practice or usage in the trade not to use one, upon delivery of the goods for carriage to the carrier or performing party:

(a) The consignor is entitled to obtain a non-negotiable transport document or, subject to article 8, subparagraph (a), a non-negotiable electronic transport record that evidences only the carrier's or performing party's receipt of the goods; and

(b) The shipper or, if the shipper consents, the documentary shipper, is entitled to obtain from the carrier, at the shipper's option, an appropriate negotiable or

<sup>75</sup> Further to the Working Group's request to make the necessary drafting adjustments to draft articles 14 (2), 28 (2), 18 (3)(h) and 35 in order to render consistent the treatment of the shipper's responsibility for the acts of the consignee and the controlling party (see A/CN.9/621, para. 260), specific reference to the consignor has been added to this provision.

<sup>76</sup> The phrase "as if such acts or omissions were its own" has been deleted as redundant and in order to render the provision consistent with draft article 20 (3).

<sup>77</sup> The closing phrase of this provision "pursuant to this chapter" has been deleted as being inaccurate. Further, paragraph 2 of this provision as it appeared in A/CN.9/WG.III/WP.81 has been deleted as agreed by the Working Group (see A/CN.9/621, paras. 259 to 260).

<sup>78</sup> Correction to the text as it appeared in A/CN.9/WG.III/WP.81, given the defined term "documentary shipper" in draft article 1 (9).

<sup>79</sup> The phrase "not valid" has been adjusted to "void" in keeping with the suggestion made in the Working Group (see A/CN.9/621, paras. 262 to 263).

<sup>80</sup> Correction to the text as it appeared in A/CN.9/WG.III/WP.81, given the defined term "documentary shipper" in draft article 1 (9).

<sup>81</sup> Given the decision of the Working Group to delete draft article 61 (see A/CN.9/642, paras. 116 and 118), the following paragraph has been deleted from draft article 35: "[ (c) To the extent that it conflicts with article 61, subparagraph (d)(iii).]".

non-negotiable transport document or, subject to article 8, subparagraph (a), a negotiable or non-negotiable electronic transport record, unless the shipper and the carrier have agreed not to use a negotiable transport document or negotiable electronic transport record, or it is the custom, usage, or practice in the trade not to use one.

*Article 38. Contract particulars*

1. The contract particulars in the transport document or electronic transport record referred to in article 37 shall include the following information, as furnished by the shipper:

- (a) A description of the goods as appropriate for the transport;<sup>82</sup>
- (b) The leading marks necessary for identification of the goods;
- (c) The number of packages or pieces, or the quantity of goods; and
- (d) The weight of the goods, if furnished by the shipper.

2. The contract particulars in the transport document or the electronic transport record referred to in article 37 shall also include:

- (a) A statement of the apparent order and condition of the goods at the time the carrier or a performing party receives them for carriage;
- (b) The name and address of<sup>83</sup> the carrier;
- (c) The date on which the carrier or a performing party received the goods, or on which the goods were loaded on board the ship, or on which the transport document or electronic transport record was issued; and
- (d) If the transport document is negotiable,<sup>84</sup> the number of originals of the negotiable transport document, when more than one original is issued.

3. For the purposes of this article, the phrase “apparent order and condition of the goods” in subparagraph 2 (a) of this article refers to the order and condition of the goods based on:

- (a) A reasonable external inspection of the goods as packaged at the time the shipper delivers them to the carrier or a performing party; and
- (b) Any additional inspection that the carrier or a performing party actually performs before issuing the transport document or the electronic transport record.

*Article 39. Identity of the carrier*

1. If a<sup>85</sup> carrier is identified by name in the contract particulars, any other information in the transport document or electronic transport record relating to the identity of the carrier shall have no effect to the extent that it is inconsistent with that identification.

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<sup>82</sup> The phrase “as appropriate for the transport” has been added as agreed by the Working Group (see A/CN.9/621, paras. 271 to 273 and 277).

<sup>83</sup> The phrase “a person identified as” has been deleted to be consistent with the approach taken in UCP 600, as agreed by the Working Group (see A/CN.9/621, paras. 276 and 277).

<sup>84</sup> The opening phrase “If the transport document is negotiable” has been added to achieve greater accuracy.

<sup>85</sup> Clarification suggested in the Working Group (see A/CN.9/621, para. 278).



2. If no person is identified in the contract particulars as the carrier as required pursuant to article 38, subparagraph 2 (b), but the contract particulars indicate that the goods have been loaded on board a named ship, the registered owner of that ship is presumed to be the carrier, unless it proves that the ship was under a bareboat charter at the time of the carriage and it identifies this bareboat charterer and indicates its address, in which case this bareboat charterer is presumed to be the carrier. Alternatively, the registered owner may rebut the presumption of being the carrier by identifying the carrier and indicating its address. The bareboat charterer may rebut any presumption of being the carrier in the same manner.

3. Nothing in this article prevents the claimant from proving that any person other than a person identified in the contract particulars or pursuant to paragraph 2 of this article is the carrier.<sup>86</sup>

#### *Article 40. Signature*

1. A transport document shall be signed by the carrier or a person acting on its behalf.

2. An electronic transport record shall include the electronic signature of the carrier or a person acting on its behalf. Such electronic signature shall identify the signatory in relation to the electronic transport record and indicate the carrier's authorization of the electronic transport record.

#### *Article 41. Deficiencies in the contract particulars*

1. The absence of one or more of the contract particulars referred to in article 38, paragraphs 1 or 2, or the inaccuracy of one or more of those particulars, does not of itself affect the legal character or validity of the transport document or of the electronic transport record.

2. If the contract particulars include the date but fail to indicate its significance, the date is deemed to be:

(a) The date on which all of the goods indicated in the transport document or electronic transport record were loaded on board the ship, if the contract particulars indicate that the goods have been loaded on board a ship; or

(b) The date on which the carrier or a performing party received the goods, if the contract particulars do not indicate that the goods have been loaded on board a ship.

3. If the contract particulars fail to state the apparent order and condition of the goods at the time the carrier or a performing party receives them from the consignor, the contract particulars are deemed to have stated that the goods were in apparent good order and condition at the time the consignor delivered them to the carrier or a performing party.

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<sup>86</sup> Text of the provision adjusted based on footnote 122 of A/CN.9/WG.III/WP.81 as agreed by the Working Group (see A/CN.9/621, paras. 287 and 288).

*Article 42. Qualifying the information relating to<sup>87</sup> the goods in the contract particulars*

1. The carrier shall qualify the information referred to in article 38, paragraph 1 to indicate that the carrier does not assume responsibility for the accuracy of the information furnished by the shipper if:<sup>88</sup>

(a) The carrier has actual knowledge that any material statement in the transport document or electronic transport record is<sup>89</sup> false or misleading; or

(b) The carrier has reasonable grounds to<sup>90</sup> believe that a material statement in the transport document or electronic transport record is false or misleading.

2. Without prejudice to paragraph 1 of this article, the carrier may qualify the information referred to in article 38, paragraph 1 in the circumstances and in the manner set out in paragraphs 3 and 4 of this article to indicate that the carrier does not assume responsibility for the accuracy of the information furnished by the shipper.<sup>91</sup>

3. When the goods are not delivered for carriage to the carrier or a performing party in a closed container, the carrier may qualify the information referred to in article 38, paragraph 1, if:

(a) The carrier had no physically practicable or commercially reasonable means of checking the information furnished by the shipper, in which case it may indicate which information it was unable to check; or

(b) The carrier has reasonable grounds to believe<sup>92</sup> the information furnished by the shipper to be inaccurate, in which case it may include a clause providing what it reasonably considers accurate information.

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<sup>87</sup> The phrase “information relating to” has been substituted for the phrase “description of” as suggested in the Working Group (see A/CN.9/621, paras. 299 and 300).

<sup>88</sup> In order to improve the clarity of the drafting of this provision, it is suggested that draft paragraph 1 deal only with the mandatory qualification of information by the carrier, and that the non-mandatory portion of the provision as it appeared in A/CN.9/WG.III/WP.81 be dealt with separately in draft paragraph 2. In adjusting the drafting in this manner, there was no intention to change the meaning of the draft article.

<sup>89</sup> The word “materially” has been deleted as suggested in the Working Group (see A/CN.9/621, paras. 299 and 300).

<sup>90</sup> The phrase “has reasonable grounds to believe” has been inserted as suggested in the Working Group (see A/CN.9/621, paras. 299 and 300).

<sup>91</sup> Draft paragraph 2 was formerly included in the chapeau of paragraph 1 of the provision as it appeared in A/CN.9/WG.III/WP.81. In order to improve the clarity of the drafting of paragraph 1, this non-mandatory portion of the provision as it appeared in A/CN.9/WG.III/WP.81 has been removed into a separate paragraph 2. In adjusting the drafting in this manner, there was no intention to change the meaning of the draft article.

<sup>92</sup> The phrase “has reasonable grounds to believe” has been inserted as suggested in the Working Group (see A/CN.9/621, paras. 299 and 300).

4. When the goods are delivered for carriage to the carrier or a performing party in a closed container, the carrier may qualify the information referred to in:<sup>93</sup>

(a) Article 38, subparagraphs 1 (a), (b), or (c), if:

(i) Neither the carrier nor a performing party has in fact inspected the goods inside the container; or

(ii) Neither the carrier nor a performing party otherwise has actual knowledge of its contents before issuing the transport document or the electronic transport record; and

(b) Article 38, subparagraph 1 (d), if:

(i) Neither the carrier nor a performing party weighed the container, and the shipper and the carrier had not agreed prior to the shipment that the container would be weighed and the weight would be included in the contract particulars; or

(ii) There was no physically practicable or commercially reasonable means of checking the weight of the container.

*Article 43. Evidentiary effect of the contract particulars*<sup>94</sup>

Except to the extent that the contract particulars have been qualified in the circumstances and in the manner set out in article 42:

(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;

(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 [provides]<sup>95</sup> [indicates] that it must be surrendered in order to obtain delivery of the goods and is transferred to the consignee acting in good faith.

(c) Proof to the contrary by the carrier shall not be admissible against a consignee that in good faith has acted in reliance on any<sup>96</sup> of the following contract

<sup>93</sup> In order to improve the drafting and to make paragraph 4 consistent with paragraphs 1, 2 and 3, the phrase "qualify the information referred to in" has been substituted for the phrase "include a qualifying clause in the contract particulars with respect to: (a) The information referred to in ... (b) The information referred to in ..." as it appeared in A/CN.9/WG.III/WP.81.

<sup>94</sup> The text of draft article 43 is taken from the corrected text set out in paragraph 1 of A/CN.9/WG.III/WP.94, on which the Working Group agreed to base its consideration of the provision (see A/CN.9/642, paras. 9 and 14).

<sup>95</sup> The word "indicates" has been placed in square brackets, and the alternative "provides" has been added to the text in order to render it consistent with the choices the Working Group has decided to retain in draft article 48.

<sup>96</sup> As agreed by the Working Group, the phrase "acting in good faith in respect of" has been adjusted to "that in good faith has acted in reliance on any of" (see A/CN.9/642, paras. 12 and 14).

particulars included in a non-negotiable transport document or a non-negotiable electronic transport record:

- (i) The contract particulars referred to in article 38, 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 38, paragraph 2.<sup>97</sup>

*Article 44. "Freight prepaid"*

If the contract particulars contain the statement "freight prepaid" or a statement of a similar nature, the carrier cannot assert against the holder or the consignee the fact that the freight has not been paid. This article does not apply if the holder or the consignee is also the shipper.

## CHAPTER 9. DELIVERY OF THE GOODS

*Article 45. Obligation to accept delivery*<sup>98</sup>

1. When the goods have arrived at their destination, the consignee that exercises its rights under<sup>99</sup> the contract of carriage 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 at which, having regard to the terms of the contract, the customs, practices and usages of the trade and the circumstances of the carriage, delivery could reasonably be expected.<sup>100</sup>

<sup>97</sup> As noted in paragraph 1 of A/CN.9/WG.III/WP.94, the Secretariat has corrected the text of paragraph (c) as it appeared in A/CN.9/WG.III/WP.81. In particular, the reference to draft article 38, subparagraph 2 (a) in the first sentence has been deleted as incorrect, since subparagraph 2 of draft article 38 refers exclusively to information in the contract particulars which would be furnished by the carrier. Instead, subparagraph (c)(i) has been substituted, such that reference is now made to the contract particulars in draft article 38, paragraph 1, that are provided by the carrier. Subparagraph (c)(ii) repeats text that appeared in the previous version of the provision, and subparagraph (c)(iii) refers to the contract particulars in draft article 38, 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.

<sup>98</sup> The text of draft article 45 is taken from the adjusted text set out in paragraph 3 of A/CN.9/WG.III/WP.94, on which the Working Group agreed to base its consideration of the provision (see A/CN.9/642, paras. 15 and 23).

<sup>99</sup> The first alternative text set out in A/CN.9/WG.III/WP.81 was retained, but the phrase "any of" was deleted, as agreed by the Working Group (see A/CN.9/642, paras. 19 to 23).

<sup>100</sup> In considering how best to clarify the relationship between paragraphs 1 and 2 of former draft article 11 as it appeared in A/CN.9/WG.III/WP.81 (see A/CN.9/621, paras. 30 to 33), the Secretariat suggested that the optimum drafting approach was to delete paragraph 2 of former draft article 11, and to move the relevant text to the end of paragraph 1 of draft article 45, deleting the cross-reference to paragraph 2 of former draft article 11 in draft article 45 as it appeared in A/CN.9/WG.III/WP.81. As indicated in paragraph 3 of A/CN.9/WG.III/WP.94, that additional text would have been added to the end of paragraph one as follows: "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." However, the Working Group decided instead to delete the phrase at the end of the first sentence, "that are in accordance with the customs, practices or usages of the trade", and insert the phrase "at which, having regard to the terms of the contract, the customs, practices and usages of the trade and the circumstances of the carriage, delivery

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.<sup>101</sup>

*Article 46. Obligation to acknowledge receipt*

On request of the carrier or the performing party that delivers the goods, the consignee shall acknowledge receipt of the goods from the carrier or the performing party in the manner that is customary at the place of delivery. The carrier may refuse delivery if the consignee refuses to acknowledge such receipt.

*Article 47. Delivery when no negotiable transport document or negotiable electronic transport record is issued*

When no negotiable transport document or no negotiable electronic transport record has been issued:

(a) The carrier shall deliver the goods to the consignee at the time and location referred to in article 45, paragraph 1. The carrier may refuse delivery if the person claiming to be the consignee does not properly identify itself as the consignee on the request of the carrier.

(b) If the name and address of the consignee are not referred to in the contract particulars, the controlling party shall prior to or upon the arrival of the goods at the place of destination advise the carrier of such name and address.

(c) If the name or the address of the consignee is not known to the carrier or if the consignee, after having received a notice of arrival, does not claim delivery of the goods from the carrier after their arrival at the place of destination, the carrier shall so advise the controlling party, and the controlling party shall give instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the controlling party, the carrier shall so advise the shipper, and the shipper shall give instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the controlling party or the shipper, the carrier shall so advise the documentary shipper, and the documentary shipper shall give instructions in respect of the delivery of the goods.<sup>102</sup>

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could reasonably be expected”, pending further consideration (see A/CN.9/642, paras. 16 to 18 and 23).

<sup>101</sup> As noted in paragraphs 2 and 3 of A/CN.9/WG.III/WP.94, in its consideration of how best to clarify the drafting of the text of paragraph 2 of draft article 28 (see A/CN.9/621, paras. 209 to 212), the Secretariat concluded that it would be best to move the obligation of unloading to a separate location in the text, as an agreement to unload the goods pursuant to paragraph 2 of draft article 14 was unlikely to be performed by the shipper, and should thus not appear in the chapter on shipper’s obligations. This obligation was thus deleted from paragraph 2 of draft article 28, clarified as the obligation of the consignee, and moved to become a new paragraph 2 of draft article 45 with respect to the obligation of the consignee to accept delivery.

<sup>102</sup> In order to clarify the drafting of the provision, the necessary steps in the procedure were set out in greater detail, and the final two sentences of the text as it appeared in A/CN.9/WG.III/WP.81 (“In such event, the controlling party or shipper shall give 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 is deemed to be the shipper for purposes of this paragraph.”) were deleted.

(d) The carrier that delivers the goods upon instruction of the controlling party, the shipper or the documentary shipper<sup>103</sup> pursuant to subparagraph (c) of this article is discharged from its obligations to deliver the goods under the contract of carriage.

*Article 48. Delivery when a non-negotiable transport document that requires surrender is issued*<sup>104</sup>

When a non-negotiable transport document has been issued that [provides] [indicates]<sup>105</sup> that it shall be surrendered in order to obtain delivery of the goods:

(a) The carrier shall deliver the goods at the time and location referred to in article 45, paragraph 1, to the consignee upon the consignee properly identifying itself<sup>106</sup> on the request of the carrier and surrender of the non-negotiable document. The carrier may refuse delivery if the person claiming to be the consignee fails to properly identify itself on the request of the carrier, and shall refuse delivery if the non-negotiable document is not surrendered. If more than one original of the non-negotiable document has been issued, the surrender of one original will suffice and the other originals cease to have any effect or validity.

(b) If the consignee, after having received a notice of arrival,<sup>107</sup> does not claim delivery of the goods from the carrier after their arrival at the place of destination or the carrier refuses delivery because the person claiming to be the consignee does not properly identify itself as the consignee or does not surrender the document, the carrier shall so advise the shipper, and the shipper shall give instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier shall so advise the documentary shipper, and the documentary shipper shall give instructions in respect of the delivery of the goods.<sup>108</sup>

(c) The carrier that delivers the goods upon instruction of the shipper or the documentary shipper<sup>109</sup> pursuant to subparagraph (b) of this article is discharged from its obligation to deliver the goods under the contract of carriage, irrespective of whether the non-negotiable transport document has been surrendered to it.

<sup>103</sup> Reference to the “documentary shipper” has been added to correct the text.

<sup>104</sup> The square brackets around draft article 48 have been deleted and the text retained, as agreed by the Working Group (see A/CN.9/642, paras. 34 to 35).

<sup>105</sup> The alternatives “[provides]” and “[indicates]” have been retained and the alternative “[specifies]” has been deleted, as agreed by the Working Group (see A/CN.9/642, paras. 31 to 33 and 35).

<sup>106</sup> The Secretariat has adjusted the text throughout the draft convention to replace the phrase “upon proper identification” with the phrase “upon the consignee properly identifying itself” to avoid inconsistencies in the different language versions of the text.

<sup>107</sup> The phrase “after having received a notice of arrival” has been inserted, as agreed by the Working Group (see A/CN.9/642, paras. 34 to 35).

<sup>108</sup> In order to clarify the drafting of the provision, and to be consistent with draft articles 47 (c) and 49 (b), the necessary steps in the procedure were set out in greater detail, and the final phrase of the text as it appeared in A/CN.9/WG.III/WP.81 (“the documentary shipper is deemed to be the shipper for the purpose of this paragraph”) was deleted.

<sup>109</sup> Reference to the “documentary shipper” has been added to correct the text.

*[Article 49. Delivery when the electronic equivalent of a non-negotiable transport document that requires surrender is issued<sup>110</sup>*

When the electronic equivalent of a non-negotiable transport document has been issued that [provides] [indicates]<sup>111</sup> that it shall be surrendered in order to obtain delivery of the goods:

(a) The carrier shall deliver the goods at the time and location referred to in article 45, paragraph 1 to the person named in the electronic record as the consignee and that has exclusive control of the electronic record. Upon such delivery the electronic record ceases to have any effect or validity. The carrier may refuse delivery if the person claiming to be the consignee does not properly identify itself as the consignee on the request of the carrier, and shall refuse delivery if the person claiming to be the consignee is unable to demonstrate in accordance with the procedures referred to in article 9, paragraph 1,<sup>112</sup> that it has exclusive control of the electronic record.]<sup>113</sup>

(b) If the consignee, after having received a notice of arrival,<sup>114</sup> does not claim delivery of the goods from the carrier after their arrival at the place of destination or the carrier refuses delivery in accordance with subparagraph (a) of this article, the carrier shall so advise the shipper, and the shipper shall give instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier shall so advise the documentary shipper, and the documentary shipper shall give instructions in respect of the delivery of the goods.<sup>115</sup>

(c) The carrier that delivers the goods upon instruction of the shipper or the documentary shipper<sup>116</sup> pursuant to subparagraph (b) of this article is discharged from its obligation to deliver the goods under the contract of carriage, irrespective of whether the person to which the goods are delivered is able to demonstrate in accordance with the procedures referred to in article 9, paragraph 1,<sup>117</sup> that it has exclusive control of the electronic record.]

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<sup>110</sup> Reference to “non-negotiable electronic transport record that requires surrender” has been corrected to “the electronic equivalent of a non-negotiable transport document that requires surrender” both here and throughout the text (see A/CN.9/642, para. 37).

<sup>111</sup> The alternatives “[provides]” and “[indicates]” have been retained and the alternative “[specifies]” has been deleted for the purposes of consistency in light of the agreement of the Working Group regarding draft article 48 (see A/CN.9/642, paras. 31 to 33 and 35).

<sup>112</sup> “Paragraph 1” has been added to make the reference more precise.

<sup>113</sup> As agreed by the Working Group, subparagraph (a) has been placed in square brackets pending further consideration (see A/CN.9/642, paras. 38 and 41).

<sup>114</sup> The phrase “after having received a notice of arrival” has been inserted for the purposes of consistency in light of the agreement by the Working Group to include it in draft article 48 (b) (see A/CN.9/642, paras. 34 to 35 and 40 to 41).

<sup>115</sup> In order to clarify the drafting of the provision, and to be consistent with draft articles 47 (c) and 48 (b), the necessary steps in the procedure were set out in greater detail, and the final phrase of the text as it appeared in A/CN.9/WG.III/WP.81 (“the documentary shipper is deemed to be the shipper for the purpose of this paragraph”) was deleted.

<sup>116</sup> Reference to the “documentary shipper” has been added to correct the text.

<sup>117</sup> “Paragraph 1” has been added to make the reference more precise.

*Article 50. Delivery when a negotiable transport document or negotiable electronic transport record is issued*<sup>118</sup>

When a negotiable transport document or a negotiable electronic transport record has been issued:

(a) Without prejudice to article 45, 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 45, paragraph 1,<sup>119</sup> to the holder:<sup>120</sup>

(i) Upon surrender of the negotiable transport document and, if the holder is one of the persons referred to in article 1, subparagraph 11 (a)(i), upon the holder properly identifying itself;<sup>121</sup> or

(ii) Upon demonstration by the holder, in accordance with the procedures referred to in article 9, paragraph 1, 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, and the number of originals is stated in that document,<sup>122</sup> 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, paragraph 1.

<sup>118</sup> Corrections and slight adjustments have been made to the text of subparagraphs 1 (a), (d) and (h) as they appeared in A/CN.9/WG.III/WP.81, as described in paragraphs 4 to 7 of A/CN.9/WG.III/WP.94, on which the Working Group agreed to base its consideration of the provision (see A/CN.9/642, paras. 42).

<sup>119</sup> Correction of the reference to paragraph 2 of draft article 11 instead to draft article 45, paragraph 1, to reflect the revised text.

<sup>120</sup> The phrase "as appropriate" has been deleted as unnecessary.

<sup>121</sup> The Secretariat has adjusted the text throughout the draft convention to replace the phrase "upon proper identification" with the phrase "upon the holder properly identifying itself" to avoid inconsistencies in the different language versions of the text.

<sup>122</sup> The phrase "and the number of originals is stated in that document" has been inserted into the text as agreed by the Working Group (see A/CN.9/642, paras. 45 to 51), having slightly adjusted the drafting prior to insertion. In addition, the Working Group agreed (see A/CN.9/642, paras. 45 to 51) to reverse the decision taken at its nineteenth session (see A/CN.9/621, paras. 296 and 297) to include a paragraph in draft article 41 (deficiencies in the contract particulars) regarding the consequences of a failure to state the number of original bills of lading, which is required in the contract particulars pursuant to draft article 38 (2)(d).



(d)<sup>123</sup> If the holder, after having received a notice of arrival,<sup>124</sup> does not claim delivery of the goods at the time or within the time referred to in article 45, paragraph 1,<sup>125</sup> from the carrier after their arrival at the place of destination, the carrier shall so advise the controlling party, and the controlling party shall give instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the controlling party, the carrier shall so advise the shipper, and the shipper shall give instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the controlling party or the shipper, the carrier shall so advise the documentary shipper, and the documentary shipper shall give instructions in respect of the delivery of the goods.<sup>126</sup>

(e) The carrier that delivers the goods upon instruction of the controlling party, the shipper or the documentary shipper<sup>127</sup> 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 negotiable electronic transport record has demonstrated, in accordance with the procedures referred to in article 9, paragraph 1,<sup>128</sup> that it is the holder.

(f) The person giving instructions under subparagraph (d) of this article shall indemnify the carrier against loss arising from its being held liable to the holder under subparagraph (h) of this article. The carrier may refuse to follow those instructions if the person fails to provide adequate security as the carrier may reasonably request.<sup>129</sup>

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<sup>123</sup> A proposal was made at the twentieth session of the Working Group to limit the operation of subparagraphs 50 (d), (e), (g) and (h) to those situations where a negotiable transport document or electronic transport record had been issued that stated on the document or the record itself that the goods to which it related could be delivered without presentation of the negotiable transport document or electronic transport record. A mechanism proposed for the implementation of that suggestion was that a phrase could be inserted as a chapeau prior to subparagraphs 50 (d), (e), (g) and (h) along the following lines: "If a negotiable transport document or electronic transport record that states on its face that the goods may be delivered without presentation of the document or electronic record, the following rules apply:" (see A/CN.9/642, paras. 63 to 64 and 67).

<sup>124</sup> The phrase "after having received a notice of arrival" has been inserted for the purposes of consistency in light of the agreement by the Working Group to include it in draft articles 48 (b) and 49 (b) (see A/CN.9/642, paras. 34 to 35 and 40 to 41).

<sup>125</sup> The phrase "before expiration of the time referred to in article 45, paragraph 1" has been added to clarify the text, for example, in the cases where the time of delivery is a time period rather than a particular date. Draft article 45, para. 1 has been adjusted to include a similar clarification.

<sup>126</sup> As in the case of draft article 47 (c), in order to clarify the drafting of the provision, the necessary steps in the procedure were set out in greater detail, and the final two sentences of the text as it appeared in A/CN.9/WG.III/WP.81 ("In such event, the controlling party or shipper shall give 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 is deemed to be the shipper for purposes of this paragraph.") were deleted.

<sup>127</sup> Reference to the "documentary shipper" has been added to correct the text.

<sup>128</sup> "Paragraph 1" has been added to make the reference more precise.

<sup>129</sup> As agreed by the Working Group, a new subparagraph (f) has been added to draft article 50 setting out the right of the carrier to take recourse action against the controlling party or the shipper for losses the carrier incurred resulting from carrying out instructions given by the controlling party or the shipper, coupled with an obligation on the consignee to establish reasonable security with the carrier (see A/CN.9/642, paras. 58 to 62 and 67).

(g) 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.

(h) Notwithstanding subparagraphs (e) and (g) of this article, a holder that becomes a holder after such delivery, and who<sup>130</sup> did not have and<sup>131</sup> 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. When the contract particulars state the expected time of arrival of the goods, or indicate how to obtain information as to whether the goods have been delivered, it is presumed that the holder at the time that it became a holder had or could reasonably have had knowledge of the delivery of the goods.<sup>132</sup>

*Article 51. Goods remaining undelivered*<sup>133</sup>

1. For the purposes of this article, goods shall be deemed to have remained undelivered only<sup>134</sup> if, after their arrival at the place of destination:

(a) The consignee does not accept delivery of the goods pursuant to this chapter at the time and location referred to in article 45, paragraph 1;

(b) The controlling party, the shipper or the documentary shipper<sup>135</sup> cannot be found or does not give the carrier adequate instructions pursuant to articles 47, 48, 49 and 50;

(c) The carrier is entitled or required to refuse delivery pursuant to articles 46,<sup>136</sup> 47, 48, 49 and 50;

(d) The carrier is not allowed to deliver the goods to the consignee pursuant to the law or regulations of the place at which delivery is requested; or

(e) The goods are otherwise undeliverable by the carrier.

2. Without prejudice<sup>137</sup> to any other rights that the carrier may have against the shipper, controlling party or consignee, if the goods have remained undelivered, the carrier may, at the risk and expense of the person entitled to the goods, take such action in respect of the goods as circumstances may reasonably require, including:

(a) To store the goods at any suitable place;

<sup>130</sup> Suggested clarification of the text through the addition of the phrase “becomes a holder after such delivery and who”.

<sup>131</sup> Correction of the text, replacing “or” with “and”.

<sup>132</sup> The second sentence in this subparagraph has been inserted as agreed by the Working Group (see A/CN.9/642, paras. 58 to 62 and 67).

<sup>133</sup> As agreed by the Working Group the order of paragraphs 1 and 2 has been reversed from the order in which they appeared in A/CN.9/WG.III/WP.81 (see A/CN.9/642, paras. 73 and 75).

<sup>134</sup> The word “undeliverable” has been corrected to “undelivered” (see A/CN.9/642, paras. 74 and 75), and the word “only” has been added for greater clarity.

<sup>135</sup> Reference to the “documentary shipper” has been added to correct the text.

<sup>136</sup> The text was corrected by adding a reference to draft article 46, pursuant to which the carrier is entitled to refuse delivery.

<sup>137</sup> The phrase “Unless otherwise agreed and” has been deleted from the opening phrase of this paragraph as agreed by the Working Group (see A/CN.9/642, paras. 72 and 75).

(b) To unpack the goods if they are packed in containers, or to act otherwise in respect of the goods, including by moving the goods or causing them to be destroyed; and

(c) To cause the goods to be sold in accordance with the practices or pursuant to the law or regulations of the place where the goods are located at the time.

3. The carrier may exercise the rights under paragraph 2 of this article only after it has given reasonable notice of the intended action under paragraph 2 of this article<sup>138</sup> to the person stated in the contract particulars as the person if any, to be notified of the arrival of the goods at the place of destination, and to one of the following persons in the order indicated, if known to the carrier: the consignee, the controlling party or the shipper.

4. If the goods are sold pursuant to subparagraph 2 (c) of this article, the carrier shall hold the proceeds of the sale for the benefit of the person entitled to the goods, subject to the deduction of any costs incurred by the carrier and any other amounts that are due to the carrier in connection with the carriage of those goods.

5. The carrier shall not be liable for loss of or damage to goods that occurs during the time that they<sup>139</sup> remain undelivered pursuant to this article unless the claimant proves that such loss or damage resulted from the failure by the carrier to take steps that would have been reasonable in the circumstances to preserve the goods and that the carrier knew or ought to have known that the loss or damage to the goods would result from its failure to take such steps.

#### *Article 52. Retention of goods*

Nothing in this Convention affects a right of the carrier or a performing party that may exist pursuant to the contract of carriage or the applicable law to retain the goods to secure the payment of sums due.

### CHAPTER 10. RIGHTS OF THE CONTROLLING PARTY

#### *Article 53. Exercise and extent of right of control*

1. The right of control may be exercised only by the controlling party and is limited to:

(a) The right to give or modify instructions in respect of the goods that do not constitute a variation of the contract of carriage;

(b) The right to obtain delivery of the goods at a scheduled port of call or, in respect of inland carriage, any place en route; and

(c) The right to replace the consignee by any other person including the controlling party.

<sup>138</sup> As agreed by the Working Group, the notice requirement in this provision has been clarified by substituting the phrase “reasonable notice of the intended action under paragraph 1 of this article” for the phrase “reasonable advance notice of arrival of the goods at the place of destination” (see A/CN.9/642, paras. 78 and 81).

<sup>139</sup> It is suggested that, in order to clarify that the carrier remains liable for loss of or damage to the goods that occurred prior to them remaining undelivered, the phrase “loss of or damage to goods that occurs during the time that they remain undelivered” should be substituted for the phrase “loss of or damage to goods that remain undelivered.”

2. The right of control exists during the entire period of responsibility of the carrier, as provided in article 12, and ceases when that period expires.<sup>140</sup>

*Article 54. Identity of the controlling party and transfer of the right of control*

1. When no negotiable transport document or no negotiable electronic transport record is issued:

(a) The shipper is the controlling party unless the shipper, when the contract of carriage is concluded, designates the consignee, the documentary shipper or another person as the controlling party;

(b) The controlling party is entitled to transfer the right of control to another person. The transfer becomes effective with respect to the carrier upon its notification of the transfer by the transferor, and the transferee becomes the controlling party; and

(c) The controlling party shall properly identify itself<sup>141</sup> when it exercises the right of control.

2. When a non-negotiable transport document or a non-negotiable electronic transport record has been issued that [provides] [indicates]<sup>142</sup> that it shall be surrendered in order to obtain delivery of the goods:

(a) The shipper is the controlling party and may transfer the right of control to the consignee named in the transport document or the electronic transport record by transferring the document to that person without endorsement, or by transferring the electronic transport record to it in accordance with the procedures referred to in article 9, paragraph 1.<sup>143</sup> If more than one original of the document was issued, all originals shall be transferred in order to effect a transfer of the right of control; and

(b) In order to exercise its right of control, the controlling party shall produce the document and properly identify itself,<sup>144</sup> or, in the case of an electronic transport record, shall demonstrate in accordance with the procedures referred to in article 9, paragraph 1,<sup>145</sup> that it has exclusive control of the electronic transport record. If more than one original of the document was issued, all originals shall be produced, failing which the right of control cannot be exercised.

3. When a negotiable transport document is issued:

(a) The holder or, if more than one original of the negotiable transport document is issued, the holder of all originals is the controlling party;

<sup>140</sup> Following the Working Group's instruction to consider whether draft article 54 (5) could be deleted (see A/CN.9/642, paras. 93 to 94 and 96), the Secretariat suggests that draft article 54 (5) could be deleted provided that the phrase "and ceases when that period expires" is added here to make it clear when the right of control ceases.

<sup>141</sup> The Secretariat has adjusted the text throughout the draft convention to replace the phrase "produce proper identification" with the phrase "properly identify itself" to avoid inconsistencies in the different language versions of the text.

<sup>142</sup> The alternatives "[provides]" and "[indicates]" have been retained and the alternative "[specifies]" has been deleted for the purposes of consistency in light of the agreement of the Working Group regarding draft article 48 (see A/CN.9/642, paras. 31 to 33 and 35).

<sup>143</sup> "Paragraph 1" has been added to make the reference more precise.

<sup>144</sup> The Secretariat has adjusted the text throughout the draft convention to replace the phrase "produce proper identification" with the phrase "properly identify itself" to avoid inconsistencies in the different language versions of the text.

<sup>145</sup> "Paragraph 1" has been added to make the reference more precise.

(b) The holder may transfer the right of control by transferring the negotiable transport document to another person in accordance with article 60. If more than one original of that document was issued, all originals shall be transferred to that person<sup>146</sup> in order to effect a transfer of the right of control; and

(c) In order to exercise the right of control, the holder shall produce the negotiable transport document to the carrier, and if the holder is one of the persons referred to in article 1, subparagraph 11 (a)(i), the holder shall properly identify itself.<sup>147</sup> If more than one original of the document was issued, all originals shall be produced, failing which the right of control cannot be exercised.<sup>148</sup>

4. When a negotiable electronic transport record is issued:

(a) The holder is the controlling party;

(b) The holder may transfer the right of control to another person by transferring the negotiable electronic transport record in accordance with the procedures referred to in article 9, paragraph 1;<sup>149</sup>

(c) In order to exercise the right of control, the holder shall demonstrate, in accordance with the procedures referred to in article 9, paragraph 1,<sup>150</sup> that it is the holder.<sup>151</sup>

#### *Article 55. Carrier's execution of instructions*

1. Subject to paragraphs 2 and 3 of this article, the carrier shall execute the instructions referred to in article 53 if:

(a) The person giving such instructions is entitled to exercise the right of control;

(b) The instructions can reasonably be executed according to their terms at the moment that they reach the carrier; and

(c) The instructions will not interfere with the normal operations of the carrier, including its delivery practices.

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<sup>146</sup> The phrase "to that person" has been added for greater clarity.

<sup>147</sup> The Secretariat has adjusted the text throughout the draft convention to replace the phrase "produce proper identification" with the phrase "properly identify itself" to avoid inconsistencies in the different language versions of the text.

<sup>148</sup> The Secretariat reviewed the text of subparagraphs 3 (b) and (c) in light of subparagraph (c) of draft article 50, as requested by the Working Group (see A/CN.9/642, paras. 92 and 96), but decided against aligning the provisions. It was thought that aligning those provisions would allow the carrier to claim discharge, and that the preferable approach would be to leave the issue to national law.

<sup>149</sup> "Paragraph 1" has been added to make the reference more precise.

<sup>150</sup> "Paragraph 1" has been added to make the reference more precise.

<sup>151</sup> Following the Working Group's instruction to consider whether draft article 53 (5) as it appeared in A/CN.9/WG.III/WP.81 could be deleted (see A/CN.9/642, paras. 93 to 94 and 96), the Secretariat suggests that draft article 53 (5) could be deleted, as has been done, provided that the phrase "and ceases when that period expires" is added to draft article 53 (2) to make it clear when the right of control ceases. Further, draft article 53 (6) as it appeared in A/CN.9/WG.III/WP.81 has been deleted as agreed by the Working Group (see A/CN.9/642, paras. 95 and 122 to 124).

2. In any event, the controlling party shall reimburse the carrier any reasonable<sup>152</sup> additional expense that the carrier may incur and shall indemnify the carrier against loss or damage that the carrier may suffer as a result of diligently<sup>153</sup> executing any instruction pursuant to this article, including compensation that the carrier may become liable to pay for loss of or damage to<sup>154</sup> other goods being carried.

3. The carrier is entitled to obtain security from the controlling party for the amount of additional expense, loss or damage that the carrier reasonably expects will arise in connection with the execution of an instruction pursuant to this article. The carrier may refuse to carry out the instructions if no such security is provided.

4. The carrier's liability for loss of or damage to the goods or for delay in delivery<sup>155</sup> resulting from its failure to comply with the instructions of the controlling party in breach of its obligation pursuant to paragraph 1 of this article shall be subject to articles 18 to 24, and the amount of the compensation payable by the carrier shall be subject to articles 62 to 64.

*Article 56. Deemed delivery*

Goods that are delivered pursuant to an instruction in accordance with article 53, subparagraph 1 (b), are deemed to be delivered at the place of destination, and the provisions of chapter 9 relating to such delivery apply to such goods.

*Article 57. Variations to the contract of carriage*

1. The controlling party is the only person that may agree with the carrier to variations to the contract of carriage other than those referred to in article 53, subparagraphs 1 (b) and (c).

2. Variations to the contract of carriage, including those referred to in article 53, subparagraphs 1 (b) and (c), shall be stated in a negotiable transport document or in a non-negotiable transport document that requires surrender,<sup>156</sup> or incorporated in a negotiable electronic transport record, or, upon the request<sup>157</sup> of the controlling party, shall be stated in a non-negotiable transport document or incorporated in a non-negotiable electronic transport record.<sup>158</sup> If so stated or incorporated, such variations shall be signed in accordance with article 40.

<sup>152</sup> The word "reasonable" has been added as agreed by the Working Group (see A/CN.9/642, paras. 99 to 101 and 103).

<sup>153</sup> The word "diligently" has been added as agreed by the Working Group (see A/CN.9/642, paras. 97 and 103).

<sup>154</sup> The phrase "[or for delay in delivery of]" has been deleted as agreed by the Working Group (see A/CN.9/642, paras. 98 to 101 and 103).

<sup>155</sup> The phrase "[or for delay in delivery of]" has been retained and the square brackets around it have been deleted as agreed by the Working Group (see A/CN.9/642, paras. 102 to 103).

<sup>156</sup> The phrase "or in a non-negotiable transport document that requires surrender" has been added as agreed by the Working Group (see A/CN.9/642, paras. 106 to 107).

<sup>157</sup> The phrase "upon the request" has been added and the phrase "at the option" deleted, as agreed by the Working Group (see A/CN.9/642, paras. 105 and 107).

<sup>158</sup> If the electronic equivalent of a non-negotiable transport document that requires surrender in draft article 49 is retained, reference to it should be included here should the Working Group decide that they will constitute conclusive evidence.

3. Variations to the contract of carriage made pursuant to this article shall not affect the parties' rights and obligations as they exist prior to the date on which the variations to the contract of carriage are signed in accordance with article 40.<sup>159</sup>

*Article 58. Providing additional information, instructions  
or documents to carrier*

1. The controlling party, on request of the carrier or a performing party, shall provide in a timely manner information, instructions or documents relating to the goods not yet provided by the shipper and not otherwise reasonably available to the carrier, that the carrier may reasonably need to perform its obligations under the contract of carriage.<sup>160</sup>

2. If the carrier, after reasonable effort, is unable to locate the controlling party or the controlling party is unable to provide adequate information, instructions, or documents to the carrier, the shipper shall do so. If the carrier, after reasonable effort, is unable to locate the shipper, the documentary shipper shall do so.<sup>161</sup>

*Article 59. Variation by agreement*

The parties to the contract of carriage may vary the effect of articles 53, subparagraphs 1 (b) and (c), 53, paragraph 2<sup>162</sup> and 55. The parties may also restrict or exclude the transferability of the right of control referred to in article 54, subparagraph 1 (b).

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<sup>159</sup> This subparagraph has been slightly adjusted to avoid inconsistencies in the different language versions of the text. However, the Working Group may wish to delete this subparagraph altogether so as to avoid its difficult construction, and since it may be superfluous, as most legal systems would enforce this rule regardless of whether it is in the draft convention.

<sup>160</sup> As requested by the Working Group, the text of draft article 58 has been aligned with the shipper's obligation to provide information, instructions and documents pursuant to draft article 30, bearing in mind the different contexts of the two provisions (see A/CN.9/642, paras. 109 to 113). As part of the alignment, the draft article has been split into two paragraphs.

<sup>161</sup> The phrase "documentary shipper" has been deleted from the final phrase of the provision as it appeared in A/CN.9/WG.III/WP.81 and instead moved to a new final sentence in order to improve clarity regarding the order in which the carrier should proceed when seeking information.

<sup>162</sup> Given the deletion of draft article 53 (5) as it appeared in A/CN.9/WG.III/WP.81, and the inclusion of a phrase denoting the expiration of the right of control in draft article 53 (2), the reference in this provision has been changed from "article 53, paragraph 5" to "article 53, paragraph 2". While reference to draft article 53 (2) makes the reference in draft article 59 slightly broader than when it referred to draft article 53 (5), that adjustment is not thought to be problematic.

CHAPTER 11. TRANSFER OF RIGHTS<sup>163</sup>*Article 60. When a negotiable transport document or negotiable electronic transport record is issued*

1. When a negotiable transport document is issued, the holder may transfer the rights incorporated in the document by transferring it to another person:<sup>164</sup>

(a) Duly endorsed either to such other person or in blank, if an order document; or

(b) Without endorsement, if: (i) A bearer document or a blank endorsed document; or (ii) A document made out to the order of a named person and the transfer is between the first holder and the named person.

2. When a negotiable electronic transport record is issued, its holder may transfer the rights incorporated in it, whether it be made out to order or to the order of a named person, by transferring the electronic transport record in accordance with the procedures referred to in article 9, paragraph 1.<sup>165</sup>

*Article 61. Liability of holder*

1. Without prejudice to article 58, a holder that is not the shipper and that does not exercise any right under the contract of carriage does not assume any liability under the contract of carriage solely by reason of being a holder.

[2. A holder that is not the shipper and that exercises any right under the contract of carriage assumes any liabilities imposed on it under the contract of carriage to the extent that such liabilities are incorporated in or ascertainable from the negotiable transport document or the negotiable electronic transport record.]<sup>166</sup>

3. For the purpose of paragraph[s] 1 [and 2] of this article and article 45,<sup>167</sup> a holder that is not the shipper does not exercise any right under the contract of carriage solely because:

(a) It agrees with the carrier, pursuant to article 10, to replace a negotiable transport document by a negotiable electronic transport record or to replace a negotiable electronic transport record by a negotiable transport document; or

(b) It transfers its rights pursuant to article 60.<sup>168</sup>

<sup>163</sup> The Working Group agreed to retain in the text draft articles 60 and 61, and to delete former draft article 61 from chapter 12 as it appeared in A/CN.9/WG.III/WP.81 (see A/CN.9/642, paras. 115 to 118).

<sup>164</sup> For ease of translation and for drafting purposes, the order of the two clauses in each of subparagraphs has been reversed from the order set out in A/CN.9/WG.III/WP.81. Further, subparagraphs (b) and (c) have been combined into one subparagraph for the purposes of improved drafting clarity.

<sup>165</sup> "Paragraph 1" has been added to make the reference more precise.

<sup>166</sup> As agreed by the Working Group, paragraph 2 has been placed in square brackets to indicate the divided views on it, and the first bracketed alternative in the text as it appeared in A/CN.9/WG.III/WP.81 has been retained and the brackets around it deleted, while the second alternative text has been deleted (see A/CN.9/642, paras. 125 to 129).

<sup>167</sup> The square brackets around the phrase "and article 45" have been deleted and the text retained, as agreed by the Working Group (see A/CN.9/642, paras. 130 to 131). Further, the text of the draft convention was examined to consider whether the opening phrase "for the purposes of paragraphs 1 and 2 of this article and article 45" could be deleted, but it is suggested that the references are important to delimit the exercise of the right referred to in draft article 45.

<sup>168</sup> Draft article 61 as it appeared in A/CN.9/WG.III/WP.81 has been deleted, as agreed by the



## CHAPTER 12. LIMITS OF LIABILITY

*Article 62. Limits of liability*

1. Subject to articles 63 and 64, paragraph 1, the carrier's liability for breaches of its obligations under this Convention<sup>169</sup> is limited to [835]<sup>170</sup> units of account per package or other shipping unit, or [2.5]<sup>171</sup> units of account per kilogram of the gross weight of the goods that are the subject of the claim or dispute, whichever amount is the higher, except when the value of the goods has been declared by the shipper and included in the contract particulars, or when a higher amount than the amount of limitation of liability set out in this article has been agreed upon between the carrier and the shipper.

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Working Group (see A/CN.9/642, paras. 118 and 132).

- <sup>169</sup> The Working Group requested the Secretariat to review the drafting history of paragraph 1 (see A/CN.9/642, paras. 165 and 166). In addition to the following note, the Working Group may wish to refer to a discussion of this issue in A/CN.9/WG.III/WP.72 (see paras. 14 to 15). In the original text of the draft convention, A/CN.9/WG.III/WP.21, the phrase "in connection with the goods" had been adopted in the text from article 4 (5) of the Hague and Hague-Visby Rules. As a result of a request by the Working Group at its thirteenth session to examine the use of the phrase "in connection with the goods" throughout the draft convention (see A/CN.9/552, paras. 41 to 43), in A/CN.9/WG.III/WP.56, the phrase "for loss of or damage to [or in connection with] the goods" was deleted throughout the text of the draft convention and the phrase "for breaches of its obligations under this Convention" was added in its stead, with appropriate footnotes. The rationale for that change was that the phrase deleted had caused considerable uncertainty and a lack of uniformity in interpretation following its use in the Hague and Hague-Visby Rules, particularly concerning whether or not it had been intended to include cases of misdelivery and misinformation regarding the goods. Under the Hague and Hague-Visby Rules, it was generally thought that misdelivery was intended to be covered, but there was uncertainty regarding whether misinformation was intended to be covered. It was thought that the revised text was more explicit in terms of including in the limitation on liability all breaches of the carrier's obligations under the draft convention, including both misdelivery and misinformation regarding the goods. Therefore, the clear inclusion of misdelivery of the goods in the limitation on liability is not a novelty, but the clear inclusion of misinformation regarding the goods represents a change from the original text as it appeared in A/CN.9/WG.III/WP.21 and A/CN.9/WG.III/WP.32. Further, as a result of the change to the text in A/CN.9/WG.III/WP.56, a consequential change to make the text more accurate was made in A/CN.9/WG.III/WP.81 to the phrase "the goods lost or damaged", so that it read "the goods that are the subject of the claim or dispute".
- <sup>170</sup> At its twentieth session, the Working Group decided, as part of its provisional decision on the level of the limitation of the carrier's liability, to fill the first set of square brackets relating to the per package limitation with the number "835", as contained in the Hamburg Rules, pending further consideration of the compromise proposal on the level of the limitation (see A/CN.9/642, paras. 163 and 166).
- <sup>171</sup> At its twentieth session, the Working Group decided, as part of its provisional decision on the level of the limitation of the carrier's liability, to fill the second set of square brackets relating to the per kilogram limitation with the number "2.5", as contained in the Hamburg Rules, pending further consideration of the compromise proposal on the level of the limitation (see A/CN.9/642, paras. 163 and 166).

[Variant A of paragraph 2]<sup>172</sup>

[2. Notwithstanding paragraph 1 of this article, if (a) the carrier cannot establish whether the goods were lost or damaged [or whether the delay in delivery was caused] during the sea carriage or during the carriage preceding or subsequent to the sea carriage and (b) provisions of an international convention [or national law] would be applicable pursuant to article 27 if the loss, damage, [or delay] occurred during the carriage preceding or subsequent to the sea carriage, the carrier's liability for such loss, damage, [or delay] is limited pursuant to the limitation provisions of any international convention [or national law] that would have applied if the place where the damage occurred had been established, or pursuant to the limitation provisions of this Convention, whichever would result in the higher limitation amount.]

Variant B of paragraph 2

[2. Notwithstanding paragraph 1 of this article, if the carrier cannot establish whether the goods were lost or damaged [or whether the delay in delivery was caused] during the sea carriage or during the carriage preceding or subsequent to the sea carriage, the highest limit of liability in the international [and national] mandatory provisions applicable to the different parts of the transport applies.]]<sup>173</sup>

3. When goods are carried in or on a container, pallet, or similar article of transport used to consolidate goods, the packages or shipping units enumerated in the contract particulars as packed in or on such article of transport are deemed packages or shipping units. If not so enumerated, the goods in or on such article of transport are deemed one shipping unit.

4. The unit of account referred to in this article is the Special Drawing Right as defined by the International Monetary Fund. The amounts referred to in this article are to be converted into the national currency of a State according to the value of such currency at the date of judgement or award or the date agreed upon by the parties. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State that is a member of the International Monetary Fund is to be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State that is not a member of the International Monetary Fund is to be calculated in a manner to be determined by that State.

*Article 63. Limits of liability for loss caused by delay*

Subject to article 64, paragraph 2, compensation for loss of or damage to the goods caused by delay shall be calculated in accordance with article 23 and<sup>174</sup> liability for

<sup>172</sup> If draft article 62 (2) is retained, its text should be adjusted based on the final text of draft article 27. Variant A is intended as a clarification of the text of Variant B, and is not intended to change the suggested approach.

<sup>173</sup> At its twentieth session, the Working Group decided, as part of its provisional decision on the level of the limitation of the carrier's liability, to place draft article 62 (2) in square brackets pending further consideration of its deletion as part of the compromise proposal on the level of the limitation (see A/CN.9/642, paras. 163 and 166).

<sup>174</sup> The phrase "[, unless otherwise agreed,]" as it appeared in A/CN.9/WG.III/WP.81 was deleted as agreed by the Working Group as part of the compromise regarding liability for delay in delivery of the goods (see A/CN.9/621, paras. 180 (b) and 183 to 184).

economic loss caused by delay is limited to an amount equivalent to [two and one-half<sup>175</sup> times] the freight payable on the goods delayed. The total amount payable pursuant to this article and article 62, paragraph 1 may not exceed the limit that would be established pursuant to article 62, paragraph 1 in respect of the total loss of the goods concerned.

*Article 64. Loss of the benefit of limitation of liability*

1. Neither the carrier nor any of the persons referred to in article 19 is entitled to the benefit of the limitation of liability as provided in article 62,<sup>176</sup> or as provided in the contract of carriage, if the claimant proves that the loss resulting from the breach of the carrier's obligation under this Convention was attributable to a personal act or omission of the person claiming a right to limit done with the intent to cause such loss or recklessly and with knowledge that such loss would probably result.

2. Neither the carrier nor any of the persons mentioned in article 19 is entitled to the benefit of the limitation of liability as provided in article 63 if the claimant proves that the delay in delivery resulted from a personal act or omission of the person claiming a right to limit done with the intent to cause the loss due to delay or recklessly and with knowledge that such loss would probably result.

CHAPTER 13. TIME FOR SUIT

*Article 65. Period of time for suit*<sup>177</sup>

1. No judicial or arbitral proceedings in respect of claims or disputes arising from a breach of an obligation under this Convention may be instituted<sup>178</sup> after the expiration of a period of two years.

2. The period referred to in paragraph 1 of this article commences on the day on which the carrier has delivered the goods, or, in cases in which no goods have been delivered, or only part of the goods have been delivered, on the last day on which the goods should have been delivered. The day on which the period commences is not included in the period.

3. Notwithstanding the expiration of the period set out in paragraph 1 of this article, one party may rely on its claim as a defence or for the purpose of set-off against a claim asserted by the other party.

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<sup>175</sup> At its twentieth session, the Working Group decided, as part of its provisional decision on the level of the limitation of the carrier's liability, to replace the word "one" with the words "two and one-half" in square brackets in draft article 63 pending further consideration of the compromise proposal on the level of the limitation (see A/CN.9/642, paras. 163 and 166).

<sup>176</sup> As discussed at paras. 55 and 62 of A/CN.9/552, the suggestion to add a reference to art. 23 might need to be further discussed in the context of chapter 16.

<sup>177</sup> The title of the article has been changed to "Period of time for suit" from "Limitation of actions" so as to avoid concerns regarding the use of the phrase "limitation period", as discussed in the Working Group (see A/CN.9/642, paras. 169 to 171).

<sup>178</sup> The word "instituted" has been substituted for the word "commenced" as being more accurate and more easily capable of appropriate translation.

*Article 66. Extension of time for suit*<sup>179</sup>

The period<sup>180</sup> provided in article 65 shall not be subject to suspension or interruption, but the person against which a claim is made may at any time during the running of the period extend that period by a declaration to the claimant. This period may be further extended by another declaration or declarations.

*Article 67. Action for indemnity*

An action for indemnity by a person held liable<sup>181</sup> may be instituted after the expiration of the period provided<sup>182</sup> in article 65 if the indemnity action is instituted within the later of:

(a) The time allowed by the applicable law in the jurisdiction where proceedings are instituted; or

(b) Ninety days commencing from the day when the person instituting the action for indemnity has either settled the claim or been served with process in the action against itself, whichever is earlier.

*Article 68. Actions against the person identified as the carrier*

An action against the bareboat charterer or the person identified as the carrier pursuant to article 39, paragraph 2, may be instituted after the expiration of the period provided<sup>183</sup> in article 65 if the action is instituted within the later of:

(a) The time allowed by the applicable law in the jurisdiction where proceedings are instituted; or

(b) Ninety days commencing from the day when the carrier has been identified, or the registered owner or bareboat charterer has rebutted the presumption that it is the carrier, pursuant to article 39, paragraph 2.<sup>184</sup>

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<sup>179</sup> The title of the article has been changed to “Extension of time for suit” from “Extension of limitation period” so as to avoid concerns regarding the use of the phrase “limitation period”, as discussed in the Working Group (see A/CN.9/642, paras. 169 to 171).

<sup>180</sup> The word “limitation” has been deleted before the word “period” so agreed by the Working Group (see A/CN.9/642, paras. 169 to 171).

<sup>181</sup> The phrase “under this Convention” has been deleted from its former placement here since it was thought to have been improperly placed, and, in any event, unnecessary (see A/CN.9/642, para. 176).

<sup>182</sup> The word “provided” has been substituted for the phrase “referred to” for improved consistency.

<sup>183</sup> The word “provided” has been substituted for the phrase “referred to” for improved consistency.

<sup>184</sup> The Secretariat was requested by the Working Group to review the interplay between draft articles 68 and 39 (2) with a view to determining whether the reference to the bareboat charterer could be deleted. It is suggested that the reference is necessary, since the registered owner or the bareboat charterer could rebut the presumption at two different times (see A/CN.9/642, paras. 178 and 179).

## CHAPTER 14. JURISDICTION

*Article 69. Actions against the carrier*

Unless the contract of carriage contains an exclusive choice of court agreement that complies with article 70 or 75, the plaintiff has the right to institute judicial proceedings under this Convention against the carrier:

(a) In a competent court within the jurisdiction of which is situated one of the following places:

- (i) The domicile of the carrier;
- (ii) The place of receipt agreed in the contract of carriage;
- (iii) The place of delivery agreed in the contract of carriage; or
- (iv) The port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship; or

(b) In a competent court or courts designated by an agreement between the shipper and the carrier for the purpose of deciding claims against the carrier that may arise under this Convention.

*Article 70. Choice of court agreements*

1. The jurisdiction of a court chosen in accordance with article 69, paragraph (b), is exclusive for disputes between the parties to the contract only if the parties so agree and the agreement conferring jurisdiction:

(a) Is contained in a volume contract that clearly states the names and addresses of the parties and either (i) is individually negotiated; or (ii) contains a prominent statement that there is an exclusive choice of court agreement and specifies the sections of the volume contract containing that agreement; and

(b) Clearly designates the courts of one Contracting State or one or more specific courts of one Contracting State.

2. A person that is not a party to the volume contract is only bound by an exclusive choice of court agreement concluded in accordance with paragraph 1 of this article if:

(a) The court is in one of the places designated in article 69, paragraph (a);

(b) That agreement is contained in the contract particulars of a transport document or electronic transport record that evidences the contract of carriage for the goods in respect of which the claim arises;

(c) That person is given timely and adequate notice of the court where the action shall be brought and that the jurisdiction of that court is exclusive; and

(d) The law of the court seized<sup>185</sup> recognizes that that person may be bound by the exclusive choice of court agreement.<sup>186</sup>

<sup>185</sup> As agreed by the Working Group, the first variant of the series of alternatives appearing in A/CN.9/WG.III/WP.81 has been retained and the square brackets around it deleted, and the other alternatives have been deleted (see A/CN.9/642, paras. 185 to 190 and 192).

<sup>186</sup> Paragraphs 3 and 4 of this draft article as it appeared in A/CN.9/WG.III/WP.81 have been deleted, as agreed by the Working Group (see A/CN.9/642, paras. 191 to 192 and 205).

*Article 71. Actions against the maritime performing party*

The plaintiff has the right to institute judicial proceedings under this Convention against the maritime performing party in a competent court within the jurisdiction of which is situated one of the following places:

- (a) The domicile of the maritime performing party; or
- (b) The port where the goods are received<sup>187</sup> by the maritime performing party or the port where the goods are delivered by the maritime performing party, or the port in which the maritime performing party performs its activities with respect to the goods.

*Article 72. No additional bases of jurisdiction*

Subject to articles 74 and 75, no judicial proceedings under this Convention against the carrier or a maritime performing party may be instituted in a court not designated pursuant to articles 69 or 71.<sup>188</sup>

*Article 73. Arrest and provisional or protective measures*

Nothing in this Convention affects jurisdiction with regard to provisional or protective measures, including arrest. A court in a State in which a provisional or protective measure was taken does not have jurisdiction to determine the case upon its merits unless:

- (a) The requirements of this chapter are fulfilled; or
- (b) An international convention that applies in that State so provides.

*Article 74. Consolidation and removal of actions*

1. Except when there is an exclusive choice of court agreement that is binding<sup>189</sup> pursuant to articles 70 or 75,<sup>190</sup> if a single action is brought against both the carrier and the maritime performing party arising out of a single occurrence, the action may be instituted only in a court designated pursuant to both article 69 and article 71. If there is no such court, such action may be instituted in a court designated pursuant to article 71, subparagraph (b), if there is such a court.

<sup>187</sup> The word “initially” has been deleted from before the word “received” and the word “finally” has been deleted from before the word “delivered” because, while the terms were intended to clarify which maritime performing parties were covered in the case of trans-shipment (see A/CN.9/594, para. 142), the words “initially” and “finally” were, in fact, confusing, and could be misread to mean only the initial receipt of the goods under the contract of carriage and their initial delivery. A similar deletion of the terms has been recommended in draft article 20 (1).

<sup>188</sup> Since the full, rather than the partial, “opt-in” approach to draft article 77 was agreed upon by the Working Group, the phrase in square brackets “[or pursuant to rules applicable due to the operation of article 77, paragraph 2]” was unnecessary and could be deleted (see A/CN.9/642, paras. 194 and 205).

<sup>189</sup> The word “binding” has been substituted for the word “valid”, since it was regarded as more appropriate.

<sup>190</sup> Since the full, rather than the partial, “opt-in” approach to draft article 77 was agreed upon by the Working Group, the phrase in square brackets “[or pursuant to rules applicable due to the operation of article 77, paragraph 2]” was unnecessary and could be deleted (see A/CN.9/642, paras. 196 and 205).

2. Except when there is an exclusive choice of court agreement that is binding<sup>191</sup> pursuant to articles 70 or 75,<sup>192</sup> a carrier or a maritime performing party that institutes an action seeking a declaration of non-liability or any other action that would deprive a person of its right to select the forum pursuant to article 69 or 71 shall at the request of the defendant, withdraw that action once the defendant has chosen a court designated pursuant to article 69 or 71, whichever is applicable, where the action may be recommenced.

*Article 75. Agreement after dispute has arisen and jurisdiction when the defendant has entered an appearance*

1. After the dispute has arisen, the parties to the dispute may agree to resolve it in any competent court.

2. A competent<sup>193</sup> court before which a defendant appears, without contesting jurisdiction in accordance with the rules of that court, has jurisdiction.

*Article 76. Recognition and enforcement*

1. A decision made by a court having jurisdiction under this Convention shall be recognized and enforced in another Contracting State in accordance with the law of that Contracting State when both States have made a declaration in accordance with article 77.

2. A court may refuse recognition and enforcement:

(a) Based on the grounds for the refusal of recognition and enforcement available pursuant to its law; or

(b) If the action in which the decision was rendered would have been subject to withdrawal pursuant to article 74, paragraph 2, had the court that rendered the decision applied the rules on exclusive choice of court agreements of the State in which recognition and enforcement is sought.<sup>194</sup>

3. This chapter shall not affect the application of the rules of a regional economic integration organization that is a party to this Convention, as concerns the recognition or enforcement of judgments as between member states of the regional economic integration organization, whether adopted before or after this Convention.

*Article 77. Application of chapter 14*

The provisions of this chapter shall bind only Contracting States that declare<sup>195</sup> in accordance with article 94, that they will be bound by them.

<sup>191</sup> The word “binding” has been substituted for the word “valid”, since it was regarded as more appropriate.

<sup>192</sup> Since the full, rather than the partial, “opt-in” approach to draft article 77 was agreed upon by the Working Group, the phrase in square brackets “[or pursuant to rules applicable due to the operation of article 77, paragraph 2]” was unnecessary and could be deleted (see A/CN.9/642, paras. 196 and 205).

<sup>193</sup> The phrase “in a Contracting State” has been deleted since it already appears in the definition of “competent court” (see A/CN.9/642, paras. 197 to 198).

<sup>194</sup> Since the full, rather than the partial, “opt-in” approach to draft article 77 was agreed upon by the Working Group, the phrase in square brackets “[or pursuant to rules applicable due to the operation of article 77, paragraph 2]” was unnecessary and could be deleted (see A/CN.9/642, paras. 200 to 201 and 205).

<sup>195</sup> As agreed by the Working Group, Variant B of the text as it appeared in A/CN.9/WG.III/WP.81

## CHAPTER 15. ARBITRATION

*Article 78. Arbitration agreements*

1. Subject to this chapter, parties may agree that any dispute that may arise relating to the carriage of goods under this Convention shall be referred to arbitration.

2. The arbitration proceedings shall, at the option of the person asserting a claim against the carrier, take place at:

- (a) Any place designated for that purpose in the arbitration agreement; or
- (b) Any other place situated in a State where any of the following places is located:
  - (i) The domicile of the carrier;
  - (ii) The place of receipt agreed in the contract of carriage;
  - (iii) The place of delivery agreed in the contract of carriage; or
  - (iv) The port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship.<sup>196</sup>

3. The designation of the place of arbitration in the agreement is binding for disputes between the parties to the agreement if it is contained in a volume contract that clearly states the names and addresses of the parties and either

- (a) Is individually negotiated; or
- (b) Contains a prominent statement that there is an arbitration agreement and specifies the sections of the volume contract containing the arbitration agreement.

4. When an arbitration agreement has been concluded in accordance with paragraph 3 of this article, a person that is not a party to the volume contract is bound by the designation of the place of arbitration in that agreement only if:

- (a) The place of arbitration designated in the agreement is situated in one of the places referred to in article 69, subparagraph (a);
- (b) The agreement is contained in the contract particulars of a transport document or electronic transport record that evidences the contract of carriage for the goods in respect of which the claim arises;<sup>197</sup>
- (c) The person to be bound is given timely and adequate notice of the place of arbitration; and
- (d) Applicable law permits that person to be bound by the arbitration agreement.

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has been retained, and Variants A and C deleted, thus preserving the full “opt-in” approach (see A/CN.9/642, paras. 202 to 203 and 205). Further, the Working Group decided that such a declaration could be made at any time, and, as a drafting improvement, reference to the time of the declaration has been moved to draft article 94 (see A/CN.9/642, paras. 203, 205 and 260 to 261).

<sup>196</sup> The reference in this provision to the “places specified in article 69, subparagraph (a)” has been deleted, and the subparagraphs under draft article 69, subparagraph (a) have instead been reproduced here to ensure completeness, since it is possible that a Contracting State could opt in to chapter 15 without opting into chapter 14, in which draft article 69 is set out.

<sup>197</sup> The square brackets around draft article 78 (4)(b) have been deleted, and the subparagraph retained, as agreed by the Working Group (see A/CN.9/642, paras. 208 and 211).



5. The provisions of paragraphs 1, 2, 3, and 4 of this article are deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement to the extent that it is inconsistent therewith is void.

*Article 79. Arbitration agreement in non-liner transportation*

1. Nothing in this Convention affects the enforceability of an arbitration agreement in a contract of carriage in non-liner transportation to which this Convention or the provisions of this Convention apply by reason of:

- (a) The application of article 7;<sup>198</sup> or
- (b) The parties' voluntary incorporation of this Convention in a contract of carriage that would not otherwise be subject to this Convention.

2. Notwithstanding paragraph 1 of this article, an arbitration agreement in a transport document or electronic transport record to which this Convention applies by reason of the application of article 7 is subject to this Chapter unless:

- (a) The terms of such arbitration agreement are the same as the terms of the arbitration agreement in the charterparty or other contract of carriage excluded from the application of this Convention by reason of the application of article 7;<sup>199</sup> or
- (b) Such an arbitration agreement: (i) incorporates by reference the terms of the arbitration agreement contained in the charterparty or other contract of carriage excluded from the application of this Convention by reason of the application of article 7; (ii) specifically refers to the arbitration clause; and (iii) identifies the parties to and the date of the charterparty.<sup>200</sup>

*Article 80. Agreements for arbitration after the dispute has arisen*

Notwithstanding the provisions of this chapter and chapter 14, after a dispute has arisen, the parties to the dispute may agree to resolve it by arbitration in any place.

*Article 81. Application of chapter 15*

The provisions of this chapter shall be binding only on Contracting States that declare<sup>201</sup> in accordance with article 94, that they will be bound by them.

<sup>198</sup> As requested by the Working Group, consideration was given to adding to this provision a reference to draft article 6 (2), but after consideration, it was thought that that was not necessary, since draft article 6 (2) was covered under draft article 78, and did not need to be included in draft article 79 (see A/CN.9/642, paras. 212 and 214).

<sup>199</sup> Concerns were expressed in the Working Group that subparagraph (a) raised questions regarding how a claimant would know that the terms of the arbitration clause were the same as those in the charterparty once arbitration had begun (see A/CN.9/642, paras. 213 and 214).

<sup>200</sup> Concerns were expressed in the Working Group in respect of subparagraph (b) regarding the specificity of the prerequisites in order to bind a third party to the arbitration agreement, since those prerequisites might not meet with practical concerns and current practice (see A/CN.9/642, paras. 213 and 214). The Working Group may wish to consider that subparagraph (b) is useful as providing clarity and uniformity, even though it may not meet with current practices in some jurisdictions.

<sup>201</sup> As agreed by the Working Group, Variant B of the text as it appeared in A/CN.9/WG.III/WP.81 has been retained, and Variant A deleted, thus adopting the full "opt-in" approach (see A/CN.9/642, paras. 216 and 218). Further, the Working Group decided that such a declaration could be made at any time, and, as a drafting improvement, reference to the time of the declaration has been moved to draft article 94 (see A/CN.9/642, paras. 216, 218 and 260 to 261).

CHAPTER 16. VALIDITY OF CONTRACTUAL TERMS<sup>202</sup>*Article 82. General provisions*

1. Unless otherwise provided in this Convention, any term in a contract of carriage is void to the extent that it:

(a) Directly or indirectly excludes or limits the obligations of the carrier or a maritime performing party under this Convention;

(b) Directly or indirectly excludes or limits the liability of the carrier or a maritime performing party for breach of an obligation under this Convention; or

(c) Assigns a benefit of insurance of the goods in favour of the carrier or a person referred to in article 19.

2. Unless otherwise provided in this Convention, any term in a contract of carriage is void to the extent that it:

(a) Directly or indirectly excludes, limits, or increases the obligations under this Convention of the shipper, consignor, consignee, controlling party, holder, or documentary shipper; or

(b) Directly or indirectly excludes, limits, or increases the liability of the shipper, consignor, consignee, controlling party, holder, or documentary shipper for breach of any of its obligations under this Convention.<sup>203</sup>

*Article 83. Special rules for volume contracts*

1. Notwithstanding article 82, as between the carrier and the shipper, a volume contract to which this Convention applies may provide for greater or lesser rights, obligations, and liabilities than those set forth in this Convention provided that the volume contract contains a prominent statement that it derogates from this Convention, and:

(a) Is individually negotiated; or

(b) Prominently specifies the sections of the volume contract containing the derogations.

2. A derogation pursuant to paragraph 1 of this article shall be set forth in the volume contract and may not be incorporated by reference from another document.

3. A carrier's public schedule of prices and services, transport document, electronic transport record, or similar document is not a volume contract for the purposes<sup>204</sup> of this article, but a volume contract may incorporate the provisions of<sup>205</sup> such documents by reference as terms of the contract.

4. Paragraph 1 of this article does not apply to rights and obligations provided in articles 15, subparagraphs (a) and (b), 30 and 33 or to liability arising from the breach

<sup>202</sup> In order to improve the drafting, this chapter has been moved from its former placement as the penultimate chapter to a position immediately following the chapter on arbitration.

<sup>203</sup> Brackets around the phrase "or increases" in paragraphs 2 (a) and (b) have been deleted from the text as it appeared in A/CN.9/WG.III/WP.81 (agreed by the Working Group A/CN.9/621, paras. 159 and 160).

<sup>204</sup> As a drafting clarification, the phrase "for the purposes" has been substituted for the phrase "pursuant to paragraph 1".

<sup>205</sup> As a drafting clarification, the phrase "the provisions of" has been inserted into the text.

thereof, nor does paragraph 1 of this article apply to any liability arising from an act or omission referred to in article 64.

5. The terms of the volume contract that derogate from this Convention, if the volume contract satisfies the requirements of paragraph 1 of this article, apply between the carrier and any person other than the shipper provided that:

(a) Such person received information that prominently states that the volume contract derogates from this Convention and expressly consents<sup>206</sup> to be bound by such derogations; and

(b) Such consent is not solely set forth in a carrier's public schedule of prices and services, transport document, or electronic transport record.

6. The party claiming the benefit of the derogation bears the burden of proof that the conditions for derogation have been fulfilled.

*Article 84. Special rules for live animals and certain other goods*

Notwithstanding article 82 and without prejudice to article 83, the contract of carriage may exclude or limit the obligations or the liability of both the carrier and a maritime performing party if:

(a) The goods are live animals, but any such exclusion or limitation will not be effective if<sup>207</sup> the claimant proves that the loss of or damage to the goods, or delay in delivery resulted from an act or omission of the carrier or of a person referred to in article 19, or of a maritime performing party done recklessly and with knowledge that such loss or damage, or that the loss due to delay, would probably result; or

(b) The character or condition of the goods or the circumstances and terms and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement, provided that such contract of carriage is not related to ordinary commercial shipments made in the ordinary course of trade and no negotiable transport document or negotiable electronic transport record is issued for the carriage of the goods.

CHAPTER 17. MATTERS NOT GOVERNED BY THIS CONVENTION<sup>208</sup>

*Article 85. International conventions governing the carriage of goods by other modes of transport<sup>209</sup>*

Nothing in this Convention affects the application of any of the following international conventions in force at the time this Convention enters into force that regulate the liability of the carrier for loss of or damage to the goods:

(a) Any convention governing the carriage of goods by air to the extent that such convention according to its provisions applies to any part of the contract of carriage;

<sup>206</sup> As a drafting clarification, the phrase "expressly consents" has been substituted for the phrase "gives its express consent".

<sup>207</sup> As a drafting improvement, it is suggested that the phrase "but any such exclusion or limitation will not be effective if" should replace the phrase "except when".

<sup>208</sup> As a drafting improvement, it is suggested that chapters 17 and 18 as they appeared in A/CN.9/WG.III/WP.81 be combined into one chapter entitled "Matters not governed by this convention". As an additional drafting improvement, the order of the provisions has been adjusted from their previous order as set out in A/CN.9/WG.III/WP.81.

<sup>209</sup> The reference to "air" in the title has been changed to "other modes of transport" to reflect the new content of the provision.

(b) Any convention governing the carriage of goods by road to the extent that such convention according to its provisions applies to the carriage of goods that remain loaded on a vehicle carried on board a ship;

(c) Any convention governing the carriage of goods by rail to the extent that such convention according to its provisions applies to carriage of goods by sea as a supplement to the carriage by rail; or

(d) Any convention regarding the carriage of goods by inland waterways to the extent that such convention according to its provisions applies to a carriage of goods without transshipment both by inland waterways and sea.<sup>210</sup>

*Article 86. Global limitation of liability*

Nothing in this Convention affects the application of any international convention or national law regulating the global limitation of liability of vessel owners.<sup>211</sup>

*Article 87. General average*<sup>212</sup>

Nothing in this Convention affects the application of terms in the contract of carriage or provisions of national law regarding the adjustment of general average.

*Article 88. Passengers and luggage*<sup>213</sup>

This Convention does not apply to a contract of carriage for passengers and their luggage.<sup>214</sup>

*Article 89. Damage caused by nuclear incident*<sup>215</sup>

No liability arises under this Convention for damage caused by a nuclear incident if the operator of a nuclear installation is liable for such damage:

(a) Under the Paris Convention on Third Party Liability in the Field of Nuclear Energy of 29 July 1960 as amended by the additional Protocol of 28 January 1964, the Vienna Convention on Civil Liability for Nuclear Damage of 21 May 1963 as amended by the Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention of 21 September 1988, and as amended by the Protocol to Amend the 1963 Vienna Convention on Civil Liability for Nuclear Damage of 12 September 1997, or the Convention on Supplementary Compensation for Nuclear Damage of 12 September 1997, including any amendment to these conventions and any future convention in

<sup>210</sup> As requested by the Working Group, draft article 85 replaces the previous text as it appeared in A/CN.9/WG.III/WP.81, as proposed text to deal with the very narrow issue of specific conflicts that may arise with unimodal transport conventions (see A/CN.9/642, paras. 228 to 236).

<sup>211</sup> As requested by the Working Group, draft article 86 replaces the previous text as it appeared in A/CN.9/WG.III/WP.81, as proposed text to reflect the subject matter of the conventions in question (see A/CN.9/642, paras. 237 to 238).

<sup>212</sup> Since there is no longer a separate chapter on general average, the title of this provision can be adjusted to "general average".

<sup>213</sup> The title of this provision has been adjusted to better reflect its contents.

<sup>214</sup> As requested by the Working Group, draft article 88 replaces the previous text as it appeared in A/CN.9/WG.III/WP.81, as proposed text to appropriately deal with the issue of passengers and their luggage (see A/CN.9/642, paras. 239 to 243).

<sup>215</sup> The title of this provision has been adjusted to better reflect its contents. It was thought that it was not necessary to adjust the text of this provision, since, unlike draft article 88, if a nuclear operator is liable to the limit of its liability under the other conventions and there is additional damage over that amount, the carrier should not be liable for it under the draft convention.

respect of the liability of the operator of a nuclear installation for damage caused by a nuclear incident; or

(b) Under national law applicable to the liability for such damage, provided that such law is in all respects as favourable to persons that may suffer damage as either the Paris or Vienna Conventions or the Convention on Supplementary Compensation for Nuclear Damage.

## CHAPTER 18. FINAL CLAUSES

### *Article 90. Depositary*

The Secretary-General of the United Nations is hereby designated as the depositary of this Convention.

### *Article 91. Signature, ratification, acceptance, approval or accession*

1. This Convention is open for signature by all States [at [...] from [...] to [...] and thereafter] at the Headquarters of the United Nations in New York from [...] to [...].

2. This Convention is subject to ratification, acceptance or approval by the signatory States.

3. This Convention is open for accession by all States that are not signatory States as from the date it is open for signature.

4. Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

### *Article 92. Denunciation of other conventions*<sup>216</sup>

1. A State that ratifies, accepts, approves or accedes to this Convention and is a party to the International Convention for the Unification of certain Rules relating to Bills of Lading signed at Brussels on 25 August 1924; to the Protocol signed on 23 February 1968 to amend the International Convention for the Unification of certain Rules relating to Bills of Lading signed at Brussels on 25 August 1924; or to the Protocol to amend the International Convention for the Unification of certain Rules relating to Bills of Lading as Modified by the Amending Protocol of 23 February 1968, signed at Brussels on 21 December 1979 shall at the same time denounce that Convention and the protocol or protocols thereto to which it is a party by notifying the Government of Belgium to that effect, with a declaration that the denunciation is to take effect as from the date when this Convention enters into force in respect of that State.<sup>217</sup>

2. A State that ratifies, accepts, approves or accedes to this Convention and is a party to the United Nations Convention on the Carriage of Goods by Sea concluded at Hamburg on 31 March 1978, shall at the same time denounce that Convention by

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<sup>216</sup> As a drafting improvement, this provision has again been moved from its location in former chapter 18 of A/CN.9/WG.III/WP.81 to its previous position in the final chapter on “final clauses”.

<sup>217</sup> As agreed in the Working Group, the phrase “with a declaration that the denunciation is to take effect as from the date when this Convention enters into force in respect of that State” has been added to the end of paragraph 1 so as to render it consistent with the approach taken in article 31 (1) of the Hamburg Rules (see A/CN.9/642, paras. 224 to 227).

notifying the Secretary-General of the United Nations to that effect, with a declaration that the denunciation is to take effect as from the date when this Convention enters into force in respect of that State.<sup>218</sup>

3. For the purpose of this article, ratifications, acceptances, approvals and accessions in respect of this Convention by States parties to the instruments listed in paragraphs 1 and 2 of this article that are notified to the depositary after this Convention has entered into force<sup>219</sup> are not effective until such denunciations as may be required on the part of those States in respect of these instruments have become effective. The depositary of this Convention shall consult with the Government of Belgium, as the depositary of the instruments referred to in paragraph 1 of this article, so as to ensure necessary coordination in this respect.

*Article 93. Reservations*

No reservation is permitted to this Convention.<sup>220</sup>

*Article 94. Procedure and effect of declarations*

1. The declarations permitted by articles 77 and 81 may be made at any time. The declarations permitted by article 95, paragraph 1, and article 96, paragraph 2, shall be made at the time of signature, ratification, acceptance, approval or accession. No other declaration is permitted under this Convention.<sup>221</sup>

2. Declarations made at the time of signature are subject to confirmation upon ratification, acceptance or approval.

3. Declarations and their confirmations are to be in writing and to be formally notified to the depositary.

4. A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary.

5. Any State that makes a declaration under this Convention may modify or withdraw it at any time by a formal notification in writing addressed to the depositary. The modification or withdrawal is to take effect on the first day of the month following

<sup>218</sup> As agreed in the Working Group, the phrase “with a declaration that the denunciation is to take effect as from the date when this Convention enters into force in respect of that State” has been added to the end of paragraph 1 so as to render it consistent with the approach taken in article 31 (1) of the Hamburg Rules (see A/CN.9/642, paras. 224 to 227).

<sup>219</sup> The phrase “that are notified to the depositary after this Convention has entered into force” has been added to paragraph 3 in order to clarify the interaction between this provision and paragraphs 1 and 2, and the word “themselves” has been deleted from after the phrase “these instruments have” as redundant.

<sup>220</sup> The text has been revised to reflect that the Working Group has chosen the “opt-in” approach to the chapters on jurisdiction and arbitration, and it has agreed that no reservations are permitted to the draft convention (see A/CN.9/642, paras. 204, 205, 216 and 218).

<sup>221</sup> It is proposed that the time limit for making the various declarations permitted under the draft convention be included in a new first paragraph to draft article 94, and that the other paragraphs be renumbered accordingly. It will be recalled that the Working Group agreed that the declarations regarding the chapters on jurisdiction and arbitration should be able to be made at any time (see A/CN.9/642, paras. 252 and 254).

the expiration of six months after the date of the receipt of the notification by the depositary.

*Article 95. Effect in domestic territorial units*

1. If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

3. If, by virtue of a declaration pursuant to this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party is located in that State, this place of business, for the purposes of this Convention, is considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends.

4. If a Contracting State makes no declaration pursuant to paragraph 1 of this article, the Convention is to extend to all territorial units of that State.

*Article 96. Participation by regional economic integration organizations*

1. A regional economic integration organization that is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention. The regional economic integration organization shall in that case have the rights and obligations of a Contracting State, to the extent that that organization has competence over matters governed by this Convention. When the number of Contracting States is relevant in this Convention, the regional economic integration organization does not count as a Contracting State in addition to its member States which are Contracting States.

2. The regional economic integration organization shall, at the time of signature, ratification, acceptance, approval or accession, make a declaration to the depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that organization by its member States. The regional economic integration organization shall promptly notify the depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration pursuant to this paragraph.

3. Any reference to a “Contracting State” or “Contracting States” in this Convention applies equally to a regional economic integration organization when the context so requires.

*Article 97. Entry into force*

1. This Convention enters into force on the first day of the month following the expiration of [one year] [six months] after the date of deposit of the [twentieth] [fifth]<sup>222</sup> instrument of ratification, acceptance, approval or accession.

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<sup>222</sup> As agreed by the Working Group, the word “fifth” should replace the word “third” in draft article 97 (see A/CN.9/642, para. 271).

2. For each State that becomes a Contracting State to this Convention after the date of the deposit of the [twentieth] [fifth]<sup>223</sup> instrument of ratification, acceptance, approval or accession, this Convention enters into force on the first day of the month following the expiration of [one year] [six months] after the deposit of the appropriate instrument on behalf of that State.

3. Each Contracting State shall apply this Convention to contracts of carriage concluded on or after the date of the entry into force of this Convention in respect of that State.

*Article 98. Revision and amendment*

1. At the request of not less than one third of the Contracting States to this Convention, the depositary shall convene a conference of the Contracting States for revising or amending it.

2. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention is deemed to apply to the Convention as amended.

*[Article 99. Amendment of limitation amounts<sup>224</sup>*

1. The special procedure in this article applies solely for the purposes of amending the limitation amount set out in article 62, paragraph 1 of this Convention.

2. Upon the request of at least [one fourth]<sup>225</sup> of the Contracting States to this Convention,<sup>226</sup> the depositary shall circulate any proposal to amend the limitation amount specified in article 62, paragraph 1, of this Convention to all the Contracting States<sup>227</sup> and shall convene a meeting of a committee composed of a representative from each Contracting State to consider the proposed amendment.

3. The meeting of the committee shall take place on the occasion and at the location of the next session of the United Nations Commission on International Trade Law.

<sup>223</sup> As agreed by the Working Group, the word “fifth” should replace the word “third” in draft article 97 (see A/CN.9/642, para. 271).

<sup>224</sup> Text as set out in para. 7 of A/CN.9/WG.III/WP.39, including footnotes. The proposal is based upon the amendment procedure set out at art. 23 of the 2002 Protocol to the Athens Convention (“Athens Convention”) and at art. 24 of the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (“OTT Convention”). Similar approaches have been taken in a number of International Maritime Organization (“IMO”) conventions, such as the Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage, 1969; the Protocol of 1992 to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971; the Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 (not yet in force) (“2003 Protocol to the IOPC Fund 1992”); the Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims, 1976; and the International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996.

<sup>225</sup> Para. 23 (2) of the Athens Convention refers to “one half” rather than “one quarter” of the Contracting States.

<sup>226</sup> Para. 23 (2) of the Athens Convention includes the phrase “but in no case less than six” of the Contracting States.

<sup>227</sup> Para. 23 (2) of the Athens Convention also includes reference to Members of the IMO.



4. Amendments shall be adopted by the committee by a two-thirds majority of its members present and voting.<sup>228</sup>

5. When acting on a proposal to amend the limits, the committee will take into account the experience of claims made under this Convention and, in particular, the amount of damage resulting therefrom, changes in the monetary values and the effect of the proposed amendment on the cost of insurance.<sup>229</sup>

6. (a) No amendment of the limit pursuant to this article may be considered less than [five]<sup>230</sup> years from the date on which this Convention was opened for signature or less than [five] years from the date of entry into force of a previous amendment pursuant to this article.

(b) No limit may be increased so as to exceed an amount that corresponds to the limit laid down in this Convention increased by [six] per cent per year calculated on a compound basis from the date on which this Convention was opened for signature.<sup>231</sup>

(c) No limit may be increased so as to exceed an amount that corresponds to the limit laid down in this Convention multiplied by [three].<sup>232</sup>

7. Any amendment adopted in accordance with paragraph 4 of this article shall be notified by the depositary to all Contracting States. The amendment is deemed to have been accepted at the end of a period of [eighteen]<sup>233</sup> months after the date of notification, unless within that period not less than [one fourth]<sup>234</sup> of the States that were Contracting States at the time of the adoption of the amendment have communicated to the depositary that they do not accept the amendment, in which case the amendment is rejected and has no effect.

8. An amendment deemed to have been accepted in accordance with paragraph 7 of this article enters into force [eighteen]<sup>235</sup> months after its acceptance.

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<sup>228</sup> Para. 23 (5) of the Athens Convention is as follows: "Amendments shall be adopted by a two-thirds majority of the Contracting States to the Convention as revised by this Protocol present and voting in the Legal Committee ... on condition that at least one half of the Contracting States to the Convention as revised by this Protocol shall be present at the time of voting."

<sup>229</sup> This provision has been taken from para. 23 (6) of the Athens Convention. See, also, para. 24 (4) of the OTT Convention.

<sup>230</sup> Paras. 11 and 12 of A/CN.9/WG.III/WP.34 suggest that the time period in this draft paragraph should be seven years rather than five years.

<sup>231</sup> No similar provision is found in the OTT Convention. An alternative approach as suggested in paras. 11 and 12 of A/CN.9/WG.III/WP.34 could be: "No limit may be increased or decreased so as to exceed an amount which corresponds to the limit laid down in this Convention increased or decreased by twenty-one per cent in any single adjustment."

<sup>232</sup> No similar provision is found in the OTT Convention. An alternative approach as suggested in paras. 11 and 12 of A/CN.9/WG.III/WP.34 could be: "No limit may be increased or decreased so as to exceed an amount which in total exceeds the limit laid down in this Convention by more than one hundred per cent, cumulatively."

<sup>233</sup> Paras. 11 and 12 of A/CN.9/WG.III/WP.34 suggest that the time period in draft paras. 7, 8 and 10 should be twelve months rather than eighteen months.

<sup>234</sup> The OTT Convention specifies at para. 24 (7) "not less than one third of the States that were States Parties".

<sup>235</sup> Recent IMO conventions have reduced this period to twelve months when urgency is important. See, for example, the 2003 Protocol to the IOPC Fund 1992, at para. 24 (8).

9. All Contracting States are bound by the amendment unless they denounce this Convention in accordance with article 100 at least six months before the amendment enters into force. Such denunciation takes effect when the amendment enters into force.

10. When an amendment has been adopted but the [eighteen]-month period for its acceptance has not yet expired, a State that becomes a Contracting State during that period is bound by the amendment if it enters into force. A State that becomes a Contracting State after that period is bound by an amendment that has been accepted in accordance with paragraph 7 of this article. In the cases referred to in this paragraph, a State becomes bound by an amendment when that amendment enters into force, or when this Convention enters into force for that State, if later.]<sup>236</sup>

*Article 100. Denunciation of this Convention*

1. A Contracting State may denounce this Convention at any time by means of a notification in writing addressed to the depositary.

2. The denunciation takes effect on the first day of the month following the expiration of one year after the notification is received by the depositary. If a longer period is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

DONE at [...], this [...] day of [...], [...], in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed this Convention.

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<sup>236</sup> At its twentieth session, the Working Group decided, as part of its provisional decision on the level of the limitation of the carrier's liability, to place draft article 99 in square brackets pending further consideration of its deletion as part of the compromise proposal on the level of the limitation (see A/CN.9/642, paras. 163 and 166).

**K. Note by the Secretariat on the preparation of a draft convention on the carriage of goods [wholly or partly] [by sea] – Proposal of the delegation of the Netherlands to include “road cargo vehicle” in the definition of “container”**

**(A/CN.9/WG.III/WP.102) [Original: English]**

In preparation for the twenty-first session of Working Group III (Transport Law), the Government of the Netherlands submitted to the Secretariat the attached proposal.

The document in the attached annex is reproduced in the form in which it was received by the Secretariat.

**Annex**

**Proposal of the delegation of the Netherlands to include “road cargo vehicle” in the definition of “container”**

1. Trailers and other road cargo vehicles loaded with goods are frequently carried by sea on board ferries and other specialized vessels. In the view of the delegation of the Netherlands, the purpose of the most important provisions in the draft convention that apply to containers, would be well served by making these provisions equally applicable to road cargo vehicles when they are loaded with goods and carried by sea.

2. In this context, reference must first be made to an ambiguity in draft article 62,<sup>1</sup> paragraph 3. Article 62 is the provision that provides for the limitation of the carrier’s liability, and paragraph 3 states that the packages enumerated in the contract particulars as packed in the “article of transport”, are deemed to be the packages for limitation purposes. In other words, the package limitation applies to each such package. However, the term “articles of transport” refers in paragraph 3 only to “a container, pallet, or similar article of transport used to consolidate goods”. As a result, it is unclear whether this term also includes trailers and other road cargo vehicles. In the view of the delegation of the Netherlands, it must be clarified that it should.

3. Without such clarification, a ferry operator could regard a road cargo vehicle loaded with goods as a single unit for limitation purposes. This would mean that in cases where the road cargo vehicle operator is liable to its customer for cargo damage that occurred on board the ferry, it could only to a limited extent take recourse against the ferry operator.<sup>2</sup> In the view of the delegation of the Netherlands, this possible result from the current draft of article 62, paragraph 3, would not be fair. The road cargo vehicle operator should be entitled, by enumerating in the contract particulars the number of packages loaded in the road cargo vehicle, to take recourse against the ferry operator up to the package limitation for each package loaded in the vehicle. In practice, this would, in a great majority of cases, mean full recourse.<sup>3</sup>

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<sup>1</sup> The article numbering in this proposal is that of A/CN.9/WG.III/WP.101.

<sup>2</sup> The concern of the International Road Union (IRU) raised in paragraph 3 of A/CN.9/WG.III/WP.90, seems to refer to this point.

<sup>3</sup> The proposed clarification may also have another effect. If (in accordance with article 85 (c) of the draft convention) article 2 of the Convention on the Contract for the International Carriage of Goods by Road, 1956 (“CMR”) would apply to the carriage of goods that are loaded on a

4. A second question is whether, in cases where the number of packages loaded in the road cargo vehicle is enumerated in the contract particulars, the ferry operator may qualify this information under article 42. In this respect, the most relevant part of article 42 is paragraph 3 that applies to “closed containers”. If the above clarification of article 62, paragraph 3 is acceptable to the Working Group, it would be logical, in the view of the delegation of the Netherlands, to apply article 42, paragraph 3, to closed “road cargo vehicles” as well.
5. A next issue is whether, in view of the apparent similarity, in the context of the draft convention, of “a container loaded with goods” and “a road cargo vehicle loaded with goods”, it would be, in terms of drafting, convenient to extend the definition of “container” in article 1, paragraph 26, so as to include the term “road cargo vehicle” as well.
6. The other provisions in the draft convention that apply to containers and that would be materially affected should the definition of “container” be extended by the inclusion of “road cargo vehicle”, are:
- Article 26, paragraph 1, (goods allowed to be carried on deck). In this paragraph, it is provided that containers may be carried on deck when the deck is specially fitted to carry containers. It seems quite reasonable that the same rule should apply to inland road cargo vehicles. In such cases, decks must be equipped with pad eyes and/or other devices to which the chains can be fitted that are used to secure the vehicles. In practice, all specialized vehicle carriers are equipped with these devices.
  - Article 26, paragraph 2 (carrier’s liability for deck cargo). The rationale that the carrier’s liability for damage to goods carried in containers regardless of whether the container is carried on deck or under deck,<sup>4</sup> should also apply to the carrier’s liability for goods carried in road cargo vehicles.
  - Article 28, paragraph 3, (shipper-packed containers). This paragraph contains the rule that the contents of these containers must be properly stowed, lashed and secured. This provision already extends this requirement to shipper-packed trailers. It is only logical to apply this provision to road cargo vehicles other than trailers as well. Obviously, the word “trailer” must be omitted from this provision should the definition of “container” be extended to “road cargo vehicle”.
7. Other, less important provisions referring to containers would not be substantially affected by an extension of the definition of container<sup>5</sup> as proposed above.
8. For the reasons outlined in the previous paragraphs it is proposed:
- to include in article 1, paragraph 26, (definition of “container”) the words: “road cargo vehicle”.

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road cargo vehicle, and that vehicle is carried on board a ship, and, consequently, through the operation of article 2 of the CMR, article 62, paragraph 3, of the draft convention would indirectly apply to the relationship between the road cargo vehicle operator and its customer, the clarification may be beneficial to that customer as well.

<sup>4</sup> This rationale is that for several operational reasons, the carrier needs the flexibility to carry containers on deck or under deck and that, consequently, with regard to the carrier’s liability for damage to the goods, it should not make a difference for the cargo-interested party whether its container is placed on deck or under deck. In addition, carriage of containers on deck has become so common that it would be odd not to apply the ordinary liability rules to containers on deck.

<sup>5</sup> These are: article 1, paragraph 24 (definition of “goods”), articles 15 (c) and 18, paragraph 5 (a) (carrier provided containers must be fit for the voyage), article 43 (c) (contract particulars referring to container seals) and article 51, paragraph 2 (b) (unpacking of undeliverable goods packed in containers).

**L. Note by the Secretariat on the preparation of a draft convention on the carriage of goods [wholly or partly] [by sea] – Proposal by the delegations of Italy, the Republic of Korea and the Netherlands to delete any reference to “consignor” and to simplify the definition of “transport document”**

**(A/CN.9/WG.III/WP.103) [Original: English]**

In preparation for the twenty-first session of Working Group III (Transport Law), the Governments of Italy, Republic of Korea and the Netherlands submitted to the Secretariat the attached proposal.

The document in the attached annex is reproduced in the form in which it was received by the Secretariat.

**Annex**

**Proposal by the delegations of Italy, the Republic of Korea and the Netherlands to delete any reference to “consignor” and to simplify the definition of “transport document”**

1. Under the draft convention, on the cargo side, three persons are defined that are involved in the commencement of the contract of carriage: the shipper, the documentary shipper and the consignor. Broadly speaking, the shipper is the contractual counterpart of the carrier; the documentary shipper is, for all practical purposes, the FOB seller and the consignor is the person that actually delivers the goods to the carrier at the place of departure. In fact, the consignor may be a truck driver. The question arises whether all three of these persons need to be dealt with in the draft convention.

2. It is obvious that the draft convention cannot do without the shipper. Nor can the documentary shipper be omitted, because this person, without being the contractual counterpart of the carrier, assumes many of the shipper's rights and obligations. The shipper and the documentary shipper are, by definition, two different persons. The consignor, however, may be the same person as the shipper or the documentary shipper. Further, if the consignor is not the same person, it may be expected to act on the instruction of, or on behalf of, the shipper or the documentary shipper. In terms of article 35,<sup>1</sup> the consignor is always “any other person, including employees, agents and subcontractors, to which it (*i.e. the shipper and, pursuant to article 34, also the documentary shipper*) has entrusted the performance of any of its obligations”. In terms of article 1, paragraph 6 (b), a consignor is “a person that is retained, directly or indirectly, by a shipper (*or*) by a documentary shipper ... instead of by the carrier”.

3. It may be concluded from paragraph 2 above that the consignor is an implementer of obligations of the shipper or documentary shipper. The shipper or the documentary shipper is responsible for its acts and omissions. Furthermore, nowhere in the draft convention is provision made for any obligation that is placed separately upon the

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<sup>1</sup> The article numbering in this proposal is that of A/CN.9/WG.III/WP.101.

consignor. This means that, unless the consignor is the shipper or the documentary shipper, a consignor has no obligations of its own<sup>2</sup> under the convention.

4. The consignor has, however, one right under the draft convention. As the actual deliverer of the goods to the carrier, it is, pursuant to article 37, entitled to obtain a receipt upon its delivery of the goods to the carrier. It seems that for this legal purpose only, the concept of “consignor” is introduced in the draft convention. In the view of the delegations of Italy, the Republic of Korea and the Netherlands, this purpose is of insufficient importance for retaining the concept of “consignor” in the draft convention. The delegations listed above would like to point out that:

- the principal that the consignor, i.e. the shipper or, with the shipper’s consent, the documentary shipper, is already entitled to a transport document, in which, according to standard maritime practice, the receipt function is integrated;
- no practical difficulties are reported on the issue of a receipt for the consignor that might require that this subject be dealt with on a uniform basis in a convention; and
- if and to the extent that at the national or local level there are such difficulties, they most probably could be more appropriately dealt with at such national or local level. In this regard, it must be noted that the convention has left matters of agency to national law generally.

5. An additional advantage of deleting the concept of “consignor” in the draft convention is that confusion with other transport conventions and some national law would be avoided. In the Convention for the Unification of Certain Rules for the International Carriage by Air (“the Montreal Convention”) and the Uniform Rules concerning the Contract for International Carriage of Goods by Rail, Appendix to the Convention concerning International Carriage by Rail, as amended by the Protocol of Modification (“CIM-COTIF 1999”), the term “consignor” is used as meaning the contractual counterpart of the carrier. Some national laws do the same or use the term “consignor” when a reference to the FOB seller is meant.

6. The entitlement of the consignor to obtain a receipt is the only reason that a split is made in the definition of “transport document” between transport documents that are receipts only and transport documents in which the receipt function is integrated with the other function of the document, namely evidence of the contract of carriage. As a result, when the concept of consignor is omitted from the draft convention, the definition of transport document can be simplified as well. Then, the “receipt only” function of the transport document is no longer needed under the convention. If the definition of transport document is adjusted accordingly, this definition would again follow the current practice of integration of the receipt function and evidence of contract function in maritime transport documents. In addition, maybe even more important, the understanding of several articles of chapter 8 would improve, because it is doubtful whether those articles are wholly appropriate for a transport document that is receipt only.

7. In the view of the delegations of Italy, the Republic of Korea and the Netherlands, removal of the concept of “consignor” from the draft convention contributes to making the convention less complicated. This removal also makes it possible to simplify the term “transport document” and to align this term with actual maritime practice. By doing

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<sup>2</sup> Therefore, the reference to the consignor in article 82, paragraph 2 (a) and (b) (validity of contractual terms), must be regarded as a drafting error.

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so, the quality of the convention as a whole will be increased. For this reason, it is proposed to:

- (a) delete article 1, paragraph 10 (definition of “consignor”)
  - (b) request the Secretariat to
    - adjust article 1, paragraphs 15 and 19 (definitions of “transport document” and “electronic transport record”) to the effect that such document or record both evidence receipt of the goods under a contract of carriage and evidence or contain the contract;
    - adjust article 37 to the effect that the right of the consignor to obtain a receipt is removed;
    - adjust any further article wherein a reference to “consignor” is made,<sup>3</sup> either by deleting the term “consignor”, or, where this word is just descriptive, to find appropriate replacement language.
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<sup>3</sup> These articles are: articles 1, paragraph 6 (b) (definition of performing party), 7 (application to certain parties), 12, paragraph 3 (hand over of goods to authorities), 33 (a) (dangerous goods), 35 (liability of shipper for other persons), 41, paragraph 3 (deficiencies in contract particulars) and 82, paragraph 2 (a) and (b) (validity of contractual terms).





## II. PROCUREMENT

### A. Report of the Working Group on Procurement on the work of its twelfth session (Vienna, 3-7 September 2007)

(A/CN.9/640) [Original: English]

#### CONTENTS

	<i>Paragraphs</i>
I. Introduction . . . . .	1-5
II. Organization of the session . . . . .	6-11
III. Deliberations and decisions . . . . .	12-14
IV. Consideration of proposals for the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services . . . . .	15-95
A. Draft provisions addressing the use of electronic communications in public procurement (A/CN.9/WG.I/WP.54, paras. 4-25) . . . . .	17-43
1. Communications in procurement: article [5 bis] and Guide to Enactment text (A/CN.9/WG.I/WP.54, paras. 4-10) . . . . .	17-27
2. Electronic submission of tenders: article 30 and Guide to Enactment text (A/CN.9/WG.I/WP.54, paras. 11-12) . . . . .	28-29
3. Publicity of legal texts and information on forthcoming procurement opportunities: article 5 and Guide to Enactment text (A/CN.9/WG.I/WP.54, paras. 13-16) . . . . .	30-36
4. Other provisions on the Model Law and the Guide (A/CN.9/WG.I/WP.54, paras. 17-25) . . . . .	37-43
B. Draft provisions addressing abnormally low tenders: article 12 bis (A/CN.9/WG.I/WP.54, paras. 26-28) . . . . .	44-55
C. Draft provisions to enable the use of electronic reverse auctions in public procurement under the Model Law (A/CN.9/WG.I/WP.55) . . . . .	56-92
1. Conditions for the use of electronic reverse auctions: draft article 22 bis and Guide to Enactment text (A/CN.9/WG.I/WP.55, paras. 3-9) . . . . .	56-61
2. Procedures in the pre-auction and auction stages: draft article 51 bis to sexies (A/CN.9/WG.I/WP.55, paras. 10-33) . . . . .	62-89
3. Consequential changes to provisions of the Model Law: record of procurement proceedings (article 11 of the Model Law) (A/CN.9/WG.I/WP.55, paras. 34-37) . . . . .	90-92
D. Draft provisions to enable the use of framework agreements in public procurement under the Model Law (A/CN.9/WG.I/WP.52 and WP.56, annex, paras. 2-9) . . . . .	93-95
1. General remarks . . . . .	93

2. Proposed article [51 octies]. General provisions (A/CN.9/WG.I/WP.52, paras. 10-17) . . . . . 94-95

Annex

- Tentative timetable and agenda for the Working Group's thirteenth to fifteenth sessions agreed at the Working Group's eleventh session . . . . .

## 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 eleventh sessions (New York, 4-8 April 2005, Vienna, 7-11 November 2005, New York, 24-28 April 2006, Vienna, 25-29 September 2006, and New York, 21-25 May 2007, respectively) (A/CN.9/575, A/CN.9/590, A/CN.9/595, A/CN.9/615 and A/CN.9/623), 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. At its eleventh session, the Working Group came to preliminary agreement on the draft revisions to the Model Law and the Guide that would be necessary to accommodate the use of electronic communications and technologies (including ERAs) in the Model Law. At that session, the Working Group decided that at its twelfth session it would proceed with further consideration of those draft revisions (A/CN.9/623, para. 13).

3. At its seventh, eighth, tenth and eleventh 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 eleventh session, the Working Group considered the revised provisions on ALTs and preliminarily agreed on their location in the Model

Law, taking into account that the issue should be considered not only in the context of tendering proceedings, and that risks of ALTs should be examined and addressed by the procuring entity at any stage of the procurement, including through qualification of suppliers. At that session, the Working Group decided that at its twelfth session it would proceed with consideration of the proposals to the revised provisions made at its eleventh session (A/CN.9/623, paras. 33-41).

4. At its eleventh session, the Working Group also held a preliminary exchange of views on drafting materials for the Model Law on the use of framework agreements, submitted by the Secretariat pursuant to the request by the Working Group at its tenth session (A/CN.9/615, para. 11), and decided to consider them in depth at its next session (A/CN.9/623, para. 12). The Working Group deferred to a future session consideration of documents A/CN.9/WG.I/WP.45 and Add.1 on suppliers' lists and WP.52/Add.1 on dynamic purchasing systems.

5. At its thirty-eighth session, in 2005, thirty-ninth session, in 2006, and fortieth session, in 2007, 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, and A/62/17 (Part I), para. 170). 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). Pursuant to that recommendation, the Working Group, at its tenth session, 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). 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).

## II. Organization of the session

6. The Working Group, which was composed of all States members of the Commission, held its twelfth session in Vienna from 3 to 7 September 2007. The session was attended by representatives of the following States members of the Working Group: Algeria, Austria, Belarus, Bolivia, Cameroon, Canada, China, Colombia, Czech Republic, Egypt, France, Germany, Iran (Islamic Republic of), Latvia, Lebanon, Mexico, Morocco, Nigeria, Norway, Paraguay, Poland, Republic of Korea, Russian Federation, Senegal, Singapore, Spain, Thailand, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

7. The session was attended by observers from the following States: Angola, Brazil, Dominican Republic, Indonesia, Nicaragua, Philippines, Portugal, Qatar, Romania, Slovenia, Sweden, Syrian Arab Republic, Tunisia and Turkey.

8. 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*: European Commission;
  - (c) *International non-governmental organizations invited by the Working Group*: International Law Institute (ILI) and the European Law Students' Association (ELSA).
9. The Working Group elected the following officers:
- Chairman*: Mr. Tore WIWEN-NILSSON (Sweden)<sup>1</sup>  
*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.53);
  - (b) Drafting materials addressing the use of electronic communications in public procurement, publication of procurement-related information, and abnormally low tenders: note by the Secretariat (A/CN.9/WG.I/WP.54);
  - (c) Drafting materials for the use of electronic reverse auctions in public procurement: note by the Secretariat (A/CN.9/WG.I/WP.55);
  - (d) Proposal by the United States regarding issues of framework agreements, dynamic purchasing systems, and anti-corruption measures (A/CN.9/WG.I/WP.56);
  - (e) Drafting materials for the use of framework agreements and dynamic purchasing systems in public procurement: note by the Secretariat (A/CN.9/WG.I/WP.52 and Add.1) (detailed consideration of the note was deferred to a future session at the eleventh session of the Working Group (see A/CN.9/623, para. 12)); and
  - (f) Issues arising from the use of suppliers' lists, including drafting materials: note by the Secretariat (A/CN.9/WG.I/WP.45 and Add.1) (the consideration of the note was deferred to a future session at the previous three sessions of the Working Group (see A/CN.9/595, para. 9, A/CN.9/615, para. 10, and A/CN.9/623, para. 12)).
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.

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<sup>1</sup> Elected in his personal capacity.

### **III. Deliberations and decisions**

12. At its twelfth 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 10 (a)-(e) above as a basis for its deliberations.

13. The Working Group heard an introduction of the first part of the proposal contained in document A/CN.9/WG.I/WP.56, addressing framework agreements, and delegates had an opportunity to pose questions about the proposal. It deferred detailed consideration of that document as well as documents A/CN.9/WG.I/WP.45 and Add.1 and A/CN.9/WG.I/WP.52 and Add.1.

14. The Working Group requested the Secretariat to revise the drafting materials contained in documents A/CN.9/WG.I/WP.54 and 55, reflecting the deliberations at its twelfth session, for its consideration at the next session. The Working Group agreed to start its deliberations at the next session with discussion of issues of framework agreements on the basis of the note by the Secretariat (A/CN.9/WG.I/WP.52 and Add.1) and the proposal contained in document A/CN.9/WG.I/WP.56.

### **IV. Consideration of proposals for the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services**

15. The Working Group noted that the Commission, at the first part of its fortieth session (Vienna, 25 June-12 July 2007), had 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). The view was expressed that the time frame for the project should be considered taking into account the number of complex issues that the Working Group faced. The view was expressed that the progress so far made in the Working Group had been commendable especially in the context of intergovernmental negotiations of legal texts.

16. The prevailing view was that the Working Group would need time beyond 2009 to complete the project. The idea of basing its work on a concrete timetable and agenda for each session was considered useful. The Working Group adopted the timeline for its thirteenth to fifteenth sessions annexed to the present report and agreed to bring it to the attention of the Commission at its forty-first session, together with a proposal for completion of its work programme. It was also agreed that an updated timeline should be brought to the Commission's attention on a regular basis.

## **A. Draft provisions addressing the use of electronic communications in public procurement (A/CN.9/WG.I/WP.54, paras. 4-25)**

### **1. Communications in procurement: article [5 bis] and Guide to Enactment text (A/CN.9/WG.I/WP.54, paras. 4-10)**

17. It was agreed that the exceptions to the general rules regulating communications in procurement (contained in paragraph (2) of the draft article) should be limited to those expressly listed by cross reference to other articles of the Model Law text, and accordingly that the general description in the second set of square brackets in paragraph (2) should be deleted.

18. The requirement that no means of communications could be used by the procuring entity unless it had been reserved in the solicitation documents or their equivalent, contained in paragraph 3 (b), was observed to be too stringent. It was explained that in some long-term procurement proceedings, such as framework agreements, and in the light of rapid technological developments, a procuring entity would not always be in a position to identify at the outset of the procurement proceedings all means that would be used to communicate information. The suggestion was made that the provisions should be drafted in more flexible terms to allow the procuring entity to switch to another means of communication, even if they were not explicitly specified at the outset of the procurement proceedings, without fear of review or challenge from suppliers or contractors.

19. It was suggested to this end that the text in square brackets in the chapeau to paragraph (3) of draft article [5 bis] should be amended, replacing the word “procurement” before the words “covered by this Law” with the word “procedures”, with a consequential addition to the first sentence of paragraph (5) of the proposed Guide text of the words “required procedures for” before the words “a given procurement”. Alternatively, the addition of the words “required by this Law” after the word “information” in paragraph 3 (b) was proposed. The aim of these proposed amendments would be to enable the use of means other than those in the solicitation documents for communications not mandated by the Model Law.

20. Concerns were expressed about these suggestions. Some delegates were of the view that the chapeau provisions in square brackets of paragraph (3) should be deleted as unnecessarily confusing in the light of the clear scope of the Model Law. It was suggested that the Guide, if necessary, could reiterate the scope of the Model Law in the context of paragraph (3) of article [5 bis].

21. It was also stressed that transparency in the procurement process, including as regards the means of communications to be used, was an important safeguard for suppliers and contractors, and promoted their participation. Consequently, the solicitation documents should indeed set out the relevant means of communication. Furthermore, the risk could arise of discrimination being introduced should procuring entities change the means of communication during the procurement process.

22. In response, it was observed that the safeguards (including those aimed at preventing discrimination) contained in paragraph (4) of the draft article would be continuing obligations throughout the procurement concerned, and that there were provisions in the Model Law that allowed the procuring entity to amend the solicitation documents (article 28 (2)), provided that prompt notification of any

amendment was given to all suppliers. The difficulties of defining long-term procurement for which changes in means of communication as suggested might be justifiable were also stressed.

23. The prevailing view was that the provisions as drafted provided sufficient flexibility to procuring entities and that the transparency requirements should not be weakened by allowing amendments to the means of communication chosen during the process, unless this possibility had been expressly envisaged by the procuring entity in the solicitation documents.

24. It was therefore agreed that the words in the square brackets in the chapeau provisions of paragraph (3) should be deleted and paragraph (3) (b) should not be amended. It was also agreed that the Guide should address the issues raised (see paragraph 26 (d) below).

25. As regards paragraph (5), it was noted that ensuring the confidentiality of information submitted by suppliers was a critical element in promoting public confidence in the use of electronic communications, and consequently enabling their use where appropriate. The understanding was that the Model Law should provide basic principles, supplemented by detailed explanations in the Guide, to the effect that procuring entities could introduce electronic communications only when the necessary safeguards including confidentiality were in place. The point was made that the actual mechanics of safeguards were technical matters beyond the scope of the Model Law. Nevertheless, the text should establish a mechanism to ensure the confidentiality of information.

*Guide to Enactment text*

26. The view was expressed that it would be preferable for the Working Group to consider the text for the Guide together with the provisions of the Model Law as soon as the main issues of principle had been agreed by the Working Group.

27. As regards the proposed text for the Guide, it was suggested that:

(a) The potential inconsistency between the reference in paragraph 1 of the Guide text to “communications in the course of judicial proceedings or administrative review proceedings”, which were governed by their own rules, and the statement in paragraph (1) of draft article [5 bis] that the means of communication chosen by the procuring entity would include those used in review proceedings under the Model Law, should be eliminated;

(b) The principle contained in article 28 (2) that all relevant information, such as clarifications and modifications to solicitation documents, should be made available to all potential suppliers or contractors for the procurement concerned should be reflected as appropriate in the fourth sentence of paragraph (3) of the Guide text;

(c) Pending the Working Group’s consideration of article 52, the reference in paragraph 4 of the Guide text in square brackets should be retained (i.e. to a challenge under article 52 of the Model Law to the selection of the means of communication by the procuring entity);

(d) Paragraph 5 of the Guide text should discuss the possibility that a procuring entity might change the means of communication set out in the solicitation documents,

should explain in which exceptional procurements and circumstances such a change would be justifiable (such as technological development), and should stress that the safeguards contained in draft article 5 bis (4) and article 28 (2), as regards prompt communication of all relevant changes to all concerned, would apply;

(e) At the end of paragraph 11, the Guide text should recommend that ideally no fees should be charged for access to, and the use of, information systems;

(f) The reference in paragraph 13 of the Guide text in square brackets to virus-scanning software should be deleted;

(g) In the last sentence of paragraph 13, additional reference be made to the public as relevant stakeholders in the context of building confidence in procurement proceedings, especially where the question of third-party involvement was concerned; and

(h) To retain in paragraph 14 appropriate cross-references to the Guide text that would accompany article 30 (5), notably as regards confidentiality of submissions.

**2. Electronic submission of tenders: article 30 and Guide to Enactment text (A/CN.9/WG.I/WP.54, paras. 11-12)**

*Article 30 (5)*

28. The proposed draft article 30 (5) was accepted without amendment.

*Guide to Enactment text*

29. It was agreed, as regards paragraph (3 bis), that the current presentation of the issues was sufficient and that no further cost-benefit discussion should be included. It was also agreed that reference should be made at the end of the paragraph to additional regulations that might be required to address the issues raised. As regards paragraph (3 ter), it was noted during the discussion that the word “strictly” should be deleted from the fourth sentence. It was decided that all the square brackets in the text should be removed.

**3. Publicity of legal texts and information on forthcoming procurement opportunities: article 5 and Guide to Enactment text (A/CN.9/WG.I/WP.54, paras. 13-16)**

30. The meaning of the reference to “other legal texts” in paragraph (1) was questioned. Various suggestions were made to make the ambit of the paragraph clearer (i.e. to state unambiguously that it referred to procurement law and procurement regulation of general application, rather than to judicial decisions or administrative rulings, which were addressed in paragraph (2)). It was agreed that a clear statement of the items that would be covered by the paragraph was required, and explanation as necessary in the Guide, taking account of the different ways in which the law was provided in different systems and the need for terms that would be equivalent in various languages.

31. The need for paragraph (1) was questioned, given that the procurement law (as any law) would have to be published in any event. In response, it was noted that the aim of the provision was to ensure that the texts concerned were accessible as a package, and went beyond a simple requirement to publish laws.



32. The need for less stringent publication standards for the judicial decisions and administrative rulings in paragraph (2) was queried. Support was expressed for the approach in the current draft that the strict requirements of accessibility and systematic maintenance found in paragraph (1) should not apply to information covered in paragraph (2). Reference was made to earlier discussions on the subject and it was noted, in addition, that as judicial review might lead to the revocation of administrative rulings, publication before appeals were exhausted could compromise suppliers' rights and their subsequent participation in procurement proceedings.

33. It was agreed that the introductory words "notwithstanding the provisions of paragraph (1) of this Law" should be deleted from paragraph (2), because no items were included in both paragraphs.

34. The following wording was agreed to replace paragraph (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."

*Guide to Enactment text*

35. The concern was expressed that the suggested text for paragraph (3) of article 5 weakened the requirements of the provision, which would be undesirable in the light of the importance of the publication of information on forthcoming procurement opportunities for prompting procurement planning, and in order to allow potential suppliers to prepare for future opportunities in regional markets. It was also observed that recourse to single-source procurement had been seen to be the result of poor procurement planning. For these reasons, it was noted, the publication of future procurement opportunities had been made mandatory in some systems. Although the text of paragraph (3) of article 5 would not be mandatory, it was agreed that the Guide text should support and strengthen the recommendation that this information should be published. In addition, it was suggested that the sequence of presenting materials in paragraph (6) of the proposed Guide should be reordered, so that the guidance started by explaining the benefits of such publication and thereafter discussed why the provision was not mandatory. It was also suggested that the Guide might recommend the period that publication of forthcoming opportunities might cover.

36. As regards paragraph (3) of the Guide, it was suggested that the words "without charge" should be deleted. Recalling the relevant consideration in the context of draft article [5 bis] (see paragraph 26 (e) above) and in order to ensure consistency in the Guide in treating similar issues, the Working Group agreed that the Guide should state that ideally no fees should be charged for access to laws, regulations and other procurement law texts. However, it was recognized that not all jurisdictions in fact provided free access to laws and regulations.

**4. Other provisions of the Model Law and the Guide (A/CN.9/WG.I/WP.54, paras. 17-25)**

*Article 11 and the text for the Guide to accompany the article*

37. The Working Group noted that it would consider the provisions in article 11 and relevant guidance addressing electronic communications when considering the record of the procurement proceedings as a whole in due course.

*Article 33 (2) and the text for the Guide to accompany the relevant provisions*

38. It was agreed that the second sentence of paragraph (2) of article 33 should read as follows: “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.”

39. It was also agreed that the Guide should address the meaning of the term “contemporaneously” in this context, and in particular how the requirement for full and contemporaneous notification could be satisfied using information technology systems.

*Liability for failures of procuring entities’ systems*

40. It was agreed that the Model Law should not address the general issue of potential liability of a procuring entity should its automatic systems fail. The general understanding was that article 30 (3) gave sufficient flexibility to procuring entities to extend the deadlines for submission of tenders inter alia in case of system failure and no changes to that article were necessary. It was also agreed that the issue of system failure after submission of tenders did not require separate provision in the Model Law. The suggestion was made that the Guide might provide more guidance on this issue, addressing the requirements upon procuring entities and the risks of protests by suppliers.

41. The Working Group agreed to reflect in the Guide that failures in automatic systems inevitably occurred; where they occurred, the procuring entity had to determine whether the system could be re-established sufficiently quickly to proceed with the procurement and if so, to decide whether any extension of the deadline for submission of tenders would be necessary. If, however, the procuring entity determined that a failure in the system would prevent it from proceeding with the procurement, the procuring entity could cancel the procurement and announce new procurement proceedings. It was suggested that the Guide should reflect that failures occurring due to reckless or intentional actions by the procuring entity, as well as decisions taken by the procuring entity to address issues arising from failures of automatic systems, could give rise to a right of review by aggrieved suppliers and contractors under article 52 of the Model Law or to other recourse, depending on the ambit of the recourse provisions concerned.

*Revisions to the text for the Guide accompanying article 36*

42. The Working Group noted that it would consider guidance to accompany article 36 when finalizing the revisions to that article in due course.

*Introductory remarks on the use of electronic procurement under the Model Law in general*

43. The Working Group noted the approach suggested.

**B. Draft provisions addressing abnormally low tenders: article 12 bis (A/CN.9/WG.I/WP.54, paras. 26-28)**

44. Strong support was expressed for deletion of paragraphs (1) (a) and (2) from the draft article. It was stated that the provisions were unnecessary, in that general provisions of law already gave the procuring entity the right to reject ALTs irrespective of whether it had been reserved in the solicitation or equivalent documents, and for good governance reasons, this right should not be fettered by introducing additional requirements. It was also said that the procuring entity, by intentionally not reserving such a right in the solicitation or equivalent documents, could open the possibility of accepting ALTs to accommodate the interests of some suppliers, and that this situation should be avoided.

45. On the other hand, it was pointed out that deleting these paragraphs could indicate an inconsistent approach compared with that taken in article 12 (1) of the Model Law. Article 12 (1) provided that the procuring entity could reject all tenders only if the right to do so had been expressly reserved in the solicitation documents. The Working Group recalled its consideration of the issue at its eleventh session (A/CN.9/623, para. 36). The view was expressed that article 12 bis addressed separate issues and factual circumstances, and there would be no inconsistency in approach simply because the provisions were different. Another view was that, although the approach taken in articles 12 and 12 bis was not consistent with some local regulations, paragraphs (1) (a) and (2) might be retained in article 12 bis, in the light of desirability of ensuring consistency in treating similar issues in the Model Law.

46. Concern was also expressed that, unless the ground relied upon for rejecting a tender as abnormally low had been specified either among qualification or evaluation criteria in the solicitation or equivalent documents, there would be no justification for a procuring entity's rejection of a tender as abnormally low. Cross-reference in this regard was made in particular to the relevant provisions of article 6 (3) of the Model Law.

47. For this reason, support was expressed for the retention of paragraphs (1) (a) and (2). The retention of these provisions was also considered important for reasons of transparency, especially in the context of international procurement. Otherwise, it was explained, the revised Model Law would introduce the possibility of allowing rejection of responsive tenders by qualified suppliers, but without providing sufficient safeguards against arbitrary decision-taking on the part of procuring entities.

48. The view prevailed that both paragraphs (1) (a) and (2) should be deleted for the reasons set out in paragraph 44 above, but that the Guide should draw the attention of procuring entities to the desirability of specifying in the solicitation or equivalent documents that tenders could be rejected on the basis that they were abnormally low.

49. It was noted that the current article 52 excluded any decision of a procuring entity to reject all tenders under article 12 from review, and questions of consistency between articles 12 and 12 bis in this particular respect were also raised. It was agreed that a final decision on the issue of review should be taken at a later stage, when article 52 would be considered as a whole. Strong support was, however, expressed for including decisions under article 12 bis within the scope of review under article 52, as an important safeguard against abuse in the exercise of discretion on the part of procuring entities when considering whether to reject an ALT.

50. The need for a definition of an ALT in the Model Law was stressed, to avoid subjectivity and any abuse on the part of procuring entities. It was emphasized that, left undefined, the concept in the Model Law might cause more harm than good. On the other hand, difficulties in defining the term were highlighted. Support was expressed for the current approach of not linking an ALT exclusively to price but rather to a broader notion of performance risk. The extensive discussion of the relevant issues at the Working Group's previous sessions was recalled.

51. The question was also raised that using the term "abnormally low tender" when the concept was not linked to price but rather to performance risk was confusing and another term, such as "unsustainable bids", "inadequate or unrealistic tenders", should be found, to convey better the intended meaning.

52. The view prevailed that clarifying the term ALT in the chapeau provisions of paragraph (1) would be sufficient, by referring to the constituent elements of tender in the context of the price that might raise concern on the part of the procuring entity as regards performance risks.

53. It was also questioned whether linking ALTs only to the risk of performance of procurement contracts, as the draft currently did, was sufficient. It was stressed that it was necessary to acknowledge that ALTs might arise from criminal activities, such as money-laundering. The Working Group noted that the text for the Guide to accompany article 12 bis (as proposed in document A/CN.9/WG.I/WP.50, paragraph 49 (5)) observed that procuring entities might be required to reject bids in which there were suspicions of money-laundering or other criminal activity under other law. It was agreed that a discussion of these questions in the Guide would be sufficient.

54. The Working Group agreed to make the following amendments to draft article 12 bis:

(a) To redraft the chapeau provisions of paragraph (1) as follows: "The procuring entity may reject a tender, proposal, offer, quotation or bid if the procuring entity has determined that the submitted price with constituent elements of a tender, proposal, offer, quotation or bid 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..."; and

(b) To delete the words "that submitted such a tender, proposal, offer, quotation or bid" from paragraph (1) (b).

55. It was also suggested that the phrase in paragraph 1 (c) that the procuring entity "continues, on a reasonable basis, to hold those concerns" should be revised, to require greater objectivity in the justification for the concerns. On the other hand, it was observed that the "reasonable basis" test had been included precisely because it was based on the notion of objectivity, and doubt was expressed as to whether drafting a more objective statement would be feasible. It was therefore agreed that as long as remedies against unjustifiable and unreasonable decisions by procuring entities were available, the reference to "reasonable basis" alone was sufficient. However, the Guide should stress the requirement of objectivity.

## C. Draft provisions to enable the use of electronic reverse auctions in public procurement under the Model Law (A/CN.9/WG.I/WP.55)

### 1. Conditions for the use of electronic reverse auctions: draft article 22 bis and Guide to Enactment text (A/CN.9/WG.I/WP.55, paras. 3-9)

56. It was agreed that the words “the invitation to the reverse auction shall be accompanied by the outcome of a full evaluation of initial bids” should be added at the end of paragraph (3), to reflect a similar provision in article 54 (5) of the European Union directive 2004/18/EC. In connection with that amendment, the point was made that, in order to preserve the anonymity of bidders, the results of the full evaluation of initial bids should be communicated individually and simultaneously to each supplier or contractor concerned, but in order not to prejudice the legitimate commercial interests of the parties or to inhibit subsequent fair competition, only to the extent relevant to each such supplier or contractor.

57. The Working Group also agreed to replace the phrase “full initial evaluation of bids” with the phrase “full evaluation of initial bids” in paragraph (3). The Working Group requested the Secretariat to make other drafting changes in paragraphs (2) (b) and (3), to ensure clarity and consistency in the use of terms and in presentation, in particular with reference to evaluation and award criteria.

#### *Guide to Enactment text*

58. It was agreed to make the following amendments to the draft text for the Guide:

- (a) To replace in paragraph (1) the words “[in addition]” with “price and”;
- (b) To delete the words “but does not require or encourage” from paragraph (3);
- (c) To delete the text in square brackets from paragraphs (3), (5) and (10);
- (d) To make references to paragraphs and subparagraphs of article 22 bis more specific throughout the text of the Guide;
- (e) To reword the last sentence to read as follows: “It also gives the right to the procuring entity to cancel the auction in accordance with article 51 quater if the number of suppliers or contractors registered to participate in the auction is insufficient to ensure effective competition during the auction”;
- (f) In the second sentence of paragraph (10), to delete the word “thus”, to move the reference to “figures and percentages” after the word “quantifiable” and add the words “can be” before the words “expressed in monetary terms”. It was stressed that the references in paragraph (10), which explained the provisions of article 22 bis, were referring to the quantifiable, non-price criteria that would be evaluated prior to or submitted to the auction, and neither to pass/fail elements of the specifications that would determine whether or not a bid was responsive, nor to points systems;
- (g) To delete the last two sentences from paragraph (10) as they were currently drafted, and to discuss, in the general section of the Guide, concerns regarding objectivity arising from the use of non-price criteria and their weighting in the award of contracts in a more general and broader context, as they were relevant to all procurement methods. Nonetheless, paragraph (10) would include a discussion of this

issue as it applied in the specific context of ERAs, and would cross refer to the general discussion; and

(h) To add a discussion of practical measures that enacting States, when introducing ERAs, could usefully undertake, such as disseminating knowledge about this procurement technique and providing necessary training to bidders and other relevant stakeholders.

59. As regards paragraph (6), it was noted that it would not be possible in practice to have up-to-date exhaustive lists of items suitable or not suitable for ERAs. Different views were expressed concerning any specific recommendation that the Guide should provide on the use of positive or negative lists. On the one hand, preference was expressed for the use of positive lists and successful experience with such use in some jurisdictions was cited. On the other hand, caution was expressed as regards recommending the use of lists at all in the light of technological development, which might impact the use and relevance of lists. It was agreed that the final part of paragraph (6) should be reworded to refer to non-exhaustive or indicative groupings of items that might suitably be procured through ERAs, and to retain the existing references to generic characteristics of items that were or were not suitable for this procurement technique.

60. It was also observed that references to “price” in this section of the Guide were to the price as an element of a bid that would be evaluated through the auction, and not to the contract amount that would eventually be recorded in the procurement contract.

61. The Working Group considered whether the Guide should recommend only ERAs based exclusively on price (see A/CN.9/WG.I/WP.55, para. 7), or those based on price and quality. The prevailing view was that the Guide should follow a flexible approach and not make any recommendation in this regard. The text currently proposed for the Guide was considered to be well balanced in that respect.

**2. Procedures in the pre-auction and auction stages: draft articles 51 bis to sexies (A/CN.9/WG.I/WP.55, paras. 10-33)**

*Draft article 51 bis and points for reflection in an accompanying Guide text (A/CN.9/WG.I/WP.55, paras. 10-13)*

62. Some reservation was expressed regarding the provisions of paragraph 2 (c), which envisaged allowing the procuring entity to set a maximum number of bidders. It was observed that this provision might lead to an unjustifiable restriction of competition. On the other hand, it was observed that there had been examples in practice where the sheer number of bidders trying to participate in the ERA had overwhelmed the system capacity. The prevailing view was that the imposition of a limit on the numbers of suppliers might be justifiable, but that an assessment would be required on a case-by-case basis. However, safeguards would need to be set out in the Model Law text to ensure that any limitation was carried out on a justified and objective basis. Thus, for example, the text could apply the reasoning behind permitting limiting the number of participants in restricted tendering set out in article 20 (b) of the current text (that the time and cost required to allow full participation would not be cost-effective). It was also observed that the manner in which numbers of participants should be limited should be objective, and addressed consistently

throughout the Model Law, and that procuring entities should be obliged to seek to ensure maximum and not just sufficient competition.

63. Some delegates stated that the procuring entity should not be permitted to limit the number of bidders. It was noted that the general principle in the Model Law was to ensure full and fair competition, but alternative procurement methods did permit limiting the number of participants for reasons of efficiency in procurement (in the case of restricted tendering, one reason for limiting numbers was if the time and cost required to examine or evaluate a large number of bids would be disproportionate to the value of the procurement (article 20 (b) of the Model Law)).

64. As regards the principle of limiting participants, it was questioned why the same considerations should not be valid in the context of ERAs, especially given the conditions for their use in draft article 22 bis. Additionally, some delegates reported experience with excessive numbers of suppliers incapacitating automatic systems, which would require the numbers to be limited, but others considered that this concern might be alleviated as technology advanced. As regards the elimination of bidders, concern was expressed that it would be difficult in practice to establish objective criteria for eliminating qualified suppliers submitting responsive bids. On the other hand, it was pointed out that the “first come first served” principle would be an objective criterion.

65. Another view was that draft articles 22 bis (1) (a) and 51 quater contained sufficient safeguards through requiring the procuring entity to ensure “effective competition”, for which they would be responsible and accountable to oversight bodies and courts. It was suggested that the requirement for “effective competition” might need to be strengthened in draft article 51 bis and in draft article 51 quater to ensure the maximum competition possible in the circumstances. It was also stated that “effective competition” was not a precise concept, depending on specific procurements, conditions of markets, and rules and regulations and their interpretation in various jurisdictions.

66. In relation to paragraph (2) (e)(i), it was agreed that the reference to article 25 (f) to (j) should be replaced with reference to article 25 (1) (f) to (j). With reference to paragraph (2) (e)(ii), it was agreed that the drafting of the paragraph should be reworded, so as to ensure that the purposes for which initial bids could be submitted were clear. Support was expressed for the view that an assessment of responsiveness before the auction should be made mandatory in all ERAs, and that the submission of initial bids for the purposes of evaluation should be mandatory in all ERAs in which criteria other than price would determine the successful bid. An alternative view was also expressed, i.e. that it would be preferable to retain the flexibility currently given to procuring entities in this respect, by allowing the procuring entity, where appropriate, to assess the responsiveness of bids after the auction (though in this case there could be a certification from the bidders prior to the ERA that they could supply the items to be procured through the ERA).

67. It was suggested that the last sentence in paragraph (6) (d) should be redrafted along the following lines: “Where an evaluation of initial bids had taken place, the procuring entity should also report to each supplier or contractor in the invitation to the auction information on the outcome of their respective evaluation.” A question was raised about the extent of the information that should be disclosed to suppliers or contractors pursuant to this requirement, considering both the objective of full

transparency and the need to avoid revealing confidential and commercially sensitive information, and the need to avoid providing information that might facilitate collusion. It was considered that the information disclosed should allow suppliers or contractors to determine before the auction the amendments to their bids that would be required to improve their status vis-à-vis other suppliers invited to the auction.

68. With reference to the requirement to ensure effective competition (set out in draft article 51 quater), some delegates stated that it would be desirable to require the procuring entity to specify in the notice of ERA the minimum number of suppliers required to be registered to participate in the auction to ensure effective competition. (This requirement would then be included as part of the relevant requirements in article 51 bis.) Reservation was expressed about this suggestion, on the basis that ensuring effective competition and preventing collusion would require more than just a certain number of bidders (for example, where branches of a company or linked entities colluded to participate in the auction to give the appearance of genuine competition). The prevailing view was that a minimum number of bidders would be part of ensuring effective competition, that no specific number should be set out in the Model Law or the Guide to Enactment, but views differed as to whether the procuring entity should be required to include a minimum number in the notice of the ERA.

69. One view was that even if the procuring entity were required to specify a minimum number of bidders in the notice of ERA, it should still have the right to cancel the auction in accordance with draft articles 51 bis and quater, if effective competition were not assured (though some delegates considered that this right would be subject to specification in the solicitation documents pursuant to article 12 (1)).

70. The experience of some jurisdictions in requiring a minimum number of bidders was shared. It was pointed out that the Model Law as well, for example in article 50, referred to the desirable minimum of participants in some procurement methods, such as at least three participants where possible in a request for quotations procedure.

71. The prevailing view was that flexibility should be given to the procuring entity to decide whether a maximum or minimum number of bidders would be justifiable in each procurement; such flexibility should be subject to the requirements of effective competition and non-discrimination in the treatment of bidders; and any such decision should be reflected in the notice of an ERA under draft article 51 bis. The Working Group agreed to finalize its consideration of the matter in the context of draft article 51 quater, for which a new paragraph (3) addressing these issues was proposed (see paragraphs 76-81 below).

72. As regards the structure of article 51 bis, it was noted that the article had been drafted to address the pre-auction procedures for all types of stand-alone ERAs, and that in order to avoid an excessively long text, extensive cross-references to other articles of the Model Law had been used. The Working Group considered that the result was complex and difficult to follow, and therefore whether alternative approaches to drafting might make the article and procedures easier to comprehend. One suggested approach was to set out in full all the relevant provisions in the text. Although, in electronic publications, the use of hyperlinks could alleviate the difficulties in using cross-references, readers might also use a paper version of the text. The considerations of making the article user-friendly and self contained, it was said, should outweigh concerns over the length of the provisions.



73. It was agreed that the text should be separated into several articles, and definitions of the concepts should be provided to facilitate the understanding of some of its provisions. As regards how to separate the text, various suggestions were made. One was that a separate article might be dedicated to various procedural elements or steps, such as the content of a notice of an ERA. Another approach suggested was to provide in one article all the procedural and related steps for the simplest ERAs, and in subsequent articles to address the procedures that would be required for more complex ERAs. The Secretariat was requested to consider ways of presenting materials contained in the text in a more user-friendly way.

*Draft article 51 ter and points for reflection in an accompanying Guide text  
(A/CN.9/WG.I/WP.55, paras. 14-17)*

74. The Working Group considered whether any procurement methods, such as tendering, should be expressly excluded from the ambit of the draft article. Recalling the decision taken by the Working Group at its eleventh session (A/CN.9/623, para. 74), the Working Group agreed with the current approach in drafting that left open options of using ERAs in various procurement methods envisaged by the Model Law, with the understanding that the Guide should provide precise guidance on all the relevant issues involved.

75. It was suggested that paragraph (1) of the draft article should be redrafted along the following lines: “The procurement contract in procurement methods envisaged under the Model Law may be awarded after an electronic reverse auction has taken place. The auction should be compatible with the conditions for use of the relevant procurement proceedings and preceding phases of the procedure.” It was noted that consequential changes would be required in paragraph (2) of the draft article.

*Draft article 51 quater and points for reflection in an accompanying Guide text  
(A/CN.9/WG.I/WP.55, paras. 18-20)*

76. It was agreed that the draft article should be expanded to address effective competition not only in quantitative but also qualitative terms, and that the right to cancel the ERA in the case of insufficient competition would apply both prior to and during the auction.

77. It was proposed that a new paragraph (3) along the following lines be included in draft article 51 quater: “Depending on the nature of goods, services or construction to be procured, and subject to the method of electronic reverse auction, the procuring entity may establish a requirement for a minimum, or a minimum and maximum number of bidders, in order to guarantee effective competition to the greatest reasonable extent as indicated in the previous paragraphs of this article and in order to guarantee non-discrimination or arbitrary exclusion thereby respecting what is contained in article 51 bis (4).” It was noted that a consequential change would be required in draft article 51 bis, to ensure that the procuring entity’s decision on the maximum or minimum number was properly reflected in the notice of an ERA.

78. Some delegates questioned whether the requirement should depend on the nature of the procurement or the type of electronic reverse auction. It was also observed that the requirement would be independent of the value of the goods since the principle of effective competition was of general application. In addition, it was noted that costs in the context of ERAs would be marginal, whereas the efficiency of

the whole procurement administration process would be the benefit to take into account. Others considered that these notions were important in the specific context of ERAs, because otherwise the provisions would not add anything to the general principles of competition and fair treatment of participants applicable to all procurement methods, and that they also made criteria for taking the procuring entity's decision on any maximum number of bidders more objective and clearer.

79. The prevailing view was in favour of an alternative wording for a new paragraph (3), along the following lines: "the procuring entity may establish a minimum or maximum number of bidders, or both, if it has satisfied itself that in doing so it would ensure effective competition and fairness," but that the factual circumstances of each procurement were relevant criteria and a further discussion would be included in the Guide.

80. As regards strengthening the requirement for effective competition, it was suggested that article 51 quater should include a requirement to ensure "effective competition to the greatest reasonable extent", especially in the light of the understanding in some jurisdictions that "effective competition" had been interpreted as the minimum required by law, and was no guarantee of adequacy. Others considered that this interpretation was not a common one.

81. It was stressed that the Model Law as a general principle required full and open competition, that the reasons for limiting participation were both exceptional and practical, and the concept was to limit the number of participants but not the principle of competition. Accordingly, limiting participants would be permitted only to the extent necessary for the reasons justifying the limitation. It was also observed that the same reasons for limiting participation should apply to all procurement methods in which full and open competition could be curtailed. It was agreed that the concept of "effective competition" in the Model Law should be explained in an early section of the Guide as a reference to full and open competition or only such limitations as were permitted by the Model Law in specified circumstances and with the safeguards discussed above, and that the limitation had to be carried out in a non-discriminatory way. Cross-references would be made to that general discussion in all guidance discussing those articles that permitted the limiting of participation.

82. The Working Group requested the Secretariat to draft a new paragraph (3) taking into account suggestions made, the understanding being that establishing a minimum number of bidders would be part of ensuring effective competition, while establishing the maximum number addressed practical necessities.

*Draft article 51 quinquies and points for reflection in an accompanying Guide text (A/CN.9/WG.I/WP.55, paras. 21-28)*

83. With reference to draft article 51 quinquies (1) (c), the Working Group considered the information that should be disclosed to participants during the auction. It was stressed that the considerations of transparency should be balanced against considerations of competition (such as to prevent collusion) and the legitimate interests of bidders (such as to prevent the disclosure of commercially sensitive information). The Working Group recalled its relevant discussion in the context of draft article 51 bis (6) (d) that addressed the extent of disclosure of the outcome of the pre-auction evaluation before the auction (see paragraph 66 above) and agreed that approaches taken in both draft articles should be consistent.

84. One view was that only restricted information should be disclosed during the auction, such as information on whether or not a bidder was leading the auction. As a result at no time during the auction would the leading price be disclosed, since, it was stated, so doing could encourage very small reductions in the bid price, and thereby prevent the procuring entity from obtaining the best result; it could also encourage the submission of abnormally low bids. On the other hand, the view was expressed that experience of some jurisdictions indicated that the disclosure of the leading price during the auction had not proved harmful.

85. In the light of the variety in and evolving practice, the prevailing view was that the current flexible approach of the text should be retained, and the Guide should explain different possibilities and advantages and disadvantages of various approaches.

86. It was agreed that in paragraph (4) of the draft article: (i) the provisions should make it clear that the provisions referred to failures in the procuring entities' systems or communication, and not systems of suppliers or contractors; (ii) the words "[that prevent holding the auction]" should be replaced with the words "that endangered the proper conduct of the auction" or similar; and (iii) the second set of square brackets (but not the text they contained) should be deleted.

87. In order to prevent possible manipulation of communication systems for the purpose of excluding some bidders from participating in the ERA, the view was expressed by several delegations that the procuring entity should suspend the ERAs in the case of failures of communication systems. It was suggested that the word "may" should be replaced with the word "must" or "shall". It was suggested that safeguards should be included to prevent manipulation with respect to failures in the system on the part of the procuring entity, in particular by providing opportunities to verify the causes, nature and authenticity of failures and the actions taken by the procuring entity to rectify them. The issue was considered relevant not only throughout the conduct of ERAs, but in procurement systems in general, and it was agreed that it would be vital not only to allow suppliers to have effective recourse after the event, but also to provide recourse prior to any award of the procurement contract. It was observed that this could be a difficult exercise, and that addressing manipulation in the dynamic environment might be especially problematic. The Working Group agreed to consider the issue and proposed solutions in the context of possible revisions to the review provisions under article 52.

88. Although it was suggested that paragraph (4) should explicitly provide that the procuring entity should be responsible for the system to operate an ERA, it was considered that relevant issues had been considered in the context of draft article 30 (5) (c) and paragraph 23 of A/CN.9/WG.I/WP.54 (see paragraphs 39-40 above).

*Draft article 51 sexes and points for reflection in an accompanying Guide text (A/CN.9/WG.I/WP.55, paras. 29-33)*

89. It was agreed to reflect in the draft article that there were four possible options that could be followed if the successful bidder did not enter into the procurement contract: the three options in the text, or to cancel the procurement. The Working Group requested the text to be revised to include the fourth option, and to ensure that the options were clearly presented (possibly by splitting paragraph (1) (b)).

It was also agreed to reflect in the text that responsiveness could be assessed after the auction. The suggestion was made that some guidance should be provided to enacting States as regards procedural aspects of checking qualifications, responsiveness and ALTs after the auction, taking into account the specific circumstances of ERAs, including that they were designed to limit or exclude human intervention in the award of procurement contracts on the basis of the results of the auction.

**3. Consequential changes to provisions of the Model Law: record of procurement proceedings (article 11 of the Model Law) (A/CN.9/WG.I/WP.55, paras. 34-37)**

90. With respect to paragraph 36 of document A/CN.9/WG.I/WP.55, it was suggested that no changes should be made to article 11 (2) but the Guide should note possible risks of collusion in subsequent procurement if the names of unsuccessful bidders, or of bidders in suspended or terminated procurement proceedings were disclosed. The Secretariat was requested to ensure that the procuring entity would be able to rely on the protection included in article 11 (3) enabling such information to be withheld so as to ensure future competition, and to include appropriate guidance as discussed at its eleventh session.

91. It was agreed to add the words “the opening and closing” after the words “the date and time of”, and to discuss in the Guide the meaning of the term “opening of the auction”.

92. It was also agreed that the Secretariat should ensure that all provisions and safeguards applying to tenders, proposals and other submissions would also apply where appropriate to initial bids submitted prior to an ERA.

**D. Draft provisions to enable the use of framework agreements in public procurement under the Model Law (A/CN.9/WG.I/WP.52 and WP.56, annex, paras. 2-9)**

**1. General remarks**

93. Support was expressed for the current drafting approach in A/CN.9/WG.I/WP.52, applying the transparency and competition safeguards of the Model Law to all stages of procurement involving framework agreements including the second stage (the award of the procurement contract itself), particularly in the light of some difficulties in ensuring effective competition that had been experienced in systems with a less encompassing approach.

**2. Proposed article [51 octies]. General provisions (A/CN.9/WG.I/WP.52, paras. 10-17)**

94. It was proposed to replace in paragraph (1) the reference to a framework agreement with the reference to framework agreements, so as to enable the procuring entity to conclude more than one agreement in each procurement. The proposed change was suggested so as to allow different contractual arrangements with different suppliers (such as for conflict of interest purposes) or for reasons of confidentiality (for example as regards intellectual property rights). Some doubt was expressed as to the need for and practical implications of this approach. Particular concerns were

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expressed about a potentially anti-competitive and non-transparent character, and potential abuse in awarding contracts under separate framework agreements.

95. Views were exchanged regarding whether the procuring entity should be permitted to purchase outside the framework agreement. It was noted that some jurisdictions permitted procuring entities to do so by conducting new procurement proceedings. The value for suppliers of participating in framework agreements under such conditions was questioned. It was argued that parties to the framework agreement should be confident that they would be awarded a contract at least for a minimum value or quantity specified in the agreement; otherwise, suppliers might consider that the costs of participation exceeded the possible benefit. On the other hand, it was argued that these costs might be marginal, but the benefits significant.

## Annex

**Tentative timetable and agenda for the Working Group's thirteenth to fifteenth sessions agreed at the Working Group's eleventh session**

<i>Session</i>	<i>Day 1</i>	<i>Day 2</i>	<i>Day 3</i>	<i>Day 4</i>	<i>Day 5</i>
13th, Spring 2008	Framework agreements	Framework agreements	Suppliers' lists	ERAs	Remedies
14th, Autumn 2008	Remedies	Remedies/ Framework agreements	Framework agreements/ Suppliers' lists	Framework agreements/ Suppliers' lists	Conflict of interest/ Services and goods
15th, Spring 2009	Conflict of interest/ Services and goods	Overall review of revisions made to the Model Law and relevant provisions of the Guide to Enactment	Overall review of revisions made to the Model Law and relevant provisions of the Guide to Enactment	Overall review of revisions made to the Model Law and relevant provisions of the Guide to Enactment	Overall review of revisions made to the Model Law and relevant provisions of the Guide to Enactment

**B. Note by the Secretariat on 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, and abnormally low tenders, submitted to the Working Group on Procurement at its twelfth session  
(A/CN.9/WG.I/WP.54) [Original: English]**

**CONTENTS**

	<i>Paragraphs</i>
I. Introduction . . . . .	1-3
II. Draft provisions addressing the use of electronic communications in public procurement	4-25
A. Communications in procurement . . . . .	4-10
1. Proposed draft text for the revised Model Law . . . . .	4-7
Commentary . . . . .	5-7
2. Guide to Enactment text . . . . .	8-10
B. Electronic submission of tenders . . . . .	11-12
1. Proposed draft text for the revised Model Law . . . . .	11
2. Guide to Enactment text . . . . .	12
C. Publication of procurement-related information . . . . .	13-16
1. Proposed revisions to article 5 . . . . .	13-15
Commentary . . . . .	14-15
2. Proposed draft text for the revised Guide . . . . .	16
D. Other provisions of the Model Law and the Guide . . . . .	17-25
1. Article 11 and the text for the Guide to accompany the article . . . . .	18-19
2. Article 33 (2) and the text for the Guide to accompany the relevant provisions . . . . .	20-22
3. Liability for failures of procuring entities' systems . . . . .	23
4. Revisions to the text for the Guide accompanying article 36 . . . . .	24
5. Guide introductory remarks on the use of electronic procurement under the Model Law in general . . . . .	25
III. Draft provisions addressing abnormally low tenders . . . . .	26-28
1. Proposed draft text for the revised Model Law . . . . .	26-27
2. Commentary . . . . .	27
3. Proposed draft text for the revised Guide . . . . .	28

## I. Introduction

1. The background to the current work of Working Group I (Procurement) on the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services (the “Model Law”) (A/49/17 and Corr.1, annex I) is set out in paragraphs 5 to 70 of document A/CN.9/WG.I/WP.53, which is before the Working Group at its twelfth 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. The regulation of such use, including in the context of the submission and opening of tenders, holding meetings, storing information and publicising procurement-related information, was included in the topics before the Working Group at its sixth to eleventh sessions. At its eleventh session, the Working Group requested the Secretariat to revise the draft provisions on the use of electronic communications in public procurement that it had considered at the session.<sup>1</sup> This note has been prepared pursuant to that request, and sets out the relevant draft provisions that reflect the Working Group’s deliberations at its eleventh session, accompanied in some cases by suggested provisions for the Guide (see paragraphs 4-25 below).

3. This note also contains draft provisions for the Model Law addressing abnormally low tenders (“ALTs”), revised pursuant to the Working Group’s request at its eleventh session<sup>2</sup> (see paragraphs 26-28 below).

## II. Draft provisions addressing the use of electronic communications in public procurement

### A. Communications in procurement

#### 1. Proposed draft text for the revised Model Law

4. The following draft article reflects the suggestions made at the Working Group’s eleventh session to draft article 5 bis that was before the Working Group at that session:<sup>3</sup>

#### “Article [5 bis]. Communications in procurement

(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 VI or in the course of a meeting, or forming part of the record of procurement proceedings under article [11], 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 [7 (4) and (6), 31 (2)(a), 32 (1)(d), 34 (1), 36 (1), 37 (3), 44 (b) to (f) and 47 (1), to update for revisions to Model Law] [and any other information generated in the course of a procurement under this Law other than information referred to in paragraph (1) of this article] may be made by means that do not provide a record of the content of the information on the

<sup>1</sup> A/CN.9/623, para. 13.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid., paras. 15-18.



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[, for the purpose of procurement covered by this Law,] specify:

(a) Any requirement of form in compliance with paragraph (1) of this article;

(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.

(5) Appropriate measures shall be put in place to secure the authenticity, integrity and confidentiality of information concerned.”

### **Commentary**

#### *Paragraph (2)*

5. At its eleventh session, the Working Group agreed to delete the reference to article 12 (3) from the list of the referred articles.<sup>4</sup> Accordingly, the form requirement prescribed by paragraph (1) of the article will be applicable to notices of the rejection of all tenders, proposals, offers or quotations to be given under article 12 (3) to all suppliers or contractors that submitted tenders, proposals, offers or quotations. All other references taken from the existing article 9 (2) of the Model Law have been kept.

6. At the same session, the Working Group noted the interdependence of paragraphs (1) and (2) of the draft article and the suggestion that paragraph (2) should be expanded to cover any communication of information in a procurement that was generated other than pursuant to a requirement of the Model Law. Final agreement on this suggestion was not reached.<sup>5</sup> The Working Group may wish to consider the new text in the second set of square brackets in paragraph (2).

#### *Paragraph (3)*

7. At the Working Group’s eleventh session, it was suggested to add the words that appear in the square brackets in the chapeau of the paragraph, to make it clear that the provisions do not intend to apply to the procurement contract administration phase. The view was expressed that these words might be superfluous in the light of the clearly-

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<sup>4</sup> Ibid., para. 16.

<sup>5</sup> Ibid.

defined scope of the Model Law. Final agreement was not reached on whether the words should be retained.<sup>6</sup> The Working Group may wish to consider this point.

## 2. Guide to Enactment text

8. The text following paragraph 10 below is proposed for the Guide to accompany the provisions of the Model Law on communications in procurement. It should be read with the understanding that it does not purport to discuss all issues relevant to electronic procurement that should be addressed in the Guide, but only those relevant in the context of the article; general matters of electronic procurement would be addressed elsewhere in the Guide, such as in its introductory section (see paragraph 25 below). The Working Group may wish to consider how to refer to other functional guidance that enacting States may need.

9. As requested by the Working Group, the provisions were drafted in technologically neutral terms so as to avoid giving prominence to any particular means or forms of communications and to envisage essentially equal requirements on both the paper-based and non paper-based procurement environment.<sup>7</sup> Furthermore, following the Working Group's instructions at its tenth session,<sup>8</sup> at this stage, in preparing accompanying provisions for the Guide, the Secretariat has focused on formulating the guidance to legislators and regulators only.

10. A number of documents were used in preparation of the draft Guide text below, including commentaries and guides to UNCITRAL legal texts on electronic commerce, the relevant provisions of the European Commission Staff Working Document (SEC(2005) 959)<sup>9</sup> and guidance provided on relevant issues by multilateral development banks and other regional and international organizations active in the field.

“1. Article 5 bis seeks to provide certainty as regards the form of information to be generated and communicated in the course of the procurement conducted under the Model Law and the means to be used to communicate such information, to satisfy all requirements for information to be in writing or for a signature, and to hold any meeting of suppliers or contractors (collectively referred to as “form and means of communications”). The position under the Model Law is that, in relation to the procuring entity's interaction with suppliers and contractors and the public at large, the paramount objective should be to seek to foster and encourage participation in procurement proceedings by suppliers and contractors and at the same time to support the evolution of technology and processes. The provisions contained in the article therefore do not depend on or presuppose the use of particular types of technology. They set a legal regime that is open to technological developments. While intended to be interpreted broadly, dealing with all communications in the course of procurement proceedings covered by the Model Law, the provisions are not intended to regulate communications that are subject to regulation by other branches of law, such as tender securities, or communications in the course of judicial proceedings or administrative review proceedings.

<sup>6</sup> Ibid., para. 17.

<sup>7</sup> Ibid., para. 14.

<sup>8</sup> A/CN.9/615, para. 14.

<sup>9</sup> Available as of the date of this note at [http://ec.europa.eu/internal\\_market/publicprocurement/docs/eprocurement/sec2005-959\\_en.pdf](http://ec.europa.eu/internal_market/publicprocurement/docs/eprocurement/sec2005-959_en.pdf).

2. Paragraph (1) of the article requires that information is to be in a form that provides a record of the content of the information and is accessible so as to be usable for subsequent reference. The use of the word “accessible” in the paragraph is meant to imply that information should be readable and capable of interpretation and retention. The word “usable” is intended to cover both human use and automatic processing. These provisions aim at providing, on the one hand, sufficient flexibility in the use of various forms of information as technology evolves and, on the other, sufficient safeguards that information in whatever form it is generated and communicated will be reliably usable, traceable and verifiable. These requirements of reliability, traceability and verification are essential for the normal operation of the procurement process, for effective control and audit and in review proceedings. The wording found in the article is compatible with form requirements found in UNCITRAL texts regulating electronic commerce, such as article 9 (2) of the United Nations Convention on the Use of Electronic Communications in International Contracts. Like these latter documents, the Model Law does not confer permanence on one particular form of information, nor does it interfere with the operation of rules of law that may require a specific form. For the purposes of the Model Law, as long as a record of the content of the information is provided and information is accessible so as to be usable for subsequent reference, any form of information may be used. To ensure transparency and predictability, any specific requirements as to the form acceptable to the procuring entity have to be specified by the procuring entity at the beginning of the procurement proceedings, in accordance with paragraph 3 (a) of the article.

3. Paragraph (2) of the article contains an exception to the general form requirement contained in paragraph (1) of the article. It permits certain types of information to be communicated on a preliminary basis in a form that does not leave a record of the content of the information, for example if information is communicated orally by telephone or in a personal meeting, in order to allow the procuring entity and suppliers and contractors to avoid unnecessary delays. The paragraph enumerates, by cross-reference to the relevant provisions of the Model Law, the instances when this exception may be used. They involve communication of information to any single supplier or contractor participating in the procurement proceedings (for example, when the procuring entity has to provide clarifications about solicitation documents in response to a request by a supplier or contractor, or asks suppliers or contractors for clarifications of their tenders). However, the use of the exception is conditional: immediately after information is so communicated, confirmation of the communication must be given to its recipient in a form prescribed in paragraph (1) of the article (i.e., that provides a record of the content of the information and that is accessible and usable). This requirement is essential to ensure transparency, integrity and the fair and equitable treatment of all suppliers and contractors in procurement proceedings. However, practical difficulties may exist to verify and enforce compliance with this requirement. Therefore, the enacting State may wish to allow the use of the exception under paragraph (2) only in strictly necessary situations. Overuse of this exception might create conditions for abuse, including corruption and favouritism.

4. Paragraph (3) of the article gives the right to the procuring entity to insist on the use of a particular form and means of communications or combination thereof in the course of the procurement, without having to justify its choice. No such right is given to suppliers or contractors [but, in accordance with article 52 of the Model Law, they may challenge the procuring entity’s decision

in this respect]. Exercise of this right by the procuring entity is subject to a number of conditions that aim at ensuring that procuring entities do not use technology and processes for discriminatory or otherwise exclusionary purposes, such as to prevent access by some suppliers and contractors to the procurement or create barriers for access.

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 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.

6. To fulfil the requirements specified by the procuring entity under paragraph (3) of the article, suppliers or contractors may have to use their own information systems or procuring entity may have to make available to the interested suppliers or contractors information systems for such purpose. (The term “information system” or the “system” in this context is intended to address the entire range of technical means used for communications. Depending on the factual situation, it could refer to a communications network, applications and standards, and in other instances to technologies, equipment, mailboxes or tools.) To make the right of access to procurement proceedings under the Model Law a meaningful right, paragraph (4) of the article requires that means specified in accordance with paragraph (3) of the article must be readily capable of being utilized with those in common use by suppliers or contractors in the relevant context. As regards the means to be used to hold meetings, it in addition requires ensuring that suppliers or contractors can fully and contemporaneously participate in the meeting. “Fully and contemporaneously” in this context means that suppliers and contractors participating in the meeting have the possibility, in real time, to follow all proceedings of the meeting and to interact with other participants when necessary. The requirement of “capable of being utilized with those in common use by suppliers or contractors” found in paragraph (4) of the article implies efficient and affordable connectivity and interoperability (i.e., capability effectively to operate together) so that to ensure unrestricted access to procurement. In other words, each and every potential supplier or contractor should be able to participate, with simple and commonly used equipment and basic technical know-how, in the procurement proceedings in question. This however should not be construed as implying that procuring entities’ information systems have to be interoperable with those of each single supplier or contractor. If, however, the means chosen by the procuring entity implies using information systems that are not generally available, easy to install (if need be) and reasonably easy to use and/or the costs of which are unreasonably high for the use envisaged, the means cannot be deemed to satisfy the requirement of “commonly used means” in the context of a specific procurement under paragraph (4) of the article.

7. The paragraph does not purport to ensure readily available access to public procurement in general but rather to a specific procurement. The procuring entity has to decide, on a case-by-case basis, which means of communication might be

appropriate in which type of procurement. For example, the level of penetration of certain technologies, applications and associated means of communication may vary from sector to sector of a given economy. In addition, the procuring entity has to take into account such factors as the intended geographic coverage of the procurement and coverage and capacity of the country's information system infrastructure, the number of formalities and procedures needed to be fulfilled for communications to take place, the level of complexity of those formalities and procedures, the expected information technology literacy of potential suppliers or contractors, and the costs and time involved. In cases where no limitation is imposed on participation in procurement proceedings on the basis of nationality, the procuring entity has also to assess the impact of specified means on access to procurement by foreign suppliers or contractors. Any relevant requirements of international agreements would also have to be taken into account. A pragmatic approach, focusing on its obligation not to restrict access to the procurement in question by potential suppliers and contractors, will help the procuring entity to determine if the chosen means is indeed "commonly used" in the context of a specific procurement and thus whether it satisfies the requirement of the paragraph.

8. In a time of rapid technological advancement, new technologies may emerge that, for a period of time, may not be sufficiently accessible or usable (whether for technical reasons, reasons of cost or otherwise). The procuring entity must seek to avoid situations when the use of any particular means of communication in procurement proceedings could result in discrimination among suppliers or contractors. For example, the exclusive choice of one means could benefit some suppliers or contractors who are more accustomed to use it to the detriment of others. Measures should be designed to prevent any possible discriminatory effect (e.g., by providing training or longer time limits for suppliers to become accustomed to new systems). The enacting State may consider that the old processes, such as paper-based ones, need to be retained initially when new processes are introduced, which can then be phased out, to allow a take-up of new processes.

9. The provisions of the Model Law do not distinguish between proprietary or non-proprietary information systems that may be used by procuring entities. As long as they are interoperable with those in common use, their use would comply with the conditions of paragraph (4). The enacting State may however wish to ensure that procuring entities should carefully consider to what extent proprietary systems, devised uniquely for the use by the procuring entity, may contain technical solutions different and incompatible with those in common use. Such systems may require suppliers or contractors to adopt or convert their data into a certain format. This can render access of potential suppliers and contractors, especially smaller companies, to procurement impossible or discourage their participation because of additional difficulties or increased costs. Effectively, suppliers or contractors not using the same information systems as the procuring entity would be excluded, with the risk of discrimination among suppliers and contractors, and higher risks of improprieties. The use of the systems that would have a significantly negative effect on participation of suppliers and contractors in procurement would be incompatible with the objectives, and article 5 bis (4), of the Model Law.

10. On the other hand, the recourse to off-the-shelf information systems, being readily available to the public, easy to install and reasonably easy to use and

providing maximal choice, may foster and encourage participation by suppliers or contractors in the procurement process and reduce risks of discrimination among suppliers and contractors. They are also more user-friendly for the public sector itself as they allow public purchasers to utilize information systems proven in day-to-day use in the commercial market, to harmonize their systems with a wider net of potential trading partners and to eliminate proprietary lock-in to particular third-party information system providers, which may involve inflexible licences or royalties. They are also easily adaptable to user profiles, which may be important for example in order to adapt systems to local languages or to accommodate multilingual solutions, and scalable through all government agencies' information systems at low cost. This latter consideration may be especially important in the broader context of public governance reforms involving integration of internal information systems of different government agencies.

11. The Model Law does not address the issue of charges for accessing and using the procuring entity's information systems. This issue is left to the enacting State to decide taking into account local circumstances. These circumstances may evolve over time with the effect on the enacting State's policy as regards charging fees. The enacting State should carefully assess the implications of charging fees for suppliers and contractors to access the procurement, in order to preserve the objectives of the Model Law, such as those of fostering and encouraging participation of suppliers and contractors in procurement proceedings, and promoting competition. Fees should be transparent, justified, reasonable and proportionate and not discriminate or restrict access to the procurement proceedings. [The Working Group may wish to consider recommending in the Guide that ideally no fees should be charged for access to, and use of, the procuring entity's information systems].

12. The objective of paragraph (5) of the article (which requires appropriate measures to secure the authenticity, integrity and confidentiality of information) is to enhance the confidence of suppliers and contractors in reliability of procurement proceedings, including in relation to the treatment of commercial information. Confidence will be contingent upon users perceiving appropriate assurances of security of the information system used, of preserving authenticity and integrity of information transmitted through it, and of other factors, each of which is the subject of various regulations and technical solutions. Other aspects and relevant branches of law are relevant, in particular those related to electronic commerce, records management, court procedure, competition, data protection and confidentiality, intellectual property and copyright. The Model Law and procurement regulations that may be enacted in accordance with article 4 of the Model Law are therefore only a narrow part of the relevant legislative framework. In addition, reliability of procurement proceedings should be addressed as part of a comprehensive good governance framework dealing with personnel, management and administration issues in the procuring entity and public sector as a whole.

13. Legal and technical solutions aimed at securing the authenticity, integrity and confidentiality may vary in accordance with prevailing circumstances and contexts. In designing them, consideration should be given both to their efficacy and to any possible discriminatory or anti-competitive effect, including in the cross-border context. The enacting State has to ensure at a minimum that the systems are set up in a way that leaves trails for independent scrutiny and audit

and in particular verifies what information has been transmitted or made available, by whom, to whom, and when, including the duration of the communication, and that the system can reconstitute the sequence of events. The system should provide adequate protection against unauthorized actions aimed at disrupting normal operation of public procurement process. Technologies[, such as virus-scanning software,] to mitigate the risk of human and non-human disruptions must be in place. So as to enhance confidence and transparency in the procurement process, any protective measures that might affect the rights and obligations of potential suppliers and contractors should be specified to suppliers and contractors at the outset of procurement proceedings or should be made generally known to public. The system has to guarantee to suppliers and contractors the integrity and security of the data that they submit to the procuring entity, the confidentiality of information that should be treated as confidential and that information that they submit will not be used in any inappropriate manner. A further issue in relation to confidence is that of systems' ownership and support. Any involvement of third parties need to be carefully addressed to ensure that the arrangements concerned do not undermine the confidence of suppliers and contractors in procurement proceedings.

14. [Cross-reference to other relevant provisions, such as commentary to article 30 (5)].”

## **B. Electronic submission of tenders**

### **1. Proposed draft text for the revised Model Law**

11. The following draft article reflects the suggestions made at the Working Group's eleventh session to draft article 30 (5) that was before the Working Group at that session:<sup>10</sup>

#### **“Article 30. Submission of tenders**

- (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;
- (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.”

### **2. Guide to Enactment text**

12. The following text is proposed for the Guide to accompany revised article 30 (5) of the Model Law (replacing the current paragraph 3 of the Guide commentary to article 30). In considering the text below, the Working Group should take into account the points raised in paragraphs 8-10 of this note, which are also relevant here:

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<sup>10</sup> A/CN.9/623, paras. 21-23.

“3. Paragraph (5) (a) of the article contains specific requirements as regards the form and means of submission of tenders that complement general requirements of form and means found in article 5 bis (see the commentary to article 5 bis in paragraphs [cross-reference] above). The paragraph provides that tenders have to be submitted in writing and signed, and that their authenticity, security, integrity and confidentiality have to be preserved. The requirement of “writing” seeks to ensure the compliance with the form requirement found in article 5 bis (1) (tenders have to be submitted 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). The requirement of “signature” seeks to ensure that suppliers or contractors submitting a tender identify themselves and confirm their approval of the content of their submitted tenders, with sufficient credibility. The requirement of “authenticity” seeks to ensure the appropriate level of assurance that a tender submitted by a supplier or contractor to the procuring entity is final and authoritative, cannot be repudiated and is traceable to the supplier or contractor submitting it. Together with the requirements of “writing” and “signature”, it thus seeks to ensure that there would be tangible evidence of the existence and nature of the intent by the suppliers or contractors submitting the tenders to be bound by the information contained in the tenders submitted and that evidence would be preserved for record-keeping, control and audit. Requirements of “security”, “integrity” and “confidentiality” of tenders seek to ensure that the information in submitted tenders cannot be altered, added to or manipulated (“security” and “integrity”), and that it cannot be accessed until the time specified for public opening and thereafter only by authorized persons and only for prescribed purposes, and according to the rules (“confidentiality”).

3 bis. In the paper-based environment, all the requirements described in the preceding paragraph of this Guide are met by suppliers or contractors submitting to the procuring entity, in a sealed envelope, tenders or parts thereof presumed to be duly signed and authenticated (at a risk of being rejected at the time of the opening of tenders if otherwise), and by the procuring entity keeping the sealed envelopes unopened until the time of their public opening. In the non-paper environment, the same requirements may be fulfilled by various standards and methods as long as such standards and methods provide at least a similar degree of assurances that tenders submitted are indeed in writing, signed and authenticated and that their security, integrity and confidentiality are preserved. The procurement or other appropriate regulations should establish clear rules as regards the relevant requirements, and when necessary develop functional equivalents for the non-paper based environment. Caution should be exercised not to tie legal requirements to a given state of technical development. The system, at a minimum, has to guarantee that no person can have access to the content of tenders after their receipt by the procuring entity prior to the time set up for formal opening of tenders. It must also guarantee that only authorized persons clearly identified to the system will have the right to open tenders at the time of formal opening of tenders and will have access to the content of tenders at subsequent stages of the procurement proceedings. The system must also be set up in a way that allows traceability of all operations in relation to submitted tenders, including the exact time and date of receipt of tenders, verification of who accessed tenders and when, and whether tenders supposed to be inaccessible have been compromised or tampered with. Appropriate measures should be in place to verify that tenders would not be deleted or damaged or affected in other unauthorized ways when they are opened and subsequently used. Standards and methods used



should be commensurate with risk. A strong level of authentication and security can be achieved through, for example, public key infrastructure with accredited digital certificate service providers, but this will not be appropriate for low risk small value procurement. [The Working Group may wish to consider further references to cost-benefit analysis.]

3 ter. Paragraph 5 (b) requires the procuring entity to provide to the suppliers or contractors a receipt showing the date and time when their tender was received. In the non paper-based environment, this should be done automatically. [In situations where the system of receipt of tenders makes it impossible to establish the time of receipt with precision, the procuring entity may need to have an element of discretion to establish the degree of precision to which the time of receipt of tenders submitted would be recorded. However, this element of discretion should be strictly regulated [by reference to applicable legal norms of electronic commerce], in order to prevent abuses.] When the submission of a tender fails, particularly due to protective measures taken by the procuring entity to prevent the system from being damaged as a result of a receipt of a tender, it shall be considered that no submission was made. Suppliers or contractors whose tenders cannot be received by the procuring entity's system should be instantaneously informed about the event in order to allow them where possible to resubmit tenders before the deadline for submission has expired. No resubmission after the expiry of the deadline shall be allowed.

3 quater. Paragraph 5 (c) raises issues of security, integrity and confidentiality of submitted tenders, discussed above. Unlike subparagraph 5 (a)(ii), it does not refer to the requirement of authenticity of tenders since issues of authenticity are relevant at the stage of submission of tenders only. It is presumed that upon receipt of a tender by the procuring entity at the date and time to be recorded in accordance with paragraph 5 (b) of the article, adequate authenticity has already been assured.”

## C. Publication of procurement-related information

### 1. Proposed revisions to article 5

13. The following draft text of article 5 incorporates drafting suggestions made at the Working Group's eleventh session:<sup>11</sup>

**“Article 5. Publicity of legal texts and information on forthcoming procurement opportunities**

(1) 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) Notwithstanding the provisions of paragraph (1) of this article, 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.

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<sup>11</sup> Ibid., paras. 26, 27, 30 and 31.

(3) As promptly as possible after beginning of a fiscal year, procuring entities may publish information of the expected procurement opportunities for the following [the enacting State specifies the period]. The information published shall not constitute the solicitation of the participation of suppliers or contractors in the procurement proceedings and shall not be binding upon the procuring entity.”

### Commentary

#### *Paragraph (3)*

14. At its eleventh session, the Working Group agreed to split the provisions on publication of information on forthcoming procurement opportunities contained in paragraph 37 of document A/CN.9/WG.I/WP.50 into two sentences. The understanding was that the Secretariat should propose a wording for the second sentence that issuing such a notice did not obligate the procuring entity to solicit tenders, proposals or bids for such procurement opportunities.<sup>12</sup> The Working Group may wish to consider the suggested wording to that effect in the second sentence of the paragraph.

15. In addition, it was suggested that provisions on publication of information on forthcoming procurement opportunities should be placed as paragraph (3) of article 5, and that the Secretariat would change the title of article 5 to reflect the addition of a new paragraph.<sup>13</sup> The Working Group may wish to consider the amendments made to reflect these suggestions.

## 2. Proposed draft text for the revised Guide

16. The following text is proposed to be included in the Guide to accompany revised article 5 (first two paragraphs have been taken from the current Guide commentary to article 5 and have been revised to reflect the suggested amendments to the article):

“1. Paragraph (1) of this article is intended to promote transparency in the laws, regulations and other legal texts of general application relating to procurement by requiring that those legal texts be promptly made accessible and systematically maintained. Inclusion of this provision may be considered especially important in States in which such a requirement is not found in existing administrative law. It may also be considered important in States in which such a requirement is already found in existing administrative law since a provision in the procurement law itself would help to focus the attention of both procuring entities and suppliers or contractors on the requirement for adequate public disclosure of legal texts referred to in the paragraph.

2. In many countries, there exist official publications in which legal texts referred to in the paragraph are routinely published. The texts concerned could be published in those publications. Otherwise, the texts should be promptly made accessible to the public, including foreign suppliers or contractors, in another appropriate medium and manner that will ensure the required level of outreach of relevant information to intended recipients and the public at large. An enacting State may wish to specify a manner and medium of publication in procurement or any other appropriate regulations that address publicity of statutes, regulations and other public acts, with the goal of ensuring easy and prompt public access to the

<sup>12</sup> Ibid., para. 30.

<sup>13</sup> Ibid., para. 31.

relevant legal texts. This should provide certainty to the public at large as regards the source of the relevant information, which is especially important in the light of proliferation of media and sources of information as a result of the use of non-paper means of publishing information. Transparency may be impeded considerably if abundant information is available from many sources, whose authenticity and authority may not be certain.

3. The procurement or any other appropriate regulations should envisage the provision of relevant information in a centralized manner at a common place (the “official gazette” or equivalent) and establish rules defining relations of that single centralized medium with other possible media where such information may appear. Information posted in the single centralized medium should be authentic and authoritative and have primacy over information that may appear in other media. Regulations may explicitly prohibit publication in different media before information is published in a specifically designated central medium, and require that the same information published in different media must contain the same data. The single centralized medium should be readily and widely accessible [without charge]. Regulations should also spell out what the requirement of “systematic maintenance” entails, including timely posting and updating of all relevant and essential information in a manner easy to use and understand by the average user.

4. Paragraph (2) of the article deals with a distinct category of legal texts – judicial decisions and administrative rulings with precedent value. The opening phrase in the paragraph intends to make it clear that publicity requirements in paragraph (1) do not apply to legal texts dealt with in paragraph (2). Due to the nature and characteristics of the legal texts dealt with in paragraph (2), including the procedure for their adoption and maintenance, application of the publicity requirements found in paragraph (1) to them may not be justifiable. For example, it may not be feasible to comply with the requirement to make these legal texts promptly accessible. In addition, the requirement of “systematic maintenance” may not be applicable to them in the light of the relatively static nature of these texts. Paragraph (2) of the article therefore requires that these texts are to be made available to the public and updated if need be. The objective is to achieve the necessary level of publicity of these texts and accuracy of publicised texts with sufficient flexibility.

5. Depending on legal traditions and procurement practices in an enacting State, interpretative texts of legal value and importance to suppliers and contractors may already be covered by either paragraph (1) or (2) of the article. The enacting State may wish to consider making necessary amendments to the article to ensure that they are covered. In addition, taking into account that non-paper means of publishing information diminish costs, time and effort of making information public and its maintenance, it may be desirable to publish other legal texts of relevance and practical use and importance to suppliers and contractors not covered by article 5 of the Model Law, in order to achieve transparency and predictability, and to foster and encourage participation of suppliers and contractors, in procurement. These additional legal texts may include, for example, procurement guidelines or manuals and other documents that provide information about important aspects of domestic procurement practices and procedures and may affect general rights and obligations of suppliers and contractors. The Model Law, while not explicitly addressing the publication of these legal texts, does not preclude an enacting State from expanding the list of legal texts covered by article 5 according to its domestic context. If such an option

is exercised, an enacting State should consider which additional legal texts are to be made public and which conditions of publication should apply to them. Enacting States may in this regard assess costs and efforts to fulfil such conditions in proportion to benefits that potential recipients are expected to derive from published information. In the paper-based environment, costs may be disproportionately high if, for example, it would be required that information of marginal or occasional interest to suppliers or contractors is to be made promptly accessible to the public and systematically maintained. In the non paper environment, although costs of publishing information may become insignificant, costs of maintaining such information, so as to ensure easy public access to the relevant and accurate information, may still be high.

6. Paragraph (3) of the article deals with the publication of information on forthcoming procurement opportunities. Publication of such information may not be advisable in all cases and, if imposed, may be burdensome, and may interfere in the budgeting process and procuring entity's flexibility to handle its procurement needs. The position under the Model Law is that the procuring entity should have flexibility to decide on a case-by-case basis on whether such information should be published. Accordingly, the provisions of the paragraph do not require but enable the publication of this information. They give to the enacting State the option to set a time frame that such publication should cover, which may be a half-year or a year or other period. When published, such information is not intended to bind the procuring entity in any way in connection with publicised information, including as regards future solicitations. Suppliers or contractors would not be entitled to any remedy if the procurement did not take place subsequent to its pre-advertisement or takes place on terms different from those pre-advertised. The inclusion of such an enabling provision in the procurement law may be considered important by the legislature to highlight benefits of publishing such information. In particular, 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. It is therefore envisaged that the enacting State might provide incentives for publication of such information, as is done in some jurisdictions, such as a possibility of shortening a period for submission of tenders in pre-advertised procurements. The enacting States, in procurement regulations, may also refer to cases when publication of such information would in particular be desirable, such as when complex construction procurements are expected or when procurement value exceeds a certain threshold. They may also recommend the desirable content of information to be published and other conditions for publication."

#### **D. Other provisions of the Model Law and the Guide**

17. At its previous sessions, the Working Group considered other revisions to the Model Law and the Guide that would be required to accommodate the use of electronic procurement. They related to articles 11 (1) (b) bis (Record of procurement proceedings)

and 33 (2) (Opening of tenders), a Guide text that would accompany articles 11 and 36 (Acceptance of tender and entry into force of procurement contract) and Guide introductory remarks on the use of electronic procurement under the Model Law in general. The sections below set up issues arising from those revisions as well as other issues, for consideration by the Working Group.

### 1. Article 11 and the text for the Guide to accompany the article

18. At its ninth session, the Working Group considered additional paragraph 1 (b) bis to be included in article 11, which read as follows:

#### “Article 11. Record of procurement proceedings

(1) The procuring entity shall maintain a record of the procurement proceedings containing, at a minimum, the following information:

...

(b) bis. The procuring entity’s decision as to the means of communication to be used in the procurement proceedings.”<sup>14</sup>

19. At the same session, suggestions were made as regards the draft Guide text proposed to accompany this provision.<sup>15</sup> In the light of the Working Group ongoing work on the revision of the Model Law and the Guide, which will affect provisions of article 11 and an accompanying Guide text, the Working Group may wish to defer consideration of any revisions to article 11 and related provisions for the Guide.

### 2. Article 33 (2) and the text for the Guide to accompany the relevant provisions

20. The Working Group may wish to consider the proposed provisions for revised article 33 (2). They are based on provisions that the Working Group approved at its eleventh session.<sup>16</sup> Amendments were made to reflect changes in the relevant provisions of draft article 5 bis (4) (see paragraph 4 above):

#### “Article 33. Opening of tenders

(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 are fully and contemporaneously apprised of the opening of the tenders.”

21. It is proposed that a Guide text that would accompany these provisions, which would be included after paragraph (2) of the current Guide commentary to article 33, would cross-refer to the discussion in the Guide addressing article 5 bis as it relates to means of holding meetings. With reference to automated opening of tenders, the Guide would refer to the “four eyes” principle, meaning that at least two persons should by simultaneous action perform opening of tenders and that data opened should remain accessible only to those persons. “Simultaneous action” in this context means that the designate authorized persons within almost the same time span shall produce logs of what components have been opened and when. This principle is consistently referred to in regional and international instruments addressing the subject. The Guide would also

<sup>14</sup> A/CN.9/WG.I/WP.42, para. 31.

<sup>15</sup> A/CN.9/595, paras. 49-51, A/CN.9/WG.I/WP.42, para. 32 and A/CN.9/WG.I/WP.42/Add.1, para. 7.

<sup>16</sup> A/CN.9/623, para. 25 and A/CN.9/WG.I/WP.50, para. 30.

alert that the information system used should also allow the deferred opening of the separate files of the tender in the required sequence in the same way as with sealed envelopes (for example, when technical and economic offers of a tender are submitted separately), without compromising the security for the unopened parts. The need to ensure traceability of all operations would be reiterated in the context of the opening of tenders. The Working Group may wish to consider these and any additional points for reflection in the Guide in relation to revised article 33 (2).

22. At the Working Group's eleventh session, the suggestion was made that the Guide should highlight that provisions of amended article 33 (2) were consistent with other international instruments in this regard and a specific reference was made to World Bank procurement guideline 2.45.<sup>17</sup> The Working Group may wish to consider that, while a general statement of this kind might be appropriate in the Guide, references to specific provisions in instruments of other international organizations to substantiate such a statement should be avoided since they may soon become obsolete.

### **3. Liability for failures of procuring entities' systems**

23. The Working Group may wish to formulate its position as regards liability of procuring entities for failures of their systems in the course of the procurement proceedings in general (e.g., with reference to article 5 bis) and in the specific contexts, such as in the context of submission of tenders under article 30 (5). As regards approaching this issue in the context of submission of tenders under article 30 (5), depending on the Working Group's position on whether the procuring entity should be required or have discretion to extend the deadline for submission of tenders in such a case, the issue will have to be addressed in paragraphs (2) or (3) of article 30 and/or in the accompanying Guide. The issue is also relevant in the context of submission of bids in electronic reverse auctions. The Working Group may wish to consider therefore whether the approach that would be taken in the context of article 30 should consistently apply in other applicable contexts.

### **4. Revisions to the text for the Guide accompanying article 36**

24. As regards the text for the Guide to accompany article 36, the Working Group, at its ninth session, considered the revised text that incorporated suggestions made at its eighth session.<sup>18</sup> At that session, further drafting suggestions to the revised text were made.<sup>19</sup> In the light of the Working Group's ongoing work, in particular as regards simplification and standardization of some provisions of the Model Law, including article 36,<sup>20</sup> the Working Group may wish to defer its consideration of any revised Guide text that would accompany article 36.

### **5. Guide introductory remarks on the use of electronic procurement under the Model Law in general**

25. The Working Group considered, most recently at its ninth session, sections addressing benefits and concerns arising from electronic procurement, interaction between electronic procurement and electronic commerce legislation, and general approach of the revised Model Law towards regulating electronic procurement.<sup>21</sup> In the

<sup>17</sup> A/CN.9/623, para. 25.

<sup>18</sup> A/CN.9/WG.I/WP.42, para. 29, and A/CN.9/WG.I/WP.42/Add.1, para. 6.

<sup>19</sup> A/CN.9/595, paras. 47 and 48.

<sup>20</sup> A/CN.9/623, para. 102.

<sup>21</sup> A/CN.9/595, paras. 18-22, A/CN.9/WG.I/WP.42, para. 13, and A/CN.9/WG.I/WP.42/

light of a general nature of those provisions, it was suggested that they should be incorporated in parts of the Guide preceding article-by-article remarks. These introductory parts of the Guide will have to be significantly revised at a later stage in the light of all revisions made to the Model Law. The revised text will be presented to the Working Group for consideration in due course.

### III. Draft provisions addressing abnormally low tenders

#### 1. Proposed draft text for the revised Model Law

26. The following draft article reflects the suggestions made to draft article 12 bis that was before the Working Group at its eleventh session:<sup>22</sup>

**“Article [12 bis]. Rejection of abnormally low tenders, proposals, offers, quotations or bids**

(1) The procuring entity may reject a tender, proposal, offer, quotation or bid if a price submitted therein is abnormally low in relation to the goods, construction or services to be procured, provided that:

(a) [The procuring entity has specified the right to do so in the solicitation documents or in any other documents for the solicitation of proposals, offers, quotations or bids;]

(b) The procuring entity has requested in writing from the supplier or contractor concerned details of constituent elements of a tender, proposal, offer, quotation or bid that give rise to concerns as to the ability of the supplier or contractor that submitted such a tender, proposal, offer, quotation or bid to perform the procurement contract;

(c) The procuring entity has taken account of the information supplied, if any, but continues, on a reasonable basis, to hold those concerns; and

(d) 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 solicitation documents or other documents for solicitation of proposals, offers, quotations or bids [may] [should] include an explicit statement that a procuring entity may carry out analyses of potential performance risks and prices submitted.]

(3) The decision of the procuring entity to reject a tender, proposal, offer, quotation or bid 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.”

#### Commentary

27. At the Working Group’s eleventh session, no agreement was reached on whether the right to reject an ALT under article 12 bis should be expressly reserved in the

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Add.1, para. 2.

<sup>22</sup> A/CN.9/623, paras. 33-41.

solicitation or equivalent documents.<sup>23</sup> The Working Group decided to consider the issue at its next session with reference to the drafting suggestions<sup>24</sup> made, as reflected in new subparagraph (1) (a) and new paragraph (2), put in square brackets, above.

## **2. Proposed draft text for the revised Guide**

28. The Working Group considered the accompanying provisions of the Guide at its eleventh session. The revised text incorporating the suggestions made to the text at that session<sup>25</sup> and any other suggestions that may be made will be presented for consideration by the Working Group in due course.

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<sup>23</sup> Ibid., paras. 33- 39.

<sup>24</sup> Ibid., para. 39.

<sup>25</sup> Ibid., paras. 42, 48 and 49.



**C. Note by the Secretariat on revisions to the UNCITRAL Model Law  
on Procurement of Goods, Construction and Services – drafting materials  
for the use of electronic reverse auctions in public procurement, submitted  
to the Working Group on Procurement at its twelfth session  
(A/CN.9/WG.I/WP.55) [Original: English]**

**CONTENTS**

	<i>Paragraphs</i>
I. Introduction .....	1-2
II. Draft provisions to enable the use of electronic reverse auctions in public procurement under the Model Law .....	3-37
A. Conditions for the use of electronic reverse auctions: draft article 22 bis. ....	3-9
1. Proposed draft text for the revised Model Law .....	3
Commentary .....	4-6
2. Proposed draft text for the revised Guide .....	7-9
B. Procedures in the pre-auction and auction stages: draft articles 51 bis to sexies. . . .	10-33
1. Draft article 51 bis .....	10-13
(a) Proposed draft text for the revised Model Law .....	10
Commentary .....	11-12
(b) Points for reflection in an accompanying Guide text .....	13
2. Draft article 51 ter .....	14-17
(a) Proposed draft text for the revised Model Law .....	14
Commentary .....	15
(b) Points for reflection in an accompanying Guide text .....	16-17
3. Draft article 51 quater .....	18-20
(a) Proposed draft text for the revised Model Law .....	18
Commentary .....	19
(b) Points for reflection in an accompanying Guide text .....	20
4. Draft article 51 quinquies .....	21-28
(a) Proposed draft text for the revised Model Law .....	21
Commentary .....	22-24
(b) Points for reflection in an accompanying Guide text .....	25-28
5. Draft article 51 sexies .....	29-33
(a) Proposed draft text for the revised Model Law .....	29

Commentary . . . . .	30-31
(b) Points for reflection in an accompanying Guide text . . . . .	32-33
C. Consequential changes to provisions of the Model Law: record of procurement proceedings (article 11 of the Model Law) . . . . .	34-37

## I. Introduction

1. The background to the current work of Working Group I (Procurement) on the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services (the “Model Law”) (A/49/17 and Corr.1, annex I) is set out in paragraphs 5 to 70 of document A/CN.9/WG.I/WP.53, which is before the Working Group at its twelfth 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 reverse auctions (“ERAs”), in public procurement.

2. Such use was included in the topics before the Working Group at its sixth to eleventh sessions. At its eleventh session, the Working Group requested the Secretariat to revise the drafting materials on ERAs that it had considered at the session.<sup>1</sup> This note has been prepared pursuant to that request.

## II. Draft provisions to enable the use of electronic reverse auctions in public procurement under the Model Law

### A. Conditions for the use of electronic reverse auctions: draft article 22 bis

#### 1. Proposed draft text for the revised Model Law

3. Draft article 22 bis below draws on the text of a draft article on conditions for the use of ERAs that was before the Working Group at its eleventh session, and reflects amendments suggested to be made thereto:<sup>2</sup>

#### “Article 22 bis. Conditions for use of electronic reverse auctions

(1) A procuring entity may engage in procurement by means of an electronic reverse auction in accordance with articles [51 bis to 51 sexies] under the following conditions:

(a) Where it is feasible for the procuring entity to formulate detailed and precise specifications for the goods [or construction or, in the case of services, to identify their detailed and precise characteristics]; and

(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.

<sup>1</sup> A/CN.9/623, para. 13.

<sup>2</sup> Ibid., paras. 53, 62 (b) and 69.

- (2) The electronic reverse auctions shall be based on:
- (a) Prices where the procurement contract is awarded to the lowest price;  
or
- (b) Where the procurement contract is awarded to the lowest evaluated bid, prices and other evaluation criteria specified in the notice of the electronic reverse auction, provided that such other criteria are quantifiable and can be expressed in monetary terms.
- (3) Where the procurement contract is awarded to the lowest evaluated bid, the electronic reverse auction shall be preceded by a full initial evaluation of bids in accordance with the award criteria and the relative weight of such criteria specified in the notice of the electronic reverse auction.”

### Commentary

4. At the Working Group’s eleventh session, the prevailing view was that both price and non-price criteria could be used in ERAs under the Model Law in such a manner that enacting States could select any or both alternatives. It was also observed that a better approach would be not to separate the alternatives and to provide for conditions for the use of price only and price and non-price based ERAs in one place.<sup>3</sup> Accordingly, the Working Group agreed at that session that the conditions in draft article 22 bis (d) for use of ERAs should be revised, to provide that ERAs could involve either the price as the only evaluation criterion or price and other criteria.<sup>4</sup>

5. In addition, the prevailing view at the same session was that the use of any ERA involving both price and non-price criteria should be subject to the condition that initial bids should be submitted and fully evaluated, and the results should be communicated to each supplier or contractor concerned. The Working Group therefore decided that conditions in draft article 22 bis (d) should also contain this requirement.<sup>5</sup>

6. Previous paragraph (d) has therefore been revised to reflect these suggestions. It has been presented as new paragraphs (2) and (3) of the draft article.

## 2. Proposed draft text for the revised Guide

7. At its eleventh session, the Working Group did not reach agreement on whether the Guide should recommend exclusively the use of ERAs where price was the only award criterion. No consensus on this point being reached at that session, the Working Group agreed to reconsider the question at its next session.<sup>6</sup> The Working Group may therefore wish to formulate its position on this issue in order that the guidance on the relevant provisions of article 22 bis can be completed.

8. At the Working Group’s eleventh session, it was stressed that in the ERAs involving non price criteria, price would always remain one of the determining criteria, so that ERAs could never be based on other criteria alone and the price would always be subject to the auction.<sup>7</sup> The Working Group’s attention is drawn to a different approach to the issue taken in the revised December 2006 version of an agreement on

<sup>3</sup> Ibid., para. 66.

<sup>4</sup> Ibid., para. 69.

<sup>5</sup> Ibid., para. 72.

<sup>6</sup> Ibid., para. 66.

<sup>7</sup> Ibid., para. 68.

government procurement of the World Trade Organization (the “revised GPA”)<sup>8</sup> and the European Union procurement directives.<sup>9</sup> For the ease of reference, the relevant extracts from these instruments are reproduced below:

The revised GPA (article I (e))	“ <b>Electronic auction</b> means an iterative process that involves the use of electronic means for the presentation by suppliers of either new prices, or new values for quantifiable non-price elements of the tender related to the evaluation criteria, or both, resulting in a ranking or re-ranking of tenders.”
European Union procurement directives (article 1 (6) of 2004/17/EC and article 1 (7) of 2004/18/EC) (the same provision appears in both directives)	“An ‘electronic auction’ is a repetitive process involving an electronic device for the presentation of new prices, revised downwards, and/or new values concerning certain elements of tenders, which occurs after an initial full evaluation of the tenders, enabling them to be ranked using automatic evaluation methods.”

9. Pending completion of the Working Group’s consideration of these issues, the following text is proposed for the Guide to accompany provisions of the Model Law on the conditions for use of ERAs. It incorporates the relevant suggestions made at the Working Group’s previous sessions and also draws on the relevant provisions of the European Commission Staff Working Document (SEC(2005) 959)<sup>10</sup> and guidance provided on relevant issues by multilateral development banks and other regional and international organizations active in the field.<sup>11</sup> Providing detailed guidance on some points may be considered premature in the light of the ongoing relevant discussions in the Working Group, and given limitations imposed on the length of Secretariat documents, it has not been possible to provide full guidance on all necessary points. The Secretariat has therefore focussed on the main issues that have been settled to date. The Working Group may wish to consider any additional points that would be desirable to reflect in the Guide in relation to provisions of article 22 bis, such as the position that the Guide should take on non-electronic auctions (see below paragraph 3 of the Guide).

“(1) Article [22 bis] sets out the conditions for the use of electronic reverse auctions, defined as a repetitive process that involves the use of electronic means for the presentation by bidders of either new prices, revised downwards, or [in addition]<sup>12</sup> new values for quantifiable non-price elements related to the evaluation criteria, resulting in a ranking or re-ranking of bidders using automatic

<sup>8</sup> Document GPA/W/297, available as of the date of this note at [http://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm).

<sup>9</sup> 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, and 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, both available as of the date of this note at [http://ec.europa.eu/internal\\_market/publicprocurement/legislation\\_en.htm](http://ec.europa.eu/internal_market/publicprocurement/legislation_en.htm).

<sup>10</sup> Available as of the date of this note at [http://ec.europa.eu/internal\\_market/publicprocurement/docs/eprocurement/sec2005-959\\_en.pdf](http://ec.europa.eu/internal_market/publicprocurement/docs/eprocurement/sec2005-959_en.pdf).

<sup>11</sup> These documents were also used in preparing points for reflection in a Guide text that would accompany other provisions of the Model Law on ERA. See the relevant paragraphs of this note.

<sup>12</sup> The words were put in square brackets pending the Working Group consideration of the issue referred to in paragraph 8 of this note.

evaluation methods and a mathematical formula.<sup>13</sup> This electronic purchasing process has been introduced in the Model Law in order to allow procuring entities in enacting States to take advantage of its benefits but subject to safeguards for its appropriate use. Electronic reverse auctions can improve value for money as a result of increased competition among bidders in a dynamic and real-time setting. They can also improve transparency in the procurement process since information on successive results of evaluation of bids at every stage of the auction and the final result of the auction are made known to all bidders instantaneously and simultaneously. Furthermore, they are characterised by an evaluation process that is fully automated or with limited human intervention and therefore can discourage abuse and corruption.

(2) 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.<sup>14</sup> Furthermore, in an auction setting, the risk of bidders' gaining access to commercially sensitive information of competitors may be higher. Procuring entities should also be aware of the possible negative implications of outsourcing of decision-making beyond government, such as to third-party software and service providers, typically involved when electronic reverse auctions are held (it is common for third-party agencies to set up and administer the auction for procuring entities, and to advise on purchasing strategies). These agencies may represent and have access to both procuring entities and bidders and these potential organizational conflicts 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. As a result, the procuring entity may face opportunity costs arising from the use of electronic reverse auctions (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 methods were used.

(3) Recognizing potential benefits of electronic reverse auctions as well as concerns over their use, the Model Law enables, but does not require or encourage, their use. Such use is subject to conditions of article [22 bis] and procedural requirements in articles [51 bis to sexies] of the Model Law. Electronic reverse auctions may be used either as procurement method in itself or as a phase in other procurement methods, as and where appropriate, preceding the award of the procurement contract. The Model Law allows auctions only with automatic evaluation processes, where the anonymity of bidders, and the confidentially and

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<sup>13</sup> At the Working Group's eleventh session, the issue of the definition of the ERA was raised. The Working Group recalled at that session the consensus reached at its previous session that no such definition should be included in the Model Law. (A/CN.9/623, para. 68). The Working Group may wish to consider including the definition of the ERA in the Guide.

<sup>14</sup> Collusion can 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 bids or not presenting bids. This point is expected to be elaborated in a revised introductory part of the Guide.

traceability of the proceedings, can be preserved. [The Working Group may wish to consider whether anything about conventional auctions should be stated here.]<sup>15</sup>

(4) Under the conditions for the use of electronic reverse auctions set out in article [22 bis], electronic reverse auctions are primarily intended to satisfy the repeated needs of a procuring entity for standardized, simple and generally available goods, such as 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 the electronic reverse auctions.

(5) The requirement for detailed and precise specifications found in paragraph (1)(a) will preclude the use of this purchasing technique in procurement of most services and construction, unless they are of a highly simple nature (for example, straightforward road maintenance works). It would be inappropriate, for example to use auctions in procurement of works or services entailing intellectual performance, such as design works. [Concerns about the use of ERAs beyond procurement of simple standardized goods are to be elaborated.] 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.

(6) 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 lists of items not suitable for acquisition through electronic reverse auctions or, alternatively, to list generic characteristics that render a particular item suitable for acquisition through this purchasing technique.

(7) 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.

(8) Paragraph (1)(b) aims at mitigating 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 electronic reverse auctions are therefore not suitable in markets with only a limited number of potentially qualified and independent bidders, or in markets dominated by one or two major players since

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<sup>15</sup> See, for example, points raised in A/CN.9/575, paras. 63-65.

such markets are especially vulnerable to price manipulation or other anti-competitive behaviour. Paragraph 1(b) is supplemented by article [51 quater] 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. It also gives the right to the procuring entity to cancel the auction 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 during the auction. [Appropriate cross-reference to a Guide text that would accompany article 51 quater]

(9) The reference in subparagraph (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 submitted the accepted bid are checked. [Appropriate cross-reference to a Guide text that would discuss the relevant options]

(10) The article is intended to apply to procurement where the award of contracts is based on either price or price and other criteria to be specified in the beginning of the procurement proceedings. When non-price award criteria are involved, the Model Law require that such criteria should be transparent and objective, and thus quantifiable and expressed in monetary terms (e.g., figures, percentages). They must also be transparently and objectively applied (through a pre-disclosed procedures and mathematical formula). [To be elaborated, including as regards pre-auction evaluation and its results.] The enacting States and procuring entities should be aware however of potential dangers of allowing such other criteria in electronic reverse auctions. In particular, when quantifying such criteria, subjectivity may inevitably be introduced (such as through a points system), and the simplicity and transparency of the process could be undermined. Evaluation of non-price criteria may also leave room for manipulation and biased assessments. [To be elaborated.]<sup>16</sup>

(11) 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 bid, and then if appropriate proceeding 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 in procuring entities, for example, 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 handling electronic reverse auctions on behalf of the procuring entity is outsourced to private third-party service providers, in order to enable the procuring entity to properly supervise activities of such third-party providers.

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<sup>16</sup> See, in particular, points raised in A/CN.9/623, para. 67.

(12) 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 advisability of consolidated purchases to amortize costs of setting a system for holding an electronic reverse auction, including costs of third-party software and service providers.

(13) [Cross-references to provisions of the Guide providing functional guidance on the use of ERAs.]”

## **B. Procedures in the pre-auction and auction stages: draft articles 51 bis to sexies**

### **1. Draft article 51 bis**

#### **(a) Proposed draft text for the revised Model Law**

10. The following text is proposed for consideration by the Working Group:

#### **“Article 51 bis. Pre-auction procedures in stand-alone electronic reverse auctions**

(1) 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) The notice shall include, at a minimum, the following:

(a) Information referred to in article 25 (1)(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 bid, including any criteria other than price to be used, the relative weight of such criteria, the mathematical formula to be used in the evaluation procedure and indication of any criteria that cannot be varied during the auction;

(c) Whether any limitation on the number of suppliers or contractors to be invited to the auction is imposed, and if so, such number and the criteria and procedure that will be followed in selecting that number of suppliers or contractors;

(d) Whether prequalification is required and, if so, information referred to in article 25 (2)(a) to (e);

(e) Whether submission of initial bids is required and, if so:

(i) Information referred to in articles 25 (f) to (j);

(ii) Whether initial bids are to be submitted for assessment of their responsiveness to the requirements specified in the notice of the auction or in addition for their evaluation; and

(iii) If evaluation of initial bids is involved, procedures to be used in such evaluation;

(f) How the electronic reverse auction can be accessed, and information about the electronic equipment being used and technical specifications for connection;



(g) The manner and, if already determined, deadline by which the suppliers and contractors shall register to participate in the auction;

(h) Criteria governing the closing of the auction and, if already determined, the date and time of the opening of the auction;

(i) 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

(j) 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.

(3) Except as provided for in paragraphs (4) to (6) 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 (7) of this article.

(4) Where a limitation on the number of suppliers or contractors to be invited to the auction is imposed, the procuring entity shall:

(a) Select suppliers or contractors corresponding to the number and in accordance with the criteria and procedure specified in the notice of the electronic reverse auction; and

(b) Send an invitation to prequalify or to submit initial bids or to participate in the auction, as the case may be, individually and simultaneously to each selected supplier or contractor.

(5) Where prequalification is required, the procuring entity shall:

(a) Prequalify suppliers or contractors in accordance with article 7; and

(b) Send an invitation to submit initial bids or to participate in the auction, as the case may be, individually and simultaneously to each prequalified supplier or contractor.

(6) Where submission of the initial bids is required, the procuring entity shall:

(a) Include in the solicitation documents information referred to in article 27 (a), (k) to (s) and (z) of this Law;

(b) Solicit and examine initial bids in accordance with articles 26, 28 to 32, 33 (1) and 34 (1) of this Law;

(c) As specified in the notice of the electronic reverse auction, assess responsiveness of initial bids to all requirements set out in the notice of the electronic reverse auction in accordance with article 34 (2) or in addition carry out evaluation of initial bids in accordance with the procedures and criteria set out in the notice of the electronic reverse auction; and

(d) Send an invitation to participate in the auction individually and simultaneously to each supplier or contractor except for those whose bid has been rejected in accordance with article 34 (3). Where evaluation of initial bids took place, the invitation shall be accompanied by the information on the outcome of such evaluation.

(7) 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.

(8) The fact of the registration to participate in the auction shall be promptly confirmed individually to each registered supplier or contractor.

(9) 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.”

### Commentary

11. Draft article 51 bis above draws on the text of draft article 51 ter that was before the Working Group at its eleventh session, and reflects amendments suggested to be made thereto<sup>17</sup> and consequential changes resulting from changes in other draft articles on ERAs.

12. At the Working Group’s eleventh session, it was recalled that a critical anti-abuse feature of ERAs was that the anonymity of bidders should be preserved throughout the process, and therefore the results of the evaluation of each bid would be communicated only to the bidder concerned.<sup>18</sup> The Working Group may wish to consider whether the requirement in paragraph (6)(d) of the draft article provides sufficient safeguards in this respect.

#### (b) Points for reflection in an accompanying Guide text

13. A Guide text that would accompany the relevant provisions of the Model Law will be submitted to the Working Group at a later stage. At the Working Group’s previous sessions,<sup>19</sup> the following points were proposed to be reflected:

(a) With reference to paragraph (1) of the article, to stress the benefits of ensuring as wide solicitation of participation in an ERA as possible, especially in the light of the requirements of effective competition in articles 22 bis and 51 quater;

(b) With reference to paragraph (2), to highlight that the Model Law lists only the minimum general requirements for the content of the notice of ERA that are crucial for the proper handling of ERAs and for the fair and equitable treatment of all suppliers

<sup>17</sup> Ibid., paras. 62 and 73.

<sup>18</sup> Ibid., para. 72.

<sup>19</sup> A/CN.9/590, para. 66, and A/CN.9/595, para. 101, A/CN.9/615, paras. 46 and 68.

and contractors. These general requirements are to be supplemented by detailed regulations. As an example, regulations must spell out criteria governing the closing of the auction referred to in subparagraph 2 (h) of the article. Criteria may include: (i) when the date and time specified for the closing of the auction has passed; (ii) when the procuring entity, within a specified period of time, receives no more new prices or new values that improve on the top-ranked bid subject to any imposed minimum differences in price or other values; or (iii) when the number of stages in the auction, fixed in the notice of the ERA, has been completed. The regulations should also make it clear that each of these criteria may entail pre-disclosure of additional specific information (for example, the criterion in item (ii) requires specification of the time that will be allowed to elapse after receiving the last submission before closing the auction). Regulations should also require disclosure of: (i) procedures to be followed in the case of any failure, malfunction, or breakdown of the system used during the auction process; (ii) how and when the information that will be made available to the bidders in the course of the auction will be made available (the minimum requirement should be to ensure equal treatment by providing the same information simultaneously to all bidders); and (iii) as regards the conditions under which the bidders will be able to bid, any minimum differences in price or other values that must be improved in any new submission during the auction, and whether there are any limits on the new values which may be submitted during the auction and, if so, what those limits are (limitations are inherent in the technical characteristics of goods, construction and services procured). This level of detail may be provided in the notice of the ERA itself or by reference in the rules for the conduct of the auction as long as all relevant information is made known to all suppliers or contractors sufficiently in advance before the auction to enable interested suppliers or contractors properly to prepare for participation in the auction and ensure transparency and predictability in the process;

(c) As regards subparagraph 2 (b), to note the importance of disclosing to potential bidders in the beginning of the procurement proceedings all information about evaluation criteria, processes and formula that would allow bidders to transparently establish their status at any stage of the procurement process. A link would be made to supplementary provisions of paragraph 6 (d) of the article that require the procuring entity to transmit the outcome of the pre-auction evaluation, where this takes place, individually and simultaneously to each supplier or contractor invited to the auction, as well as to provisions of article 51 quinquies (1)(c) that require keeping bidders informed on a regular basis on successive results of the auction during the auction itself.

## 2. Draft article 51 ter

### (a) Proposed draft text for the revised Model Law

14. The following text is proposed for consideration by the Working Group:

**“Article 51 ter. Pre-auction procedures in auctions used as a phase preceding the award of the procurement contract in procurement proceedings under this Law**

(1) The award of the procurement contract in procurement proceedings under this Law may be preceded by an electronic reverse auction[, provided that conditions for use of the relevant procurement proceedings and electronic reverse auctions are met and their procedures are compatible].

(2) The procuring entity when first soliciting the participation of suppliers or contractors in the procurement proceedings shall state that the award of the

procurement contract will be preceded by an electronic reverse auction and provide information referred to in article 51 bis (2)(b) and (f) to (j).

(3) Before proceeding to the auction, the procuring entity shall send an invitation to participate in the auction individually and simultaneously to each supplier or contractor admitted to participate in the auction and comply with the provisions of article 51 bis (7) to (9).”

### Commentary

15. Draft article 51 ter above draws on the text of a draft article 51 quater that was before the Working Group at its eleventh session, and reflects amendments suggested to be made thereto.<sup>20</sup> It retains cross-references to the applicable provisions of draft article 51 bis that contain essential safeguards specific to ERAs. It was also considered important to refer explicitly in article 51 ter to the requirement that the procuring entity must send the invitation to participate in the auction individually and simultaneously to each supplier or contractor admitted to participate in the auction. This requirement is found in several provisions of article 51 bis (subparagraphs (4)(b), (5)(b) and (6)(d)).

#### (b) Points for reflection in an accompanying Guide text

16. The Guide text that would accompany the relevant provisions of the Model Law will be submitted to the Working Group at a later stage. As suggested at the Working Group's eleventh session,<sup>21</sup> the guidance would recognize difficulties with introducing and regulating ERAs as a phase in some procurement methods and alert enacting States about the lack of practical experience with regulation and use of ERAs in this manner. It would explain whether and if so how ERAs might be incorporated in various procurement methods envisaged by the Model Law, and which modifications of traditional characteristics of those procurement methods where ERAs might be incorporated would be needed. The Guide would note, with relevant cross-references, that ERAs could in particular appropriately be used upon the reopening of competition in framework agreements. The Working Group may wish to consider whether the guidance should note that the use of ERAs in tendering proceedings would be inappropriate due to the particular characteristics of the latter (such as prohibition of substantive modification of tenders after their submission) and whether, in other procurement methods, provisions of the current Model Law would have to be amended to allow repetitive submission of offers or quotations so that to accommodate the use of ERAs in them.

17. The Guide text would also highlight that procuring entities must announce, when soliciting the participation of suppliers or contractors in the procurement proceedings, their intention to hold an ERA and provide, in addition to information usually required to be provided in the relevant procurement method, all essential information specific to the ERA. Once announced, it becomes mandatory to hold the ERA unless the number of suppliers or contractors participating in the procurement proceedings is insufficient to ensure effective competition. In such case, in accordance with article 51 quater, the procuring entity would have the right to cancel the ERA. The Guide would also explain the importance of complying with procedural requirements of paragraph (3) of the article. The Working Group may wish to formulate additional points for reflection in the Guide in relation to the provisions of article 51 ter, in particular as regards anonymity

<sup>20</sup> A/CN.9/623, paras. 74-76.

<sup>21</sup> *Ibid.*, paras. 57 and 76.

of bidders in ERAs used as a phase in some procurement methods and framework agreements (see article 51 quinquies and paragraph 24 below).

### 3. Draft article 51 quater

#### (a) Proposed draft text for the revised Model Law

18. The following text is proposed for consideration by the Working Group:

**“Article 51 quater. Requirement of sufficient number of bidders to ensure effective competition**

(1) The procuring entity shall ensure that the number of suppliers or contractors invited to participate in the auction in accordance with articles 51 bis (4) to (6) and article 51 ter (3) is sufficient to secure effective competition.

(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.”

#### Commentary

19. Draft article 51 quater above draws on the text of a draft article 51 quinquies on requirement of effective competition that was before the Working Group at its eleventh session, and reflects amendments suggested to be made thereto.<sup>22</sup>

#### (b) Points for reflection in an accompanying Guide text

20. The Guide text that would accompany the relevant provisions of the Model Law will be submitted to the Working Group at a later stage. As agreed at the Working Group’s ninth session,<sup>23</sup> the Guide text would elaborate on the importance of a sufficient number of bidders to ensure competition. As suggested at the Working Group’s eleventh session,<sup>24</sup> the Guide would also illustrate some options on how a procuring entity should proceed if the ERA was cancelled as a result of insufficient number of registered bidders to ensure effective competition. It should also mention that solicitation or equivalent documents might set out any steps that the procuring entity intended to take should the situation arise.

### 4. Draft article 51 quinquies

#### (a) Proposed draft text for the revised Model Law

21. The following text is proposed for consideration by the Working Group:

**“Article 51 quinquies. Requirements during the auction**

(1) During an electronic reverse auction:

(a) All bidders shall have an equal and continuous opportunity to submit their bids;

(b) There shall be automatic evaluation of all bids;

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<sup>22</sup> Ibid., paras. 78, 81 and 82.

<sup>23</sup> A/CN.9/595, para. 101.

<sup>24</sup> A/CN.9/623, para. 83.

(c) The successive results of the auction established according to the evaluation criteria specified in the notice of the electronic reverse auction must instantaneously be communicated on a continuous basis to all bidders;

(d) There shall be no communication between the procuring entity and 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.

(4) The procuring entity may suspend or terminate the electronic reverse auction in the case of system or communication failures [that prevent holding the auction] [or for other reasons stipulated in the rules for the conduct of the electronic reverse auction]. The provisions of paragraph (2) of this article shall apply in the case of suspension or termination of the auction”

### Commentary

22. Draft article 51 quinquies above draws on the text of a draft article 51 sexies on requirements during the auction that was before the Working Group at its eleventh session, and reflects amendments suggested to be made thereto.<sup>25</sup>

23. At its eleventh session, the Working Group requested to the Secretariat to redraft paragraph (4) taking into account practical observations that suspension might be desirable in the case of suspected abnormally low bids. Such a suspension, it was observed, would allow the procuring entity instantaneously to intervene to the process to prevent any disruptive effect that the abnormally low bid might have on the auction (such a bid might have the effect of preventing other bidders from continuing to participate). The Working Group also took note that complaints from bidders about irregularities in the process might be made, which might also justify suspension of the auction. It was also suggested that the provisions should make it clear that the suspension of the ERA would not be justifiable in the case of failures in communications or systems of any single bidder.<sup>26</sup> The Working Group may wish to consider whether the texts in square brackets in paragraph (4) sufficiently reflect these suggestions.

24. The last sentence was added in paragraph (4) to reflect the understanding in the Working Group that the anonymity of bidders has to be preserved during the auction, and in the case of suspension or termination of the auction.<sup>27</sup> However, the anonymity of bidders may be compromised already at a stage preceding the auction, especially in ERAs used as a phase in some procurement methods or framework agreements. The Working Group may therefore wish to consider which safeguards should be built in to mitigate such risks.

### (b) Points for reflection in an accompanying Guide text

25. The Guide text that would accompany the relevant provisions of the Model Law will be submitted to the Working Group at a later stage. With reference to paragraph 1 (b) of the article, it would elaborate that the auction must be based on pre-disclosed award criteria (and their relative weighting where applicable) that cannot

<sup>25</sup> Ibid., paras. 84, 85 and 89.

<sup>26</sup> Ibid., para. 89.

<sup>27</sup> Ibid., para. 85.

be varied during the auction. What can be varied during the auction are prices and modifiable elements. Each such modifiable element is assigned a value, expressed in figures or percentages, in a pre-disclosed mathematical formula. With reference to paragraph 1 (c), the Guide would highlight that the purpose of the provisions is to ensure that all bidders can ascertain their status vis-à-vis other bidders at any moment of the auction. With reference to paragraph 1 (d), the Guide should highlight the importance of avoiding any human intervention during the running of the auction. The auction device shall collect, electronically, anonymous bids which will be automatically evaluated according to the criteria and processes disclosed in the notice of the ERA. On-line capacities should also exist for automatic rejection of invalid bids with immediate notification of rejection and explanation of reasons for rejection. A contact point for urgent communications concerning possible technical problems may be offered to bidders. Such a contact point has to be external to the auction device and the procurement proceedings in question.

26. As regards paragraphs (2) and (4), the Guide would underline that under no circumstances shall the identities of the bidders be able to be disclosed or identified by other bidders during the auction, including in the case of its suspension or termination (see however the concern raised in paragraph 24 above). As regards paragraph (3), the Guide would cross-refer to article 51 bis (2)(h) and related discussion in the Guide. It would also stress that under no circumstances may the auction be closed before the established deadline. As agreed at the Working Group's ninth session,<sup>28</sup> the Guide would elaborate on how suppliers might withdraw from the ERA process before its closure and the effect of such withdrawal.

27. As regards paragraph (4), subject to the Working Group's final position on the relevant issues (see paragraph 23 above), the Guide would elaborate on all cases that would justify termination or suspension of the ERA and procedural safeguards that should be in place to protect interests of bidders (such as immediate and simultaneous notification of all bidders about suspension, new time for the reopening of the auction and new deadlines). The Guide would also highlight the importance of carefully monitoring the auction proceedings for market manipulation and, in this respect, the need in the procuring entity for good intelligence on past similar transactions, the relevant marketplace and market structure.<sup>29</sup> The Guide would alert enacting States that while mechanisms may be put in place to interfere into and prevent possible collusive behaviour, practical difficulties may exist in distinguishing justifiable from collusive behaviour and therefore any discretion given to procuring entities in this respect should be carefully regulated in order to prevent abuses and unjustifiable disruptions.

28. The Working Group may wish to formulate additional points for reflection in the Guide in relation to provisions of article 51 quinquies, in particular whether it should be possible during the auction to (i) extend deadlines for submission of bids, other than in the situations referred in paragraph (4) of the article, and (ii) change the rules of the auction.<sup>30</sup>

<sup>28</sup> A/CN.9/595, para. 111.

<sup>29</sup> These issues are expected to be discussed in more detail in a revised introductory part of the Guide. A cross-reference may therefore be introduced to the relevant provisions.

<sup>30</sup> Both possibilities, i.e., as regards changing deadlines and auction rules during the auction, are envisaged in the European Commission Staff Working Document (SEC(2005) 959, section 5.4, available as of the date of this note at [http://ec.europa.eu/internal\\_market/publicprocurement/docs/e-procurement/sec2005-959\\_en.pdf](http://ec.europa.eu/internal_market/publicprocurement/docs/e-procurement/sec2005-959_en.pdf)). A possibility to adjust a deadline during the auction is also envisaged in the E-reverse Auction Guidelines for MDBs financed procurement,

## 5. Draft article 51 sexies

### (a) Proposed draft text for the revised Model Law

29. The following text is proposed for consideration by the Working Group:

**“Article 51 sexies. 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, submitted the bid with the lowest price or the lowest evaluated bid, as applicable, unless such bid 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, submitted the bid with the next lowest price or next lowest evaluated bid, as applicable; or

(b) Reject all remaining bids in accordance with article 12 (1) of this Law, and hold another auction under the same procurement proceedings or announce new procurement proceedings.

(2) Notice of acceptance of the bid shall be given promptly to the bidder that submitted the bid that the procuring entity is prepared to accept.

(3) 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.”

### Commentary

30. Draft article 51 sexies above draws on the text of draft article 51 septies that was before the Working Group at its eleventh session, and reflects amendments suggested to be made thereto.<sup>31</sup>

31. Paragraphs (1) and (2) have been merged and streamlined by the use of cross-references, as suggested at the Working Group’s eleventh session. Cross-references will be finalised once the Working Group has approved content and location of current article 36 of the Model Law.<sup>32</sup> What was paragraph (3) has been split into two paragraphs: the first, paragraph (2), addressing the notification of the bidder with whom the procurement contract is concluded, and the second, paragraph (3), addressing notification of other bidders about the winning bidder and the contract price. The wording of the latter paragraph has been aligned with article 11 (1)(b) of the Model Law.

### (b) Points for reflection in an accompanying Guide text

32. The Guide text that would accompany the relevant provisions of the Model Law will be submitted to the Working Group at a later stage. As suggested at the Working Group’s ninth session,<sup>33</sup> the Guide would point out that the results of the auction are intended to be the final results of the procurement proceedings and the winning price would figure in the procurement contract, including in the case of framework agreements. Exceptions to this rule (i.e., each cross-reference in paragraph (1)) would

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para. 4.5 (December 2005), available as of the date of this note at <http://www.mdb-egp.org/>.

<sup>31</sup> A/CN.9/623, paras. 91-93 and 95.

<sup>32</sup> Ibid., para. 102.

<sup>33</sup> A/CN.9/595, para. 101.



be explained. No further evaluation should be allowed to take place after the auction has been held to avoid improprieties, such as corruption and favouritism.

33. As agreed at the Working Group's eleventh session,<sup>34</sup> the Guide would emphasize the need for prompt action after the auction, whether as regards any post-auction checking of qualifications of the successful bidder or reviewing a possible abnormally low bid, so as to ensure that the final outcome should be determined as soon as reasonably practical. It was also agreed that the Guide should elaborate on practical implications of each option described in subparagraphs (1)(a) and (b).

### C. Consequential changes to provisions of the Model Law: record of procurement proceedings (article 11 of the Model Law)

34. The proposed addition to article 11 (1) of the Model Law below replaces the wording that was before the Working Group at its previous sessions.<sup>35</sup> It reflects the agreement reached at the Working Group's eleventh session that the text should be expanded to refer to all information that would have to be included in the record of procurement proceedings in the context of an ERA, which was not expressly mentioned in article 11 (1) of the Model Law.<sup>36</sup> It was suggested in particular that records should contain information about the grounds and circumstances on which the procuring entity relied to justify recourse to the ERA, and the date and time of the ERA.

#### “Article 11. Record of procurement proceedings

(1) The procuring entity shall maintain a record of the procurement proceedings containing, at a minimum, the following information:

...

(i bis) “In procurement proceedings involving the use of 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 auction and [any other information that the Working Group decides to add].”

35. In addition, at the Working Group's eleventh session, it was considered appropriate to provide exceptions to disclosure of some type of information under article 11 in the light of the specific characteristics of the ERA.<sup>37</sup> It was considered in particular that the names of all bidders could be disclosed only if the procurement proceedings resulted in the procurement contract, and such disclosure should not result in the disclosure of price-sensitive commercial information regarding any particular bidder.<sup>38</sup>

36. Under article 11 (2) of the Model Law, the portion of record containing the names and addresses of all bidders would be made available, on request, to any person after the bid has been accepted or after procurement proceedings have been terminated without resulting in a procurement contract. The Working Group may wish to consider whether article 11 (2) should be amended so as explicitly to exclude the possibility of disclosing identity of bidders to the public if procurement proceedings have been terminated without resulting in a procurement contract. The Guide might explain that

<sup>34</sup> A/CN.9/623, para. 94.

<sup>35</sup> A/CN.9/WG.I/WP.40/Add.1, para. 3, A/CN.9/WG.I/WP.43, para. 59, and A/CN.9/WG.I/WP.51, para. 68.

<sup>36</sup> A/CN.9/623, para. 100.

<sup>37</sup> Ibid.

<sup>38</sup> Ibid., paras. 85 and 87.

disclosure of identity of bidders, especially when a small number of bidders participated in the auction, might lead to collusion of bidders in successive auctions on the same or similar type of products and thus jeopardise the maintenance of competitiveness in the market and the success of future auctions.

37. Under article 11 (3), the price, or the basis for determining the price, and a summary of the other principal terms and conditions of each bid and of the evaluation and comparison of bids, would be made available to the bidders on request. The procuring entities, as a general rule, would be prohibited under subparagraphs (a) and (b) of article 11 (3) from disclosing detailed information relating to the examination, evaluation and comparison of bids as well as information if its disclosure would *inter alia* prejudice legitimate commercial interests of the parties or would inhibit fair competition. The Working Group may wish to consider whether any revisions to the disclosure provisions of article 11 would be required in the light of the specific characteristics of the ERA or whether the provisions of subparagraphs (a) and (b) of article 11 (3), strengthened by appropriate commentary in the Guide as suggested at the Working Group's eleventh session,<sup>39</sup> would be sufficient.

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<sup>39</sup> *Ibid.*, paras. 87-88.

**D. Note by the Secretariat on revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services – Proposal by the United States, submitted to the Working Group on Procurement at its twelfth session**  
**(A/CN.9/WG.I/WP.56) [Original: English]**

In preparation for the twelfth session of Working Group I (Procurement), during which the Working Group is expected to proceed with its review of documents A/CN.9/WG.I/WP.52 and Add.1 (see the report of the eleventh session, A/CN.9/623, para. 12), the Government of the United States, on 14 June 2007, submitted a proposal regarding issues for discussion at the Working Group's twelfth session of framework agreements, dynamic purchasing systems, and anti corruption measures. The text of the proposal is reproduced as an annex to this note in the form in which it was received by the Secretariat with formatting changes.

**Annex**

**Paper of the United States' Delegation to Working Group I (Procurement) of the United Nations Commission on International Trade Law (UNCITRAL) Regarding Issues for Discussion at the Working Group's September 2007 Meeting: Framework Agreements, Dynamic Purchasing Systems, and Anti-Corruption Measures**

1. Working Group I of the United Nations Commission on International Trade Law (UNCITRAL) is scheduled to meet in Vienna during the week of September 3-7, 2007 to address proposed revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services (the "Model Law"). The United States' delegation to the Working Group submits this paper in order to facilitate the Working Group's discussion of two topics likely to arise in the September 2007 meeting: (1) framework agreements and dynamic purchasing systems, and (2) the Model Law's provisions regarding conflict of interest in public procurement.

**I. Framework Agreements/Dynamic Purchasing Systems**

2. At Working Group I's meeting of May 21-25, 2007, see A/CN.9/WG.I/WP.49 (agenda), the Working Group made an initial review of, among others, Working Papers 52 and 52 Addendum 1 (respectively, A/CN.9/WG.I/WP.52 (Mar. 13, 2007) and A/CN.9/WG.I/WP.52/Add.1 (Mar. 13, 2007),<sup>1</sup> which presented drafting materials for the use of framework agreements and dynamic purchasing systems in public procurement.

3. Working Paper 52 focused on framework agreements, which for reference we would note are defined by a European procurement directive as follows:

4. A "framework agreement" is an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the

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<sup>1</sup> Available at [www.uncitral.org/uncitral/en/commission/working\\_groups/1Procurement.html](http://www.uncitral.org/uncitral/en/commission/working_groups/1Procurement.html)).

terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged.

5. 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, Art. I.5.<sup>2</sup> These “framework agreements” are very similar to “Indefinite-Delivery/Indefinite-Quantity” (“ID/IQ”) contracts used by the U.S. government, *see, e.g.*, Federal Acquisition Regulation<sup>3</sup> (FAR) 16.504-16.505, 48 C.F.R. §§ 16.504-16.505, including the related “Multiple Award Schedule” contracts principally sponsored by the U.S. General Services Administration, *see* FAR Subpart 8.4, 48 C.F.R. Subpart 8.4.

6. We have two comments regarding the referenced working papers, WP52 and WP.52 Add. 1, which are likely to be taken up again at the September 2007 meeting of the Working Group in Vienna.

7. *Allowing for Multiple Framework Agreements:* First, we recommend that the Working Group consider more flexibility in the proposed legislative language regarding the structure of framework agreements. Working Paper 52, at paragraph 10, proposes legislative language that contemplates the award of a *single* framework agreement to *multiple* suppliers. This approach seems to draw from Article 32, paragraph 4 of the European procurement directive cited above. Our recommendation is that the Model Law also allow procuring entities to enter into multiple, parallel framework agreements with *multiple* suppliers, rather than requiring procuring entities to enter into only a single framework agreement with many suppliers. Under this proposed approach, procuring entities would have the flexibility to enter into multiple agreements with essentially parallel language.

8. This more flexible approach would seem to enhance purchasing entities’ ability to achieve best value in procurement. Framework agreements are designed to allow procuring entities to launch “mini-competitions” among the subscribing vendors, as requirements arise. *See, e.g.*, Working Paper 52, para. 6. Forcing all the vendors to subscribe to a single master agreement would mean less genuine competition in those “mini-competitions,” for vendors would be forced to conform to identical terms at the outset. This would heighten concerns, similar to those raised by the European Commission approximately a decade ago, that framework agreements may foster anti-competitive behavior in procurement. *See* European Commission, Press Release: “Public Procurement: Infringement Proceedings Against the United Kingdom, Austria, Germany and Portugal,” IP/97/1178 (Brussels Dec. 19, 1997).<sup>4</sup>

9. An alternative approach, which is used in the United States, is to favor *multiple* awards to *multiple* vendors, under a single solicitation. *See, e.g.*, FAR 16.504(c), 48 C.F.R. § 16.504(c). This approach yields multiple, nearly identical master agreements with the various vendors, but allows the procuring entity and the vendors to negotiate slightly different terms — such as different licensing terms — in each vendor’s master agreement. These differences can increase the level of competition in subsequent “mini-competitions” under the master agreements. The separate agreements also allow

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<sup>2</sup> The directive is available at [http://ec.europa.eu/internal\\_market/publicprocurement/legislation\\_en.htm](http://ec.europa.eu/internal_market/publicprocurement/legislation_en.htm).

<sup>3</sup> A copy of the Federal Acquisition Regulation is available at [www.acquisition.gov/far](http://www.acquisition.gov/far).

<sup>4</sup> The European Commission’s press release is available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/97/1178&format=HTML&aged=1&language=EN&guiLanguage=en>.

the procuring agency more flexibility should, for example, it decide to terminate one agreement with one vendor because of concerns regarding corruption or malfeasance.

10. *Closing the Divide Between Framework Agreements and “Dynamic Purchasing Systems: Working Papers 52 and 52 Add. 1* follow the European procurement directives and create a conceptual divide between “framework agreements” and “dynamic purchasing systems.” Indeed, paragraph 7 of Working Paper 52 Add. 1 explicitly cites the European procurement directive’s definition of “dynamic purchasing systems,” as follows:

“A ‘dynamic purchasing system’ is a completely electronic process for making commonly used purchases, the characteristics of which, as generally available on the market, meet the requirements of the contracting authority, which is limited in duration and open throughout its validity to any economic operator which satisfies the selection criteria and has submitted an indicative tender that complies with the specifications.”

11. The experience of the United States’ federal procurement system, however, has been that “framework agreements” and “dynamic purchasing systems” (at least as contemplated by the Model Law) are not distinct, but rather that “dynamic purchasing systems” are merely a logical extension of framework agreements.

12. A practical illustration may assist the Working Group in its consideration of this point. For many decades, the U.S. General Services Administration (“GSA”) (a centralized purchasing agency) has sponsored “Multiple Award Schedule” contracts. These are essentially framework agreements, which may be entered into *at any time* by any qualified vendor interested in selling the subject goods or services to the U.S. government. There are many different classes of these standing agreements, such as classes of contracts for information technology and for management services. The GSA Multiple Award Schedule contracts give U.S. agencies ready access to thousands of vendors, and literally millions of commercial goods and services. *See* [www.gsa.gov](http://www.gsa.gov) (“GSA Schedules”).

13. To enter into a Multiple Award Schedule contract with the GSA, a vendor may *at any time* prepare and submit a proposal against a standing GSA solicitation. The GSA contracting officer will then work to negotiate an agreement with the vendor for the proffered goods and services. *See* FAR Subpart 8.4, 48 C.F.R. Subpart 8.4. The terms of that agreement are generally based on the vendor’s commercial sales practices; typically, the GSA Multiple Award Schedule contract ultimately will be based upon a discount against the vendor’s commercial prices, and will incorporate at least some of the vendor’s standard commercial terms.

14. The vendor’s Multiple Award Schedule agreement with the GSA may be one of hundreds, if not thousands, of other such GSA agreements in the same industry. There are, for example, thousands of information technology vendors that hold GSA Multiple Award Schedule contracts for hardware, software and information technology services. This rich field of potential vendors allows buying agencies to launch robust “mini-competitions” amongst many eligible vendors — the eligible Multiple Award Schedule contract holders — when requirements later arise. As with the “dynamic purchasing systems” contemplated by the European procurement directive, these “mini-competitions” may be held through an electronic marketplace. There is no requirement in the U.S. system, however, that the system be fully electronic.

15. As this example illustrates, the U.S. experience is that a “dynamic purchasing systems” can perhaps best be understood as a unique form of framework agreement — a third model,<sup>5</sup> under which vendors may join an “always open” standing system of agreements.

16. There are advantages and disadvantages to this approach. Among other things, this “always open” model allows vendors to join existing framework agreements as market conditions and technologies evolve; as a result, there is less chance that framework agreements will protect locked sets of incumbent vendors, and agencies are more likely to have easy access to new vendors and new technologies. On the other hand, this “always open” approach means that vendors, when initially entering into such agreements, will probably not be competing directly against other vendors, and thus may feel less acute competitive pressures to offer the government favorable prices and terms. To protect against this, the law must ensure that the “mini-competitions” subsequently held among vendors are indeed robust.

17. As a drafting matter, many of these concerns are addressed by Working Paper 52 Add.1, which describes proposed provisions to ensure that procuring entities use careful procedures for entering into, and implementing, “dynamic purchasing systems.” Our recommendation therefore goes mainly to the conceptual structure of the proposed revisions. Instead of dealing with “dynamic purchasing systems” as a distinct concept, we would recommend that the Working Group treat such systems as another model for framework agreements, perhaps renamed “dynamic framework agreements.” This would, it seems, clarify the intent behind these unique agreements.

## II. Anti-Corruption Measures: Conflicts of Interest in Procurement

18. In previous sessions, the Working Group agreed to add the issue of conflicts of interest to the list of topics to be considered in the ongoing revision of the Model Law. *See, e.g.*, A/CN.9/WG.I/WP.49, paras. 8 & 64 (Mar. 2, 2007).

19. In this regard, we would note that the United Nations Convention Against Corruption, which entered into force in December 2005,<sup>6</sup> specifically calls for anti-corruption measures in procurement to address conflicts of interest. The Convention calls, in relevant part, for “measures to regulate matters regarding personnel responsible for procurement, such as declaration of interest in particular public procurements, screening procedures and training requirements.”<sup>7</sup> We would recommend that the Model

<sup>5</sup> “Model 1” framework agreements (with fixed terms for purchase orders) and “Model 2” framework agreements (which allow for “mini-competitions” among vendors under the agreement) are described in Working Paper 52, at paragraph 6.

<sup>6</sup> Information on the UN Convention Against Corruption is available at [http://www.unodc.org/unodc/crime\\_convention\\_corruption.html](http://www.unodc.org/unodc/crime_convention_corruption.html).

<sup>7</sup> Article 9, paragraph 1, of the UN Convention Against Corruption reads, in total, as follows:  
Article 9

### Public procurement and management of public finances

1. 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*:

- (a) The public distribution of information relating to procurement procedures and contracts, including information on invitations to tender and relevant or pertinent information on the award of contracts, allowing potential tenderers sufficient time to prepare and submit their tenders;

Law include such conflict-of-interest provisions, so that nations implementing the Model Law have, included in their procurement systems, provisions in place in accord with the UN Convention Against Corruption.<sup>8</sup>

20. In addressing this topic of conflicts of interest in procurement, we would refer the Working Group to the substantial work that has been done in this field, including studies done by the Organisation for Economic Cooperation and Development (OECD) (available at [http://www.oecd.org/departement/0,3355,en\\_2649\\_34135\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/departement/0,3355,en_2649_34135_1_1_1_1_1,00.html)), and the United Nations' own *Standards of Conduct for the International Civil Service*, which specifically highlight the dangers of conflicts of interest in procurement, at paragraph 22. The United States has developed extensive laws regarding conflicts of interest in procurement, and work continues in expanding and improving that body of laws. We look forward to discussion of this important topic in future sessions of the Working Group.

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- (b) The establishment, in advance, of conditions for participation, including selection and award criteria and tendering rules, and their publication;
  - (c) The use of objective and predetermined criteria for public procurement decisions, in order to facilitate the subsequent verification of the correct application of the rules or procedures;
  - (d) An effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures established pursuant to this paragraph are not followed;
  - (e) Where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declaration of interest in particular public procurements, screening procedures and training requirements.

<sup>8</sup> Nations adopting the Model Law may have joined the UN Convention Against Corruption already. For a list of nations that have signed, and then ratified, accepted, approved of, acceded to, or succeeded to, the Convention, see [http://www.unodc.org/unodc/crime\\_signatures\\_corruption.html](http://www.unodc.org/unodc/crime_signatures_corruption.html).

**E. Report of the Working Group on Procurement on the work  
of its thirteenth session (New York, 7-11 April 2008)**

**(A/CN.9/648) [Original: English]**

**CONTENTS**

	<i>Paragraphs</i>
I. Introduction . . . . .	1-5
II. Organization of the session . . . . .	6-11
III. Deliberations and decisions . . . . .	12-17
IV. Consideration of proposals for the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services . . . . .	18-138
A. Draft provisions to enable the use of framework agreements in public procurement under the Model Law (A/CN.9/WG.I/WP.52, paras. 5-40, A/CN.9/WG.I/WP.52/Add.1, paras.1-19, and A/CN.9/WG.I/WP.56, paras. 2-17). . . . .	18-133
1. Types of framework agreements . . . . .	18-23
2. Conditions for the use of framework agreements . . . . .	24-54
3. Procedures for the use of framework agreements . . . . .	55-133
B. Issues arising from the use of suppliers' lists (A/CN.9/WG.I/WP.45 and A/CN.9/WG.I/WP.45/Add.1) . . . . .	134-136
C. Drafting materials addressing the use of electronic communications in public procurement, publication of procurement-related information, and abnormally low tenders (A/CN.9/WG.I/WP.58) . . . . .	137
D. Drafting materials for the use of electronic reverse auctions in public procurement (A/CN.9/WG.I/WP.59) . . . . .	138
Annex	
Tentative timetable and agenda for the Working Group's fourteenth to fifteenth sessions agreed at the Working Group's thirteenth session . . . . .	

**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 twelfth 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, respectively) (A/CN.9/575, A/CN.9/590, A/CN.9/595, A/CN.9/615, A/CN.9/623 and A/CN.9/640), 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. At its twelfth session, the Working Group came to preliminary agreement on the draft revisions to the Model Law and the Guide that would be necessary to accommodate the use of electronic communications and technologies (including ERAs) in the Model Law. At that session, the Working Group requested the Secretariat to revise the drafting materials contained in documents A/CN.9/WG.I/WP.54 and 55, reflecting the deliberations at its twelfth session, for its consideration at the next session (A/CN.9/640, para. 14).

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 twelfth session, the Working Group considered whether the right to reject an ALT under article 12 bis should be expressly reserved in the solicitation or equivalent documents. At that session, the Working Group agreed to amend article 12 bis (a) and (b) as to provide more clarity to the term ALT, by referring to the constituent elements of tender in the context of the price that might raise concern with the procuring entity on the ability of the supplier or contractor to perform the procurement contract (A/CN.9/640, paras. 44-55).

4. At its twelfth session, the Working Group also held a preliminary exchange of views on the first part of the proposal contained in document A/CN.9/WG.I/WP.56, addressing framework agreements. At that session, the Working Group considered that the transparency and competition safeguards should be applied to all stages of procurement, involving framework agreements, including the second stage at which the award of the procurement contract is made (A/CN.9/640, para. 93). It deferred detailed consideration of that document as well as documents A/CN.9/WG.I/WP.52 and Add.1 on framework agreements and dynamic purchasing systems and A/CN.9/WG.I/WP.45 and Add.1 on suppliers' lists to a future session (A/CN.9/640, para. 13).

5. At its thirty-eighth session, in 2005, thirty-ninth session, in 2006, and fortieth session, in 2007, 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, and A/62/17 (Part I), para. 170). 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). Pursuant to that recommendation, the Working Group, at its tenth session, 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). 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).

## II. Organization of the session

6. The Working Group, which was composed of all States members of the Commission, held its thirteenth session in New York from 7-11 April 2008. The session was attended by representatives of the following States members of the Working Group: Algeria, Armenia, Austria, Belarus, Cameroon, Canada, China, Colombia, Egypt, El Salvador, Fiji, France, Germany, Guatemala, Honduras, Madagascar, Malaysia, Mexico, Namibia, Pakistan, Paraguay, Republic of Korea, Russian Federation, Senegal, Singapore, Spain, Thailand, United States of America and Venezuela (Bolivarian Republic of).

7. The session was attended by observers from the following States: Angola, Côte d'Ivoire, Haiti, Holy See, Kuwait, Lithuania, Moldova, Nicaragua, Oman, Philippines, Romania, Slovenia, Sweden, Turkey and Yemen.

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

(a) *United Nations system*: United Nations Development Programme (UNDP) and World Bank;

(b) *Intergovernmental organizations*: Asian-African Legal Consultative Organization (AALCO), European Space Agency (ESA), European Union (EU) and International Development Law Organization (IDLO);

(c) *International non-governmental organizations invited by the Working Group*: Center for International Legal Studies (CILS), Forum for International Conciliation and Arbitration (FICACIC), International Bar Association (IBA), International Chamber of Commerce (ICC) and International Law Institute (ILI).

9. The Working Group elected the following officers:

*Chairman*: Mr. Tore WIWEN-NILSSON (Sweden)<sup>1</sup>

*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.57);

(b) Drafting materials addressing the use of electronic communications in public procurement, publication of procurement-related information, and abnormally low tenders: note by the Secretariat (A/CN.9/WG.I/WP.58);

(c) Drafting materials for the use of electronic reverse auctions in public procurement: note by the Secretariat (A/CN.9/WG.I/WP.59);

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<sup>1</sup> Elected in his personal capacity.

(d) Note transmitting a proposal by the United States regarding issues of framework agreements, dynamic purchasing systems, and anti-corruption measures (A/CN.9/WG.I/WP.56) (the detailed consideration of the note was deferred to a future session at the twelfth session of the Working Group (see A/CN.9/640, para. 13));

(e) Drafting materials for the use of framework agreements and dynamic purchasing systems in public procurement: note by the Secretariat (A/CN.9/WG.I/WP.52 and Add.1) (the detailed consideration of the note was deferred to a future session at the eleventh and twelfth sessions of the Working Group (see A/CN.9/623, para. 12, A/CN.9/640, para. 13)); and

(f) Issues arising from the use of suppliers' lists, including drafting materials: note by the Secretariat (A/CN.9/WG.I/WP.45 and Add.1) (the consideration of the note was deferred to a future session at the previous four sessions of the Working Group (see A/CN.9/595, para. 9, A/CN.9/615, para. 10, A/CN.9/623, para. 12, and A/CN.9/640, para. 13)).

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 thirteenth 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 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.52 and Add 1, as well as A/CN.9/WG.I/WP.56, reflecting the deliberations at its thirteenth session, for its consideration at the next session. The Working Group agreed to combine the two approaches proposed in the documents, so that the Model Law, where appropriate, would address common features applicable to all types of framework agreements together, in order to avoid *inter alia* unnecessary repetitions, while addressing distinct features applicable to each type of framework agreement separately.

14. 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, para. 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.

15. The Working Group considered 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.

16. The Working Group took note of the contents of A/CN.9/WG.I/XIII/INF.2, United Nations Convention against Corruption: implementing procurement-related aspects, and noted that it would form a basis for assessing the legislative requirements of the Convention, notably as regards the topic of conflicts of interest.

17. The Working Group recalled the remaining topics on its agenda (listed in A/CN.9/640, annex 1) and requested the Secretariat to propose an updated timeline for its approval.

#### **IV. Consideration of proposals for the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services**

##### **A. Draft provisions to enable the use of framework agreements in public procurement under the Model Law (A/CN.9/WG.I/WP.52, paras. 5-40, A/CN.9/WG.I/WP.52/Add. 1, paras. 1-19, and A/CN.9/WG.I/WP.56, paras. 2-17)**

###### **1. Types of framework agreements**

18. The Working Group heard a summary of types of framework agreements.

(a) “Type 1” framework agreements, concluded with one or more suppliers or contractors, in which the specifications, evaluation criteria and all terms and conditions of the procurement were established at the first stage of the procurement, and there was no competition at the second stage. Thus the second stage would be the award of a procurement contract on the basis of the specifications, evaluation criteria and all terms and conditions concerned;

(b) “Type 2” framework agreements, which left some terms of the procurement subject to further competition and/or evaluation at the second stage. It was observed that in some systems, evaluation criteria were definitively established at the first stage, and, in others, evaluation criteria could be amended at the second stage. Thus in some systems, Type 2 framework agreements were concluded with one or more suppliers or contractors, and in others, they were concluded in all cases with more than one supplier or contractor;

(c) “Type 3” framework agreements, concluded with more than one supplier or contractor, with competition at the second stage, and with terms and conditions and specifications (and, in some systems, evaluation criteria) established in advance.

19. It was noted that the difference between Type 3 and Type 1 and 2 framework agreements was that Type 3 framework agreements were open in that suppliers or contractors could join them at any time during their operation, while Types 1 and 2 were concluded between fixed parties at their outset.

20. From a drafting perspective, the Working Group noted that the Model Law should address common features applicable to all types of framework agreements together, while addressing distinct features applicable to each type of framework agreement separately.

21. It was observed that flexibility in the operation of Type 2 and Type 3 framework agreements in particular would be useful. Thus, it was suggested that at the second stage of competition, the evaluation criteria could be amended. On the other hand, it was stated that the introduction of new evaluation criteria at the second stage could introduce new terms and conditions, and be open to abuse. The Working Group noted that it was not recommending the type of framework agreement in which the evaluation criteria could be varied at the second stage.

22. It was noted that the notion of “evaluation” in this context merited clarification. The text provided flexibility in that the procuring entity could refine its needs at the second stage – by reference for example to delivery times, specific needs regarding training, invoicing arrangements, approval of methodologies or price adjustment mechanisms, but did not envisage that new evaluation criteria per se could be introduced. It was also observed that the EU Directives did not permit substantive modifications to evaluation criteria and specifications at the second stage, but only non-material refinements. Further, it was commented that as Type 1 and 2 framework agreements were closed, they could only be concluded following a complete evaluation of the submissions. It was agreed that this issue would be re-examined when the Working Group considered the text of article 22 ter (see para. ... below).

23. As regards amending the definition of the “procuring entity” to allow for multiple purchasers (and with reference to the proposals for amendment to the definitions of “procuring entity” contained in para. 11 of A/CN.9/WG.I/WP.52), it was agreed that these questions should not be addressed in legislative text, but (as matters of national law) in the Guide to Enactment. Similarly, the use of multiple framework agreements would be addressed in the Guide.

## 2. Conditions for the use of framework agreements

*Types of framework agreements and conditions for their use: Article [22 ter]*

24. The view was expressed that positive conditions for use would be beneficial, irrespective of whether they could be legally enforced (a question for individual enacting States), because they would enhance accountability and would seek to promote good practice. Positive conditions of use were also considered to be beneficial in promoting appropriate behaviour on the part of centralized purchasing agencies and procuring entities, which might otherwise enter into framework agreements for inappropriate reasons.

25. It was observed, on the other hand, that the reason for addressing such conditions for use was because of potential abuse in the operation of framework agreements, in that procuring entities could abuse them to restrict competition. It was added that the appropriate way of addressing this concern would be to limit their duration. Further, competition could be limited in all procurement, particularly in larger and longer-term procurement, but it was not regulated through equivalent conditions for use elsewhere in the Model Law. It was stated that there would thus be no justification to add conditions for use for framework agreements beyond limiting their duration.

26. Another view expressed was that although conditions for use were in principle useful, among the conditions suggested only administrative efficiency should be stipulated, because other conditions such as economies of scale and security of supply would pertain equally to other methods of procurement, and it would be very difficult to express further appropriate conditions. Furthermore, it was observed, the criteria might be mutually exclusive if, for example, the aim was to secure supply for possible one-time purchases, rather than to conclude framework agreements for regular or

periodic purchases to achieve administrative efficiency, and some framework agreements could be appropriate even in the absence of these conditions.

27. An alternative suggestion was to require the justification of recourse through a framework agreement. The requirement for justification could be optional and placed in square brackets for enacting States to choose whether it should be enacted or not. It could make express reference to the economic case for framework agreements, without setting out that case itself. Alternatively, such a requirement could be expressed as requiring the procuring entity “to include in the record required under article 11 of the Model Law a statement of the grounds and circumstances upon which it relied” to procure through a framework agreement. The Guide to Enactment could also address the justification criteria themselves, noting that enacting States should issue regulations addressing those criteria. It was recalled, however, that there was no consensus on whether the criteria themselves were appropriate, and that referring the question to the Guide would not be an effective solution.

28. In addition, it was observed that without conditions for use in the Model Law itself, the justification provisions would be of little benefit, and would make review of the decisions concerned impracticable. Furthermore, it was stated that it would be unhelpful to the review process to have subjective criteria that were subject to challenge or review.

29. It was additionally observed that enacting States could implement the Model Law in different ways, with implications such as whether decisions regarding the use of framework agreements would be excluded from the review system. Thus, it was stated, enacting States should be given flexibility regarding the conditions for use.

30. It was also considered that instructions for use of a procurement technique, rather than provisions restricting its use, were of educational and not legislative value, and should be in the Guide to Enactment rather than the text of the Model Law. Some delegations observed that enacting States that had already provided for framework agreements had decided not to include conditions for use for these reasons.

31. It was agreed that detailed explanatory text would be required in the Guide to Enactment, including guidance to the effect that if there were an elevated risk of abuse in a particular enacting State, that State might wish to include legislative provisions on conditions for use. This formulation would also, it was said, avoid serious consequences if other relevant conditions for use were omitted from the text of the Model Law.

32. It was also stated that framework agreements were generally characterized by periodic or repeated purchases (though it was noted that these terms were difficult to define) and that this notion should be expressed in the provisions. On the other hand, it was observed that framework agreements could also be used so as to avoid the well-documented abuse of certain procurement methods such as single source procurement in urgent and emergency situations, and thus that repeated purchases should not be an absolute requirement.

33. It was subsequently considered whether the conditions for use should seek to address the risk of reducing competition in framework agreements by mandating open procedures in the absence of justification for alternative methods, as for all procurement under the Model Law, or by providing that framework agreements could follow only stated methods of procurement.

34. The view was expressed that only exceptionally should non-open procurement methods be used for the first stage of procurement using framework agreements. Where the circumstances would justify procurement methods used for complex procurement

(for example, the procuring entity could not draft sufficiently precise specifications), those circumstances might generally preclude the appropriate use of framework agreements. However, it was observed that framework agreements were occasionally concluded using competitive negotiations or similar procedures.

35. It was agreed that the Guide to Enactment would stress the risks to competition inherent in procurement through framework agreements, and the desirability of ensuring full and where possible open competition, but the use of any procurement method to conclude a framework agreement would not be prohibited per se.

36. It was also agreed that the Guide would address the question of parallel framework agreements and purchasing outside the framework agreement, with a view to providing commentary on achieving the economic benefits of framework agreements.

37. It was further observed that, with reference to situations in which there could be only one supplier because of the nature of the procurement concerned, a framework agreement with that one supplier was sometimes concluded. It was stated that a discussion of the benefits and concerns of this type of framework agreement should be included in the Guide to Enactment.

38. It was also recalled that maximum and minimum aggregate values or estimated values could be required for each framework agreement, or the solicitation documents or their equivalent could provide for minimum, maximum or estimated values, and could allow the procuring entity to set different maxima depending on the nature and potential obsolescence of the items to be procured. It was agreed that the Guide to Enactment should discuss these questions in detail, including budgetary appropriations that would have an impact on the efficacious use of framework agreements.

39. It was agreed that framework agreements were appropriate for standardized procurement, which would include some construction and services procurement as well as goods procurement. Thus the Model Law should permit them to be used in all types of procurement, with discussion regarding the nature of the procurement that would be appropriate.

40. As regards the maximum duration of a framework agreement, one view expressed was that the Model Law should make reference to a limited duration, but that the duration itself should be left for enacting States to decide, with appropriate guidance in the Guide to Enactment (also addressing the nature of the items to be procured, and changing market conditions that might justify shorter or longer periods). Thus flexibility would be accorded to the procuring entity.

41. On the other hand, it was observed that practice had demonstrated that procuring entities would generally seek to maximize the length of framework agreements, and that the level of competition in a significant proportion of procurement would accordingly be limited. It was stressed that the importance of the provision was not to limit flexibility but to prevent excessive duration in framework agreements, with a maximum but not a recommended duration. What was required was to balance the administrative efficiency that could be obtained by longer agreements with the need to ensure effective competition, in the light of the closing of competition during the term of the framework agreement. Thus an explicit limit on duration, it was said, should be set out in the Model Law itself, and this requirement should also be located early in the provisions.

42. Some support was expressed for the four-year limit found in the EU Directives, noting that it was reasonable (even if not objectively justifiable) given the normal time of six or seven months required for conducting a tendering proceeding. Support was also expressed for a strict provision regulating duration and one that was not permissive

regarding exceptions, to be supported by a discussion of the rationale behind the limits in the Guide to Enactment. In that regard, the benefits to the procuring entity of limiting the duration by permitting new prices, technologies and solutions to be sought at the end of the term, as well as mandating the periodic refreshing of competition and avoiding the perpetuation of monopolies or oligopolies of suppliers or contractors, should be stressed.

43. It was observed that procurement-related disputes in the framework agreement context arose relatively commonly regarding extensions or exceptions to the permitted duration of a framework agreement, and therefore that the risks of excessively long framework agreements were real. Longer framework agreements, it was said, also involved the risks of an inappropriate relationship developing between supplier and procuring entity. However, it was agreed that it was difficult to set one maximum that would be applicable to all enacting States in the Model Law itself.

44. It was therefore agreed that there would be no maximum duration set out in the text, but that a requirement for a maximum duration would be set out, for each enacting State to complete in accordance with prevailing local circumstances. In addition, the Guide to Enactment would discuss an appropriate range for the maximum duration as being 3-5 years, and would provide further guidance for enacting States, drawing on the issues set out above and notions such as budgetary allocation and the type of procurement concerned. It would also make reference to the utility of a maximum duration in preventing attempted justification of excessively long framework agreements.

45. Furthermore, the Model Law would not contemplate exceptions to the maximum in the text itself, or address the questions of extensions to concluded framework agreements. However, the Guide should address these questions, noting that extensions to the term of the framework agreement or exceptions to the maximum duration should not be permitted in the absence of exceptional circumstances, that extensions should be of short duration, and that guidance to avoid the issue of lengthy purchase orders or procurement contracts shortly before the end of the duration of the framework agreement itself should also be given.

46. Regarding whether to permit the use of framework agreements in the procurement of construction and services, it was noted that the aim of the provisions was appropriate construction and services procurement through framework agreements, but to ensure through the use of specifications and evaluation criteria established in advance that complex construction and services procurement would in practice be excluded. Another observation was that the Model Law could make express reference to "standardized" procurement. It was considered, however, that the use of descriptions in the Guide such as procurement of commonly used, off-the-shelf goods, straightforward, recurring services, and small-scale maintenance and repair works would adequately address this issue.

47. Recalling that a key goal for the procuring entity was a procurement contract with a fixed price, it was observed that one consequence of framework agreements could be a tendency to pricing based on an hourly rate, with negative costs consequences in the longer term. Stressing repeated needs, it was said, would tend to mitigate this risk by promoting task-based or project-based contract pricing.

48. The risks of an overly narrow approach in specifications were highlighted, for example in high technology procurement where the appropriate specifications could evolve over time, and thus a functional approach to drafting specifications would be recommended in the Guide.



49. It was queried whether Type 3 framework agreements should be required to operate electronically (as the EU Directives required for dynamic purchasing systems). The Working Group was informed that in some jurisdictions, equivalent systems did not always function electronically. It was accordingly agreed that the reference to mandatory electronic operation should be deleted. It was also observed that Type 1 and Type 2 framework agreements could operate electronically, but that an express reference in the text was unnecessary given the deletion of the equivalent reference in Type 3 agreements. The Guide would explain that all framework agreements could operate either using traditional, paper-based systems or electronically, and that transparency in their operation would be critical.

50. It was noted that closed framework agreements should always be preceded by competitive procedures (unless the conditions for single source procurement were satisfied), but that open framework agreements must be concluded following fully open procedures, as provided for in article 51 undecies. It was agreed that further substantive provision to mandate competition in article 22 ter would therefore not be required.

51. As regards the provision that a framework agreement was not a procurement contract under the Model Law, it was recalled that the Guide to Enactment should point out that the legal effects of framework agreements were questions of national law and legal systems, for enacting States to address. The safeguards and procedures of the Model Law would continue until the issue of purchase orders under framework agreements through providing that the purchase orders would be procurement contracts. However, the drafting of the provision would be revisited. In addition, it was commented that a cross reference should be made in the Guide to Enactment to the requirements of article 51, so as to remind procuring entities that the normal publication, competition and transparency requirements nonetheless applied to framework agreements.

52. The Working Group decided that it would reconsider whether to locate this provision in article 22 ter or as a definition in article 2 of the Model Law at a later date. A full supporting discussion would be included in the Guide to Enactment in either case.

53. It was queried whether an open framework agreement could be an enforceable contract so far as later parties were concerned. In response, it was observed that later parties would become bound to the initial agreement through the mechanism of joining the agreement, and that individual enacting States would need to ensure that the mechanism operated adequately in its respective jurisdiction.

54. The Working Group agreed to continue its deliberations based on the following text:

**“Article 22 ter. Types of framework agreements and conditions for their use**

(1) [to be located either in article 22 ter or article 2] A framework agreement is a procurement conducted in two stages: a first stage to select [the] supplier(s) or contractor(s) to be the party or parties to the framework agreement, and a second stage to award procurement contracts under the framework agreement in accordance with the procedures set out in [Section/Chapter \*\*]. A framework agreement is not a procurement contract within the meaning of article 2 (g) of this Law. Purchase orders issued under a framework agreement are procurement contracts within that meaning.

(2) A framework agreement shall set out the terms and conditions upon which supplier(s) or contractor(s) is/are to provide the goods, construction or services and the procedures for the award of procurement contracts under the framework agreement.

- (3) A framework agreement shall be concluded for a given duration, which is not to exceed [the enacting State specifies a maximum] years.
- (4) A procuring entity may enter into a framework agreement with one or more suppliers or contractors, in accordance with articles [51 octies to 51 seddecies]:
- (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 framework agreement shall be one of the following types:
- (a) A closed framework agreement structure involving one or more suppliers or contractors without second stage competition;
  - (b) A closed framework agreement structure involving more than one supplier with second stage competition;
  - (c) An open framework agreement structure involving more than one supplier with second stage competition.
- (6) A closed framework agreement is an agreement to which any supplier or contractor who is not initially a party to the framework agreement may not subsequently become a party.
- (7) 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.
- (8) 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 procure using the mechanism of a framework agreement.”

### 3. Procedures for the use of framework agreements

*Article [51 octies]. Procedures for setting up framework agreements*

55. The Working Group considered the following proposed provisions:

**“Article [51 octies]. Procedures for setting up framework agreements**

- (1) Where the procuring entity intends to enter into a framework agreement, it shall:
- (a) Select the type of framework agreement to be concluded from among the types set out in article 22 ter;
  - (b) Subject to the provisions of article [...] below, and so as to select the supplier(s) and contractor(s) to be the party or parties to the framework agreement, choose a procurement method for solicitation of tenders, proposals, offers or quotations (collectively referred to as “submissions” in this section).
- (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 specified in article 22 ter.”

56. As regards paragraph (1)(b), it was noted that the formulation of the paragraph accommodated the use of any procurement method to select the suppliers to be parties to the framework agreement, as agreed upon by the Working Group, subject to justification under article 18 where required. It was noted that an express cross-reference to article 18 should therefore be made.

57. As regards paragraph (2), it was recalled that article 22 ter would address the criteria for justification of the use of a framework agreement. The proposal in paragraph (2) would add a further element of justification, but based on technical rather than legislative criteria. It was further noted that it would be difficult to define the criteria against which justification could be measured. It was therefore suggested that paragraph (2) should be deleted from the proposed text.

58. On the other hand, it was considered that there were several reasons for including paragraph (2), in that there would be benefit for both transparency and oversight reasons to require procuring entities to record their decision-making under article 11 of the Model Law, and so as not to facilitate the ex post facto justification of decisions in the procurement process. It was recalled that article 11 was included to facilitate review as well as oversight, and some information was made publicly available for that purpose. It was agreed that it would be appropriate to use information regarding selection of the type of framework agreement for internal purposes only, and not for the purpose of review. Thus it was agreed that paragraph (2) should be retained, but subject to the question of whether the selection of the type of framework agreement would be subject to review in due course.

*Information to be specified when first soliciting participation in procurement involving framework agreements: Article [51 novies]*

59. The Working Group considered the following proposed provisions:

**“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 the procurement involving framework agreements, the procuring entity shall specify all information required for the chosen procurement method under this Law, except to the extent that those provisions are derogated from in this article, and in addition the following information:

(a) A statement that the procurement will involve a framework agreement, of the type of framework agreement to be concluded and whether the framework agreement will take the form of an individual agreement with each supplier or contractor, or whether it will take the form of one agreement between all parties;

(b) The total quantity of, 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;

(c) If suppliers or contractors are to be permitted to submit offers for only a portion of the goods, construction or services to be procured, a description of the portion or portions for which offers may be submitted;

(d) Whether the framework agreement is to be concluded with one supplier or contractor or several and in the latter case the number, the minimum or maximum or the minimum and the maximum number of suppliers or contractors to be parties to the framework agreement;

(e) 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;

(f) If the procuring entity intends to enter into a framework agreement with more than one supplier or contractor, a statement that the suppliers or contractors that are parties to the framework agreement will be ranked according to the selection criteria specified;

(g) The terms and conditions of the framework agreement upon which supplier(s) or contractor(s) is/are to provide the goods, construction or services, including the duration of the framework agreement;

(h) Whether a written framework agreement will be required [and the manner of entry into force of the framework agreement];

(i) In the case of closed framework agreements, whether the selection of the supplier(s) or contractor(s) with which it will enter the framework agreement will be based on lowest price or lowest evaluated submission;

(j) The procedure for the award of procurement contracts under the framework agreement;

(k) If the procuring entity intends to enter into a framework agreement with second-stage competition, the criteria for selecting the supplier or contractor to be awarded the procurement contract, their relative weight, the manner in which they will be applied in the evaluation of the submissions, and whether the award of procurement contracts will be based on lowest price or lowest evaluated submission; and

(l) If an electronic reverse auction will take place to award the procurement contract under a framework agreement with second-stage competition, the information referred to in article [cross-reference to the relevant provisions on electronic reverse auctions].”

60. Regarding paragraph (a), it was queried whether one common agreement with all suppliers should be required, or whether individual agreements with each supplier should be permitted and, if so, whether the solicitation documents should set this out.

61. It was observed that there were benefits to individual agreements, for example in that minor variations in terms and conditions could be accommodated, intellectual property rights or confidential information could be protected, so as to reflect framework agreements concluded with suppliers that have submitted offers for part only of the procurement, and in order to guard against the collapse of the entire framework agreement if the agreement with one supplier was avoided. It was commented that individual agreements would be possible in some, but not necessarily all, jurisdictions. It was also observed that the form of the agreement should not inadvertently create rights between suppliers and contractors.

62. It was added that it would be important for suppliers and contractors to be aware that elements such as intellectual property and confidential information could be individually accommodated, and that the requirement should be retained in the solicitation documents.

63. On the other hand, it was stated that individual agreements would undermine the aim of equal treatment in the preamble to the Model Law. This notion, it was stressed,

would be particularly important in Type 3 framework agreements. It was agreed to redraft the provision for further consideration by the Working Group at a later date.

64. As regards paragraph (b), it was stated that the procuring entity should provide as much information as possible to suppliers or contractors. It was observed, however, that the requirements of paragraph (g) would include the information in paragraph (b) and that the latter paragraph should therefore be deleted. In addition, discussion of the information to be made available should be set out in the Guide.

65. As regards paragraph (d), it was agreed that the requirement for a statement of the maximum and minimum number of parties to the framework agreement would assist in guaranteeing competition, but that the drafting should be clarified. The Guide to Enactment would also address the question of how to address amendments to those numbers where necessary during a particular procurement.

66. It was queried whether the first element of paragraph (h) was necessary. It was stated that it would be undesirable to indicate that an oral agreement would be possible. It was agreed that the definition of a framework agreement would refer to a written agreement (in article 2 or 22 ter, see paragraph ... above). As regards the second element of the paragraph, it was decided to retain the reference to the manner of entry into force of the framework agreement pending the Working Group's revisions of articles 13 and 36 of the Model Law.

67. As regards paragraph (i), it was queried whether the paragraph was necessary in the light of paragraph (e). It was agreed that paragraph (e) should be expanded to incorporate the aim of requiring the selection criteria to be disclosed in advance, with appropriate discussion in the Guide to Enactment. The notions of selection criteria and the identification of successful tender or other offer should be clarified, and the application of the Model Law terms "lowest" price or evaluated tender to framework agreements should be considered.

68. It was recalled that the operation of framework agreements involved the selection of the suppliers and contractors to be parties to the framework agreement as a first stage, and the evaluation or selection criteria for the award of the procurement at the second stage. Considering that paragraph (k) would address the second stage for Types 2 and 3 framework agreements, it was agreed that a new paragraph would be included to address the award criteria for procurement contracts under Type 1 framework agreements. It was also agreed that all such information should be recorded in the framework agreement itself, and that appropriate provision to this effect would be made.

69. As regards paragraph (j), it was observed that details of the procedure for the award should be addressed in the framework agreement as well as the solicitation documents.

70. As regards paragraph (k), and the notion of relative weight, it was queried whether relative weight for the second stage could be established at the first stage. On the one hand, it was said, it might be difficult to do so given that multiple purchasers might use a framework agreement and the 3-5 year duration of a framework agreement. On the other hand, it was stated that it would be critical for transparency reasons to establish the award criteria in advance, as for all procurement, because flexibility at the second stage would enable the misuse of the framework agreement – to select favoured suppliers, for example.

71. Regarding paragraph (k), it was observed that different purchasers or procuring entities under a framework agreement might wish, when applying the selection criteria at the second stage, to use different relative weights, such as quality or experience of

suppliers. It was added that there would be an obligation to treat all suppliers equally, that this obligation could be enforced through legal remedies in many jurisdictions, that the relative weight would be set out at the beginning of each second stage, and thus that the procedure would have to be transparent and objective. Additionally, it was said, requiring one common need for all users of framework agreements would lead to a proliferation of parallel framework agreements, which would defeat the purpose of administrative efficiency upon which they were based. It was added that the most efficient result would be obtained where the ultimate user could set its needs and evaluation criteria shortly before purchasing.

72. A practical example was given: the use of ecological criteria for vehicle purchases that might vary between ministries within one government. It was queried whether policy decisions regarding such criteria could mask inappropriate selection criteria that were based on, for example, connections between procuring entities and suppliers.

73. It was observed that experience had showed that centralized purchasing agencies sought to set up broad and vague criteria at the first stage, without identifying the real needs of their client procuring entities, so as to maximize use of framework agreements. Requiring those agencies to establish selection criteria at the first stage would be beneficial, but there would be disadvantages to setting relative weight at that stage in terms of allocative efficiency, and it was recalled in this regard that the procuring entity would probably not have a perfect knowledge of the appropriate relative weight at the first stage.

74. The use of competition at the second stage was considered to be very important. A dialogue with suppliers at the second stage, it was said, would allow the appropriate relative weights to be ascribed and effective competition facilitated. As regards Type 3 framework agreements, it was added that there would be no real price competition at the first stage because they would be open agreements. Hence the Guide to Enactment should stress the importance of real price competition at the second stage, and the need to ensure that the second stage should involve effective second stage competition. Should the relative weights be fixed at the first stage, it was added, the result might be so inflexible that there would remain only one supplier at the second stage.

75. On the other hand, while noting the need for a measure of flexibility, it was observed that in those jurisdictions where there were insufficiently strong controls and safeguards, the risk of abuse through manipulation of the relative weight so as to predetermine the outcome at the second stage was significant, and would defeat the purpose of open and competitive first stage procedures. This risk would be elevated because of the recurrent nature of purchases under framework agreements and because the agreements themselves would run over three to five years. It was observed that there had been documented cases of abuse of framework agreements and the risks were therefore real.

76. It was noted, in addition, that UNCAC article 9 (1)(b) required the establishment and disclosure of selection and award criteria in advance, and it was queried whether any adaptation of relative weight at the second stage might be inconsistent with the UNCAC requirements. Additionally, it was observed that such adaptation would inevitably raise the risk of manipulation, even if the legislative requirement was for any possible variations to be objective, within a predefined range or margin of variation and not material or substantive.

77. It was therefore suggested that all relative weights should be published at the first stage, and a selection between them, where necessary, would be made at the second stage. An alternative proposal was that, the procuring entity should be required to set

out both the fixed relative weights and those that could be varied in the initial solicitation, but the latter would additionally be required to be non material.

78. It was observed that enabling appropriate flexibility within the parameters of UNCAC need not require one common relative weight for all purchasers but a set or range of relative weights could be set out (for example using a matrix). Such an approach, it was added, would promote appropriate procurement planning and avoid individual procuring entities being able to defer the definition of their requirements until the second stage. On the other hand, it was observed that the use of a range of relative weights could be manipulated to predetermine the selection of a favoured supplier.

79. It was recalled that the EU Directives addressing the equivalent of the Type 2 framework agreement limited the flexibility of the procuring entity to vary the selection criteria at the second stage, by providing that the second stage award must be made “on the basis of the award criteria set out in the specifications of the framework agreement,” with more precisely formulated terms if necessary, and that no material change to the specifications was permitted. It was observed that this provision, nonetheless, would permit a range of relative weights to be specified.

80. It was stressed that objectivity was critical and support for flexibility should be given subject to the publication of objective and predetermined criteria, so as to prevent any form of manipulation. It was emphasized that the Model Law should not be drafted in such a way that it could be used to justify manipulation.

81. It was suggested that the Model Law itself should take a conservative approach, with all relative weights being fixed in advance, but the Guide would recognize that individual enacting States could permit more flexibility in their own legislation, but if they chose to do so, it would have to be in accordance with the safeguards set out above.

82. After discussion, it was agreed that paragraph (k) would be amended by providing that relative weights at the second stage could be varied within a pre-established range set out in the solicitation documents, provided that the variation could not lead to a material change to the specifications and overall evaluation criteria, and that there could be no change in minimum quality requirements. Consequential changes elsewhere in the text would be made if necessary. Examples of possible risks of this approach, and guidance that this flexibility should be the exception rather than the rule, should also be set out in the Guide.

83. As regards paragraph (l), it was agreed that its requirements would be addressed in paragraph (j) and the provisions governing electronic reverse auctions, and so that paragraph should be deleted.

*Additional information to be specified when first soliciting participation in procurement involving open framework agreements: Article [51 decies]*

84. The Working Group agreed to consider the following proposed provisions:

**“Article [51 decies]. Additional information to be specified when first soliciting participation in procurement involving open framework agreements**

When first soliciting the participation of suppliers or contractors in the procurement involving open framework agreements, the procuring entity shall specify in addition to the information set out in the preceding article:

(a) All necessary information concerning the electronic equipment to be used and the technical connection arrangements;

(b) The [website or other electronic] address at which the specifications, the terms and conditions of the procurement, notifications of forthcoming procurement contracts and other necessary information relevant to the operation of the framework agreement may be accessed;

(c) A 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 the maximum number of suppliers or contractors, if any.”

85. It was agreed that paragraphs (a) and (b) were no longer necessary in the light of the removal of the requirement for Type 3 framework agreements to operate electronically, but that article 51 novies should be amended to include a requirement that all information necessary for the use of electronic framework agreements would be set out in the solicitation documents, supported by appropriate text in the Guide.

86. As regards paragraph (c), it was queried whether there should be a limit on the maximum number of suppliers that should be parties to a Type 3 framework agreement. It was agreed that any such limit should be recorded in the solicitation documents. The Working Group agreed to consider the question of a limit in the context of article 51 duodecies, governing the operation of Type 3 framework agreements.

87. It was agreed that the remaining requirements of article 51 decies should be incorporated into article 51 novies.

*First stage of procurement involving framework agreements: Article [51 undecies]*

88. The Working Group agreed to consider the following proposed text:

**“Article [51 undecies]. 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 of one of [identify relevant methods] of this Law.

(2) The first stage of procurement proceedings under open framework agreements shall be conducted in accordance with the provisions of Chapter III of this Law.

(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.

(4) [The framework agreement, on the terms and conditions of the selected submission(s), comes into force as specified in accordance with the requirements of article [...] above].

(5) 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.]”

89. As regards paragraph (1), it was agreed that as any appropriate procurement method could be used for the first stage of closed framework agreements, the text in



square brackets would be replaced by a reference to the procurement method chosen under article 51 octies.

90. It was queried whether paragraph (2) should be limited to open procurement methods under Chapter III (and Chapter IV for services). It was suggested that open publication requirements should be applied to all first stage of framework agreements, but that the other elements of open procurement methods would not apply. On the other hand, it was observed that this approach might not be consistent with the Model Law's procurement methods. It was accordingly agreed that reference would be made to the procurement method chosen under article 51 octies, with the qualification that the method should be open and competitive. It was agreed that the Working Group would revisit the details of the procedures to be followed at a future session.

91. As regards paragraph (3), it was observed that the term "ranking" might be misleading and that the formulation of the paragraph would be reconsidered.

92. It was also suggested that paragraphs (1), (2), (4) and (5) could alternatively be located in the Guide. Other views were that they should be retained in the text.

93. It was subsequently agreed that paragraph (4) was unnecessary because the framework agreement was not a procurement contract, and should be deleted. It was agreed that an equivalent deletion would be made from article 51 novies (h).

94. As regards paragraph (5), it was agreed that the square brackets should be deleted to provide an obligation to publish the identities of the parties. It was also agreed that the information to be published under article 14 would be revisited at a future session, and the Working Group would consider whether these requirements should apply also to framework agreements although they were not procurement agreements as defined by the Model Law.

95. It was agreed that the paragraphs (1), (2), (3) and (5) should be retained, as amended, and that the Working Group would consider the amended provisions at a future session.

*Additional provisions regarding the first stage of procurement involving open framework agreements: Article [51 duodecies]*

96. The Working Group considered the following proposed provisions:

**"Article [51 duodecies]. Additional provisions regarding the first stage of procurement involving open framework agreements**

(1) The procuring entity shall, during the entire period of the 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.

(2) 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.

(3) The procuring entity shall evaluate all such submissions 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.

(4) Subject to any maximum number of suppliers or contractors to be parties to the open framework agreement, and the criteria and procedure for the selection of that number, in each case as specified when first soliciting participation in the procurement involving the framework agreement, the framework agreement shall be concluded with all suppliers or contractors satisfying the selection criteria and whose submissions comply with the specifications and any other additional requirements pertaining to the framework agreement.

(5) The procuring entity shall promptly notify the suppliers or contractors whether they are to be parties to the framework agreement or of the rejection of their tenders.

(6) 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 specifications pertaining to the procurement.”

97. As regards paragraph (4), it was queried whether an open framework agreement with a maximum number of suppliers would in effect be a closed rather than an open framework agreement, particularly if the maximum were attained at the initial offer stage. Thus, it was asserted, there should be no maximum number of suppliers, also so as to encourage as many suppliers to participate. On the other hand, it was stated that Type 3 framework agreements were normally run by electronic systems with limited capacities, and those capacities should be publicized. It would be important for transparency reasons and also to avoid suppliers spending considerable sums on preparing submissions that could not be accepted.

98. It was agreed that where there were transparent and objective criteria that were predisposed (as article 51 novies (d) stipulated), based on the notion of technical or other reasonable operational constraints, a limitation on numbers would be acceptable, but it would need to be assessed on a case-by-case basis and the Guide to Enactment should in any event discuss the importance of avoiding the creation of effectively a closed framework agreement. It was suggested that the provisions could be revised to reflect this notion, confirming that there was no requirement for a maximum, but if technology placed a limit on the number of suppliers, it should be predisposed.

99. On the other hand, it was observed that this formulation would lead to two types of open framework agreements – those that were genuinely open and those that were semi-open, and that it would involve significant drafting difficulties.

100. It was observed that the procuring entity also should be given the flexibility to reduce the maximum number of suppliers during the operation of the framework agreement if the procuring entity determined that a reduction would be necessary, and that a discussion to such effect should be included in the Guide. It was confirmed that this would not involve changing the criteria for limiting the number themselves, but would allow for evolution of the detailed requirements underlying the criteria. It was commented that before the second stage, the requirements should not change and therefore it should not be necessary to reduce the numbers.

101. After discussion, it was agreed that the current drafting could be considered to invite the use of a maximum, and therefore that the provisions should be redrafted to state that, for open framework agreements only, where there would be technical or other capacity limitations to the framework agreement, the limitations should be set out in the solicitation documents. The reference to a maximum in paragraph (4) would be deleted, and article 51 novies would be amended to provide that any capacity limitations to the

open system should be set out in the solicitation documents, drawing on similar provisions in article 51 bis regarding electronic reverse auctions. This formulation would be supported by discussion in the Guide.

102. As regards paragraph (6), it was agreed that suppliers could revise any element of their submissions during the operation of the framework agreement. However, it was queried whether an improvement would add value in the context of second stage competition, how an improvement would affect ranking or an equivalent term and how this might operate in the context of a limitation on numbers in the framework agreement. It was also observed that any consequent re-ranking should be re-notified to participants. It was agreed that the Working Group would reconsider at a future session whether paragraph (6) should be retained in its current formulation, whether ranking or an equivalent concept should be required in open framework agreements, or whether it might be permitted where appropriate but not required.

103. It was suggested that the Guide to Enactment should encourage procuring entities to assess on a periodic basis whether the prices and terms and conditions of offers remain current. The Working Group also agreed to consider the issue whether suppliers should be able to exit a framework agreement or compelled to continue participation at a future session.

104. As regards paragraph (6), it was agreed that the text should be amended to provide that the offer should continue to conform to “the terms and conditions of the framework agreement” and not “the specifications pertaining to the procurement”.

105. It was queried whether paragraph (6) was necessary in the light of second-stage competition under Types 2 and 3 framework agreements. It was explained that this provision was derived from a similar provision in the EU Directives, the aim of which was to enable the conditions of an offer, including price, to be improved during the operation of the framework agreement. For example, a supplier could augment the quantities of its offer so that it would be capable of fulfilling and invited to compete for a greater range of future purchase orders.

106. It was also queried whether the term “improve” should be replaced by the term “change”, as suppliers might wish to increase their price or otherwise negatively change their submissions. It was considered that suppliers should not be able to do so, because otherwise there could be no security of supply, thus defeating one of the main purposes of a framework agreement. A contrary view was that the purpose would not be defeated if the procuring entity were required to agree to any such increase.

107. The concern was also raised that permitting suppliers to improve their submissions without the agreement of the procuring entity could lead to changes to the framework agreement itself. It was observed, on the other hand, that the obligation upon suppliers to continue to comply with the specifications would prevent any such change.

108. It was added the procuring entity should be the party that decided whether a revised submission was a genuine improvement and whether it wanted the purported improvement concerned. The procuring entity would also be required to assess whether the improved offer would comply with the terms and conditions of the framework agreement.

109. It was agreed that these questions should be discussed in the Guide to Enactment, including that the procuring entity retained the option not to accept any improvement, but that the text of paragraph (6) would not incorporate further amendments in this regard at this stage.

*Second stage of procurement involving closed framework agreements without second-stage competition*

110. The Working Group considered the following proposed provisions:

**“Article [51 terdecies]. Second stage of procurement involving closed framework agreements without second-stage competition**

(1) The procuring entity may award one or more procurement contracts under the framework agreement in accordance with the terms and conditions of the framework agreement and the provisions of this article.

(2) No procurement contract under the framework agreement may be awarded to suppliers or contractors that were not originally party to the framework agreement.

(3) The terms of a procurement contract under the framework agreement may not materially amend or vary any term or condition of the framework agreement.

(4) If the framework agreement is entered into with one supplier or contractor, the procuring entity shall award any procurement contract on the basis of the terms and conditions of the framework agreement to the supplier or contractor party to that agreement by the issue of a purchase order [in writing] 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 purchase order [in writing] to the highest-ranked supplier(s) or contractor(s) [with the resources at the time to fulfil] [capable of fulfilling] the contract. The procuring entity shall notify in writing all other suppliers or contractors that are parties to the framework agreement of the name and address of the supplier(s) or contractor(s) to whom the purchase order has been issued.”

111. It was agreed that paragraph (1) should be replaced with the following text: “Any procurement contract issued shall be in accordance with the terms and conditions of the framework agreement and the provisions of this article”.

112. As regards paragraph (2), it was agreed that the word “may” should be replaced by the word “shall”, and the word “party” by “parties”.

113. As regards paragraph (3), it was agreed that the phrase “amend or vary” should be replaced by a reference to “departing from” the terms and conditions of the framework agreement, and that the text should then be conformed to similar text in article 34 (4) (2) (b). It was also agreed that the Guide should explain that this provision (which allowed non-material amendments) did not permit amendments to the framework agreement.

114. As regards paragraph (4), it was agreed that a purchase order should be required to be in writing (and the square brackets in the text accordingly deleted), and that the reference to “the purchase order” should be broadened to provide for other types of documents issued to award procurement contracts.

115. As regards paragraph (5), it was suggested that the first sentence should end with the words “framework agreement”. It was also observed that the Guide should set out in detail how the selection of the supplier would be selected (best value, rotation, or on other grounds). As regards the final sentence, the suggestion was made that the

notification should be made “promptly”, and that the basic details of the award should be included in the notification, such as the contract price. The Working Group agreed to amend the text accordingly.

116. It was agreed that equivalent changes to those agreed for paragraphs (1), (3) and (5) would be made to article 51 quaterdecies onwards.

*Second stage of procurement involving closed framework agreements with second-stage competition*

117. The Working Group considered the following proposed provisions:

**“Article [51 quaterdecies]. Second stage of procurement involving closed framework agreements with second-stage competition**

(1) The procuring entity may award one or more procurement contracts under the framework agreement in accordance with the terms and conditions of the framework agreement, subject to the provisions of this article.

(2) No procurement contract under the framework agreement may be awarded to suppliers or contractors that were not originally party to the framework agreement.

(3) The terms of a procurement contract under the framework agreement may not materially amend or vary any term or condition of the framework agreement.

(4) The procuring entity shall award any procurement contract on the basis of the terms and conditions of the framework agreement, and in accordance with the following procedures:

(a) The procuring entity shall invite in writing all suppliers or contractors that are parties to the framework agreement, or where relevant those parties [with the resources at the time to fulfil] [capable of fulfilling] the contract, to present their submissions for the supply of the items to be procured;

(b) The invitation shall restate the terms and conditions of the framework agreement, and unless already specified in the framework agreement shall set out the terms and conditions of the procurement contract that were not specified in the terms and conditions of the framework agreement, and shall set out instructions for preparing submissions;

(c) The procuring entity shall fix the place for and a specific date and time as the deadline for presenting the submissions. The deadline shall afford suppliers or contractors sufficient time to prepare and present their submissions;

(d) The successful submission shall be determined in accordance with the criteria set out in the framework agreement;

(e) Where an electronic reverse auction is held, the procuring entity shall comply with requirements during the auction set out in article [cross references to the relevant provisions]; and

(f) 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 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.”

118. It was observed that the word “submission” in paragraph (4) should be replaced with the word “tender”. It was also observed more generally that the term “tender” might be misunderstood to mean a reference to tendering proceedings, which would be inaccurate, and misleading, as a framework agreement could also be used for the procurement of services. Additionally, it was stated that the terms for submissions under the first stage and second stage of framework agreements should be different, such as by using “offer” or “proposal”. A further proposal was to use the term “second stage submissions”. It was agreed that suitable generic terms should be found.

119. As regards paragraph 4 (a), it was noted that the reference to “those parties” might be ambiguous and imply that the framework agreement could become an open agreement. It was agreed that the reference should be amended to remove any ambiguity. It was also agreed to replace the phrases in square brackets with a statement that the procuring entity should invite all the parties that met its needs at the time of the second stage competition, and that this notion should be further elaborated in the Guide.

120. As regards paragraph 4 (b), it was agreed that the reference to “unless specified” should be to “to the extent not already notified”.

121. As regards paragraph (4) (d), it was agreed that the phrase “criteria set out in the framework agreement” should be replaced by “terms and conditions of the framework agreement and any other information contained in the second-stage invitation in paragraph (b)”. An alternative proposal, to add a reference to “relative weight” at the end of the paragraph as currently formulated, was considered but not adopted. It was agreed that the Guide would explain that, for transparency reasons, the framework agreement and the invitation would record all specifications, criteria, relative weight, and terms and conditions.

122. It was agreed that paragraph 4 (e) should be deleted, in conformity with the Working Group’s decisions to delete references to electronic procurement in articles 22 ter and 51 bis onwards.

123. As regards paragraph 4 (f), it was noted that the notification envisaged would be in addition to the publication of the contract award under article 14 and notification to the successful supplier. It was observed the Guide should discuss the need to ensure that, following the award of the procurement contract, notice to unsuccessful parties to the framework agreement was given in an effective and efficient manner, such as by individual notification in electronic or small-scale systems and by a general publication in others.

124. It was observed that the question of ensuring effective ongoing participation in a framework agreement was an important issue that could not appropriately be addressed in the text, but should be considered in the Guide.

125. It was also stressed that the need to ensure effective and sufficient second-stage competition was critical. It was stated in this regard that some systems required that a minimum number of invitations be issued (to which a minimum number of participants had responded) before the second stage competition could take place. On the other hand, it was observed that a more general requirement for effective competition could be set out in the article, also so as to avoid manipulation of numerical requirements. In addition, it was commented that the appropriate number of participants to ensure effective competition would depend on the nature of the procurement.

126. It was considered that the requirement to issue invitations at the second stage to all or to all suppliers that can meet the procuring entity's needs, as the case may be, would be sufficient to ensure effective competition (and it was noted that whether or not the procuring entity had satisfied this requirement would be subject to review). In addition, it was agreed that the procuring entity should be able to cancel the procurement if there was insufficient competition (as was also the case in ERAs). Accordingly it was agreed that no further provision was necessary in the text, but that the Guide to Enactment should address the topic of effective competition in detail. Furthermore, it was agreed that the Guide to Enactment text that addressed article 51 octies should cross-refer to the general obligation to ensure effective competition at the first stage, where that stage was being conducted in accordance with alternative procurement methods.

*Second stage of procurement involving open framework agreements with second-stage competition*

127. The Working Group considered the following proposed provisions:

**“Article [51 quindecies]. Second stage of procurement involving open framework agreements**

(1) The procuring entity may award one or more procurement contracts under the framework agreement in accordance with the terms and conditions of the framework agreement and the provisions of this article.

(2) The procuring entity shall publish a notice that it intends to award a procurement contract in accordance with the terms and conditions of the framework agreement at the [website or other electronic] address set out in [article 51 decies (b) above].

(3) Each potential procurement contract shall be the subject of an invitation to tender. The procuring entity shall invite all suppliers or contractors that are parties to the framework agreement to submit tenders for the supply of the items to be procured for each procurement contract it proposes to award. The invitation shall:

(a) Restate, [or formulate where necessary more precisely, information referred to in article [cross reference] of this Law], [or restate the specifications and delivery requirements for the items being procured and, if necessary, provide greater detail in this respect than was given to suppliers or contractors when first soliciting their participation in the framework agreement];

(b) Restate or set out the terms and conditions of the procurement contract;

(c) Restate the procedure for the award of a procurement contract resulting from the invitation to tender; and

(d) Include instructions for preparing tenders.

(4) The procuring entity shall fix a specific date and time as the deadline for submitting tenders. The deadline shall afford suppliers or contractors sufficient time to prepare and submit their tenders.

(5) The procuring entity shall evaluate all tenders received and determine the successful tender in accordance with the evaluation criteria set out in the invitation to submit tenders under paragraph (3) (a) of this article.

(6) Subject to articles [12, 12 bis and other appropriate references] of this Law, the procuring entity shall accept the successful tender(s), and shall promptly notify the successful supplier(s) or contractor(s) that it has accepted their tender(s). The procuring entity shall also notify all other suppliers and contractors that submitted tenders of the name and address of the supplier(s) or contractor(s) whose tender(s) was or were accepted and the contract price.”

128. As regards paragraph (2), it was queried whether the notice envisaged in the provision as currently drafted would satisfy transparency requirements and be effective without a deadline, set out in the notice, which would have to expire before the procuring entity could proceed to a second-stage competition. It was observed that provisions to such effect in the EU Directives had been considered by some commentators to operate as a disincentive to the use of a similar system.

129. After discussion, it was agreed that the provision, which sought to encourage new entrants to the framework agreement during its operation, should be moved to article 51 duodecies. It was also agreed to amend the text to provide 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.

130. It was agreed that provisions relating to the second stage of Type 2 and Type 3 framework agreements should be conformed, as both types could now be conducted electronically or in paper-based form. Thus the procedures applying to the second stage Type 2 framework agreements in article 51 quaterdecies, incorporating the Working Group’s deliberations as set out above, would be repeated for Type 3 framework agreements in article 51 quindecies, with the exception that paragraph (2) in article 51 quaterdecies would not apply to Type 3 framework agreements.

*Award of the procurement contract under a framework agreement*

131. The Working Group considered the following proposed provisions:

**“Article [51 seddecies]. 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 price payable pursuant to a procurement contract concluded 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.”

132. As regards paragraph (1), it was noted that the framework agreement in some systems might provide that orders over a certain size need not be accepted by a supplier. It was added that there might be other circumstances in which the supplier should be



permitted not to accept a purchase order, and thus, it was suggested, that the solution provided in the current article 13 would be a better one.

133. In response, it was noted that the purchase order would be an acceptance of the supplier's offer, which could not exceed the supplier's offer, and therefore it was queried whether this concern could arise in practice. It was observed that a second-stage competition would, in any event, mean that the suppliers would have tendered for the amount concerned and so the concern would not arise in Types 2 and 3 framework agreements. On the other hand, in a Type 1 framework agreement, an order might exceed the amount of the supplier's capacity and it was agreed that provision should be made to address this risk. It was therefore agreed that the following words should be added to the end of paragraph (2) "or in any other manner set out in the framework agreement".

#### **B. Issues arising from the use of suppliers' lists (A/CN.9/WG.I/WP.45 and A/CN.9/WG.I/WP.45/Add.1)**

134. It was observed that the concerns previously considered by the Working Group relating to the use of suppliers' lists (A/CN.9/568, paragraph 59) had been considered to be such that the disadvantages of suppliers' lists might outweigh any possible benefits. Additionally, the flexible provisions proposed by the Working Group relating to framework agreements, it was said, would provide for the benefits that suppliers' lists could bring.

135. It was observed that the proper use of suppliers' lists, for example by ensuring that they were open and accessible, would not inevitably lead to abuse or misuse. It was suggested that the Model Law might address the topic in order to seek to prevent inappropriate use and ensure that they were not abused. On the other hand, it was suggested that the Model Law should not provide for the use of suppliers' lists at all because of the concerns their use raised and given the better alternative of framework agreements, and the Guide to Enactment could explain this stance. In addition, it was stated that any provisions to address the use of suppliers' lists would be excessively lengthy and complex.

136. It was agreed that there should not be provisions in the Model Law to address suppliers' lists for the above reasons, but that there should be a discussion of the issues in the Guide to Enactment, addressing the interaction with Type 3 framework agreements in addition. Thus the discussion would draw on A/CN.9/568 paras. 55-68 and A/CN.9/WG.I/WP.45/Add.1 paras. 10-17, supplemented with additional detail where necessary. In summary, it was agreed, that the discussion would focus on the following elements: a description of suppliers' lists; their purported benefits, concerns observed as to their use, and safeguards and controls to be exercised in any compilation of a suppliers' list that might take place prior to a procurement using one of the Model Law's alternative procurement methods. It was added that the Guide should emphasize that the use of a suppliers' list would not replace any step in procurement proceedings under the Model Law, and that no list should operate as a mandatory list. To require registration on a list as a precondition to participation in procurement, it was noted, would contradict the provisions in article 6 of the current Model Law. Those provisions prohibited the imposition of any criterion, requirement or procedure for participation in procurement other than those in article 6 itself (and article 6 did not include registration on a list).

**C. Drafting materials addressing the use of electronic communications in public procurement, publication of procurement-related information, and abnormally low tenders (A/CN.9/WG.I/WP.58)**

137. As regards A/CN.9/WG.I/WP.58, the Working Group considered the draft text for the Guide to Enactment addressing publication of procurement-related opportunities, provisions addressing the use of electronic communications in procurement (including electronic submission and opening of tenders) and those addressing abnormally low tenders. The Working Group made drafting suggestions to those materials.

**D. Drafting materials for the use of electronic reverse auctions in public procurement (A/CN.9/WG.I/WP.59)**

138. As regards A/CN.9/WG.I/WP.59, the Working Group considered the draft text for the Guide to Enactment addressing the conditions for use of electronic reverse auctions, and the revised text for the Model Law addressing the procedures in the pre-auction and auction stages of procurement through electronic reverse auctions. The Working Group made drafting suggestions to those materials.

## Annex

**Tentative timetable and agenda for the Working Group's  
fourteenth to fifteenth sessions agreed at the Working  
Group's thirteenth session**

<i>Session</i>	<i>Day 1</i>	<i>Day 2</i>	<i>Day 3</i>	<i>Day 4</i>	<i>Day 5</i>
14th, Autumn 2008	Remedies	Remedies	Remedies/ Framework agreements	Framework agreements	Conflict of interest/ Services and goods
15th, Spring 2009	Conflict of interest/ Services and goods	Overall review of revisions made to the Model Law and relevant provisions of the Guide to Enactment	Overall review of revisions made to the Model Law and relevant provisions of the Guide to Enactment	Overall review of revisions made to the Model Law and relevant provisions of the Guide to Enactment	Overall review of revisions made to the Model Law and relevant provisions of the Guide to Enactment

**F. Note by the Secretariat on 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, and abnormally low tenders, submitted to the Working Group on Procurement at its thirteenth session**  
(A/CN.9/WG.I/WP.58) [Original: English]

**CONTENTS**

	<i>Paragraphs</i>
I. Introduction . . . . .	1-2
II. Draft provisions addressing publication of procurement-related information . . . . .	3-4
A. Proposed revisions to article 5 . . . . .	3
B. Guide to Enactment text . . . . .	4
III. Draft provisions on the use of electronic communications in public procurement . . . . .	5-10
A. Communications in procurement . . . . .	5-6
1. Draft article 5 bis . . . . .	5
2. Guide to Enactment text . . . . .	6
B. Electronic submission of tenders . . . . .	7-8
1. Proposed revisions to article 30 (5) . . . . .	7
2. Guide to Enactment text . . . . .	8
C. Opening of tenders . . . . .	9-10
1. Proposed revisions to article 33 (2) . . . . .	9
2. Guide to Enactment text . . . . .	10
IV. Draft provisions addressing abnormally low tenders . . . . .	11-12
A. Draft article 12 bis . . . . .	11
B. Guide to Enactment text . . . . .	12

## **I. Introduction**

1. The background to the current work of Working Group I (Procurement) on the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services (the “Model Law”) (A/49/17 and Corr.1, annex I) is set out in paragraphs 5 to 76 of document A/CN.9/WG.I/WP.57, which is before the Working Group at its thirteenth 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 pursuant to the request of the Working Group at its twelfth session to the Secretariat to revise the draft provisions on the use of electronic communications in public procurement and those addressing publication of procurement-related information, and abnormally low tenders (“ALTs”), reflecting the Working Group’s deliberations at that session.<sup>1</sup>

## II. Draft provisions addressing publication of procurement-related information

### A. Proposed revisions to article 5

3. The following draft article reflects the drafting suggestions made at the Working Group’s twelfth session to the draft article 5 that was before the Working Group at its twelfth session:<sup>2</sup>

**“Article 5. Publicity of legal texts and information on forthcoming procurement opportunities**

(1) Except as provided for in paragraph 2 of this article,<sup>3</sup> 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.

(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.”<sup>4</sup>

### B. Guide to Enactment text

4. The following draft text for the Guide reflects the suggestions made at the Working Group’s twelfth session to the draft text for the Guide to accompany article 5 that was before the Working Group at that session:<sup>5</sup>

“1. Paragraph (1) of this article is intended to promote transparency in the laws, regulations and other legal texts of general application relating to procurement by requiring that those legal texts be promptly made accessible and systematically maintained. Inclusion of this provision may be considered particularly important in States in which such a requirement is not found in existing administrative law. It may also be considered useful in States in which such a requirement is already

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<sup>1</sup> A/CN.9/640, para. 14. The revised text is cross-referred to paragraphs of that Report in the footnotes that follow, so as to highlight for the benefit of the Working Group the reasons for the changes in the text.

<sup>2</sup> Ibid., paras. 30-34.

<sup>3</sup> Ibid., para. 30.

<sup>4</sup> Ibid., para. 33.

<sup>5</sup> Ibid., paras. 35-36.

found in existing administrative law, since a provision in the procurement law itself would help to focus the attention of both procuring entities and suppliers or contractors on the requirement for adequate public disclosure of legal texts referred to in the paragraph.

2. In many countries, there exist official publications in which legal texts referred to in this paragraph are routinely published. The texts concerned could be published in those publications. Otherwise, the texts should be promptly made accessible to the public, including foreign suppliers or contractors, in another appropriate medium and manner that will ensure the required level of outreach of relevant information to intended recipients and the public at large. An enacting State may wish to specify the manner and medium of publication in procurement or any other appropriate regulations that address publicity of statutes, regulations and other public acts, with the goal of ensuring easy and prompt public access to the relevant legal texts. This should provide certainty to the public at large as regards the source of the relevant information, which is especially important in the light of proliferation of media and sources of information as a result of the use of non-paper means of publishing information. Transparency may be impeded considerably if abundant information is available from many sources, whose authenticity and authority may not be certain.

3. The procurement or any other appropriate regulations should envisage the provision of relevant information in a centralized manner at a common place (the “official gazette” or equivalent) and establish rules defining relations of that single centralized medium with other possible media where such information may appear. Information posted in the single centralized medium should be authentic and authoritative and have primacy over information that may appear in other media. Regulations may explicitly prohibit publication in different media before information is published in a specifically designated central medium, and require that the same information published in different media must contain the same data. The single centralized medium should be readily and widely accessible.<sup>6</sup> Ideally, no fees should be charged for access to laws, regulations and other legal texts of general application in connection with procurement covered by this Law, and all amendments thereto.<sup>7</sup> Regulations should also spell out what the requirement of “systematic maintenance” entails, including timely posting and updating of all relevant and essential information in a manner easy to use and understand by the average user.

4. Paragraph (2) of the article deals with a distinct category of legal texts – judicial decisions and administrative rulings with precedent value. The opening phrase in paragraph (1) intends to make it clear that publicity requirements in paragraph (1) do not apply to legal texts dealt with in paragraph (2). Due to the nature and characteristics of the legal texts dealt with in paragraph (2), including the procedure for their adoption and maintenance, application of the publicity requirements found in paragraph (1) to them may not be justifiable. For example, it may not be feasible to comply with the requirement to make these legal texts promptly accessible. In addition, the requirement of “systematic maintenance” may not be applicable to them in the light of the relatively static nature of these texts. Paragraph (2) of the article therefore requires that these texts are to be made available to the public and updated if need be. The objective is to achieve the

<sup>6</sup> *Ibid.*, para. 36.

<sup>7</sup> A/CN.9/640, para. 36.

necessary level of publicity of these texts and accuracy of publicised texts with sufficient flexibility.

5. Depending on legal traditions and procurement practices in an enacting State, interpretative texts of legal value and importance to suppliers and contractors may already be covered by either paragraph (1) or (2) of the article. The enacting State may wish to consider making necessary amendments to the article to ensure that they are covered. In addition, taking into account that non-paper means of publishing information diminish costs, time and effort of making information public and its maintenance, it may be desirable to publish other legal texts of relevance and practical use and importance to suppliers and contractors not covered by article 5 of the Model Law, in order to achieve transparency and predictability, and to foster and encourage participation of suppliers and contractors, in procurement. These additional legal texts may include, for example, procurement guidelines or manuals and other documents that provide information about important aspects of domestic procurement practices and procedures and may affect general rights and obligations of suppliers and contractors. The Model Law, while not explicitly addressing the publication of these legal texts, does not preclude an enacting State from expanding the list of legal texts covered by article 5 according to its domestic context. If such an option is exercised, an enacting State should consider which additional legal texts are to be made public and which conditions of publication should apply to them. Enacting States may in this regard assess costs and efforts to fulfil such conditions in proportion to benefits that potential recipients are expected to derive from published information. In the paper-based environment, costs may be disproportionately high if, for example, it would be required that information of marginal or occasional interest to suppliers or contractors is to be made promptly accessible to the public and systematically maintained. In the non-paper environment, although costs of publishing information may become insignificant, costs of maintaining such information, so as to ensure easy public access to the relevant and accurate information, may still be high.

6. Paragraph (3) of the article enables the publication of information on forthcoming procurement opportunities. The inclusion of such an enabling provision in the procurement law may be considered important by the legislature to highlight benefits of publishing such information. In particular, 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.<sup>8</sup>

7. The enacting States, in procurement regulations, might provide incentives for publication of such information, as is done in some jurisdictions, such as a possibility of shortening a period for submission of tenders in pre-advertised procurements. The enacting States, in procurement regulations, may also refer to cases when publication of such information would in particular be desirable, such

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<sup>8</sup> Ibid, para. 35. Paragraph 6 of previous text (following para. 16 of A/CN.9/WG.I/WP.54) has accordingly been separated into two paragraphs and consequential drafting amendments made.

as when complex construction procurements are expected or when procurement value exceeds a certain threshold. They may also recommend the desirable content of information to be published and other conditions for publication, such as a time frame that such publication should cover, which may be a half-year or a year or other period. The enacting States and procuring entities should be aware however that publication of such information may not be advisable in all cases and, if imposed, may be burdensome, and may interfere in the budgeting process and procuring entity's flexibility to handle its procurement needs. The position under the Model Law is therefore, as reflected in paragraph 3 of the article, that the procuring entity should have flexibility to decide on a case-by-case basis on whether such information should be published. When published, such information is not intended to bind the procuring entity in any way in connection with publicised information, including as regards future solicitations. Suppliers or contractors would not be entitled to any remedy if the procurement did not take place subsequent to pre-publication of information about it or takes place on terms different from those pre publicised."

### III. Draft provisions on the use of electronic communications in public procurement

#### A. Communications in procurement

##### 1. Draft article 5 bis

5. At its twelfth session, the Working Group preliminarily agreed on the following wording of draft article 5 bis:<sup>9</sup>

**"Article [5 bis]. Communications in procurement**

(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 VI or in the course of a meeting, or forming part of the record of procurement proceedings under article [11], 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 [7 (4) and (6), 31 (2) (a), 32 (1) (d), 34 (1), 36 (1), 37 (3), 44 (b) to (f) and 47 (1), to update for revisions to Model Law] 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 in compliance with paragraph (1) of this article;

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<sup>9</sup> Ibid., paras. 17-25, 27 (a).



(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.

(5) Appropriate measures shall be put in place to secure the authenticity, integrity and confidentiality of information concerned.”

## 2. Guide to Enactment text

6. At its twelfth session, the Working Group preliminarily agreed on the following text for the Guide to Enactment to accompany provisions of article 5 bis:<sup>10</sup>

“1. Article 5 bis seeks to provide certainty as regards the form of information to be generated and communicated in the course of the procurement conducted under the Model Law and the means to be used to communicate such information, to satisfy all requirements for information to be in writing or for a signature, and to hold any meeting of suppliers or contractors (collectively referred to as “form and means of communications”). The position under the Model Law is that, in relation to the procuring entity’s interaction with suppliers and contractors and the public at large, the paramount objective should be to seek to foster and encourage participation in procurement proceedings by suppliers and contractors and at the same time to support the evolution of technology and processes. The provisions contained in the article therefore do not depend on or presuppose the use of particular types of technology. They set a legal regime that is open to technological developments. While they should be interpreted broadly, dealing with all communications in the course of procurement proceedings covered by the Model Law, the provisions are not intended to regulate communications that are subject to regulation by other branches of law, such as tender securities.<sup>11</sup>

2. Paragraph (1) of the article requires that information is to be in a form that provides a record of the content of the information and is accessible so as to be usable for subsequent reference. The use of the word “accessible” in the paragraph is meant to imply that information should be readable and capable of interpretation and retention. The word “usable” is intended to cover both human use and automatic processing. These provisions aim at providing, on the one hand, sufficient flexibility in the use of various forms of information as technology evolves and, on the other, sufficient safeguards that information in whatever form it is generated and communicated will be reliably usable, traceable and verifiable. These requirements of reliability, traceability and verification are essential for the normal operation of the procurement process, for effective control and audit and in review proceedings. The wording found in the article is compatible with form

<sup>10</sup> Ibid., para. 27.

<sup>11</sup> Footnote 9, supra.

requirements found in UNCITRAL texts regulating electronic commerce, such as article 9 (2) of the United Nations Convention on the Use of Electronic Communications in International Contracts. Like these latter documents, the Model Law does not confer permanence on one particular form of information, nor does it interfere with the operation of rules of law that may require a specific form. For the purposes of the Model Law, as long as a record of the content of the information is provided and information is accessible so as to be usable for subsequent reference, any form of information may be used. To ensure transparency and predictability, any specific requirements as to the form acceptable to the procuring entity have to be specified by the procuring entity at the beginning of the procurement proceedings, in accordance with paragraph 3 (a) of the article.

3. Paragraph (2) of the article contains an exception to the general form requirement contained in paragraph (1) of the article. It permits certain types of information to be communicated on a preliminary basis in a form that does not leave a record of the content of the information, for example if information is communicated orally by telephone or in a personal meeting, in order to allow the procuring entity and suppliers and contractors to avoid unnecessary delays. The paragraph enumerates, by cross-reference to the relevant provisions of the Model Law, the instances when this exception may be used. They involve communication of information to any single supplier or contractor participating in the procurement proceedings (for example, when the procuring entity asks suppliers or contractors for clarifications of their tenders).<sup>12</sup> However, the use of the exception is conditional: immediately after information is so communicated, confirmation of the communication must be given to its recipient in a form prescribed in paragraph (1) of the article (i.e., that provides a record of the content of the information and that is accessible and usable). This requirement is essential to ensure transparency, integrity and the fair and equitable treatment of all suppliers and contractors in procurement proceedings. However, practical difficulties may exist to verify and enforce compliance with this requirement. Therefore, the enacting State may wish to allow the use of the exception under paragraph (2) only in strictly necessary situations. Overuse of this exception might create conditions for abuse, including corruption and favouritism.

4. Paragraph (3) of the article gives the right to the procuring entity to insist on the use of a particular form and means of communications or combination thereof in the course of the procurement, without having to justify its choice. No such right is given to suppliers or contractors but, in accordance with article [52] of the Model Law, they may challenge the procuring entity's decision in this respect.<sup>13</sup> Exercise of this right by the procuring entity is subject to a number of conditions that aim at ensuring that procuring entities do not use technology and processes for discriminatory or otherwise exclusionary purposes, such as to prevent access by some suppliers and contractors to the procurement or create barriers for access.

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 more form and means of

<sup>12</sup> *Ibid.*, para. 27 (b).

<sup>13</sup> *Ibid.*, para. 27 (c).

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 such a 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.<sup>14</sup>

6. To fulfil the requirements specified by the procuring entity under paragraph (3) of the article, suppliers or contractors may have to use their own information systems or procuring entity may have to make available to the interested suppliers or contractors information systems for such purpose. (The term “information system” or the “system” in this context is intended to address the entire range of technical means used for communications. Depending on the factual situation, it could refer to a communications network, applications and standards, and in other instances to technologies, equipment, mailboxes or tools.) To make the right of access to procurement proceedings under the Model Law a meaningful right, paragraph (4) of the article requires that means specified in accordance with paragraph (3) of the article must be readily capable of being utilized with those in common use by suppliers or contractors in the relevant context. As regards the means to be used to hold meetings, it in addition requires ensuring that suppliers or contractors can fully and contemporaneously participate in the meeting. “Fully and contemporaneously” in this context means that suppliers and contractors participating in the meeting have the possibility, in real time, to follow all proceedings of the meeting and to interact with other participants when necessary. The requirement of “capable of being utilized with those in common use by suppliers or contractors” found in paragraph (4) of the article implies efficient and affordable connectivity and interoperability (i.e., capability effectively to operate together) so that to ensure unrestricted access to procurement. In other words, each and every potential supplier or contractor should be able to participate, with simple and commonly used equipment and basic technical know-how, in the procurement proceedings in question. This however should not be construed as implying that procuring entities’ information systems have to be interoperable with those of each single supplier or contractor. If, however, the means chosen by the procuring entity implies using information systems that are not generally available, easy to install (if need be) and reasonably easy to use and/or the costs of which are unreasonably high for the use envisaged, the means cannot be deemed to satisfy the requirement of “commonly used means” in the context of a specific procurement under paragraph (4) of the article.

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<sup>14</sup> Ibid., para. 27 (d).

7. The paragraph does not purport to ensure readily available access to public procurement in general but rather to a specific procurement. The procuring entity has to decide, on a case-by-case basis, which means of communication might be appropriate in which type of procurement. For example, the level of penetration of certain technologies, applications and associated means of communication may vary from sector to sector of a given economy. In addition, the procuring entity has to take into account such factors as the intended geographic coverage of the procurement and coverage and capacity of the country's information system infrastructure, the number of formalities and procedures needed to be fulfilled for communications to take place, the level of complexity of those formalities and procedures, the expected information technology literacy of potential suppliers or contractors, and the costs and time involved. In cases where no limitation is imposed on participation in procurement proceedings on the basis of nationality, the procuring entity has also to assess the impact of specified means on access to procurement by foreign suppliers or contractors. Any relevant requirements of international agreements would also have to be taken into account. A pragmatic approach, focusing on its obligation not to restrict access to the procurement in question by potential suppliers and contractors, will help the procuring entity to determine if the chosen means is indeed "commonly used" in the context of a specific procurement and thus whether it satisfies the requirement of the paragraph.

8. In a time of rapid technological advancement, new technologies may emerge that, for a period of time, may not be sufficiently accessible or usable (whether for technical reasons, reasons of cost or otherwise). The procuring entity must seek to avoid situations when the use of any particular means of communication in procurement proceedings could result in discrimination among suppliers or contractors. For example, the exclusive choice of one means could benefit some suppliers or contractors who are more accustomed to use it to the detriment of others. Measures should be designed to prevent any possible discriminatory effect (e.g., by providing training or longer time limits for suppliers to become accustomed to new systems). The enacting State may consider that the old processes, such as paper-based ones, need to be retained initially when new processes are introduced, which can then be phased out, to allow a take-up of new processes.

9. The provisions of the Model Law do not distinguish between proprietary or non-proprietary information systems that may be used by procuring entities. As long as they are interoperable with those in common use, their use would comply with the conditions of paragraph (4). The enacting State may however wish to ensure that procuring entities should carefully consider to what extent proprietary systems, devised uniquely for the use by the procuring entity, may contain technical solutions different and incompatible with those in common use. Such systems may require suppliers or contractors to adopt or convert their data into a certain format. This can render access of potential suppliers and contractors, especially smaller companies, to procurement impossible or discourage their participation because of additional difficulties or increased costs. Effectively, suppliers or contractors not using the same information systems as the procuring entity would be excluded, with the risk of discrimination among suppliers and contractors, and higher risks of improprieties. The use of the systems that would have a significantly negative effect on participation of suppliers and contractors in procurement would be incompatible with the objectives, and article [5 bis (4)], of the Model Law.

10. On the other hand, the recourse to off-the-shelf information systems, being readily available to the public, easy to install and reasonably easy to use and providing maximal choice, may foster and encourage participation by suppliers or contractors in the procurement process and reduce risks of discrimination among suppliers and contractors. They are also more user-friendly for the public sector itself as they allow public purchasers to utilize information systems proven in day-to-day use in the commercial market, to harmonize their systems with a wider net of potential trading partners and to eliminate proprietary lock-in to particular third-party information system providers, which may involve inflexible licences or royalties. They are also easily adaptable to user profiles, which may be important for example in order to adapt systems to local languages or to accommodate multilingual solutions, and scalable through all government agencies' information systems at low cost. This latter consideration may be especially important in the broader context of public governance reforms involving integration of internal information systems of different government agencies.

11. The Model Law does not address the issue of charges for accessing and using the procuring entity's information systems. This issue is left to the enacting State to decide taking into account local circumstances. These circumstances may evolve over time with the effect on the enacting State's policy as regards charging fees. The enacting State should carefully assess the implications of charging fees for suppliers and contractors to access the procurement, in order to preserve the objectives of the Model Law, such as those of fostering and encouraging participation of suppliers and contractors in procurement proceedings, and promoting competition. Fees should be transparent, justified, reasonable and proportionate and not discriminate or restrict access to the procurement proceedings. Ideally, no fees should be charged for access to, and use of, the procuring entity's information systems.<sup>15</sup>

12. The objective of paragraph (5) of the article (which requires appropriate measures to secure the authenticity, integrity and confidentiality of information) is to enhance the confidence of suppliers and contractors in reliability of procurement proceedings, including in relation to the treatment of commercial information. Confidence will be contingent upon users perceiving appropriate assurances of security of the information system used, of preserving authenticity and integrity of information transmitted through it, and of other factors, each of which is the subject of various regulations and technical solutions. Other aspects and relevant branches of law are relevant, in particular those related to electronic commerce, records management, court procedure, competition, data protection and confidentiality, intellectual property and copyright. The Model Law and procurement regulations that may be enacted in accordance with article 4 of the Model Law are therefore only a narrow part of the relevant legislative framework. In addition, reliability of procurement proceedings should be addressed as part of a comprehensive good governance framework dealing with personnel, management and administration issues in the procuring entity and public sector as a whole.

13. Legal and technical solutions aimed at securing the authenticity, integrity and confidentiality may vary in accordance with prevailing circumstances and contexts. In designing them, consideration should be given both to their efficacy

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<sup>15</sup> Ibid., para. 27 (e).

and to any possible discriminatory or anti-competitive effect, including in the cross-border context. The enacting State has to ensure at a minimum that the systems are set up in a way that leaves trails for independent scrutiny and audit and in particular verifies what information has been transmitted or made available, by whom, to whom, and when, including the duration of the communication, and that the system can reconstitute the sequence of events. The system should provide adequate protection against unauthorized actions aimed at disrupting normal operation of public procurement process. Technologies to mitigate the risk of human and non-human disruptions must be in place.<sup>16</sup> So as to enhance confidence and transparency in the procurement process, any protective measures that might affect the rights and obligations of potential suppliers and contractors should be specified to suppliers and contractors at the outset of procurement proceedings or should be made generally known to public. The system has to guarantee to suppliers and contractors the integrity and security of the data that they submit to the procuring entity, the confidentiality of information that should be treated as confidential and that information that they submit will not be used in any inappropriate manner. A further issue in relation to confidence is that of systems' ownership and support. Any involvement of third parties need to be carefully addressed to ensure that the arrangements concerned do not undermine the confidence of suppliers and contractors and the public at large in procurement proceedings.<sup>17</sup>

14. Further aspects relevant to the provisions of article 5 bis are discussed in the commentary to article[s] [30 (5) and ...], in paragraphs [...] of this Guide."<sup>18</sup>

## **B. Electronic submission of tenders**

### **1. Proposed revisions to article 30 (5)**

7. At its twelfth session, the Working Group preliminarily agreed on the following wording of draft article 30 (5):<sup>19</sup>

#### **“Article 30. Submission of tenders**

(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;

(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.”

<sup>16</sup> Ibid., para. 27 (f).

<sup>17</sup> Ibid., para. 27 (g).

<sup>18</sup> Ibid., para. 27 (h).

<sup>19</sup> Ibid., para. 28.

## 2. Guide to Enactment text

8. At its twelfth session, the Working Group preliminarily agreed on the following text for the Guide to Enactment to accompany provisions of article 30 (5 ):<sup>20</sup>

“3. Paragraph (5) (a) of the article contains specific requirements as regards the form and means of submission of tenders that complement general requirements of form and means found in article 5 bis (see the commentary to article 5 bis in paragraphs [cross-reference] above). The paragraph provides that tenders have to be submitted in writing and signed, and that their authenticity, security, integrity and confidentiality have to be preserved. The requirement of “writing” seeks to ensure the compliance with the form requirement found in article [5 bis (1)] (tenders have to be submitted 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). The requirement of “signature” seeks to ensure that suppliers or contractors submitting a tender identify themselves and confirm their approval of the content of their submitted tenders, with sufficient credibility. The requirement of “authenticity” seeks to ensure the appropriate level of assurance that a tender submitted by a supplier or contractor to the procuring entity is final and authoritative, cannot be repudiated and is traceable to the supplier or contractor submitting it. Together with the requirements of “writing” and “signature”, it thus seeks to ensure that there would be tangible evidence of the existence and nature of the intent by the suppliers or contractors submitting the tenders to be bound by the information contained in the tenders submitted and that evidence would be preserved for record-keeping, control and audit. Requirements of “security”, “integrity” and “confidentiality” of tenders seek to ensure that the information in submitted tenders cannot be altered, added to or manipulated (“security” and “integrity”), and that it cannot be accessed until the time specified for public opening and thereafter only by authorized persons and only for prescribed purposes, and according to the rules (“confidentiality”).

3 bis. In the paper-based environment, all the requirements described in the preceding paragraph of this Guide are met by suppliers or contractors submitting to the procuring entity, in a sealed envelope, tenders or parts thereof presumed to be duly signed and authenticated (at a risk of being rejected at the time of the opening of tenders if otherwise), and by the procuring entity keeping the sealed envelopes unopened until the time of their public opening. In the non-paper environment, the same requirements may be fulfilled by various standards and methods as long as such standards and methods provide at least a similar degree of assurances that tenders submitted are indeed in writing, signed and authenticated and that their security, integrity and confidentiality are preserved. The procurement or other appropriate regulations should establish clear rules as regards the relevant requirements, and when necessary develop functional equivalents for the non-paper based environment. Caution should be exercised not to tie legal requirements to a given state of technological development. The system, at a minimum, has to guarantee that no person can have access to the content of tenders after their receipt by the procuring entity prior to the time set up for formal opening of tenders. It must also guarantee that only authorized persons clearly identified to the system will have the right to open tenders at the time of formal opening of tenders and will have access to the content of tenders at subsequent stages of the procurement proceedings. The system must also be set up

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<sup>20</sup> Ibid., para. 29.

in a way that allows traceability of all operations in relation to submitted tenders, including the exact time and date of receipt of tenders, verification of who accessed tenders and when, and whether tenders supposed to be inaccessible have been compromised or tampered with. Appropriate measures should be in place to verify that tenders would not be deleted or damaged or affected in other unauthorized ways when they are opened and subsequently used. Standards and methods used should be commensurate with risk. A strong level of authentication and security can be achieved through, for example, public key infrastructure with accredited digital certificate service providers, but this will not be appropriate for low risk small value procurement.<sup>21</sup> These and other issues will have to be addressed in the procurement or other appropriate regulations.<sup>22</sup>

3 ter. Paragraph 5 (b) requires the procuring entity to provide to the suppliers or contractors a receipt showing the date and time when their tender was received. In the non paper-based environment, this should be done automatically. In situations where the system of receipt of tenders makes it impossible to establish the time of receipt with precision, the procuring entity may need to have an element of discretion to establish the degree of precision to which the time of receipt of tenders submitted would be recorded. However, this element of discretion should be regulated by reference to applicable legal norms of electronic commerce, in order to prevent abuses.<sup>23</sup> When the submission of a tender fails, particularly due to protective measures taken by the procuring entity to prevent the system from being damaged as a result of a receipt of a tender, it shall be considered that no submission was made. Suppliers or contractors whose tenders cannot be received by the procuring entity's system should be instantaneously informed about the event in order to allow them where possible to resubmit tenders before the deadline for submission has expired. No resubmission after the expiry of the deadline shall be allowed.

3 quater. Paragraph 5 (c) raises issues of security, integrity and confidentiality of submitted tenders, discussed above. Unlike subparagraph 5 (a)(ii), it does not refer to the requirement of authenticity of tenders since issues of authenticity are relevant at the stage of submission of tenders only. It is presumed that upon receipt of a tender by the procuring entity at the date and time to be recorded in accordance with paragraph 5 (b) of the article, adequate authenticity has already been assured.

3 quinques. It recognizes that failures in automatic systems, which may prevent suppliers or contractors to submit their tenders before the deadline, may inevitably occur. The Model Law leaves the issue to be addressed by procurement or other appropriate regulations. Under the provisions of article 30 (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. In such case, it would have to give notice of any extension of the deadline promptly to each supplier or contractor to which the procuring entity provided the solicitation documents (see article 30 (4) of the Model Law). Thus, where the failure occurs, the procuring entity has to determine whether the system can be re-established sufficiently quickly to proceed with the procurement and if so, to decide whether any extension of the deadline for submission of tenders would be

<sup>21</sup> *Ibid.*, para 27 (c).

<sup>22</sup> *Ibid.*, para. 29.

<sup>23</sup> *Ibid.*, para. 29.



necessary. If, however, the procuring entity determines that a failure in the system will prevent it from proceeding with the procurement, the procuring entity can cancel the procurement and announce new procurement proceedings. Failures in automatic systems occurring due to reckless or intentional actions by the procuring entity, as well as decisions taken by the procuring entity to address issues arising from failures of automatic systems, can give rise to a right of review by aggrieved suppliers and contractors under article 52 of the Model Law.”<sup>24</sup>

## C. Opening of tenders

### 1. Proposed revisions to article 33 (2)

9. At its twelfth session, the Working Group preliminarily agreed on the following wording of draft article 33 (2):<sup>25</sup>

#### “Article 33. Opening of tenders

(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.”

### 2. Guide to Enactment text

10. The following text is proposed for the Guide to accompany the revised provisions of article 33 (2) of the Model Law. It has been drafted to reflect the relevant suggestions made at the Working Group’s previous sessions.<sup>26</sup> It is proposed that the text would be included in paragraph (2) of the current Guide’s commentary to article 33. This would result in splitting the paragraph into several paragraphs, as follows:

“2. Paragraph (2) sets forth the 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 by means that comply with requirements of article 5 bis of the Model Law (for the discussion of the relevant requirements, see paragraphs [...] of this Guide). In particular, article [5 bis (3) (d)] requires that the procuring entity, when first soliciting the participation of suppliers or contractors in the procurement proceedings, 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 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 of article 33 (2) has been found consistent with other international

<sup>24</sup> Ibid., paras. 40-41.

<sup>25</sup> Ibid., para. 38.

<sup>26</sup> Ibid., para. 39, and A/CN.9/623, para. 25.

instruments addressing the matter. The term “fully and contemporaneously” in this context means that suppliers or contractors are given opportunity to observe in real time the opening of tenders, including by receiving (hearing or reading) properly immediately and at the same time all and the same information communicated during the opening, such as the announcements made in accordance with article 33 (3). [They should also be able to interfere where any improprieties take place. The system in place has to be capable to receive and respond to suppliers’ feedback without delay]. Different methods may exist to satisfy the requirement for full and contemporaneous appraisal using information technology systems. Regardless of methods used, sufficient information about them have to be communicated to suppliers or contractors well in advance to enable them to take all required measures to connect themselves to the system in order to observe opening of tenders.<sup>27</sup>

3. The rule requiring the procuring entity to permit all suppliers or contractors that have submitted tenders, or their representatives, to be present at the opening of tenders contributes to transparency of the tendering proceedings. It enables suppliers and contractors to observe that the procurement laws and regulations are being complied with and helps to promote confidence that decisions will not be taken on an arbitrary or improper basis. For similar reasons, paragraph (3) requires that at such an opening the names of suppliers or contractors that have submitted tenders, as well as the prices of their tenders, are to be announced to those present. With the same objectives in view, provision is also made for the communication of that information to participating suppliers or contractors that were not present or represented at the opening of tenders.<sup>28</sup>

4. Where automated opening of tenders takes place, the enacting State should be aware of additional safeguards that must be in place to ensure transparency and integrity of the process of the opening of tenders. The system must guarantee that only authorized persons clearly identified to the system will have the right to set or change in the system the time for opening tenders in accordance with article 33 (1), without compromising the security, integrity and confidentiality of tenders. Only such persons will have the right to open tenders at the set time. The enacting State may consider establishing the “four eyes” principle, found in many relevant international instruments addressing the subject. Under this principle, the system ensures that at least two authorised persons should by simultaneous action perform opening of tenders. “Simultaneous action” in this context means that the designate authorized persons within almost the same time span shall open the same components of a tender and produce logs of what components have been opened and when. It is advisable that before the tenders are opened, the system should confirm the security of tenders by verifying that no authorised access has been detected. The authorized persons should be required to verify the authenticity and integrity of tenders and their timely submission. Where tenders are to be submitted in separate parts (for example, as separate technical and economic offers), the information system should allow the deferred opening

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<sup>27</sup> Text proposed to be additional to that in existing para. 2 of the Guide text addressing article 33. Additional observations, such as whether suppliers should be able to intervene in the process, e.g., by claiming non-observance of procedures or infringement of rights and insisting and able to insist that the record of the opening reflect their concerns for subsequent audit could be included. Further, guidance on scheduling in the light of time differences in international procurement could also be included.

<sup>28</sup> See existing para. 2 of the Guide text addressing article 33.

of the separate files of the tender in the required sequence in the same way as with two sealed envelopes, without compromising the security, integrity and confidentiality for the unopened parts. Measures should be in place to prevent [mitigate risks of] compromising the integrity of tenders (for example, their deletion) by the system upon their opening as well destructing the procurement system by opened tenders. The system must also be set up in a way that allows traceability of all operations during the opening of tenders, including verification of who opened, which tender and components thereof and at which date and time. It must also guarantee that the data opened will remain accessible only to persons authorized to acquaint themselves therewith (such as to members of an evaluation committee or auditors at subsequent stages of the procurement proceedings). These and other issues have to be addressed in procurement and other regulations to be adopted by the enacting State.”

## IV. Draft provisions addressing abnormally low tenders

### A. Draft article 12 bis

11. At its twelfth session, the Working Group preliminarily agreed on the following wording of draft article 12 bis:<sup>29</sup>

**“Article [12 bis]. Rejection of abnormally low tenders, proposals, offers, quotations or bids**

(1) The procuring entity may reject a tender, proposal, offer, quotation or bid if the procuring entity has determined that the submitted price with constituent elements of a tender, proposal, offer, quotation or bid 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:<sup>30</sup>

(a) The procuring entity has requested in writing from the supplier or contractor concerned details of constituent elements of a tender, proposal, offer, quotation or bid that give rise to concerns as to the ability of the supplier or contractor to perform the procurement contract;<sup>31</sup>

(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 tender, proposal, offer, quotation or bid 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.”

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<sup>29</sup> A/CN.9/640, paras. 44-55.

<sup>30</sup> Ibid., para. 54 (a).

<sup>31</sup> Ibid., para. 54 (b).

## **B. Guide to Enactment text**

12. The Working Group considered the accompanying provisions of the Guide at its eleventh session. The revised text incorporating the suggestions made to the text at that and twelfth sessions<sup>32</sup> and any other suggestions that may be made will be presented for consideration by the Working Group in due course.

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<sup>32</sup> Ibid., paras. 48, 53 and 55 and A/CN.9/623, paras. 42, 48 and 49.

**G. Note by the Secretariat on revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services – drafting materials for the use of electronic reverse auctions in public procurement, submitted to the Working Group on Procurement at its thirteenth session**

**(A/CN.9/WG.I/WP.59) [Original: English]**

CONTENTS

	<i>Paragraphs</i>
I. Introduction .....	1-2
II. Draft provisions to enable the use of electronic reverse auctions in public procurement under the Model Law .....	3-8
A. Conditions for the use of electronic reverse auctions: draft article 22 bis .....	3-4
1. Proposed draft text for the revised Model Law .....	3
2. Guide to Enactment text .....	4
B. Procedures in the pre-auction and auction stages: draft articles 51 bis to septies .....	5-6
1. Proposed draft text for the revised Model Law .....	5
2. Guide to Enactment text .....	6
C. Consequential changes to provisions of the Model Law: record of procurement proceedings (article 11 of the Model Law) .....	7-8

## I. Introduction

1. The background to the current work of Working Group I (Procurement) on the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services (the “Model Law”) (A/49/17 and Corr.1, annex I) is set out in paragraphs 5 to 76 of document A/CN.9/WG.I/WP.57, which is before the Working Group at its thirteenth 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 reverse auctions (“ERAs”), in public procurement.

2. Such use was included in the topics before the Working Group at its sixth to twelfth sessions. At its twelfth session, the Working Group requested the Secretariat to revise the drafting materials on ERAs that it had considered at the session.<sup>1</sup> This note has been prepared pursuant to that request.

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<sup>1</sup> A/CN.9/640, para. 14. In the footnotes that follow, document A/CN.9/640 (which is the report of the Working Group on the work of its twelfth session) is referred to, so as to highlight for the benefit of the Working Group the reasons for the changes made to the revised Model Law and Guide text contained in this document.

## II. Draft provisions to enable the use of electronic reverse auctions in public procurement under the Model Law

### A. Conditions for the use of electronic reverse auctions: draft article 22 bis

#### 1. Proposed draft text for the revised Model Law

3. Draft article 22 bis below draws on the text of a draft article on conditions for use of ERAs that was before the Working Group at its twelfth session, and reflects amendments suggested to be made thereto:<sup>2</sup>

#### “Article 22 bis. Conditions for use of electronic reverse auctions

(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 tender, proposal, offer or quotation (collectively referred to as a “submission” in this section) in [other appropriate/specify relevant] procurement methods, in accordance with articles [51 bis to 51 septies], under the following conditions:<sup>3</sup>

(a) Where it is feasible for the procuring entity to formulate detailed and precise specifications for the goods [or construction or, in the case of services, to identify their detailed and precise characteristics];

(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 auctions 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 as specified 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 to the lowest evaluated submission, the electronic reverse auction shall be preceded by a full 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, both as specified in the notice of the electronic reverse auction. The invitation to the electronic reverse auction shall be accompanied by the outcome of the full evaluation of initial submissions in accordance with the provisions of article [51 quater (4)].”<sup>4</sup>

<sup>2</sup> Ibid., paras. 56 and 57.

<sup>3</sup> Amended to incorporate provisions of draft article 51 ter (1) as contained in document A/CN.9/WG.I/WP.55.

<sup>4</sup> Other changes to the draft article were made in the light of A/CN.9/640, paras. 56-57.

## 2. Guide to Enactment text

4. The following text incorporates the suggestions made at the Working Group's twelfth session to the draft text for the Guide to accompany provisions of the Model Law on the conditions for use of ERAs that was before the Working Group at that session as well as some drafting changes:<sup>5</sup>

“1. Article [22 bis] sets out the conditions for the use of electronic reverse auctions. Such auctions are defined as 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.<sup>6</sup> Each revised submission results in a ranking or re-ranking of bidding suppliers (the “bidders”) using automatic evaluation methods and a mathematical formula. The Model Law allows auctions only with automatic evaluation processes, where the anonymity of the bidders, and the confidentiality and traceability of the proceedings, can be preserved.

2. Electronic reverse auctions can improve value for money as a result of increased competition among bidders in a dynamic and real-time setting. They can also improve transparency in the procurement process since information on 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. Furthermore, they are characterised by an evaluation process that is fully automated or with limited human intervention and therefore can discourage abuse and corruption.

3. 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.\*

4. 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

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<sup>5</sup> Ibid., paras. 58-61.

<sup>6</sup> A/CN.9/640, para. 58 (a).

\* 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.

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.

5. 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.<sup>7</sup>

6. Electronic reverse auctions may be used either as procurement method in itself or as a phase in other procurement methods, as and where appropriate, preceding the award of the procurement contract. Using electronic reverse auctions as a phase may not be appropriate in all procurement methods envisaged under the Model Law.<sup>8</sup> Whether such an option is appropriate would depend first of all on how close the conditions for the use of electronic reverse auctions specified in article [22 bis] coincide with the conditions for the use of a procurement method in question. 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. Procedural requirements of some procurement methods may also be in contrast with 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 lowered submissions. Electronic reverse auctions may appropriately be used in particular upon the reopening of competition in framework agreements.<sup>9</sup>

7. Under the conditions for the use of electronic reverse auctions set out in article [22 bis], 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;

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<sup>7</sup> Ibid., para. 58 (b).

<sup>8</sup> It was suggested that the Guide should alert enacting States about the lack of practical experience with regulation and use of auctions in this manner. However, such a provision might become obsolete and on this ground has not been included in the revised text. The Working Group may wish to reconsider this point.

<sup>9</sup> The provisions in this paragraph are new.



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 the electronic reverse auctions.

8. 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). It would 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.<sup>10</sup>

9. 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.<sup>11</sup>

10. 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.

11. Paragraph (1) (b) aims at mitigating 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 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 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

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<sup>10</sup> A/CN.9/640, para. 58 (c).

<sup>11</sup> *Ibid.*, para. 59.

insufficient to ensure effective competition during the auction. [Appropriate cross-reference to Guide text that would accompany the relevant articles].<sup>12</sup>

12. 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 a Guide text that would discuss the relevant options, in particular in conjunction with article 51 septies (2)].

13. 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. When non-price criteria are involved in 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 can be expressed in monetary terms.<sup>13</sup> These non-price criteria should be differentiated from those elements of the specifications that would determine whether or not a submission was responsive (i.e., pass/fail criteria; see article 34 (2) of the Model Law). The article requires that all non-price criteria should 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 no manipulation and subjectivity (such as through a points system) are introduced in determination of the successful submission.<sup>14</sup> 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.<sup>15</sup>

14. The enacting States and procuring entities should be aware however of 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

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<sup>12</sup> Ibid., para. 58 (e). See also revisions made to draft articles 51 quater and quinquies.

<sup>13</sup> Ibid., para. 58 (f).

<sup>14</sup> Ibid.

<sup>15</sup> 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.

specific context of electronic reverse auctions, such as: **[further detail to be added at a future session]**.<sup>16</sup>

15. 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 submission, and subsequently, if at all 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 in procuring entities, for example, 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 handling electronic reverse auctions on behalf of the procuring entity is outsourced to private third-party service providers, in order to enable the procuring entity to properly supervise activities of such third-party providers.

16. 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 make them confident 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.<sup>17</sup>

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<sup>16</sup> The provisions in paragraphs 13 and 14 are mostly new. See also A/CN.9/640, para. 58 (c) and (g).

<sup>17</sup> The provisions in this paragraph are new. See also *ibid.*, para. 58 (h).

17. 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 advisability of consolidated purchases to amortize costs of setting a system for holding an electronic reverse auction, including costs of third-party software and service providers.

18. [Cross-references to provisions of the Guide providing functional guidance on the use of ERAs.]”

## **B. Procedures in the pre-auction and auction stages: draft articles 51 bis to septies**

### **1. Proposed draft text for the revised Model Law**

5. The following revised draft article are proposed for consideration by the Working Group. They reflect the suggestions made at the Working Group’s twelfth session, in particular as regards alternative approaches to drafting provisions on pre-auction procedures (previously draft article 51 bis).<sup>18</sup> The new drafting approach presented below has affected the drafting of all articles related to procedural aspects of ERAs.

#### **“Article 51 bis. Procedures for soliciting participation in procurement involving the use of electronic reverse auctions<sup>19</sup>**

(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) Where an electronic reverse auction is to be used in [other] procurement methods envisaged in this Law, the procuring entity shall give a notice of the electronic reverse auction when first soliciting the participation of suppliers or contractors in the procurement proceedings in accordance with the relevant provisions of this Law.”

#### **“Article 51 ter. Contents of the notice of the electronic reverse auction<sup>20</sup>**

(1) The notice of the electronic reverse auction shall include, at a minimum, the following:

(a) Information referred to in article 25 (1) (a), (d) and (e), and article 27 (d), (f), (h) to (j) and (t) to (y);<sup>21</sup>

(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 weight of such criteria, the mathematical formula to be used in the

<sup>18</sup> Ibid., paras. 72-73.

<sup>19</sup> The draft article is new. It draws on provisions of draft articles 51 bis (1) and 51 ter (2) in A/CN.9/WG.I/WP.55.

<sup>20</sup> The draft article is new. It draws on the provisions of draft article 51 bis (2) in document A/CN.9/WG.I/WP.55, and A/CN.9/640, para. 79.

<sup>21</sup> The Working Group may wish to consider whether the cross-referred provisions should be restated in full in this subparagraph.

evaluation procedure and indication of any criteria that cannot be varied during the auction;

(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 effective competition and fairness. 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.

(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 25 (2) (a) to (e).<sup>22</sup>

(4) The procuring entity may decide that the electronic reverse auction shall be preceded by assessment of responsiveness of submissions. 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 (1) (f) to (j) and 27 (a), (k) to (s) and (z)<sup>23</sup> and information on procedures to be used in such assessment.

(5) Where a full evaluation of initial submissions is required in accordance with the provisions of article 22 bis (3), the notice of the electronic reverse auctions shall contain invitation to present initial submissions and shall include information referred to in articles 25 (1) (f) to (j) and 27 (a), (k) to (s) and (z) and information on procedures to be used in such evaluation."<sup>24</sup>

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<sup>22</sup> The Working Group may wish to consider whether the cross-referred provisions should be restated in full in this subparagraph.

<sup>23</sup> The Working Group may wish to consider whether the cross-referred provisions should be restated in full in this subparagraph.

<sup>24</sup> The Working Group may wish to consider whether the cross-referred provisions should be restated in full in this paragraph.

**“Article 51 quater. Invitation to participate in the electronic reverse auction”<sup>25</sup>**

(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 51 ter (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 7 and 51 ter (3), the procuring entity shall send the invitation to participate in the auction individually and simultaneously to each supplier or contractor prequalified in accordance with article 7 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 32, 33 (1), 34 (1) and (2) and 51 ter (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 34 (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;

(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 [to the greatest reasonable extent].”

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<sup>25</sup> The draft article is new. It draws on draft articles 51 bis (3) to (7) and 51 quater (1) in document A/CN.9/WG.I/WP.55, and A/CN.9/640, para. 80.

**“Article 51 quinquies. Registration to participate in the electronic reverse auction and timing of holding of the auction”<sup>26</sup>**

(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 51 sexies. Requirements during the auction”<sup>27</sup>**

(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;

(d) There shall be no communication between the procuring entity and 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.

(4) The procuring entity [may] [must] [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 51 septies. Award of the procurement contract on the basis of the results of the electronic reverse auction”<sup>28</sup>**

(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

<sup>26</sup> The draft article is new. It draws on draft articles 51 bis (8) and (9) and 51 quater (2) in document A/CN.9/WG.I/WP.55.

<sup>27</sup> The draft article is new. It draws on draft article 51 quinquies in document A/CN.9/WG.I/WP.55. Revisions in paragraph (4) draw on paragraphs 86-87 of A/CN.9/640.

<sup>28</sup> The draft article is new. It draws on draft article 51 sexies in document A/CN.9/WG.I/WP.55:

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 submission 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 assess 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.

(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.”

## 2. Guide to Enactment text

6. In accordance with the view expressed at the Working Group’s twelfth session,<sup>29</sup> the text to accompany articles 51 bis to septies will be proposed for the Working Group’s consideration as soon as the Working Group agrees on the main issues of principle as regards these articles and on their presentation and structure. The relevant points for reflection in the accompanying provisions of the Guide are listed in document A/CN.9/WG.I/WP.55. In addition, at the Working Group’s twelfth session, some suggestions have been made as regards the guidance to be provided to enacting States in relation to the relevant provisions of the Model Law.<sup>30</sup>

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paragraph (1) of that draft article was revised; paragraphs (2) to (4) of the current draft are new (paragraph (2) draws on the provisions of article 34 (6) of the Model Law); and paragraphs (5) and (6) repeat paragraphs (2) and (3) of draft article 51 sexies in document A/CN.9/WG.I/WP.55. All changes were made in the light of A/CN.9/640, para. 89.

<sup>29</sup> A/CN.9/640, para. 26.

<sup>30</sup> *Ibid.*, paras. 79, 81, 85 and 89.



### C. Consequential changes to provisions of the Model Law: record of procurement proceedings (article 11 of the Model Law)

7. The proposed revisions to article 11 reflect suggestions made at the Working Group's twelfth session.<sup>31</sup>

#### “Article 11. Record of procurement proceedings

(1) The procuring entity shall maintain a record of the procurement proceedings containing, at a minimum, the following information:

...

(i bis) In procurement proceedings involving the use of 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 and [any other information that the Working Group decides to add].

(2) Subject to article 33 (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 tender, proposal, offer or quotation, as the case may be, has been accepted or after procurement proceedings have been terminated without resulting in a procurement contract.

(3) Subject to article 33 (3), the portion of the record referred to in subparagraphs (c) to (g), and (m), of paragraph (1) of this article shall, on request, be made available to suppliers or contractors that submitted tenders, proposals, offers or quotations, or applied for prequalification, after a tender, proposal, offer or quotation 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 (c) to (e), and (m), may be ordered at an earlier stage by a competent court.

(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;

(b) Information relating to the examination, evaluation and comparison of tenders, proposals, offers or quotations, and tender, proposal, offer or quotation prices, other than the summary referred to in paragraph (1) (e).

(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.”

8. It was agreed that the Guide should note possible risks of collusion in subsequent procurement if the names of unsuccessful bidders, or of bidders in suspended or terminated procurement proceedings were disclosed. It was also agreed that the Guide would discuss the meaning of the term “opening of the auction” referred to in article 11 (1) (i bis).<sup>32</sup>

<sup>31</sup> Ibid., paras. 90-91.

<sup>32</sup> Ibid.



### III. INTERNATIONAL COMMERCIAL ARBITRATION AND CONCILIATION

#### A. Report of the Working Group on Arbitration on the work of its forty-seventh session (Vienna, 10-14 September 2007)

(A/CN.9/641) [Original: English]

#### CONTENTS

	<i>Paragraphs</i>
I. Introduction . . . . .	1-7
II. Organization of the session . . . . .	8-14
III. Deliberations and decisions . . . . .	15
IV. Revision of the UNCITRAL Arbitration Rules . . . . .	16-121
Section III. Arbitral proceedings (Articles 21 to 30)	18-67
Section IV. The award (Articles 31 to 37) . . . . .	68-121
V. Other business . . . . .	122

#### 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.<sup>1</sup>

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.<sup>2</sup> When the Commission discussed that topic, it left open the question of what form its future work

<sup>1</sup> *Official Records of the General Assembly, Fifty-third Session, Supplement No. 17 (A/53/17)*, para. 235.

<sup>2</sup> *Ibid.*, *Fifty-fourth Session, Supplement No. 17 (A/54/17)*, para. 337.

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).<sup>3</sup>

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.<sup>4</sup>

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.<sup>5</sup>

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 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.<sup>6</sup>

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

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<sup>3</sup> Ibid., para. 338.

<sup>4</sup> Ibid., *Sixty-first Session, Supplement No. 17 (A/61/17)*, para. 184.

<sup>5</sup> Ibid., para. 185.

<sup>6</sup> Ibid., para. 186.

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.<sup>7</sup>

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.<sup>8</sup> 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.<sup>9</sup>

## II. Organization of the session

8. The Working Group, which was composed of all States members of the Commission, held its forty-seventh session in Vienna, from 10 to 14 September 2007. The session was attended by the following States members of the Working Group: Algeria, Australia, Austria, Bahrain, Belarus, Bolivia, Bulgaria, Cameroon, Canada, Chile, China, Czech Republic, El Salvador, France, Germany, Honduras, Iran (Islamic Republic of), Italy, Japan, Latvia, Lebanon, Malaysia, Mexico, Morocco, Nigeria, Norway, Paraguay, Poland, Republic of Korea, Russian Federation, Senegal, Singapore, Spain, Switzerland, Thailand, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

9. The session was attended by observers from the following States: Argentina, Belgium, Brazil, Croatia, Cuba, Democratic Republic of the Congo, Dominican Republic, Finland, Indonesia, Ireland, Kazakhstan, Libyan Arab Jamahiriya, Mauritius, Netherlands, Panama, Philippines, Portugal, Qatar, Romania, Slovakia, Slovenia, Sweden, Tunisia and Turkey.

10. The session was also attended by observers from the following international intergovernmental organizations invited by the Commission: United Nations Conference on Trade and Development (UNCTAD) and Permanent Court of Arbitration (PCA).

11. 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), Arab Association for International Arbitration (AAIA),

<sup>7</sup> Ibid., para. 187.

<sup>8</sup> Ibid., *Sixty-second Session, Supplement No. 17 (A/62/17)*, part one, para. 174.

<sup>9</sup> Ibid., para. 175.

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), Council of Bars and Law Societies of Europe (CCBE), European Law Students' Association (ELSA), Forum for International Commercial Arbitration C.I.C. (FICACIC), Inter-Pacific Bar Association (IPBA), International Arbitral Centre of the Austrian Federal Economic Chamber, International Arbitration Institute (IAI), International Bar Association (IBA), International Chamber of Commerce (ICC), International Council for Commercial Arbitration (ICCA), International Institute for Sustainable Development (IISD), International Swaps & Derivatives Association (ISDA), 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, Singapore International Arbitration Centre – Construction Industry Arbitration Association (SIAC–CIAA Forum) and the *Union Internationale des Avocats* (UIA).

12. The Working Group elected the following officers:

*Chairman:* Mr. Michael E. Schneider (Switzerland);

*Rapporteur:* Mr. Abbas Bagherpour Ardekani (Islamic Republic of Iran).

13. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.II/WP.146); (b) notes by the Secretariat on a revision of the UNCITRAL Arbitration Rules to reflect deliberations of the Working Group at its forty-fifth (A/CN.9/WG.II/WP.145/Add.1) and forty-sixth (A/CN.9/WG.II/WP.147 and Add.1) sessions.

14. 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

15. 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.145/Add.1, A/CN.9/WG.II/WP.147 and Add.1). The deliberations and conclusions 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 conclusions of the Working Group. The deliberations and conclusions of the Working Group in respect of agenda item 5 are reflected in chapter V.

## IV. Revision of the UNCITRAL Arbitration Rules

16. The Working Group recalled the mandate given by the Commission at its thirty-ninth session (New York, 19 June-7 July 2006) and set out above (see above, paragraphs 3-6) which provided, *inter alia*, that any revision of the UNCITRAL Arbitration Rules should not alter the structure of the text, its spirit and drafting style and that it should respect the flexibility of the text rather than make it more complex. The Working Group recalled as well its decision that harmonizing the provisions of the UNCITRAL Arbitration Rules with the corresponding provisions of the UNCITRAL Arbitration Model Law should not be automatic but rather considered only where appropriate (A/CN.9/614, para. 21).

17. The Working Group recalled that it had concluded a first reading of articles 1 to 21 at its forty-sixth session (A/CN.9/619) and agreed to resume discussions on the revision of the Rules on the basis of document A/CN.9/WG.II/WP.145/Add.1 and the proposed revisions contained therein.

### Section III. Arbitral proceedings

#### Pleas as to the jurisdiction of the arbitral tribunal

##### Article 21

###### *Paragraph (3)*

18. One delegation expressed doubts as to whether the proposed wording in paragraph (3) (as contained in A/CN.9/WG.II/WP.145/Add.1 and discussed at the forty-sixth session, A/CN.9/619, para. 164) was preferable to the text as contained in the original version of the Rules. The Working Group took note of that point and confirmed that it would consider again draft article 21 in the context of its second reading of the revised Rules.

#### Further written statements

##### Article 22

19. The Working Group agreed to adopt article 22 in substance, as contained in A/CN.9/WG.II/WP.145/Add.1.

#### Periods of time

##### Article 23

20. The Working Group agreed to adopt article 23 in substance, as contained in A/CN.9/WG.II/WP.145/Add.1.

#### Evidence and hearings – Articles 24 and 25

##### Article 24

###### *Paragraph (1)*

21. The Working Group agreed to adopt paragraph (1) in substance, as contained in A/CN.9/WG.II/WP.145/Add.1.

*Paragraph (2)*

22. The Working Group considered whether paragraph (2) should be deleted for the reason that it might not be common practice for an arbitral tribunal to require parties to present a summary of documents and therefore it might be desirable to promote a system according to which the parties would attach to their claims the evidentiary materials upon which they wished to rely (see A/CN.9/WG.II/WP.145/Add.1, para. 23).

23. Wide support was expressed for the deletion of paragraph (2), which was said to be rarely, if at all, used in practice. It was also stated that the retention of paragraph (2) would be inappropriate since that provision might be misread and create uncertainty regarding the optimal form in which evidence was expected to be submitted by the parties under the Rules, given that articles 18 (2) and 19 (2) already established the possibility for the parties to provide documents or other evidence.

24. Some support was expressed for the retention of paragraph (2), as it could provide the arbitral tribunal with an opportunity to obtain from the parties an overview of the dispute, particularly in complex matters. Paragraph (2) could also assist in imposing a discipline on the parties to rationalize the evidence upon which they wished to rely. In response, it was said that article 15 already provided the arbitral tribunal with a discretion to conduct the proceedings as it sought fit. Should the need arise, article 15 thus offered the arbitral tribunal every opportunity to request a summary of documents and paragraph (2) was unnecessary. Since the arbitral tribunal could not content itself with a summary of the documents and other evidence but had to examine the evidence itself, the summary provided by paragraph (2) would even risk increasing the arbitral tribunal's work rather than simplifying it. However, the view was reiterated that the summary would assist the arbitral tribunal in better understanding the case and resolving the dispute.

25. The widely prevailing view was that paragraph (2) should be deleted. In light of the remaining objection to deletion, the Working Group agreed that the issue could be revisited at a future session. It was emphasized that 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.

*Paragraph (3)*

26. The Working Group agreed to adopt paragraph (3) in substance, as contained in A/CN.9/WG.II/WP.145/Add.1.

**Article 25**

27. A suggestion was made to clarify that article 25 applied to expert witnesses.

*Paragraph (1)*

28. The Working Group agreed to adopt paragraph (1) in substance, as contained in A/CN.9/WG.II/WP.145/Add.1.

*Paragraphs (2) and (2 bis)*

29. Paragraph (2 bis) as contained in A/CN.9/WG.II/WP.145/Add.1 confirmed the discretion of an arbitral tribunal to set out conditions under which it might hear witnesses. It also established that parties to the arbitration or officers, employees or



shareholders thereof who testified to the arbitral tribunal should be treated as witnesses under the Rules.

30. It was observed that divergences existed between legal systems on the question whether a party or a representative of a party could be heard as a witness or in another capacity. Support was expressed for the inclusion of paragraph (2 bis) for the reason that it would provide an international standard to overcome these national differences. It was also noted that paragraph (2 bis) would ensure that government officials were not precluded from giving evidence in investor-State arbitration cases. A number of suggestions were made to clarify paragraph (2 bis).

31. It was proposed that paragraph (2 bis) be redrafted along the following lines: “Witnesses may be heard under conditions set by the arbitral tribunal. For the purpose of these Rules, witnesses include any individual testifying to the arbitral tribunal on any issue of fact or expertise, whether or not that individual is a party to the arbitration or was or is an officer, employee or shareholder of any party.” It was said that adding the words “for the purpose of these Rules” and avoiding the reference to an individual being “treated” as a witness provided a more neutral standard, particularly in States where parties were prohibited from being heard as witnesses.

32. It was further suggested that the reference to “officer, employee or shareholder of any party” was too restrictive and might exclude other possible categories of witnesses such as associates, partners or legal counsel of the parties. It was suggested that the provision be redrafted either to provide a non-exhaustive list or to omit examples altogether.

33. A question was raised as to whether the reference to an individual testifying on any issue of expertise could be interpreted as applying to tribunal-appointed experts. It was agreed that paragraph (2 bis) was intended to be limited in scope to witnesses and experts presented by a party. A suggestion was made that the words “or expertise” should be deleted to clarify that objective. In that respect, it was noted that article 27 already dealt with the question of experts generally.

34. It was suggested that it was preferable first to describe the conditions under which witnesses could be heard and the discretion of the arbitral tribunal in relation to the hearing of witnesses as currently laid out in paragraph (2 bis), and only thereafter to expand on procedural details regarding witnesses. For that reason, it was proposed to merge paragraphs (2) and (2 bis) and reverse the order of sentences. It was further suggested that any such restructuring should also delete any time period during which parties should provide communication of details regarding witnesses. It was suggested that the 15-day time period might be too long in some cases. That proposal received some support.

35. Some opposition was expressed to the inclusion of paragraph (2 bis) for the reason that it was inconsistent with some existing national laws and could impact negatively on the enforcement of an award (including through an exception based on public policy) in jurisdictions where a party was prohibited from being heard as a witness. In response, it was observed that, to the extent such an inconsistency existed, article 1 (2) provided that, where the Rules conflicted with a provision of mandatory applicable law, the provision of that mandatory law prevailed. It was further observed that the principle expressed in paragraph (2 bis), which might be helpful in those jurisdictions that did not regulate who might act as a witness, was not novel since it was 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 of International

Arbitration (“Swiss Rules”) and article 20.7 of the Arbitration Rules of the London Court of International Arbitration (“LCIA Rules”).

36. A suggestion was made that it might be possible to avoid referring in paragraph (2 bis) to the notion of “witness” altogether, thus avoiding the problems that might arise from any distinction between hearing the testimony of a witness and hearing a party on an issue of fact. Broad support was expressed for the principle that any person could be heard on an issue of fact or expertise.

37. A view was expressed that a party should not be heard as a witness in its own case since it had ample opportunity to express itself as a party in the arbitration proceedings.

38. After discussion, the Working Group agreed to include a provision along the lines contained in paragraph (2 bis) and requested the Secretariat to reformulate the text in more neutral terms, taking account of the suggestions made, for consideration by the Working Group at a future session.

*Paragraph (3)*

39. The Working Group agreed to adopt paragraph (3) in substance, as contained in A/CN.9/WG.II/WP.145/Add.1.

*Paragraph (4)*

40. The view was expressed that the last sentence in paragraph (4), which referred to the discretion of the arbitral tribunal to determine the manner in which witnesses could be heard, might overlap with the principle expressed in paragraph (2 bis). In response, it was observed that paragraph (2 bis) related to the status of witnesses and general conditions under which witnesses might be heard, whereas paragraph (4) dealt with the procedure whereby witnesses would be examined.

41. It was observed that, if paragraph (2 bis) were adopted by the Working Group, the second sentence of paragraph (4) might need to be amended as the possibility to seek the retirement of a witness during the testimony of other witnesses might not always be applicable to a party appearing as a witness as it would affect a party’s ability to present its case.

42. The Secretariat was requested to reformulate paragraph (4) taking account of the comments made for consideration at a future session.

*Paragraph (5)*

43. A suggestion was made that paragraph (5) should also refer to the possibility of witnesses being heard by videoconference. In support of that proposal, it was suggested that paragraph (4), which required that the hearings be held in camera, when read in conjunction with paragraph (5), which referred to evidence by witnesses also being presented in the form of written signed statement, could be understood as excluding witness evidence presented in any other form. However, it was said that inclusion of a reference to videoconference delved into detail that could overburden the Rules and reduce their flexibility. Some hesitation was expressed to including a reference to a particularly technology, such as video conferencing, given the rapidly evolving technological advancements in means of communication. A suggestion was made to provide a more generic term such as “teleconference” to accommodate technological advancements. Broad support was expressed for a suggestion that paragraph (5) should state not only that evidence of witnesses 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 the physical presence of witnesses. More generally, it was also noted that the arbitral tribunal had the authority under paragraph (6) to determine the weight of the evidence.

44. The Secretariat was requested to reformulate paragraph (5), taking account of the suggestions made, with possible variants, for consideration by the Working Group at a future session.

*Paragraph (6)*

45. The Working Group agreed to adopt paragraph (6) in substance, as contained in A/CN.9/WG.II/WP.145/Add.1.

**Interim measures**

**Article 26**

*Inclusion of detailed provisions on interim measures*

46. The Working Group noted that article 26, as contained in A/CN.9/WG.II/WP.145/Add.1, mirrored the provisions on interim measures as contained in chapter IV A of the UNCITRAL Arbitration Model Law adopted by the Commission in 2006.

47. Support was expressed for the proposed updating of article 26 based on the most recently adopted international standard on interim measures.

48. A proposal was made that paragraph (2) (c) should be amended expressly to refer to security for costs through an addition of the words “or securing funds” after the word “assets”. Opposition was expressed to that proposal as it could connote that the corresponding provision in the UNCITRAL Arbitration Model Law was insufficient to provide for security for costs. The Working Group agreed that security for costs was encompassed by the words “preserving assets out of which a subsequent award may be satisfied.”

49. The view was expressed that the allocation of risk in paragraph (8) was unbalanced in that it held the party requesting an interim measure liable in situations where the party disclosed in good faith all the information and documents in its possession and where the arbitral tribunal later determined that, in the circumstances, it should not have granted the interim measure. In response, it was observed that the party requesting the measure took the risk of causing damage to the other party. If the measure was later determined not to have been justified, the requesting party should have to repair that damage. It was also observed that similar provisions were found in some national laws and arbitration rules, and served a useful purpose of indicating to the parties the risks associated with a request for an interim measure.

50. A suggestion was made that, instead of amending the text of article 26 as contained in A/CN.9/WG.II/WP.145/Add.1, it might be preferable to include a concise provision on interim measures based on the original text of the Rules, updated as necessary.

51. After discussion, the Working Group agreed that it would be preferable to maintain the text of article 26 as contained in A/CN.9/WG.II/WP.145/Add.1. In that context, it was considered desirable to avoid unnecessary departure from the provisions on interim measures as contained in chapter IV A of the UNCITRAL Arbitration Model Law. It was observed that the words “whether in the form of an award or another form”

which appeared in article 17 (2) of the UNCITRAL Arbitration Model Law had been deleted from the corresponding article in the revised Rules (article 26 (2)). It was explained that, while in the past some practitioners might have used the form of an award for interim measures with a view to enhancing their enforceability, this no longer had much purpose given that the UNCITRAL Arbitration Model Law now contained provisions permitting enforcement of interim measures regardless of the form in which they were issued. As well, it was noted that issuing an interim measure in the form of an award under the Rules could create confusion, particularly in light of article 26 (5) of the Rules, which permitted the arbitral tribunal to modify or suspend an interim measure.

*Paragraph (3) of original text of the Rules*

52. The Working Group agreed that the original text of article 26 (3) of the Rules, which provided that a request for an interim measure to a court was not incompatible with an arbitration agreement, was a useful provision and should be retained in the Rules.

*Inclusion of provisions on preliminary orders*

53. 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. Provisions on preliminary orders had been discussed at length by the Working Group in the context of the revisions of the UNCITRAL Arbitration Model Law, and the Working Group agreed that discussion on the content of those provisions should not be repeated. The Working Group considered whether provisions on preliminary orders, as contained in section 2 of chapter IV A of the UNCITRAL Arbitration Model Law should be included in the Rules. Diverging views were expressed.

54. Against the inclusion of such provisions, it was stated that the Rules and the UNCITRAL Arbitration Model Law had different purposes in that the Rules were directed to parties, whereas the UNCITRAL Arbitration Model Law was directed to legislators. It was recalled that the notion of preliminary orders had been very controversial, and it was stated that there remained divisions in the international arbitration practice on the acceptability of such orders, regardless of the safeguards attached thereto in the revised UNCITRAL Arbitration Model Law. It was further clarified by those opposing inclusion of provisions on preliminary orders in the Rules that the intention was not to reject the corresponding provisions in the UNCITRAL Arbitration Model Law, but rather to acknowledge the difference in nature and function between the two instruments.

55. It was also stated that introducing such provisions in the Rules could undermine their acceptability, particularly by States in the context of investor-State dispute. Concern was expressed that, where the applicable law prohibited such orders, inclusion of a provision that contradicted the applicable law could give the false impression to arbitrators that they were empowered to grant such measures. Furthermore, it was recalled that the mandate of the Working Group in respect of the revision of the Rules was precise and required that the structure, spirit and drafting style of the Rules should not be altered. In that respect, it was said that inclusion of such lengthy provisions on preliminary orders might create the impression that such mechanism was one of the key

aspects of the Rules, whereas preliminary orders were rarely used in practice. It was said that flexibility would be better achieved by keeping the Rules as short and simple as possible.

56. In favour of the inclusion of provisions on preliminary orders, it was said that the text formed part of an accepted compromise package which enabled the arbitral tribunal to prevent a party from frustrating the purpose of an interim measure, subject to carefully crafted safeguards. It was also suggested that the Working Group had learned during its revision of the UNCITRAL Arbitration Model Law that, in some cases, arbitrators were issuing preliminary orders in practice and thus that inclusion of the provisions would give useful guidance to arbitrators on a procedure which was far from settled in practice and would therefore contribute to harmonization of international commercial arbitral practice in relation to the granting of preliminary orders.

57. As well, it was said that failure to include provisions on preliminary orders could undermine the effectiveness of interim measures. In that respect, it was noted that the length of the provision should not constitute an argument against their inclusion in the Rules.

58. It was stated that, since the Rules would apply pursuant to an agreement of the parties, provisions in the Rules that would bestow on the arbitral tribunal the power to issue preliminary orders would not come as a surprise but as the result of a conscious decision of the parties to opt into such a legal regime.

59. After discussion, 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 (1), the Rules, in and of themselves, did not prevent the arbitral tribunal from issuing preliminary orders.

60. A number of delegations expressed their willingness to continue the discussion at future sessions about the possible replication in the Rules of the provisions of the UNCITRAL Arbitration Model Law dealing with preliminary orders. The Working Group requested the Secretariat to prepare for consideration at a future session a short draft sentence expressing the notion that the arbitral tribunal was entitled to take appropriate measures to prevent the frustration of an interim measure ordered by the arbitral tribunal. It was suggested that such a sentence should avoid terminology such as “preliminary order” to avoid having to define that term.

## **Experts**

### **Article 27**

61. A question was raised whether the title of article 27 should clarify that its focus was on tribunal-appointed experts. While it was noted that the article also mentioned expert witnesses, i.e., experts presented at the initiative of a party in the specific context of a hearing for the purpose of interrogating the tribunal-appointed experts, the article focused on experts appointed by the arbitral tribunal and that therefore such a clarification might be useful. In that connection, it was considered that the Rules should not cast doubt on the right of a party to present expert evidence on its own initiative irrespective of whether the arbitral tribunal appointed an expert. The question was raised whether that principle was expressed sufficiently clearly in article 15 (2). The Secretariat was requested to prepare drafts for consideration by the Working Group at a future session, possibly also in the context of its deliberations regarding article 25 of the Rules, in particular paragraph (2 bis).

## **Default**

### **Article 28**

#### *Paragraph (1)*

62. The Working Group considered the proposed modification, as contained in A/CN.9/WG.II/WP.145/Add.1, to add the words “unless the respondent has submitted a counter-claim” in article 28 (1). It was suggested that a consequence of that modification could be that arbitral proceedings would not terminate even if the claimant after submitting the notice of arbitration did not submit the statement of claim or if the claim was withdrawn, provided that a counter-claim had been submitted. It was questioned whether in such a situation the arbitral tribunal should continue to deal only with the counter-claim. Given that some revisions proposed for article 19 would allow a counter-claim arising out of a different contract, paragraph (1) could raise the possibility that a counter-claim made in relation to one arbitration agreement could be decided by an arbitral tribunal established in relation to a claim under another arbitration agreement. While the question was raised whether such a result was advisable, it was widely considered that, if the counter-claim met the jurisdictional requirements under article 19, there was no reason to prevent it from being entertained by the arbitral tribunal in the interest of efficiency.

63. The Working Group considered the proposed modification to article 28 (1) as contained in A/CN.9/WG.II/WP.145/Add.1, to add the words “without treating such failure in itself as an admission of the claimant’s allegations”, so as to reflect the language contained in article 25 of the UNCITRAL Arbitration Model Law. The Working Group agreed that that provision should apply equally to the claim and the counter-claim and that the Secretariat should prepare a revised draft to make that clear.

#### *Paragraph (3)*

64. The Working Group agreed that the wording of paragraph (3) which referred to “documentary evidence” and article 24 (3) which referred to “documents, exhibits or other evidence” should be aligned.

## **Closure of hearings**

### **Article 29**

65. The Working Group agreed to adopt article 29 in substance, as contained in A/CN.9/WG.II/WP.145/Add.1.

## **Waiver of rules**

### **Article 30**

66. A proposal was made to amend the title of article 30 to refer to “waiver of right to object” for the sake of conformity with the corresponding provision contained in article 4 of the UNCITRAL Arbitration Model Law and to better reflect the content of article 30. That proposal was accepted.

67. A proposal was also made to align the language contained in article 30 with that in article 4 of the UNCITRAL Arbitration Model Law, by including a reference to the circumstance where a party knew that a requirement under the arbitration agreement had not been complied with. That proposal was also accepted.

## Section IV. The award

### Decisions – Article 31

#### *Paragraph (1)*

68. It was recalled that, given the differing views expressed, the Working Group had requested the Secretariat to prepare various options for consideration by the Working Group (A/CN.9/614, para. 112). One option was to leave article 31 unchanged (the so-called “majority requirement”) (A/CN.9/614, para. 111); another option was to revise that paragraph, in order to avoid a deadlock situation where no majority decision could be made, by providing that, if an arbitral tribunal composed of three arbitrators could not reach a majority, then the award would be decided by the presiding arbitrator as if he or she were a sole arbitrator (the so-called “presiding arbitrator solution”) (A/CN.9/614, para. 108). The Working Group noted that, if that latter option were accepted, consequential amendments to article 32 (4), relating to the signing of the award might also need to be considered.

69. Against the majority requirement, it was suggested that that requirement had a number of negative implications. In practice, it was said that it allowed the possibility that the co-arbitrators could each defend unreasonable positions which would leave the presiding arbitrator with no alternative but to join one or other of the co-arbitrators in order to form a majority. The majority rule was said to offer no solution where there was a deadlock. It was suggested that, by comparison, the presiding arbitrator solution provided the presiding arbitrator with a possibility to break such deadlocks without modifying his or her position. In addition, the presiding arbitrator solution provided an incentive for party-appointed arbitrators to reach agreement with the presiding arbitrator.

70. In favour of retaining the majority requirement, it was observed that, given the rarity of deadlock situations in arbitral tribunals that could not be resolved, formulating a rule to cater to such situations was inadvisable. As well, it was said that the majority rule was a tried and tested feature of the Rules, which had been generally well received in practice. It was also suggested that an award made solely by the presiding arbitrator would be less acceptable to the parties. It was also suggested that the addition of the presiding arbitrator solution might render the Rules less attractive to States in investor-State disputes. In that respect, it was observed that the Rules of Procedure for Arbitration Proceedings of the International Centre for Settlement of Investment Disputes (“ICSID Rules”) operated on the basis of the majority requirement. It was also observed that the majority rule was not obsolete and that, in a recent review of the International Arbitration Rules of the American Arbitration Association (“AAA Rules”), a proposal to modify the majority requirement had been rejected. It was further stated that abandoning the majority rule would change the internal dynamics of an arbitral tribunal’s deliberation, weakening the resolve to achieve a majority.

71. Considerable support was expressed for the presiding arbitrator solution. It was noted that the proposed revision to article 31 (1) contained in A/CN.9/WG.II/WP.145/Add.1 provided that the presiding arbitrator should only make a decision when there was no majority. It was said that such an amendment would conform to the approach taken in a number of arbitration rules. For example, article 25, paragraph (1) of the International Chamber of Commerce Arbitration Rules, 1998 (“ICC Rules”) addressed the case where no majority existed and provided that: “When the Arbitral Tribunal is composed of more than one arbitrator, an Award is given by a majority decision. If there be no majority, the Award shall be made by the chairman of the Arbitral Tribunal alone”. Similar provisions were included in article 26.3 of the

LCIA Rules, article 61 of the arbitration rules of the World Intellectual Property Organization (“WIPO Rules”), article 26, paragraph (2) of the rules of arbitration and conciliation of the International Arbitral Centre of the Austrian Federal Economic Chamber, Vienna (“Vienna Rules”), article 31 of the Swiss Rules and article 35 (1) of the rules of the Arbitration Institute of the Stockholm Chamber of Commerce, as well as article 43 of the arbitration rules of the China International Economic and Trade Arbitration Commission (“CIETAC Rules”). It was said that the option contained in these rules for the presiding arbitrator had rarely, if ever, been exercised. In that respect, it was observed that the existence of that approach in these rules had not impacted negatively on their attractiveness to users. It was said that, in one jurisdiction that had enacted legislation that included the presiding arbitrator solution, that had not affected the attractiveness of that jurisdiction as a place for arbitration. In response to the argument that the majority requirement was a central feature of the Rules, it was said that users were often unaware of that provision. Rather, the reason why the Rules were chosen was that they were perceived to be the international benchmark for arbitration practice. It was said that the review offered the Working Group an opportunity to modernize the Rules to bring them in line with modern realities and expectations.

72. Against the presiding arbitrator solution, it was said that it could undermine party agreement that the decision be by a majority of arbitrators. It was said that that solution was based on the premise that party appointed arbitrators were less neutral than the presiding arbitrator. It was said that such a premise was unfounded given that all arbitrators were required to sign a statement of independence according to the proposed revised version of article 9. It was said that such a rule gave excessive powers to the presiding arbitrator and could be open to abuse. A question was raised as to how the presiding arbitrator rule would work, namely what standard should be met or due diligence would be required, in order to determine whether a majority decision could not be reached.

73. Given the absence of consensus on that issue, various proposals were made to directly involve the parties in resolving difficulties arising from a lack of a majority. One option could be to follow the language contained in article 29 of the UNCITRAL Arbitration Model Law by referring to the majority approach with an opt-out provision for the parties. It was cautioned that such an option could be understood by the parties to limit their choice to either majority or unanimity decision-making. To address that concern, it was proposed to add to the model arbitration clause appended to article 1 of the Rules a provision referring to the presiding arbitrator solution. Some hesitation was expressed to that suggestion as it could complicate the conclusion of the arbitration agreement.

74. It was said that the opt-out approach, whilst needed in the UNCITRAL Arbitration Model Law as a legislative text, was unnecessary in the Rules, which by virtue of their contractual nature were subject to party autonomy. It was proposed that the operation of the presiding arbitrator solution should be preceded by a preliminary phase that could directly involve the parties at a point when the arbitral tribunal would inform them of the impossibility of reaching a majority decision.

75. An alternative suggestion was made to provide an opportunity for parties to opt in to the presiding arbitrator solution.

76. It was suggested that the words “three arbitrators” be replaced by “more than one arbitrator” if modifications to article 5 of the Rules as contained in A/CN.9/WG.II/WP.147 to accommodate tribunals consisting of more than three arbitrators were adopted.



77. After discussion, the Working Group requested the Secretariat to prepare alternative drafts based on the above proposals for consideration at a future session. To assist the Secretariat in its work, arbitral institutions were requested to provide the Secretariat with information about their experience.

### **Form and effect of the award**

#### **Article 32**

##### *Paragraph (1)*

78. The Working Group considered whether there existed any practical need to list the various types of awards, and whether the list contained in paragraph (1) should be deleted.

79. Support was expressed for amending that paragraph as it was said that the words “interim” or “interlocutory” created confusion, as these types of awards were not known in all legal systems or might bear different meanings. It was said that the word “final” could be understood in different senses, i.e., as an award that could not be subject to appeal, as the last award in time rendered by the arbitral tribunal or as an award that the arbitral tribunal could not modify.

80. After discussion, the Working Group agreed that paragraph (1) should clarify that the arbitral tribunal might render awards on different issues during the course of the proceedings. It was suggested that in paragraph (1) qualifications regarding the nature of the award such as “final”, “interim” or “interlocutory” should be avoided. The view was expressed that article 26.7 of the LCIA Rules, which provided that “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”, could constitute a useful model in that respect.

##### *Paragraph (2)*

##### *“final and binding”*

81. The Working Group considered whether the first sentence of paragraph (2) needed to be amended to clarify the words “final and binding”. It was explained that one possible meaning of the word “final” in paragraph (2) was that the arbitral proceedings were terminated by that award. A similar meaning was accorded to that term in article 32 (1) of the UNCITRAL Arbitration Model Law. Whilst the term “final” was used to characterise the nature of the award, by contrast, the word “binding” was used to refer to the obligation on the parties to comply with the award. A similar meaning was accorded to the term binding in article 35 (1) of the UNCITRAL Arbitration Model Law. It was generally agreed that the “final and binding” character of the award should be envisaged at three levels: in respect of the arbitral tribunal, which could not modify the award after it was rendered; in respect of the parties, who were bound by the findings of the award; and in respect of the courts, which were under a duty not to entertain any recourse against the award, save in the exceptional circumstances that justified the setting aside of the award.

82. A proposal was made to delete the word “final” from paragraph (2), based on the following observations. One observation was that, given that article 26 of the Rules empowered the arbitral tribunal to modify, suspend or terminate an interim measure it had granted, it was uncertain whether an interim measure contained in an award could be considered as final. Another observation was that, if the arbitral tribunal decided to

solve part of the issues addressed to it, the award rendered might not be considered as a final award. In response, it was stated that, while deletion of the word “final” might address those concerns, it could imply that the arbitral tribunal was empowered to revisit an award it had made. A proposal was made to amend the first sentence of paragraph (2) with 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”. In response, it was pointed out that omission of the long-used term “final and binding” would raise questions in the minds of many users and that the term, therefore, should be retained.

83. Another proposal was made to clarify the meaning of the words “final and binding” by explicitly stating that an award was final for the arbitral tribunal, which was not empowered to revise an award rendered, save when the tribunal used its powers under article 26 (5) of the Rules.

84. After discussion, the Working Group requested the Secretariat to prepare options revising paragraph (2), taking account the above proposals.

#### *Waiver of recourse to courts*

##### *Scope of waiver*

85. The Working Group considered the proposed additional language inserted in paragraph (2) (as contained in A/CN.9/WG.II/WP.145/Add.1) which provided that: “[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, insofar as such waiver can be validly made”.

86. There was general agreement on the principle that, under the Rules, the parties should be deemed to have waived any right they might have to appeal against the award or to use any other recourse to courts on the merits of the case or on any point of fact or law. However, it was observed that the proposed language, which referred to the waiver of “review or recourse to any court or other competent authority” could be understood as also deeming the parties to have waived their right to apply for setting aside of the award (for example, on matters such as lack of jurisdiction, violation of due process or any other ground for challenging the award as set out under article 34 of the UNCITRAL Arbitration Model Law). Clarification was sought from the Working Group as to whether the Rules should, where the applicable law so permitted, provide as a default rule for an automatic waiver of the right to apply for setting aside of awards.

87. A view was expressed that there was no reason to exclude the possibility for waiver in respect of setting aside in countries where the applicable law permitted such a possibility. However, it was observed that such a waiver could be interpreted as inconsistent with the policy expressed in article 34 (1) of the UNCITRAL Arbitration Model Law, which provided for recourse to a court for setting aside an arbitral award. Moreover, in countries where it was not yet settled whether the law allowed parties to waive their right to apply for setting aside of an award, the proposed language might introduce additional uncertainty. More generally, it was pointed out that the proposed language would promote forum shopping by parties. It was observed that the rules of arbitration institutions such as the ICC Rules (article 28 (6)) and the LCIA Rules (article 26 (9)) contained provisions comparable to those of the proposed revision. Despite the trend in those rules in favour of allowing waiver in respect of setting aside, it was widely agreed that the Rules operated in a different framework and should preserve the parties’ rights as set forth under article 34 of the UNCITRAL Arbitration Model Law.

88. In favour of clarifying the prevailing view that the intention of the provision was not to include waiver in respect of setting aside, it was proposed to make a distinction within the clause between two types of recourse: an appeal on the merits, which could be waived, and a challenge of the award in a setting aside procedure, which could not be waived. That proposal received limited support as it was said that such a distinction would require parties to examine the applicable law in every case in order to determine the applicability of the provision. In addition, it was observed that introducing such categories carried the risk that not all possible types of recourse were listed and that the understanding of such categories might not be universally agreed.

89. Another proposal was made to delete the word “recourse” for the reason that that word was used in the context of article 34 (1) of the UNCITRAL Arbitration Model Law, the title of which referred to “application for setting aside as exclusive recourse against an award”. Some support was expressed for that proposal. Yet another proposal was made to include a generic word rather than listing the various forms of recourse that could be made against the award given the risk that such a list might not be comprehensive.

90. After discussion, the Working Group agreed that the provision should be redrafted to avoid creating the impression that it encompassed the waiver of the right to apply for setting aside of the award. In jurisdictions where such a waiver was possible, it could be exercised under the applicable legal regime but the Rules should not result in such waiver being given automatically or merely (and possibly inadvertently) through the submission of a dispute to the Rules. The Secretariat was invited to revise the draft provision to reflect the deliberations of the Working Group.

*“insofar as such waiver can be made”*

91. A view was expressed that the words “insofar as such waiver can be made” should be deleted for the reason that the interaction of the Rules with national laws was already covered by article 1 (2) of the Rules. As well, it was said that these words would oblige parties to delve into the details of relevant applicable laws and would run counter to the harmonization objectives of the Rules.

92. After discussion, the Working Group agreed that that matter should be further considered at a future session.

### **Form and effect of the award**

#### **Article 32**

##### *Paragraph (3)*

93. The Working Group agreed to adopt paragraph (3) in substance, as contained in A/CN.9/WG.II/WP.145/Add.1.

##### *Paragraph (4)*

94. The Working Group agreed that, for the sake of consistency, the words “three arbitrators” should be replaced by “more than one arbitrator”.

##### *Paragraph (5)*

95. The Working Group proceeded to consider the two options on the question of publication of awards as contained in A/CN.9/WG.II/WP.145/Add.1. It was observed that option 1 corresponded to the existing text of the Rules providing that the award

could be made public only with the consent of the parties. Option 2 provided for the additional situation where a party was under a legal duty of disclosure.

96. Support was expressed for option 1 as sufficiently dealing with the question. It was suggested that option 2 imported questions that were not appropriate in the context of the Rules given that they related to matters already covered by national laws. As well, it was said that option 2 might not cover all situations where disclosure might be required and that, for that reason, it would be better to leave that matter to national laws. However, it was observed that option 1 had been known to create practical difficulties as it might make it difficult for a party to use the award for the protection of its rights.

97. Wide support was expressed for option 2. In favour of that option, it was said that it provided greater protection to parties who might need to disclose an award in court or other proceedings, and greater clarity as to the extent of their rights. It was noted that option 2 was in similar terms to the approach taken in a number of rules including the LCIA Rules. It was suggested that option 2 could be shortened with the deletion of the words “to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority” as it was understood that parties could not agree against a provision of mandatory law. However, it was explained that, in addition to the situation where a party was under a legal duty to produce an award, option 2 covered the two distinct situations where a party sought to protect or pursue a legal right and where a party sought to produce an award in relation to legal proceedings. With a view to better distinguishing those situations, it was suggested that a comma should be included after the word “duty”. That proposal was found generally acceptable.

98. A proposal was made to delete paragraph (5) altogether and include instead an additional sentence in paragraph (6) along the following lines: “The arbitral tribunal shall not communicate the award to third parties.” That solution was said to address the obligations of the arbitral tribunal while leaving the question of confidentiality to national laws. That proposal received little support.

99. It was questioned whether the words “made public” also encompassed the situation where a party sought to disclose the award only to one person or to a limited number of individuals (e.g., accountant, insurer, business partner). The Working Group requested the Secretariat to give further consideration to the issue and, if necessary, to propose revised language to clarify that disclosure of the award to a specific public for a legitimate purpose was intended to be allowed by option 2. The Working Group took note of the view that paragraph (5) might need to be revisited in the context of its discussions on the application of the Rules to investor-State disputes. It was also stated that, when a State was a party to arbitration, in the case of investor-State dispute under the Rules, awards should be made public, considering that States have to respond to public interest.

#### *Paragraph (6)*

100. The Working Group adopted paragraph (6) in substance, as contained in A/CN.9/WG.II/WP.145/Add.1.

#### *Paragraph (7)*

101. It was observed that paragraph (7) had been amended to avoid what was perceived as an onerous burden being placed on the arbitral tribunal which might not be familiar with the registration requirements at the place of arbitration, by including the words “at the timely request of any party”.

102. Various proposals were made to modify paragraph (7). It was suggested that the obligation that the arbitral tribunal complied with the filing or registration requirement in a timely manner was ambiguous. It was suggested that that obligation was better expressed by wording such as “the tribunal shall make its best efforts to comply with the requirement within the time period required by law”. It was said that that proposal transferred the obligation regarding the filing or registration to the arbitral tribunal whereas the current version of paragraph (7) appeared to require compliance with filing or registration requirements only if so requested by the party.

103. Another proposal was made that the filing or registration of the award and any associated costs should be borne by the party requesting such filing or registration. It was said that, in practice, an arbitrator would seek costs from both parties before filing or registering the award.

104. It was noted that a provision similar to paragraph (7) had not been included in the Swiss Rules.

105. After discussion, the Working Group agreed to delete paragraph (7) 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.

### **Article 33**

#### *Paragraph (1)*

106. The Working Group considered two sets of options concerning the law that an arbitral tribunal should apply to the substance of the dispute, as contained in A/CN.9/WG.II/WP.145/Add.1.

107. In relation to the first set of options, 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”.

108. In relation to the second set of options, 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 recalled that article 28 (2) of the UNCITRAL Arbitration Model Law referred to the arbitral tribunal applying the “law determined by the conflict of laws rules which it considers applicable”.

109. For reasons of consistency with the UNCITRAL Arbitration Model Law, it was suggested that the same approach should be adopted in the Rules. The discussion focused on whether, where the parties had not designated the applicable law, the arbitral tribunal should refer to conflict-of-laws rules or whether direct designation of substantive law or rules of law by the arbitral tribunal was possible.

110. Some support was expressed for variant 1, which referred to conflict-of-laws rules, could only result in the application of a national law and placed the arbitral tribunal in the same situation as a State court having to determine which law should govern a dispute in the absence of designation by the parties, with the additional obligation for the arbitral tribunal to choose the conflict-of-laws rules to be used for that determination. It was emphasised that variant 1 did not provide guidance to the arbitral tribunal in its determination of the conflict-of-laws rules. Broader support was expressed for variant 2, which was said to offer the opportunity to modernize the Rules by allowing the arbitral tribunal to decide directly on the applicability of such instruments as e.g., the United Nations Convention on Contracts for the International Sale of Goods, the

Unidroit Principles of International Commercial Contracts, texts adopted by the International Chamber of Commerce, such as the Incoterms and the Uniform Customs and Practices for Documentary Credit, or *lex mercatoria*.

111. A proposal was made to modify variant 2 to provide the arbitral tribunal with a broader discretion in the determination of the applicable law by adopting wording along the lines of article 17 of the ICC Rules as follows: “In the absence of any such agreement, the Arbitral Tribunal shall apply the rules of law which it determines to be appropriate”.

112. The Secretariat was requested to revise paragraph (2) to reflect the above discussion.

*Paragraph (3)*

113. It was suggested that paragraph (3) should be amended to ensure broader applicability of the Rules in situations where a contract was not necessarily the basis of the dispute (e.g., investor-State disputes), by referring to the word “any” in relation to “terms” and “usages of trade”. The Working Group agreed that that proposal should be considered in the context of discussions on the application of the Rules in the context of investor-State disputes.

**Article 34**

*Paragraph (1)*

114. Consistent with its decision to encompass multi-party arbitrations, the Working Group agreed to replace the word “both parties” by “the parties”.

**Article 35**

*Paragraph (1)*

115. The Working Group agreed to replace the words “either party” by “a party” for the reasons set out in paragraph 114 above.

**Article 36**

116. The Working Group agreed to adopt the substance of article 36 as contained in A/CN.9/WG.II/WP.145/Add.1.

**Article 37**

*Paragraph (2)*

117. The Working Group considered whether the words “without any further hearings or evidence” should be deleted, and whether or not paragraph (2) could be understood as already allowing the arbitral tribunal to make an additional award after holding further hearings and taking further evidence.

118. The Working Group agreed that paragraph (2) was intended to be limited to claims presented during the course of arbitral proceedings. Diverging views were expressed on the question of whether the arbitral tribunal should be permitted to hold further hearings or seek further evidence.

119. Support was expressed for allowing the arbitrators to hold further hearings and seek further evidence where necessary. Various proposals were made. As a matter of

drafting, it was proposed to redraft paragraph (2) to define conditions applicable when further hearings or evidence were necessary. One proposal was to include a reference to article 15 (1), along the following lines: “Where the arbitral tribunal determines that subsequent hearings or evidence are required in order to issue an additional award, article 15 (1) shall apply.” Support was expressed for that proposal. It was observed, however, that the reference in revised article 15 (1) to the arbitral tribunal’s discretion to conduct proceedings was intended to apply generally. Therefore, it was not necessary to include an express reference to article 15 (1) in paragraph (2).

120. Another proposal was made to clarify paragraph (2) by adding to paragraph (1) the words “which ought to have been but were not decided” after the words “claims”. It was said that that addition would better indicate that paragraph (2) was intended only to address unintentional omissions. In response, it was said that this proposal was neither practically workable nor really necessary since parties were not in the best position to judge that a claim had intentionally been omitted from an award and since the arbitrators could readily determine that an additional award on a claim they intentionally omitted was not “justified” under the language of paragraph (2).

121. It was observed that article 33, paragraphs (3) and (4) of the UNCITRAL Arbitration Model Law dealt with the same issue addressed in paragraph (2) and could therefore provide a useful model in that respect.

## V. Other business

122. The Working Group noted that, at its fortieth session, the Commission was informed that 2008 would mark the fiftieth anniversary of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958 (the “New York Convention”) and that conferences to celebrate that anniversary were being planned in different regions, which would provide opportunities to exchange information on how the New York Convention had been implemented around the world. At that session, the Commission requested the Secretariat to monitor the conferences and make full use of events associated with that anniversary to encourage further treaty actions in respect of the New York Convention and promote a greater understanding of that instrument.<sup>10</sup> The Working Group noted that a one-day conference organized by the International Bar Association in cooperation with the United Nations was scheduled to be held in New York on 1 February 2008.

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<sup>10</sup> *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17 (A/62/17)*, part one, para. 178.

**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-seventh session  
(A/CN.9/WG.II/WP.147 and Add.1) [Original: English]**

**CONTENTS**

	<i>Paragraphs</i>
Introduction .....	1-3
1. General remarks .....	4-5
2. Notes on a draft of revised UNCITRAL Arbitration Rules .....	6
Section I. Introductory rules (article 1 to article 4 bis) .....	7-33
Section II. Composition of the arbitral tribunal (article 5 to article 14) .....	34-59

**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”).<sup>1</sup> The Commission previously discussed that matter at its thirty-sixth (Vienna, 30 June-11 July 2003), thirty-seventh (New York, 14-25 June 2004) and thirty-eighth (Vienna, 4-15 July 2005) sessions.<sup>2</sup>

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 prepare a draft revision 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 session (New York, 5-9 February 2007), the Working Group discussed articles 1 to 21 of the draft revised Rules, as contained in documents A/CN.9/WG.II/WP.145 and Add.1. The report of that session is contained in document A/CN.9/619.

3. This note contains an annotated draft of revised UNCITRAL Arbitration Rules, based on the deliberations of the Working Group at its forty-sixth session and covers articles 1 to 14 of the UNCITRAL Arbitration Rules. Articles 15 to 21 are dealt with under A/CN.9/WG.II/WP.147/Add.1. Unless otherwise indicated, all references to

<sup>1</sup> *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17 (A/61/17)*, paras. 182-187.

<sup>2</sup> *Ibid.*, *Fifty-eighth Session, Supplement No. 17 (A/58/17)*, para. 204; *ibid.*, *Fifty-ninth Session, Supplement No. 17 (A/59/17)*, para. 60; *ibid.*, *Sixtieth Session, Supplement No. 17 (A/60/17)*, para. 178.



deliberations by the Working Group in the note are to deliberations made at the forty-sixth session of the Working Group.

## 1. General remarks

### Time-periods under the Rules

4. The Working Group agreed that there might be a need to revisit the various time periods provided in the Rules so as to ensure consistency (A/CN.9/619, para. 59).

### Investor-state arbitration

5. A view was expressed that specific provisions might need to be included to ensure transparency of the procedure for arbitration involving a State (A/CN.9/619, paras. 61 and 62). The Working Group agreed to revisit the issue after it had completed its review of the revised provisions.

## 2. Notes on a draft of revised UNCITRAL Arbitration Rules

6. All suggested modifications to the UNCITRAL Arbitration Rules are indicated in the text below. Where the original text has been deleted, the text is struck through and new text is indicated by being underlined.

### Section I. Introductory rules

#### Scope of application

##### 7. Draft article 1

#### Article 1

1. Where ~~the parties to a contract~~ have agreed ~~in writing~~<sup>\*</sup> that disputes ~~in relation to that contract~~ 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 ~~in writing~~.

1 bis. [Option 1: Unless the parties have agreed to apply the Rules as in effect on the date of their agreement, the parties shall be deemed to have submitted to the Rules in effect on the date of commencement of the arbitration.] [Option 2: Unless the parties have agreed to apply the Rules in effect on the date of commencement of the arbitration, the parties shall be deemed to have submitted to the Rules as in effect on the date of their agreement.]

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.

## Remarks

### *Paragraph (1)*

*“parties to a contract” – “in writing” – “disputes in relation to that contract” – “in respect of a legal relationship, whether contractual or not”*

8. Draft paragraph (1) is intended to reflect the revisions discussed in the Working Group (A/CN.9/619, paras. 19-31).

### *Applicable version of the UNCITRAL Arbitration Rules*

9. Draft paragraph (1 bis) seeks to determine which version of the Rules applies to arbitrations after the Rules have been revised. Two options are proposed for the consideration of the Working Group. Both options address the observation made at the forty-fifth session of the Working Group that, in practice, some parties preferred to apply the most up-to-date rules to their dispute, whereas others preferred the certainty of agreeing on the rules in existence at the time the arbitration agreement was made (A/CN.9/614, para. 23).

10. It was observed at the fifty-sixth session of the Working Group that text as now reflected in option 1 comprehensively set out the parties' choice to apply either the most recent version of the Rules to their dispute or the Rules in existence at the time the arbitration agreement was made (A/CN.9/619, para. 35). That approach received considerable support. At that session, an alternative proposal, as contained in option 2, was made which sought to avoid the situation where a default rule would apply retroactively to agreements made before the adoption of the revised Rules without sufficient regard for the principle of party autonomy (A/CN.9/619, para. 36).

11. The Working Group agreed to revisit that question once it had completed its review of the current text of the Rules (A/CN.9/614, para. 26, A/CN.9/619, para. 38).

### *References to previous UNCITRAL documents*

*“parties to a contract” – “disputes in relation to that contract” – “in respect of a legal relationship, whether contractual or not”*: A/CN.9/614, paras. 32-34; A/CN.9/WG.II/WP.143, paras. 24-25; A/CN.9/619, paras. 19-24; A/CN.9/WG.II/WP.145, paras. 10 and 11

*The writing requirement for the agreement to arbitrate and for modification of the Rules*: A/CN.9/614, paras. 27-31; A/CN.9/WG.II/WP.143, paras. 12-23; A/CN.9/619, paras. 25-31; A/CN.9/WG.II/WP.145, paras. 12 and 13

*Applicable version of the UNCITRAL Arbitration Rules*: A/CN.9/614, paras. 22-26; A/CN.9/WG.II/WP.143, paras. 8-11; A/CN.9/619, paras. 32-38; A/CN.9/WG.II/WP.145, paras. 14-19

### 12. Draft model arbitration clause

#### **\*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 ~~as at present in force~~.

*Note – Parties may wish to 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 ~~or~~ and country);
- (d) The language(s) to be used in the arbitral proceedings shall be ...

## Remarks

### *Title and placement of the model arbitration clause*

13. The Working Group may wish to consider whether to include the words “for contracts” in the title of the Model Arbitration Clause. The Working Group may wish to consider where to locate the reference to the model arbitration clause, in case its decision to delete the words “in writing\*” in draft article 1, paragraph (1) is maintained (see above, paragraph 8).

### *Notes to the model arbitration clause*

14. The Working Group agreed that the words “as at present in force” should be considered for deletion if a provision referring to the applicable version of the Rules is adopted in draft article 1, paragraph (1) (see above, paragraphs. 9-11) (A/CN.9/619, para. 39). In draft subparagraph (c), the word “place” is in brackets, as it may be amended at a later stage to reflect any revised language adopted under article 16 in respect of the legal place of arbitration (see A/CN.9/WG.II/WP.147/Add.1, paragraphs 10 and 11) (A/CN.9/619, para. 41 and paras. 137-144). The word “or” is replaced by the word “and”, thus requiring the parties to clarify in the arbitration clause the agreed place of arbitration and to address the concern that the designation of the location of the arbitration could have significant legal consequences (A/CN.9/619, para. 41). The deletion of the plural form for language in draft subparagraph (d) is in line with a decision of the Working Group to delete in article 17 the reference to “languages” (see A/CN.9/WG.II/WP.147/Add.1, paragraph 13) (A/CN.9/619, para. 145).

### *Reference to previous UNCITRAL documents*

A/CN.9/614, paras. 36-38; A/CN.9/619, paras. 39-43; A/CN.9/WG.II/WP.145, paras.20-23

### 15. Draft article 2

#### **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 ~~mailing~~ 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.

1 bis. Such delivery may be made by delivery against receipt, registered post, courier, facsimile transmission, telex, telegram, or by any other means of communication, including electronic communications that provide a record of dispatch and receipt thereof.

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.

## Remarks

### *Paragraph (1)*

#### *Deemed delivery*

16. Draft paragraph (1) reflects the decision of the Working Group that paragraph (1) should not be amended in respect of deemed delivery, but that any accompanying material should include clarification to deal with the situation where delivery is not possible (A/CN.9/619, para. 49).

#### *“Physically”, “Mailing”*

17. As suggested in the Working Group, the words “physically” and “mailing” have been deleted to avoid any ambiguity concerning the possibility of delivery of notices by electronic means as proposed in draft paragraph (1 bis) (A/CN.9/614, para. 40 and A/CN.9/619, para. 47).

### *Paragraph (1 bis)*

18. Draft paragraph (1 bis) reflects the decision of the Working Group to expressly include language which authorizes both electronic as well as other traditional forms of communication, keeping in mind the importance of effectiveness of delivery, the necessity to keep a record of the issuance and receipt of notices, and the consent of the parties to the means of communication used (A/CN.9/619, para. 50).

## **References to previous UNCITRAL documents**

*Paragraph (1) – Deemed delivery:* A/CN.9/614, para. 40; A/CN.9/WG.II/WP.143, paras.27-29; A/CN.9/619, paras. 45 and 46; A/CN.9/WG.II/WP.145, para. 24

*“Mailing address”:* A/CN.9/619, para. 47

*Paragraph (1 bis) – Delivery of the notice: “Electronic communication”:* A/CN.9/614, paras. 39 and 40; A/CN.9/WG.II/WP.143, paras. 27-29; A/CN.9/619, para. 50; A/CN.9/WG.II/WP.145, para. 25

## 19. Draft article 3

### **Notice of arbitration and response**

#### **Article 3**

1. The party 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 ~~addresses~~ contact details of the parties;
  - (c) ~~A reference to the arbitration clause or the separate~~ Identification of the arbitration agreement that is invoked;
  - (d) ~~A reference to the~~ Identification of any contract, or other legal instrument or, in the absence of any contract or other legal instrument, a brief description of the relationship out of or in relation to which the dispute arises;
  - (e) ~~The general nature~~ 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, ~~(i.e. one or three)~~, language and place of arbitration, if the parties have not previously agreed thereon.
4. The notice of arbitration may also include:
  - (a) The proposals for the appointment of an appointing authority referred to in ~~article 6, paragraph (1)~~ article 4 bis, paragraph 1;
  - (a bis) The proposal for the appointment of a sole arbitrator ~~and an appointing authority~~ referred to in article 6, paragraph 1;
  - (b) The notification of the appointment of an arbitrator referred to in article 7 or article 7 bis, paragraph 2;
  - (c) The statement of claim referred to in article 18].
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:
  - (a) Any plea that an arbitral tribunal constituted under these Rules lacks jurisdiction;
  - (b) The full name and contact details of any respondent;
  - (c) The respondent's comments on the information set forth in the notice of arbitration, pursuant to article 3, paragraph 3 (c), (d) and (e);
  - (d) The respondent's response to the relief or remedy sought in the notice of arbitration, pursuant to article 3, paragraph 3 (f);
  - (e) The respondent's proposal as to the number of arbitrators, language and place of arbitration, if the parties have not previously agreed thereon, pursuant to article 3, paragraph 3 (g).
6. The response to the notice of arbitration may also include:
  - (a) The respondent's proposal for the appointment of an appointing authority referred to in article 4 bis, paragraph (1);
  - (b) The respondent's proposal for the appointment of a sole arbitrator referred to in article 6, paragraph 1;

(c) The respondent's designation of an arbitrator referred to in article 7 or article 7 bis, paragraph 2;

(d) A brief description of counter-claims 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. [Option 1: The arbitral tribunal may proceed, notwithstanding that the notice of arbitration is incomplete, or that the response to the notice of arbitration is missing, late or incomplete and shall finally resolve any controversy in relation thereto. [In respect of an incomplete notice of arbitration, the arbitral tribunal may request the claimant to remedy the defect within an appropriate period of time, and may delay the date of commencement of the arbitral proceedings until such defect is remedied.]]

[Option 2: 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.]

## Remarks

### *Notice of arbitration*

#### *Paragraph (3)*

##### *Subparagraph (b)*

20. The replacement of the word “address” with the words “contact details” in draft paragraphs (3) (b) and (5) (b) reflects the decision of the Working Group to provide for a more generic language (A/CN.9/619, para. 52).

##### *Subparagraph (d)*

21. It was suggested that the reference in draft subparagraph (d) to “any contract, or other legal instrument” ought to be made consistent with the earlier decision by the Working Group that disputes of a non-contractual nature would also be covered by the Rules (A/CN.9/619, para. 54). For that reason, a broader formulation to encompass non-contractual disputes is proposed for the consideration of the Working Group.

#### *Paragraph (4)*

##### *Subparagraph (c)*

22. The Working Group may wish to further discuss whether the decision by the claimant that the notice of arbitration would constitute the statement of claim should be postponed until the stage of proceedings reflected in article 18 (A/CN.9/619, para. 57).

### *Response to the notice of arbitration*

#### *Paragraphs (5) and (6)*

23. Draft paragraphs (5) and (6) have been modified to take account of comments made in the Working Group that more precise language should be used (A/CN.9/619, paras. 58 and 60).

***Incomplete notice of arbitration – Missing, late or incomplete response to the notice of arbitration***

*Paragraph (7)*

24. In order to deal with an incomplete notice of arbitration, the Working Group agreed to indicate that an incomplete notice of arbitration should not prevent the constitution of an arbitral tribunal and that the consequences of failing to include mandatory items in the notice of arbitration should be a matter to be determined by the arbitral tribunal (A/CN.9/619, paras. 55 and 56). Various options are proposed for the consideration of the Working Group. Option 1 takes account of the suggestions that article 5.4 of the Arbitration Rules of the London Court of International Arbitration (“LCIA Rules of Arbitration”) and rule 4.5 of the Australian Centre for International Commercial Arbitration Rules might provide useful models on the question of the impact of an incomplete notice of arbitration. Option 2 corresponds to a suggestion made in the Working Group that the constitution of the arbitral tribunal shall not be impeded by any controversy on the response to the notice of arbitration or by any failure to communicate such response (A/CN.9/619, para. 56).

***References to previous UNCITRAL documents***

*Separation of the notice of arbitration from the statement of claim:* A/CN.9/614, paras. 48 and 49; A/CN.9/WG.II/WP.143, paras. 33-35; A/CN.9/619, para. 57; A/CN.9/WG.II/WP.145, para. 37

*Paragraphs (3) and (4):* A/CN.9/614, paras. 50-55; A/CN.9/WG.II/WP.143, paras. 36-39; A/CN.9/619, paras. 52-57; A/CN.9/WG.II/WP.145, paras. 31-38

*Paragraphs (5), (6) and (7):* A/CN.9/614, paras. 56 and 57; A/CN.9/WG.II/WP.143, paras. 40 and 41; A/CN.9/619, paras. 55 and 56; paras. 58-60; A/CN.9/WG.II/WP.145, para. 39

25. Draft article 4

**Representation and assistance**

**Article 4**

The parties may be represented or assisted by persons chosen by them ~~of their choice~~. The names and addresses of such persons must be communicated ~~in writing to the other~~ 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].

*Persons “of their choice” – “chosen by them”*

26. Draft article 4 takes account of the suggestion to replace the words “of their choice” appearing in the first sentence of article 4 with “chosen by them”. The Working Group might wish to consider whether any additional wording is necessary to avoid the implication that a party has an unrestricted discretion, at any time during the proceedings, to impose the presence of any counsel (A/CN.9/619, para. 63).

*“in writing”*

27. The Working Group agreed to delete the words “in writing”, as the manner in which information should be exchanged among the parties and the arbitral tribunal is already dealt with under article 2 (A/CN.9/619, para. 68).

*Representation of a party*

28. The Working Group considered whether it would be useful to add language to article 4 to clarify that, when a person is empowered to represent a party, the other party or parties are informed of the content of those representation powers. Draft article 4 reflects the suggestion that proof of the representation powers should be communicated at the request of the arbitral tribunal itself or at the request of a party. The Working Group may wish to consider whether the provision should clarify that communication on proof of authority does not exclude communication on the scope of the representative’s power (A/CN.9/619, paras. 64-67). The Working Group may wish to consider whether such clarification could be contained in any accompanying material.

#### *References to previous UNCITRAL documents*

A/CN.9/619, paras. 63-68; A/CN.9/WG.II/WP.145, para. 40

29. Draft article 4 bis

#### **Designating and appointing authorities**

##### **Article 4 bis**

1. The parties may agree, with the notice of arbitration or at any time thereafter, on a person or institution, including the Secretary-General of the Permanent Court of Arbitration at The Hague, (“Secretary-General of the PCA”) to act as appointing authority under these Rules.
2. If, within 30 days of the receipt of a party’s request therefore, the parties have not agreed on the identity of an appointing authority, or the appointing authority refuses or fails to act in accordance with these Rules, any party may request the Secretary-General of the PCA to designate an appointing authority.
3. The appointing authority may require from any party the information it deems necessary to exercise its functions under these Rules and, in doing so, it shall give the parties an opportunity to be heard [if so requested by a party]. Copies of all requests or other communications between a party and the appointing authority or the Secretary-General of the PCA shall also be provided to all other parties.
4. When an appointing authority is requested to appoint an arbitrator pursuant to articles 6, 7 or 7 bis, the party which makes the request shall send to the appointing authority copies of the notice of arbitration and, if it exists, the response to the notice of arbitration.
5. 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 as well the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties. Where persons are proposed for appointment as arbitrators, the proposed arbitrators shall communicate to the



parties their full names, addresses and nationalities, together with a description of their qualifications.

6. In all cases, the appointing authority may exercise its discretion in appointing an arbitrator.

### Remarks

#### *Paragraph (1)*

30. In the interest of simplicity, the words “Secretary-General of the PCA” are proposed to be used instead of the full title “Secretary-General of the Permanent Court of Arbitration at The Hague” (A/CN.9/619, para. 70). Draft paragraph (1) clarifies that the designation of the appointing authority may be sought by any party at any time during the arbitration proceedings (A/CN.9/619, para. 75).

#### *Paragraph (2)*

31. In articles 6 and 7 of the current version of the Rules, if no appointing authority has been agreed upon by the parties, or if the appointing authority refuses or fails to act, within 60 or 30 days from its request (depending on whether it is a sole arbitrator or three-member tribunal), a party may refer the matter to the Secretary-General of the PCA. Consistent with the recommendation of the Working Group to assess simplifications which could be made in the Rules (A/CN.9/619, para. 69), draft article 4 bis provides for a general time limit of 30 days before a party may request the Secretary-General of the PCA to designate an appointing authority, and draft articles 6 and 7 have been simplified accordingly (see below, paragraphs 38 and 40).

#### *Paragraph (3)*

32. Draft paragraph (3) includes the principle that the parties, if they so wish, should be invited to be heard by the appointing authority (A/CN.9/619, para. 76).

#### *Paragraph (5)*

33. Draft paragraph (5) clarifies that it is for the proposed arbitrators (rather than the appointing authority) to provide information regarding their qualifications to the parties (A/CN.9/619, para. 78).

### **References to previous UNCITRAL documents**

A/CN.9/619, paras. 69-78; A/CN.9/WG.II/WP.145, paras. 41 and 42

## **Section II. Composition of the arbitral tribunal**

34. Draft article 5

### **Number of arbitrators**

#### **Article 5**

1. *Option 1:* [If the parties have not previously agreed on the number of arbitrators (~~i.e. one or three~~), and if within ~~fifteen~~ thirty 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 thirty days after its receipt of the notice of arbitration, requests that there be three, in which case three arbitrators shall be appointed.]

## Remarks

35. The Working Group decided to further consider alternative proposals on the number of arbitrators. Option 1, which provides that if the parties are unable to agree on the appointment of one arbitrator, three arbitrators should be appointed, most closely reflects the current default rule set out in article 5. Option 2 includes an additional level of flexibility, by providing that if the parties have not previously agreed on the number of arbitrators, one arbitrator shall be appointed, unless either party requests that there be three (A/CN.9/619, paras. 79-82).

36. Draft article 5, as contained in document A/CN.9/WG.II/WP.145, included a second paragraph to address the situation where parties decided to appoint a number of arbitrators other than 1 or 3. This paragraph has been placed under article 7 bis because, as revised, it contains a fallback rule dealing with methods for appointing arbitrators, and therefore relates more to the section on appointment of arbitrators (see below, paragraph 42) (A/CN.9/619, para. 83).

## References to previous UNCITRAL documents

A/CN.9/614, paras. 59-61; A/CN.9/WG.II/WP.143, paras. 42-44; A/CN.9/619, paras. 79-83; A/CN.9/WG.II/WP.145, paras. 43 and 44

## 37. Draft article 6

### Appointment of arbitrators (Articles 6 to 8)

#### Article 6

~~1. If a sole arbitrator is to be appointed, either party may propose to the other:~~

~~(a) The names of one or more persons, one of whom would serve as the sole arbitrator; and~~

~~(b) If no appointing authority has been agreed upon by the parties, the name or names of one or more institutions or persons, one of whom would serve as appointing authority.~~

~~2. If within thirty days after receipt by a party of a proposal made in accordance with paragraph 1 the parties have not reached agreement on the choice of a sole arbitrator, the sole arbitrator shall be appointed by the appointing authority agreed upon by the parties. If no appointing authority has been agreed upon by the parties, or if the appointing authority agreed upon refuses to act or fails to appoint the arbitrator within 60 days of the receipt of a party's request therefor, either party may request the Secretary General of the Permanent Court of Arbitration at The Hague to designate an appointing authority.~~

1. If the parties have agreed that a sole arbitrator is to be appointed, and if within thirty days after the receipt by a party of the proposal for the appointment of a sole arbitrator, all parties have not agreed on the identity of the sole arbitrator, the sole arbitrator shall be appointed by the Appointing Authority.

2. The appointing authority shall, at the request of ~~one of the~~ a party~~ies~~, 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 ~~one of the~~ of a party~~ies~~ the appointing authority shall communicate to ~~both the~~ 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 ~~he it~~ objects and numbered the remaining names on the list in the order of ~~his 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.

~~4. In making the appointment, 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 as well the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.~~

#### Remarks

38. Paragraphs (1) and (2) of the current version of the Rules have been merged, as draft article 4 bis already incorporates the rules previously contained in paragraph (2), 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 (A/CN.9/619, para. 69). Paragraph (4) has been deleted as its content is covered by draft article 4 bis, paragraph (5).

#### *References to previous UNCITRAL documents*

A/CN.9/619, para. 84; A/CN.9/WG.II/WP.145, para. 45

#### 39. Draft article 7

##### Article 7

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 ~~appointment of an~~ arbitrator ~~he or she~~ it has appointed, ~~(a) the~~ first party may request the appointing authority ~~previously designated by the parties~~ to appoint the second arbitrator. ~~;~~ ~~or~~

~~(b) If no such authority has been previously designated by the parties, or if the appointing authority previously designated refuses to act or fails to appoint the arbitrator within 30 days after receipt of a party's request therefor, the first party may request the Secretary General of the Permanent Court of Arbitration at The Hague to designate the appointing authority. The first party may then request the appointing authority so designated to appoint the second arbitrator. In either case, the appointing authority may exercise its discretion in appointing the 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 an appointing authority in the same way as a sole arbitrator would be appointed under article 6.

### Remarks

40. Draft paragraph (2) has been simplified, given that draft article 4 bis already contains the rules which were previously under paragraph (2) (b), 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 (A/CN.9/619, para. 69).

### *References to previous UNCITRAL documents*

A/CN.9/619, para. 85; A/CN.9/WG.II/WP.145, para. 46

41. Draft article 7 bis

### Article 7 bis

1. If the parties decide 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 methods agreed upon by the parties.

2. Where there are multiple claimants or respondents, unless the parties have agreed to another method of appointment of arbitrators, the multiple claimants, jointly, and the multiple respondents, jointly, shall each appoint an arbitrator. The two arbitrators thus appointed shall endeavour to choose the third arbitrator who will act as the presiding arbitrator of the arbitral tribunal.

3. In the event of failure to constitute the arbitral tribunal, 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

#### *Paragraph (1)*

42. The purpose of draft paragraph 1 is to clarify that articles 6 and 7 establish the rules for forming either a one or a three member arbitral tribunal and if the parties wish to derogate from that rule (for example, by opting for a two-member arbitral tribunal, which is allowed by the UNCITRAL Model Law on International Commercial Arbitration (“the Model Law”), they should define their own method for the constitution of the arbitral tribunal (A/CN.9/619, para. 83).

*Paragraph (2)*

43. Draft paragraph (2) has been revised in accordance with suggestions made in the Working Group (A/CN.9/619, para. 87).

*Paragraph (3)**Right to be heard*

44. Draft paragraph (3) provides a fallback rule in the event of failure to constitute the arbitral tribunal involving the appointing authority and has been revised in accordance with suggestions made in the Working Group (A/CN.9/619, paras. 88-91). A suggestion was made that, in case of failure to constitute the arbitral tribunal, the appointing authority should give the parties the right to be heard (A/CN.9/619, para. 92). A general principle has been added to that effect under draft article 4bis, paragraph (3) (see above, paragraph 32), and the Working Group may wish to consider whether there is a need to restate that principle under draft paragraph (3).

*Time limits*

45. The Working Group may wish to further consider whether time-limits should be included under draft paragraph (3) (A/CN.9/619, para. 93).

**References to previous UNCITRAL documents**

A/CN.9/614, paras. 62 and 63; A/CN.9/WG.II/WP.143, paras. 45-47

*Paragraph (1)*: A/CN.9/619, para. 83; A/CN.9/WG.II/WP.145, para. 44

*Paragraph (2)*: A/CN.9/619, paras. 86-87; A/CN.9/WG.II/WP.145, para. 47

*Paragraph (3)*: A/CN.9/619, paras. 88-93

A/CN.9/WG.II/WP.145, para. 47

**Article 8**

~~1.—When an appointing authority is requested to appoint an arbitrator pursuant to article 6 or article 7, the party which makes the request shall send to the appointing authority a copy of the notice of arbitration, a copy of the contract out of or in relation to which the dispute has arisen and a copy of the arbitration agreement if it is not contained in the contract. The appointing authority may require from either party such information as it deems necessary to fulfil its function.~~

~~2.—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.~~

**Remarks**

46. The Working Group agreed to the deletion of article 8, the substance of which has been placed under draft article 4 bis on the designating and appointing authorities (A/CN.9/619, para. 94).

**References to previous UNCITRAL documents**

A/CN.9/619, para. 94; A/CN.9/WG.II/WP.145, para. 48

## Challenge of arbitrators (Articles 9 to 12)

### 47. Draft article 9

#### Article 9

~~A prospective arbitrator shall disclose to those who approach him or her. When a person is approached in connexion 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, ~~once appointed or chosen~~ 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 statement of independence*

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. 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 my reliability for independent and impartial judgment to be questioned by a party. [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

48. The substance of draft article 9 as well as of the model statements of independence were approved by the Working Group (A/CN.9/619, paras. 95-99).

#### *References to previous UNCITRAL documents*

A/CN.9/614, paras. 64-65; A/CN.9/WG.II/WP.143, para. 48; A/CN.9/619, paras. 95-99; A/CN.9/WG.II/WP.145, paras. 49 and 50

### 49. Draft article 10

#### Article 10

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 ~~him~~ it only for reasons of which ~~he~~ it becomes aware after the appointment has been made.

**Remarks**

50. The substance of draft article 10 was approved by the Working Group (A/CN.9/619, para. 100).

51. Draft article 11

**Article 11**

1. A party who intends to challenge an arbitrator shall send notice of ~~his~~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 ~~the~~ 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.

3. When an arbitrator has been challenged by ~~one~~ a party, ~~the~~ all other 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 procedure provided in article 6, ~~or 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 ~~his~~its right to appoint or to participate in the appointment.

**Remarks**

52. The substance of draft article 11 was approved by the Working Group (A/CN.9/619, para. 101).

53. The following modifications are proposed for the consideration of the Working Group:

- the words “shall be in writing and” in draft paragraph (2) are proposed to be deleted, consistent with the view that the manner in which information should be exchanged among the parties and the arbitral tribunal is already dealt with under article 2 (see above, paragraph 27);
- a reference in draft paragraph (2) to article 7 bis is proposed to be added given that it relates to procedure for the appointment of arbitrators.

54. Draft article 12

**Article 12**

1. If, within 15 days from the date of the notice of challenge, ~~the~~ any other party does not agree to the challenge and the challenged arbitrator does not withdraw, the party making the challenge may seek, within 30 days from date of the notice of challenge, the decision on the challenge, which will be made:

(a) When the initial appointment was made by an appointing authority, by that authority;

(b) When the initial appointment was not made by an appointing authority, but an appointing authority has been previously designated, by that authority;

(c) In all other cases, by the appointing authority to be designated in accordance with the procedure for designating an appointing authority as provided for in article ~~6~~ 4 bis.

2. If the appointing authority sustains the challenge, a substitute arbitrator shall be appointed or chosen pursuant to the procedure applicable to the appointment or choice of an arbitrator as provided in articles 6 to 9 except that, when this procedure would call for the designation of an appointing authority, or if the appointing authority considers that the circumstances of the arbitration so warrant, the appointment of the arbitrator shall be made by the appointing authority ~~which decided on the challenge.~~

### Remarks

#### *Paragraph (1)*

#### *Time-limits for challenge*

55. Draft paragraph (1) reflects the decision of the Working Group to shorten time-limits for challenge (A/CN.9/619, para. 102).

#### *References to previous UNCITRAL documents*

A/CN.9/614, para. 66; A/CN.9/WG.II/WP.143, paras. 49 and 50

*Paragraph (1)*: A/CN.9/619, para. 102; A/CN.9/WG.II/WP.145, para. 53;

*Paragraph (2)*: A/CN.9/619, paras. 103-105; A/CN.9/WG.II/WP.145, para. 54

56. Draft article 13

### Replacement of an arbitrator

#### Article 13

1. In the event of the death or resignation of 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.

2. In the event that a party or the arbitral tribunal considers that an arbitrator has resigned for invalid reasons or refuses or fails to act, the party or the arbitral tribunal may apply to the appointing authority to request either the replacement of that arbitrator or the authorization for the other arbitrators to proceed with the arbitration and make any decision or award. If the appointing authority considers that the circumstances of the arbitration warrant a substitute arbitrator to be appointed, it shall decide whether to apply the procedure for the appointment of an arbitrator provided for in articles 6 to 9 or to appoint the substitute arbitrator. ~~an arbitrator refuses or fails to act or in the event of the *de jure* or *de facto* impossibility of his or her performing his or her functions, the procedure in respect of the challenge and replacement of an arbitrator as provided in the preceding articles shall apply.~~

### Remarks

#### *Paragraph (2)*

57. Draft paragraph (2) takes account of a suggestion that the arbitrators themselves, rather than the parties, should be given the power to decide to proceed as a “truncated”



tribunal, or seek approval from the appointing authority to proceed as a truncated tribunal (A/CN.9/619, para. 109).

***References to previous UNCITRAL documents***

A/CN.9/614, paras. 67-74; A/CN.9/WG.II/WP.143, paras. 51-57; A/CN.9/619, paras. 107-112; A/CN.9/WG.II/WP.145, para. 55

58. Draft article 14

**Repetition of hearings in the event of the replacement of an arbitrator**

**Article 14**

~~If under articles 11 to 13 the sole arbitrator or presiding arbitrator is replaced, any hearings held previously shall be repeated; if any other arbitrator is replaced, such prior hearings may be repeated at the discretion of the arbitral tribunal.~~

If under articles 11 to 13 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**

59. Draft article 14 has been approved in substance by the Working Group (A/CN.9/619, para. 113).

***References to previous UNCITRAL documents***

A/CN.9/614, para. 75; A/CN.9/WG.II/WP.143, paras. 58-61; A/CN.9/619, para. 113; A/CN.9/WG.II/WP.145, para. 56.

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**A/CN.9/WG.II/WP.147/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-seventh session**

ADDENDUM

CONTENTS

	<i>Paragraphs</i>
Introduction . . . . .	1-3
1. General remarks . . . . .	4
2. Notes on a draft of revised UNCITRAL Arbitration Rules . . . . .	5-28
Section III. Arbitral proceedings (article 15 to article 21) . . . . .	5-28

## 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”).<sup>1</sup> The Commission previously discussed that matter at its thirty-sixth (Vienna, 30 June-11 July 2003), thirty-seventh (New York, 14-25 June 2004) and thirty-eighth (Vienna, 4-15 July 2005) sessions.<sup>2</sup>

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 prepare a draft revision 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 session (New York, 5-9 February 2007), the Working Group discussed articles 1 to 21 of the draft revised Rules, as contained in documents A/CN.9/WG.II/WP.145 and Add.1. The report of that session is contained in document A/CN.9/619.

3. This note contains an annotated draft of revised UNCITRAL Arbitration Rules, based on the deliberations of the Working Group at its forty-sixth session from article 15 to article 21 of the Rules. Articles 1 to 14 are dealt with under A/CN.9/WG.II/WP.147. Unless

<sup>1</sup> *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17 (A/61/17)*, paras. 182-187.

<sup>2</sup> *Ibid.*, *Fifty-eighth Session, Supplement No. 17 (A/58/17)*, para. 204; *ibid.*, *Fifty-ninth Session, Supplement No. 17 (A/59/17)*, para. 60; *ibid.*, *Sixtieth Session, Supplement No. 17 (A/60/17)*, para. 178.

otherwise indicated, all references to deliberations by the Working Group in the note are to deliberations made at the forty-sixth session of the Working Group.

## 1. General remarks

4. All suggested modifications to the UNCITRAL Arbitration Rules are indicated in the text below. Where the original text has been deleted, the text is struck through and new text is indicated by being underlined.

## 2. Notes on a draft of revised UNCITRAL Arbitration Rules

### Section III. Arbitral proceedings

#### 5. Draft article 15

##### 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 any appropriate stage of the proceedings each party is given an full opportunity of presenting ~~his~~ its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings with a view to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute. The arbitral tribunal may, at any time, extend or abridge: (a) any period of time prescribed under the Rules; or (b) after inviting consultation with the parties, any period of time agreed by the parties.

2. If, at any appropriate stage of the proceedings, ~~either~~ any party so requests ~~at any appropriate stage of the proceedings~~, 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 documents or information supplied to the arbitral tribunal by one party shall at the same time be communicated by that party to ~~the~~ all other parties.

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 and, provided such a third person and the applicant party have consented, make an award in respect of all parties involved in the arbitration.

##### Remarks

##### *Paragraph (1)*

##### *Power to extend or shorten time periods*

6. The Working Group discussed whether the Rules should provide that the arbitral tribunal might have an express power to extend or shorten the time periods stipulated under the UNCITRAL Arbitration Rules, as necessary for a fair and efficient process of resolving the parties' dispute (A/CN.9/614, paras. 41-46, A/CN.9/619, paras. 134-136). The last

sentence of draft paragraph (1) 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).

*Paragraph (4)*

*Consolidation of cases before arbitral tribunal*

7. Draft paragraph (4) as it appears in document A/CN.9/WG.II/WP.145/Add.1 contains a provision on consolidation of cases which provided that “the arbitral tribunal may, on the application of any party assume jurisdiction over any claim involving the same parties and arising out of the same legal relationship, provided that such claims are subject to arbitration under these Rules and that the arbitration proceedings in relation to those claims have not yet commenced”. It is recalled that the Working Group considered that it might not be necessary to provide for consolidation under the Rules (A/CN.9/619, para. 120).

*Joinder*

8. 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”,<sup>3</sup> the ICC briefly outlines certain aspects of the ICC’s experience in relation to joinder.<sup>4</sup> The ICC has generally taken a conservative view that, under the rules, only the claimant is entitled to identify the parties to the arbitration. 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<sup>5</sup> have been made in approximately

<sup>3</sup> *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.

<sup>4</sup> 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.

<sup>5</sup> 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

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<sup>6</sup>, 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 have yet been reported.

### References to previous UNCITRAL documents

Paragraph (1) – Avoidance of unnecessary delays: *A/CN.9/614, para. 76; A/CN.9/WG.II/WP.143, para. 62; A/CN.9/619, para. 114; A/CN.9/WG.II/WP.145/Add.1, para. 3*

Paragraph (1) – Extend or shorten time periods: *A/CN.9/614, paras. 41-47; A/CN.9/WG.II/WP.143, paras. 30 and 31; A/CN.9/619, paras. 134-136; A/CN.9/WG.II/WP.145, paras. 26-29*

Paragraphs (1) and (2) – “appropriate stage”: *A/CN.9/614, para. 77*

Paragraphs (2) and (3): *A/CN.9/619, para. 115; A/CN.9/WG.II/WP.145/Add.1, para. 4*

Paragraph (4) – Consolidation of cases before arbitral tribunal – joinder: *A/CN.9/614, paras. 79-83; A/CN.9/WG.II/WP.143, paras. 66-71; A/CN.9/619, paras. 116-126; A/CN.9/WG.II/WP.145/Add.1, paras. 5 and 6*

Confidentiality of proceedings: *A/CN.9/614, paras. 84-86; A/CN.9/WG.II/WP.143, paras. 72-74; A/CN.9/619, paras. 127-133; A/CN.9/WG.II/WP.145/Add.1, para. 7 and 8*

## 9. Draft article 16

### Place of arbitration

#### Article 16

~~1. Unless the parties have agreed upon the place where the arbitration is to be held, such place shall be determined by the arbitral tribunal, having regard to the circumstances of the arbitration.~~

~~2. The arbitral tribunal may determine the locale of the arbitration within the country agreed upon by the parties. It may hear witnesses and hold meetings for consultation among its members at any place it deems appropriate, having regard to the circumstances of the arbitration.~~

~~3. The arbitral tribunal may meet at any place it deems appropriate for the inspection of goods, other property or documents. The parties shall be given sufficient notice to enable them to be present at such inspection.~~

~~4. The award shall be made at the place of arbitration.~~

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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;”

<sup>6</sup> 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.”

*Option 1:*

1. Unless the parties have agreed upon the [[legal] place] [seat] where the arbitration is to be held, such [[legal] place] [seat] shall be determined by the arbitral tribunal, having regard to the circumstances of the arbitration. The award shall be deemed to have been made at the [[legal] place] [seat] of arbitration.

2. The arbitral tribunal may determine the [[geographical] place] [location] of the arbitration within the country agreed upon by the parties. It may hear witnesses and hold meetings for consultation among its members at any [[geographical] place] [location] it deems appropriate, having regard to the circumstances of the arbitration. The arbitral tribunal may meet at any [[geographical] place] [location] it deems appropriate for the inspection of goods, other property or documents. The parties shall be given sufficient notice to enable them to be present at such inspection.

*Option 2:*

1. Unless the parties have agreed upon the seat (legal place) where the arbitration is to be held, such seat shall be determined by the arbitral tribunal, having regard to the circumstances of the arbitration. The award shall be deemed to have been made at the seat of arbitration.

2. The arbitral tribunal may hold hearings, meetings and deliberations at any convenient geographical place in its discretion and, if elsewhere than the seat of the arbitration, the arbitration shall be treated as an arbitration conducted at the seat of the arbitration.

**Remarks***Use of differentiated terminology*

10. It was suggested 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).

11. The Working Group agreed that it might be useful to consider alternative drafts in relation to that matter (A/CN.9/619, para. 144). Option 1 corresponds to the proposal made to restructure article 16 by merging paragraphs (1) and (4) (which deal with the legal place of arbitration) and paragraphs (2) and (3) (which deal with the physical place of arbitration) (A/CN.9/619, para. 142). Option 2 is modelled upon article 16 of the LCIA Rules of Arbitration (A/CN.9/619, para. 140).

**References to previous UNCITRAL documents**

“Place of arbitration” – “seat of arbitration” – “location”: A/CN.9/614, paras. 87-89; A/CN.9/WG.II/WP.143, paras. 75 and 76; A/CN.9/619, paras. 137-144; A/CN.9/WG.II/WP.145/Add.1, para. 9

Paragraph (4) – “shall be deemed”: A/CN.9/614, para. 90; A/CN.9/WG.II/WP.145/Add.1, para. 10

12. Draft article 17**Language****Article 17**

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

13. The modifications made to article 17 take account of the suggestion made in the Working Group to delete the words “or languages” in on the basis that, in situations where more than one language is required to be used in arbitral proceeding, the parties are free to agree upon that (A/CN.9/619, para. 145).

### References to previous UNCITRAL documents

*A/CN.9/614, para. 91; A/CN.9/WG.II/WP.143/Add.1, para. 3; A/CN.9/619, para. 145; A/CN.9/WG.II/WP.145/Add.1, para. 11*

### 14. Draft article 18

#### Statement of claim

#### Article 18

1. Unless the statement of claim was contained in the notice of arbitration, within a period of time to be determined by the arbitral tribunal, the claimant shall communicate ~~his or her~~ its statement of claim in writing to the respondent and to each of the arbitrators. A copy of ~~the~~ any contract, or other legal instrument, and of the arbitration agreement ~~if not contained in the contract~~, shall be annexed thereto.

2. The statement of claim shall include the following particulars:

- (a) The names and ~~addresses~~ 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 [arguments] [grounds] supporting the claim.

~~The claimant may annex to its statement of claim all documents he or she it deems relevant or may add a reference to the documents or other evidence he or she it will submit.~~ The statement of claim should, as far as possible, be accompanied by all documents and other evidentiary materials relied upon by the claimant or by references to them.

## Remarks

### *Paragraph (1)*

15. Draft paragraph (1) has been amended in accordance with proposals made in the Working Group to align the wording used in draft articles 3 and 18 concerning the reference to the contract and the deletion of the words “if not contained in the contract” (A/CN.9/619, para. 147).

### *Paragraph (2)*

#### *Subparagraph (a)*

16. The word “addresses” has been replaced by the words “contact details” to ensure consistency with the revisions made to draft article 3, paragraphs (3) (b) and (5) (b) ” (A/CN.9/619, para. 148).

#### *Subparagraph (e)*

17. The Working Group agreed to add a new subparagraph (e) providing that the statement of claim should include a reference to the legal arguments or grounds supporting the claim (A/CN.9/619, paras. 149-151).

#### *Last sentence of paragraph (2)*

18. The modification to the last sentence of draft paragraph (2) reflects the decision of the Working Group to reword that sentence and to establish a standard for the contents of the statement of claim without imposing rigid consequences for departure from that standard (A/CN.9/619, paras. 152-154).

## **References to previous UNCITRAL documents**

*A/CN.9/614, para. 92; A/CN.9/WG.II/WP.143/Add.1, paras. 4-7; A/CN.9/619, paras. 146-155; A/CN.9/WG.II/WP.145/Add.1, paras. 12 and 13*

### 19. Draft article 19

#### **Statement of defence**

##### **Article 19**

1. Within a period of time to be determined by the arbitral tribunal, the respondent shall communicate ~~his~~ its statement of defence in writing to the claimant and to each of the arbitrators.

2. The statement of defence shall reply to the particulars (b), (c) ~~and (d) and (e)~~ of the statement of claim (article 18, para. 2). ~~The respondent may annex to his statement the documents on which he relies for his defence or may add a reference to the documents or other evidence he will submit. The statement of defence shall, as far as possible, be accompanied by all documents and other evidentiary material relied upon by the respondent or by references to them.~~

3. In ~~his~~ 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 arising out of the same contract or rely on a claim arising out of the same contract for the purpose of a set-off.~~ ] the respondent



may make a counter-claim or rely on a claim for the purpose of a set-off [*option 1*: arising out of the same ~~contract~~ legal relationship, whether contractual or not.] [*option 2*: provided that it falls within the scope of an agreement between the parties to arbitrate under these Rules.]

4. The provisions of article 18, paragraph 2, shall apply to a counter-claim and a claim relied on for the purpose of a set-off.

#### *Paragraph 2*

20. The modification to the last sentence of draft paragraph (2) seeks to align the drafting of draft article 19 with the revisions adopted in respect of draft article 18 (A/CN.9/619, para. 156).

#### *Paragraph 3*

##### *Raising claims for the purpose of set-off and counter-claims*

21. The Working Group agreed that article 19 should contain a provision on set-off and that the arbitral tribunal's competence to consider counter-claims 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, the revised provision as contained in document A/CN.9/WG.II/WP.145/Add.1 replaced the words "arising out of the same contract" with the words "arising out of the same legal relationship, whether contractual or not" (A/CN.9/157). That approach is reflected in option 1. Option 2 reflects a proposal that the provision should not require that there be a connection between the claim and the counter-claim or set-off, leaving to the arbitral tribunal the discretion to decide that question (A/CN.9/619, para. 158).

22. The Working Group may also wish to consider the approach taken in article 21, paragraph (5) of the Swiss Rules which provides that "the arbitral tribunal shall have jurisdiction to hear a set-off defence even when the relationship out of which this defence is said to arise is not within the scope of the arbitration clause or is the object of another arbitration agreement or forum-selection clause."

#### ***References to previous UNCITRAL documents***

*A/CN.9/614, paras. 93-96; A/CN.9/WG.II/WP.143/Add.1, paras. 8-10; A/CN.9/619, paras. 156-160; A/CN.9/WG.II/WP.145/Add.1, paras. 14-16*

23. Draft article 20

#### **Amendments to the claim or defence**

##### **Article 20**

During the course of the arbitral proceedings ~~either~~ a party may amend or supplement ~~his—its~~ claim or defence unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to ~~the~~ all other parties or any other circumstances. However, a claim may not be amended in such a manner that the amended claim falls outside the scope of the ~~arbitration clause or separate~~ arbitration agreement.

### Remarks

24. The Working Group approved draft article 20 in substance (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” are proposed for deletion.
25. Draft article 21

### Pleas as to the jurisdiction of the arbitral tribunal

#### Article 21

~~1. The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.~~

~~2. The arbitral tribunal shall have the power to determine the existence or the validity of the contract of which an arbitration clause forms a part. For the purposes of article 21, an arbitration clause which forms part of a contract and which provides for arbitration under these Rules 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 *ipso jure* the invalidity of the arbitration clause.~~

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 not later than in the statement of defence or, with respect to a counter-claim, in the reply to the counter-claim. 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. In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award. The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article 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

#### *Paragraph (1)*

26. Draft paragraph (1) reflects the view expressed in the Working Group that the existing version of article 21, paragraphs (1) and (2), should be redrafted along the lines of article 16, paragraph (1), of the 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

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jurisdiction (A/CN.9/614, para. 97). In the interests of simplicity, the Working Group agreed to replace the words “*ipso jure*” with wording such as “of itself” (A/CN.9/619, para. 162).

*Paragraph (2)*

27. The Working Group adopted draft paragraph (2) in substance (A/CN.9/619, para. 163).

*Paragraph (3)*

28. Draft paragraph (3), which replaces the existing version of article 21, paragraph (4), 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).

***References to previous UNCITRAL documents***

*A/CN.9/614, paras. 97-102; A/CN.9/WG.II/WP.143/Add.1, paras. 11-14; A/CN.9/619, paras. 162-164*

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**C. Report of the Working Group on Arbitration on the work of its  
forty-eighth session (New York, 4-8 February 2008)**

**(A/CN.9/646) [Original: English]**

**CONTENTS**

	<i>Paragraphs</i>
I. Introduction . . . . .	1-7
II. Organization of the session . . . . .	8-15
III. Deliberations and decisions . . . . .	16
IV. Revision of the UNCITRAL Arbitration Rules . . . . .	17-84
Section IV. The award (Articles 38 to 41) . . . . .	18-37
Proposed additional provisions . . . . .	38-53
Investor-State arbitration . . . . .	54-69
Section 1. Introductory rules (Articles 1 and 2) . . . . .	70-84
V. Other business . . . . .	85
 Annexes	
I. Statement made on behalf of the Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises . . . . .	
II. Statement by the Milan Club of Arbitrators . . . . .	
III. Statement by the Center for International Environmental Law (CIEL) and the International Institute for Sustainable Development (IISD) . . . . .	

## **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.<sup>1</sup>

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

<sup>1</sup> *Official Records of the General Assembly, Fifty-third Session, Supplement No. 17 (A/53/17)*, para. 235.

International Commercial Arbitration (1985) (“the UNCITRAL Model Law on Arbitration”), 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.<sup>2</sup> 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).<sup>3</sup>

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. 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. 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 (“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 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

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<sup>2</sup> *Ibid.*, *Fifty-fourth Session, Supplement No. 17 (A/54/17)*, para. 337.

<sup>3</sup> *Ibid.*, para. 338.

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. 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.<sup>4</sup>

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.<sup>5</sup> 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.<sup>6</sup>

## II. Organization of the session

8. The Working Group, which was composed of all States members of the Commission, held its forty-eighth session in New York, from 4 to 8 February 2008. The session was attended by the following States members of the Working Group: Algeria, Australia, Austria, Bahrain, Belarus, Benin, Bolivia, Cameroon, Canada, Chile, China, Colombia, Czech Republic, Ecuador, Egypt, El Salvador, Fiji, France, Germany, Greece, Guatemala, Honduras, India, Iran (Islamic Republic of), Israel, Italy, Japan, Kenya, Lebanon, Madagascar, Malaysia, Mexico, Mongolia, Norway, Pakistan, Paraguay, Poland, Republic of Korea, Russian Federation, Senegal, Serbia, Singapore, South Africa, Spain, Switzerland, Thailand, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela (Bolivarian Republic of) and Zimbabwe.

9. The session was attended by observers from the following States: Albania, Angola, Antigua and Barbuda, Argentina, Belgium, Brazil, Côte d'Ivoire, Croatia, Cuba, Dominican Republic, Ethiopia, Finland, Holy See, Indonesia, Jordan, Kazakhstan, Mauritius, Netherlands, Philippines, Romania, Slovakia, Slovenia, Sweden, Syrian Arab Republic, Trinidad and Tobago and Turkey.

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<sup>4</sup> Ibid.

<sup>5</sup> Ibid., *Sixty-second Session, Supplement No. 17 (A/62/17)*, part one, para. 174.

<sup>6</sup> Ibid., para. 175.

10. The session was attended by observers from the following organizations of the United Nations System: International Trade Centre, UNCTAD/WTO (ITC) and Office of the United Nations High Commissioner for Human Rights (OHCHR).

11. The session was attended by observers from the following international intergovernmental organizations invited by the Commission: Asian-African Legal Consultative Organization (AALCO), International Cotton Advisory Committee (ICAC) and 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), Arab Association for International Arbitration (AAIA), Arab Union for International Arbitration (AUIA), Asia Pacific Regional Arbitration Group (APRAG), Association for the Promotion of Arbitration in Africa (APAA), Association Suisse de l'Arbitrage (ASA), Association of the Bar of the City of New York (ABCNY), Cairo Regional Centre for International Commercial Arbitration (CRCICA), Center for International Environmental Law (CIEL), Center for International Legal Studies (CILS), Chartered Institute of Arbitrators (CI Arb), Corporate Counsel International Arbitration Group (CCIAG), European Law Students' Association (ELSA), Forum for International Commercial Arbitration C.I.C. (FICACIC), Inter-American Bar Association, International Arbitration Institute (IAI), International Bar Association (IBA), International Institute for Sustainable Development (IISD), 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, Singapore International Arbitration Centre – Construction Industry Arbitration Association (SIAC–CIAA Forum) and Union Internationale des Avocats (UIA).

13. The Working Group elected the following officers:

*Chairman:* Mr. Michael E. Schneider (Switzerland);

*Rapporteur:* Ms. Shavit Matias (Israel).

14. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.II/WP.148); (b) notes by the Secretariat on a revision of the UNCITRAL Arbitration Rules pursuant to the deliberations of the Working Group at its forty-sixth and forty-seventh sessions (A/CN.9/WG.II/WP.147, A/CN.9/WG.II/WP.147/Add.1 and A/CN.9/WG.II/WP.149).

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.145/Add.1, A/CN.9/WG.II/WP.147, A/CN.9/WG.II/WP.147/Add.1 and A/CN.9/WG.II/WP.149). The deliberations and conclusions 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 conclusions of the Working Group. The deliberations and conclusions of the Working Group in respect of agenda item 5 are reflected in chapter V.

### IV. Revision of the UNCITRAL Arbitration Rules

17. The Working Group recalled that it had concluded a first reading of articles 22 to 37 at its forty-seventh session (A/CN.9/641) and agreed to resume discussions on the revision of the Rules on the basis of document A/CN.9/WG.II/WP.145/Add.1.

#### Section IV. The award

##### Costs – Articles 38 to 40

##### Article 38

*Subparagraphs (b), (c) and (d)*

18. The Working Group agreed that subparagraphs (b), (c) and (d) be qualified by the word “reasonable”.

*Subparagraph (e)*

19. The Working Group agreed to replace the word “party” with the word “parties” and to delete the word “legal”. It also agreed to delete the word “successful” because article 38 provided a list of the different elements of the costs of arbitration and did not deal with the question of the criteria for apportionment of costs, which was dealt with under article 40.

##### Article 39

20. The Working Group considered whether it was advisable to provide for more control by an independent body over the fees charged by arbitrators. It was said that such control was advisable as a precaution to guard against the rare situations where an arbitrator might seek excessive fees. It would help avoid the difficult situation that might arise where one or more parties were concerned about the fees charged by arbitrators. Furthermore, the process for establishing the arbitrators’ fees was crucial for the legitimacy and integrity of the arbitral process itself. It was observed that article 39 had been the source of difficulties in practice when exaggerated fees were charged by arbitral tribunals, leaving parties without practical solutions other than perhaps resorting to a State court. It was emphasized that it was important to avoid situations where the parties engaged a State court over a dispute regarding the arbitrators’ fees, since in such a situation, the court might enter into the consideration of the merits of the case.



21. The necessity of providing for a neutral mechanism controlling the fees charged by arbitrators was underlined. The Working Group agreed that the appointing authority, or failing its designation the Permanent Court of Arbitration (“PCA”), were best placed to exercise supervision over arbitrators’ fees.

*Paragraph (1)*

22. The Working Group adopted in substance the principles for determining the fees as expressed in paragraph (1).

*Paragraph (2)*

23. While the Working Group generally agreed with the substance of paragraph (2), it decided to reconsider it at a later stage in the context of the redrafted provisions on determination of arbitrators’ fees. It was suggested that it might be useful to indicate that the fee charged by the appointing authority for its work in exercising supervisory authority over the amount of the arbitrators’ fees should be distinguished from the fee charged by the arbitral institution for the administration of cases conducted under its own rules.

*Paragraphs (3) and (4)*

24. The Working Group agreed to replace paragraphs (3) and (4) with new provisions that would implement the considerations in the Working Group reflected above. The Working Group considered the draft provision in paragraph 45 of document A/CN.9/WG.II/WP.145/Add.1 and made several suggestions for the future draft to be prepared by the Secretariat. It was suggested that, except in unusual cases involving special circumstances, the basis for determining the fees should be established promptly upon the appointment of the arbitral tribunal and that any disagreement should be resolved promptly by the appointing authority. Early resolution of open issues was desirable for the parties who typically were eager to obtain a predictable and fair basis for the determination of the fees, as well as for the persons who undertook to act as arbitrators.

25. It was also suggested that the wording should more clearly distinguish between the methodology for the determination of the fees (e.g. an hourly rate, a fee depending on the value of the dispute or a fee to be determined on another basis), which should be clarified promptly after the constitution of the arbitral tribunal, and the actual computation of the fees, which should be determined on the basis of the work performed by the arbitrators, either at the end of the proceedings or at appropriate stages during the proceedings. It was agreed that the authority of the appointing authority should also extend to the determination of the deposit for costs (article 41) and to any additional fees that might be charged by the arbitral tribunal for interpretation, correction or completion of the award (article 40 (4)). Support was expressed for the view that party’s challenges to the determination of fees or deposits should be subject to time limits.

26. It was cautioned against including too much rigidity in the provision since this might jeopardize the flexibility of the Rules. It was said that a preferable approach would be to provide for a general supervisory power of the appointing authority, or failing its appointment, the PCA, over the methodology and the final computation of the fees. It was also proposed that the wording be flexible enough to permit parties, if and when they wished to contest arbitrators’ fees, to seek designation of an appointing authority if one had not been agreed already.

27. The Secretariat was requested to prepare a revised draft for a future session of the Working Group.

#### **Article 40**

##### *Paragraphs (1) and (2)*

28. A proposal was made to amalgamate paragraphs (1) and (2), so as to make the apportionment of the costs of representation and assistance subject to the same principles as other costs currently governed by paragraph (1). While it was observed that the distinction between the different types of costs in paragraphs (1) and (2) reflected different legal traditions, it was considered by the Working Group that it was preferable to amalgamate both paragraphs as proposed.

29. It was suggested that it might not be easy in all instances to determine which party was to be considered the successful party, and that more neutral formulation be adopted for the determination of the apportionment of costs by the arbitral tribunal, along the lines of the provision contained in article 31 (3) of the Rules of Arbitration of the International Chamber of Commerce. That proposal did not receive support.

##### *Paragraph (3)*

30. The Working Group adopted paragraph (3) in substance, without any modification.

##### *Paragraph (4)*

31. The discussion focused on paragraph (4). A proposal for deletion of that paragraph was based on the view that paragraph (4) was implicitly premised on the belief that arbitrators would not deserve additional fees because the need for correction or completion of their award was due to their own fault. It was stated that such a rigorous premise did not account for legitimate work by arbitrators on unmeritorious requests for correction or completion of an award. Another reason given for deleting paragraph (4) was that it established a single rule for issues that should be dealt with separately, namely the issue of interpretation and correction, for which it was stated that no additional fee should be charged, and the issue of completion of the award, for which it was said that additional work by the tribunal could legitimately result in additional fees being charged.

32. A contrary view was that paragraph (4) was needed to encourage the tribunal both to draft its award with optimal clarity (to the effect that no interpretation or correction would be needed) and to deal expeditiously with any frivolous request for interpretation, correction or completion of the award that might be made by a party seeking a reversal of the initial award.

33. With a view to reconciling the above opposite views, a proposal was made that the issue might be dealt with by reformulating article 35 of the Rules, under which “either party, with notice to the other party” was entitled to “request that the arbitral tribunal give an interpretation of the award”. It was suggested that such reformulation should draw inspiration from article 33 (1) (b) of the UNCITRAL Model Law on Arbitration, which had made such request possible only “if so agreed by the parties”. A distinction could thus be drawn between collective requests for interpretation, correction or completion of the award (which should entail no additional fees) and unilateral requests (where fees could be charged).

34. Another proposal was made to retain paragraph (4) and add wording along the lines of “unless there are compelling reasons to charge such fees”. An alternative suggestion was to use wording along the lines of “unless the request is unfounded”. Yet another suggestion was made to rephrase paragraph (4) along the lines of “Only in exceptional circumstances may additional fees be charged by an arbitral tribunal for interpretation or correction or completion of its award under articles 35 to 37”. While considerable support was expressed for introducing an exception to tame the rigour of paragraph (4), concern was expressed regarding possible ethical issues that might stem from the fact that the arbitral tribunal itself would be called upon to qualify the circumstances for the purpose of justifying or not the charging of additional fees to be paid to the arbitral tribunal. With a view to alleviating such concern, it was explained that having to correct errors or omissions in the award was normally neither contentious nor costly and could hardly be regarded as constituting an exceptional circumstance. A request presented in bad faith and aimed at producing the effect of a de facto appeal should be easy to identify and justify the charging of additional fees.

35. It was suggested that appropriate wording might be introduced in article 39 to clarify that the evaluation of exceptional circumstances under a revised version of paragraph (4) should fall within the sphere of scrutiny of the appointing authority. In that context, doubts were expressed about the limit of the supervisory power to be conferred upon the appointing authority.

36. After discussion, it was agreed that the discussion would be resumed at a future session, on the basis of a revised draft of both paragraph (4) (including its possible deletion) and article 39 to be prepared by the Secretariat to reflect the above discussion. It was agreed that, in preparing such a revised version, the Secretariat should bear in mind the need to limit the scope of paragraph (4) to fees, without affecting the ability of the arbitral tribunal to fix other additional costs as listed in article 38.

#### **Article 41**

37. The Working Group adopted article 41 in substance, as contained in document A/CN.9/WG.II/WP.145/Add.1.

### **Proposed additional provisions**

#### **Liability of Arbitrators**

38. The Working Group discussed whether the question of liability of arbitrators and institutions performing the function of appointing authority under the UNCITRAL Arbitration Rules should be addressed. The Working Group considered a proposed draft provision, according to which arbitrators and appointing authorities should in principle be granted immunity or limitation of liability for their acts or omissions in connection with the arbitration, except in the case of “conscious and deliberate wrongdoing”.

39. As to whether recognizing the immunity of arbitrators was desirable as a matter of general policy, a view was expressed that, since the current legislative trend in certain countries was to introduce stricter standards regarding the liability of judges for their acts or omissions in relation to State court proceedings, that trend should not be ignored in respect of arbitrators. It was said that protecting the interests of parties to arbitration was a goal of the Rules, the acceptability of which might be at risk if they appeared overly protective of arbitrators. In response, it was recalled that the Rules were not legislative but contractual in nature and inherently subject to the mandatory provisions

of any applicable law. It was also explained that a large number of arbitration rules comparable to the UNCITRAL Arbitration Rules generally included provisions limiting the liability of arbitrators, and that failure to add such protection would leave arbitrators exposed to the threat of potentially large claims by parties dissatisfied with arbitral tribunals' rulings or awards who might claim that such rulings or awards arose from the negligence or fault of an arbitrator. The prevailing view was that establishing a degree of immunity or exoneration from liability in favour of arbitrators was advisable in view of the fact that the absence of recourses against awards had occasionally resulted in increasing the number of lawsuits brought against arbitrators, who exercised quasi-judicial functions without enjoying any level of protection comparable to the immunity and privileges granted to judges by law or the insurance mechanisms available to certain categories of professionals through their professional associations. It was pointed out that ignoring the issue in the Rules would only result in the unhealthy situation where the arbitrators would have to negotiate with the parties regarding their immunity after the arbitral tribunal had been constituted. It was generally agreed that any provision that might be introduced in the Rules to exonerate arbitrators from liability should be aimed at reinforcing the independence of arbitrators and their ability to concentrate with a free spirit on the merits and procedures of the case. However, such a provision should not result or appear to result in total impunity for the consequences of any personal wrongdoing on the part of arbitrators or otherwise interfering with public policy. It was recognized that any such provision would not interfere with the operation of applicable law.

40. In that context, the view was expressed that further discussion might be needed regarding the professional and ethical standards of conduct to be met by arbitrators. It was explained that if the justification for exonerating arbitrators from liability was the quasi-judicial nature of their functions, such exoneration should be balanced by an obligation to perform these functions according to standards comparable to those applied by State judges. It was pointed out that it should be possible to combine the freedom of the parties in selecting their arbitrators with the imposition of a high standard of professionalism and ethical behaviour. On the other hand, it was pointed out that concerns about an alleged failure of an arbitrator to meet ethical or professional standards were designed to be addressed in the context of challenge proceedings. While no decision was made on that point, the Working Group agreed that the discussion should be reopened together with the issue of qualification of arbitrators in the course of the second reading of the revised Rules.

41. A discussion took place as to whether any immunity that might be recognized in the Rules in respect of arbitrators should also extend to such participants in the arbitral process as arbitral institutions, including the PCA, appointing authorities, experts appointed by the arbitral tribunal, expert witnesses, secretaries, assistants of arbitral tribunals or interpreters. However, doubts were expressed as to whether it was appropriate for a set of arbitration rules to exonerate the liability of institutions or individuals that did not share the quasi-judicial status of the arbitrators. After discussion the Working Group agreed to consider at a future session provisions establishing immunity to cover the broadest possible range of participants in the arbitration process. The Secretariat was requested to prepare wording to that effect for continuation of the discussion.

42. Having agreed on the desirability of a degree of immunity as a matter of general policy, the Working Group considered whether such policy should be reflected in the Rules or whether a legislative standard was required. The view was expressed that a contractual standard on immunity could be ineffective and lead to a diversity of legal

consequences depending upon the provisions of applicable law, which, in many countries, were likely to treat the issue as a matter of public policy. It was recalled that, under article 1, the Rules would govern the arbitration subject to any mandatory provision of “the law applicable to the arbitration”. However, it was also pointed out that attempts to establish personal liability of arbitrators could be brought under laws distinct from the law applicable to the arbitration. After discussion, the Working Group recognized that, while a provision in the Rules regarding immunity might be void under certain national laws, as a contractual standard, it might still serve a useful purpose under the laws of other countries.

43. As to the contents of a rule on immunity, the Working Group heard different views as to whether the immunity of the arbitrators should be recognized in case of “gross” or “extremely serious” negligence. In certain countries, a contractual exoneration of liability for gross negligence would be contrary to public policy. In other countries where the concept of “gross negligence” was not in use, it would be possible for a party to exonerate itself from the consequences of its “negligence”, except to the extent that negligent conduct would be of such a magnitude that it would amount to “dishonesty” or “conscious and deliberate wrongdoing”, which would, for that purpose, appear to subsume the foreign concept of “gross negligence”. While a standard based on “negligence” was, in the view of some delegations, more “objective” than (and thus preferable to) a “subjective” reference to “conscious and deliberate wrongdoing”, it was generally realized that a provision relying on any notion of “negligence” should be avoided as it could lend itself to divergent interpretations in different countries.

44. With respect to drafting, support was expressed for adoption of the additional provision proposed in paragraph 47 of document A/CN.9/WG.II/WP.145/Add.1. It was also proposed that additional wording should be added along the lines of “Where an arbitrator cannot avail himself/herself of immunity under [the additional provision], he/she may avail himself/herself of the highest level of immunity available under applicable law”. It was explained that the additional wording might be necessary to preserve a degree of exoneration in cases where the applicable law would allow contractual exoneration from liability only up to a threshold lower than that of “conscious and deliberate wrongdoing” and, at the same time, treat as unwritten any clause that would exonerate liability above that threshold. With a view to simplifying the provision, another proposal was made to avoid referring to any specific criterion such as “conscious and deliberate wrongdoing” and simply to indicate that “The arbitrators or [other participants in the arbitral process] shall be exempt from liability to the fullest extent possible under any applicable law for any act or omission in connection with the arbitration”.

45. An alternative proposal was made along the lines of: “The arbitrators, the appointing authority and the Permanent Court of Arbitration shall not be liable for any act or omission in connection with the arbitration, except for the consequences of conscious or deliberate wrongdoing”. It was explained that replacing “conscious and deliberate wrongdoing” by “conscious or deliberate wrongdoing” might practically produce the same effect as including a reference to “gross negligence”. The Secretariat was requested to prepare a revised draft to reflect the above views and proposals.

### **General Principles**

46. The Working Group considered the draft provision on general principles contained in paragraph 48 of document A/CN.9/WG.II/WP.145/Add.1. Suggestions were made

that, if the draft provision was adopted, it should be placed in the opening section of the Rules.

*International origin and uniform interpretation*

47. Support was expressed for retaining the first sentence of the draft provision. It was stated that the provision established useful principles which should be promoted in arbitration practice. It was observed that similar provisions were contained in international instruments, such as the United Nations Convention on Contracts for the International Sale of Goods, the UNCITRAL Model Law on Electronic Commerce, the UNCITRAL Model Law on Cross-border Insolvency and the latest revision of the UNCITRAL Model Law on Arbitration, as well as in the 2004 version of the Unidroit Principles of International Commercial Contracts.

48. Considerable opposition was expressed against the inclusion of that provision. It was stated that the need for uniformity was not a primary goal in the context of contractual arbitration rules, at least not to the same extent as in a legislative text. Furthermore, failure by the arbitrators to apply the Rules in a manner alleged not to follow a uniform interpretation might be argued to provide a basis for challenging the award. In addition, in view of the confidentiality of arbitration cases, it was difficult to obtain sufficient information about the way the Rules were applied.

49. After discussion, it was found that there was not sufficient support for including the first sentence of the draft provision in a revised version of the Rules.

*Filling of gaps in the Rules*

50. Considerable support was expressed in favour of retaining the concept in the second sentence of the draft provision. It was considered useful to emphasize that the Rules constituted a self-contained system of contractual norms and that any lacuna in the Rules were to be filled by reference to the Rules themselves, while avoiding reliance on applicable procedural law governing the arbitration. While it was recognized that article 15 of the Rules provided sufficient basis for finding solutions to procedural questions that arose during the proceedings, it was pointed out that issues not related to the conduct of proceedings might arise that were not addressed in the Rules; it was preferable to resolve those issues by reference to the general principles on which the Rules were based.

51. Some of the delegations that supported inclusion of a gap filling provision considered that it might be difficult to distil general principles from the system of the Rules, and that it was therefore preferable to empower the parties and the arbitral tribunal to determine how to fill the gaps. Wording along the following lines was suggested to address that consideration: "When the rules are silent on any matter, the arbitration shall be governed by any rules which the parties, or failing them, the arbitral tribunal may settle on."

52. However, the contrary view was that it was either undesirable or unnecessary to include a provision of that nature in the Rules. In particular, the Rules themselves, such as article 15 provided sufficient basis for filling the gaps. In addition, it was said that both the draft provision and the proposed alternative version might give rise to complex issues of interpretation which outweighed the benefits of either proposed provisions.

53. After discussion, there was no majority, let alone consensus, in favour of a change of the Rules by such an addition. However, given the importance attributed by some delegations to gap filling, there should be a possibility for reconsidering the issue. The

note to be prepared by the Secretariat for a future session should set out the text contained in paragraph 51 above and the text of the second sentence of the clause on general principles, as contained in paragraph 48 of document A/CN.9/WG.II/WP.145/Add.1.

## **Investor-State arbitration**

### **General discussion**

54. The Working Group recalled its mandate to maintain a generic approach to the Rules.

55. During the course of the discussion, the following views were expressed *inter alia*.

56. The Working Group heard a statement made on behalf of the Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises on the significant effect on human rights of rules governing global business, especially private investment agreements between investors and host States. The Working Group decided to reproduce the substance of that statement in annex I to this report.

57. General agreement was expressed by the Working Group regarding the desirability of dealing with transparency in investor-State arbitration, which differed from purely private arbitration, where confidentiality was an essential feature. According to principles of good governance, government activities might be subject to basic requirements of transparency and public participation. A view was expressed that investor-State arbitration might involve consideration of public policy and could lead to large potential monetary liability for public treasuries. Provisions on increased transparency would enhance the public understanding of the process and its overall credibility. It was said that certain bilateral investment protection treaties already contained provisions on transparency. It was stated that a high degree of transparency might be required for arbitrations in some jurisdictions by virtue of their particular legal and political systems.

58. It was observed that the existing UNCITRAL Arbitration Rules had been drafted primarily for commercial arbitration, and that the Rules lacked provisions on publicity of information relating to the proceedings conducted under the Rules. It was pointed out that the Rules were the second most widely used rules for resolving investor-States disputes (after the rules of the International Centre for Settlement of Investment disputes (ICSID)). It was said that the regulations and rules of ICSID were amended in 2006 to incorporate greater transparency and opportunity for public participation in investor-States disputes. It was suggested that a revision of the UNCITRAL Arbitration Rules should follow that trend. However, it was observed that while the provision of a second standard based on rules of ICSID might be desirable, it was also desirable to provide parties to investor-States disputes with real alternative solutions and to take into account that UNCITRAL arbitration was not institutional arbitration, which might give rise to differences in rules and procedures.

59. In response to a question as to whether its mandate would allow the Working Group to deal with issues involving States, it was generally felt that while the mandate of the Working Group was consistent with the possible drafting of uniform law standards in respect of treaty-based investor-States arbitration, it would not easily extend to broader intervention in the field of good governance.

60. Reservations were expressed by many delegations in respect of the possible inclusion of provisions on transparency in the UNCITRAL Arbitration Rules because it was necessary to preserve the generic nature of the Rules and it was not certain that full transparency was in all circumstances desirable. Some support was expressed for dealing with the issue in investment treaties and not in the Rules, which would better allow States to reflect such circumstances. In that connection, it was suggested by one non-governmental organization (Milan Club of Arbitrators) that it might be worthwhile to consider preparing one or more optional clauses to address specific factors for investor-State arbitration taking place under investment protection treaties for consideration by States when negotiating such treaties. The Working Group decided to reproduce the statement made by the Milan Club of Arbitrators in annex II to this report.

61. Against the general background of the concern for promoting greater transparency, the Working Group did not discuss specific provisions but engaged in general discussion on how best to address treaty-based arbitrations in light of changes and developments that have occurred throughout the years. One suggestion was that the Rules themselves could include a specific regime, possibly as an annex to the Rules, applying only in the context of investor-State arbitration, while at the same time the general regime of the Rules would remain unamended in respect of other types of commercial arbitration to avoid undue delay, disruption or cost. Another suggestion was to prepare an annex to the Rules that would apply if the parties agreed upon, or the treaty provided for, its application. Another view was expressed that issues relating to whether such an annex might be optional or mandatory could be discussed at a later stage. Other possible approaches included guidelines or model clauses for inclusion in investment protection treaties.

#### **Scope of possible future work**

62. It was suggested that special provision on transparency should be limited to addressing investment arbitration brought under the terms of a treaty. On the question of how to distinguish between investor-State disputes to which a specific set of rules might apply and generic commercial arbitration, it was said that a definition along the lines of article 25 of the ICSID Convention might be useful. Concerns were expressed that that approach might give rise to preliminary jurisdictional issues.

63. Questions were raised as to the binding effect those provisions might have on existing agreements between private investors and States, in particular for those agreements that did not mention as the applicable version of the Rules the version in force at the date of commencement of the arbitration. It was said that most bilateral investment treaties referred to the application to the UNCITRAL Arbitration Rules, without mentioning which version would apply in case of revision. In that context, it was stated that the revised Rules should not apply to treaties entered into prior to adoption of the revised Rules. However, examples were given of existing treaties that expressly referred to dispute settlement under the version of the Rules in effect at the date of commencement of arbitration.

64. One view was expressed that dealing with transparency in arbitrations brought by an investor against a State under the terms of a treaty should focus on improving the rules on public notice of proceedings, access to documents, open hearing, and *amicus curiae* briefs in respect of such arbitration. In all those instances, the arbitral tribunal would have discretion to protect truly confidential information but the presumption would be of open and public access to the process. It was explained that this corresponded to the position taken in North American Free Trade Agreement (NAFTA), in particular in a note of interpretation on access to documents issued in 2001. It was



said that those provisions could be easily managed by arbitral tribunals, would not disrupt the proceedings, and did not interfere with the commercial interest of the parties.

65. In order to take account of the public interest aspects of investor-State arbitrations, a proposal was made to amend a limited number of provisions of the UNCITRAL Arbitration Rules. In that connection, the delegation that referred to the Milan Club of Arbitrators also referred to two non-governmental organizations (the Center for International Environmental Law (CIEL) and the International Institute for Sustainable Development (IISD)) and the Working Group had no objection to hearing their proposal. The Working Group did not discuss the contents of that proposal and decided to reproduce the substance of the statement by the two non governmental organizations in annex III to this report.

66. Other views were expressed that it might be overly simplistic to deal exclusively with the issue of transparency by amending few provisions in the Rules, as there were other aspects that might need to be dealt with in investor-State arbitration, such as the question of applicable law, or State immunity. That question was said to be a complex one, requiring careful consideration of many different aspects.

67. It was emphasized that it was a mistake to distinguish rules for “commercial” arbitration and rules for “investor-State” arbitration, given that the UNCITRAL Arbitration Rules were conceived as having broad application and, in particular, in view of UNCITRAL’s understanding of the term “commercial” as shown in footnote \*\* to article 1 (1) of the UNCITRAL Model Law on Arbitration. The attention of the Working Group was brought to the fact that investment was expressly included as an element of the definition of the term “commercial” contained in that footnote. Another delegation suggested that a more operational distinction could be made between “generic” or “ordinary” commercial arbitration on the one hand, and “treaty-based” arbitration on the other.

68. The Working Group was urged not to embark at this stage on the preparation of Rules governing transparency and possibly other issues since the complex negotiation would delay the current work of revising the Rules. There was an expectation that the revised Rules would be available to users of commercial arbitration as soon as feasible.

### Conclusions

69. After in-depth consideration of the above issues, the Working Group reached the following conclusions. (a) It was generally recognized that arbitration proceedings in treaty-based arbitration raised issues that, in some respect, differed from ordinary commercial arbitration and a large number of delegations expressed the view that they required, on certain points, distinct regulation. The most frequently mentioned matter for such distinct regulation concerned transparency of the proceedings and the resulting award, an objective which received wide support in principle. (b) Many delegations expressed concern that considering the specificity of treaty-based arbitration would be a complex and time consuming task; others did not share that view. The widely prevailing view was that any work on treaty arbitration which the Working Group might have to undertake should not delay the completion of the revision of the UNCITRAL Arbitration Rules in their generic form and should be undertaken after the completion of such revision. (c) A wide range of suggestions was expressed with respect to the objective which could usefully be pursued by the Working Group in the field of treaty-based arbitration. These suggestions included preparing texts such as model clauses, specific rules or guidelines. Such texts could be adopted in the form of an annex to the UNCITRAL Arbitration Rules in their generic form, separate arbitration rules or

optional clauses for adoption in specific treaties. There was general agreement, however, that it would not be desirable to include specific provisions on treaty-based arbitration in the UNCITRAL Arbitration Rules themselves. (d) The Working Group 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.

## Section I. Introductory rules

70. The Working Group commenced its second reading of a revised version of the Rules on the basis of document A/CN.9/WG.II/WP.147.

### Scope of application

#### Article 1

##### *Paragraph (1)*

71. One delegation opposed to the deletion of the writing requirement. The Working Group did not modify the substance of the revised version of paragraph (1), as reproduced in paragraph 7 of document A/CN.9/WG.II/WP.147.

##### *Paragraph (1 bis) – Applicable version of the UNCITRAL Arbitration Rules*

72. The Working Group considered the options contained in draft paragraph (1 bis). Some support was expressed for the provision contained in option 2, whereby the parties would be deemed to have submitted to the Rules in effect on the date of the arbitration agreement. It was stated that that option would better reflect the contractual nature of arbitration by relying on the parties' understanding at the time of the arbitration agreement. It was also said that that option would minimize doubts regarding the chosen version of the Rules. However, it was recalled that it would run contrary to the expectation that the most recent version of the Rules would apply.

73. Considerable support was expressed for option 1, which put the parties on notice that, unless they agreed to apply the Rules in effect on the date of their agreement, then the Rules in effect on the date of the commencement of the arbitration would be deemed to apply. It was said that that provision corresponded to the solution commonly adopted by a number of arbitral institutions when revising their rules. That deeming rule of application of the revised version of the Rules in force on the date of commencement of arbitration was said to promote application of the last version of the Rules in a greater number of situations.

74. It was also noted that any deeming provision should be worded with the maximum degree of clarity to avoid disputes concerning which version of the Rules to apply in a given proceeding. While such disputes might be administratively resolved in the context of arbitration administered by arbitration centres, they could create difficulties in the context of ad hoc arbitration. It was observed that arbitration centres, when applying similar provisions usually decided, as a preliminary question, before the constitution of the arbitral tribunal, and on a case-by-case basis, which set of rules the parties intended to apply. In the absence of a supervisory authority fulfilling that function, it was said that in case of disagreement or doubts, it would be for the arbitral tribunal to interpret

the will of the parties, and therefore the provision might need to be amended to provide more guidance to the arbitral tribunal.

75. A concern was expressed that that provision could lead to a situation where the revised version of the Rules would apply retroactively to agreements made before its adoption without sufficient regard for the principle of party autonomy. It was observed that certain national laws or arbitration practices might allow retroactive application. The Working Group agreed that the provision should not result in retroactive application of the revised version of the Rules to arbitration agreements and treaties concluded before its adoption.

76. Another concern was expressed that option (1), without amendment, could have unintended retroactive application where the arbitration agreement was formed by the claimant accepting (in a notice of arbitration) an open offer to arbitrate made by the respondent. This concern could arise in arbitration pursuant to a treaty, as well as in certain commercial contexts. It was emphasized that the Rules applicable to such a dispute should be those consented to in the offer to arbitrate (i.e., the treaty or other instrument). It was suggested that a revised version of that provision would be drafted to also make it clear that, “for agreements or offers to arbitrate made before [date], the parties shall be deemed to have submitted to the previous version of the Rules”. The Working Group generally looked with favour on that proposal recognizing that it had only been proposed during the discussion at this session and might benefit from further refinement.

77. An additional proposal was made to amend the provision contained in option 1 by adding the word “expressly” before the word “agreed” so as to clarify that a version of the Rules other than the one in effect at the commencement of arbitration would apply only if the intention of the parties was unambiguously established. It was observed that those words would provide the arbitral tribunal with more guidance on their determination of the parties’ intent. However, the Working Group did not adopt that proposal, for the reason that, by establishing a stricter standard for the applicability of the Rules, in this case, it would complicate the interpretation of other references to “agreement” in the Rules and could create new grounds for dispute. In addition, it was said that the parties should be able to agree on the applicable version of the Rules, either expressly or impliedly.

#### *Paragraph (2)*

78. The Working Group adopted paragraph (2), as reproduced in paragraph 7 of document A/CN.9/WG.II/WP.147, without modification.

#### **Model arbitration clause**

79. The Working Group adopted the Model Arbitration Clause, with the amendments suggested in paragraph 12 of document A/CN.9/WG.II/WP.147.

#### **Notice, calculation of periods of time**

##### **Article 2**

#### *Paragraph (1)*

80. The Working Group considered the proposed amendments to paragraph (1), as contained in paragraph 15 of document A/CN.9/WG.II/WP.147.

*“Physically”*

81. Reservations were expressed on the proposed deletion of the word “physically”. It was said that that word had not given rise to difficulties in the application of that article and that its retention would clarify the distinction between the personal or physical delivery to the addressee and delivery at its residence. After discussion, the Working Group agreed to retain the word “physically”.

*“Mailing”*

82. Views were expressed that the deletion of the word “mailing” before the word “address” might create unnecessary difficulties regarding the acceptability of postal box address. After discussion, it was decided to replace the reference to a mailing address by mention of a “designated address”.

*Paragraph (1 bis)*

83. Diverging views were expressed as to whether paragraph (1 bis) should be revised to better align with either (a) the wording of comparable provisions in the arbitration rules of a number of arbitral institutions; (b) article 3 of the UNCITRAL Model Law on Arbitration; (c) previous standards prepared by UNCITRAL in the field of electronic commerce, such as the UNCITRAL Model Law on Electronic Commerce, or the 2005 Convention on Electronic Contracts. It was suggested that the provision should better distinguish between the designation of acceptable method of communication and rules to be adopted on evidencing receipt or dispatch of communication. It was agreed that the discussion should be reopened at a future session on the basis of revised draft prepared by the Secretariat.

*Paragraph (2)*

84. The Working Group adopted paragraph (2) in substance, as contained in paragraph 15 of document A/CN.9/WG.II/WP.147.

## V. Other business

85. At the close of the session, on 8 February 2008, the Working Group adopted the following statement:

“Working Group II (Arbitration and Conciliation) of the United Nations Commission on International Trade Law,

“Being informed that Mr. Jernej Sekolec, Secretary, United Nations Commission on International Trade Law and Director, International Trade Law Division/Office of Legal Affairs is scheduled to retire at about the end of June 2008, and

“Recognizing that his retirement will take place before the next session of this Working Group, and, therefore, the present session is the last meeting of the Working Group at which he will be present and is, thus, the last opportunity to express to him in person the deep appreciation of the Working Group for his many activities during his more than twenty-five years of United Nations service;

“Declares that he has advanced the development of arbitration and conciliation as methods for harmoniously settling disputes arising in the context

of commercial and other relations, and has thereby made lasting contributions to world peace. He has inspired the efforts of the Working Group, has strongly supported its work, has successfully completed major projects and has built enduring foundations for our ongoing projects and future endeavours. He is a model of the highest standards of conduct by a leader of an international secretariat. The friendship of the members of the Working Group will accompany him after his retirement;

“Requests that this resolution be set forth in the Working Group report of the present session and thereby be recorded in the permanent history of the United Nations”.

## Annex I

### **Statement made on behalf of the Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises**

The growing recognition that the rules governing global business might have significant effects on human rights practices led the United Nations to appoint a special representative for business and human rights. The results of the initial work done under that mandate had been submitted in a report to the Human Rights Council in 2007. They were well received both by Governments in the Council and by the G8 2007 Summit. The report surveyed a range of significant legal and policy innovations in the field of business and human rights by States, business and civil society. It concluded that imbalances remained between the scope of markets and business organizations on the one hand and the capacity of societies to protect and promote the core values of social community on the other: imbalances that could only be corrected by embedding global markets with shared values and institutional practices.

In specific recommendations to be made to the Human Rights Council in June 2008, the report would be based on three core principles that had gathered broad support in the course of the consultations: first, the “State duty to protect” with respect to preventing and punishing corporate abuse of human rights; second, the corporate responsibility to respect human rights in the course of their operations; and third, grievance and accountability mechanisms for addressing and redressing abuses.

Part of the work currently undertaken that might be of particular relevance to the work of the Working Group consisted in conducting, together with the International Finance Corporation, an empirical study exploring some aspects of private investment agreements between investors and host States. Issues relative to bilateral and regional investment treaties were also explored.

There were two dimensions to that research which were brought to the attention of the Working Group. The first aspect was the assessment whether and to what extent various stabilization provisions in private investment agreements between investors and host States might constrain a State ability to fulfil its international human rights obligations, and if they did so, how the legitimate needs of investors and governments could be better balanced. Another aspect of that work focused on the question of transparency or the lack thereof in arbitration processes with regards to disputes that raised human rights and other public policy issues.

From the perspective of the mandate, adequate transparency where human rights and other States responsibilities were concerned was essential if the public were to be aware of proceedings that might affect the public interest. Transparency lay at the very foundation of what the United Nations and other authoritative entities had been promulgating as the precept of good governance. The benefits of such cross-United Nations discussions of how shared values, including human rights could be embedded into institutional practices in the context of economic globalization was highlighted.

## Annex II

### Statement by the Milan Club of Arbitrators

The members of the Milan Club of Arbitrators:

- (1) reaffirmed their support for the general principle of confidentiality in international commercial arbitrations and, in particular, in arbitrations taking place under the UNCITRAL Arbitration Rules;
- (2) supported the current proposals in the Working Group to exclude from the new UNCITRAL Arbitration Rules any specific provision for investor-State arbitrations;
- (3) recommended that one or more optional clauses be formulated by UNCITRAL to address specific factors for investor-State arbitrations taking place under investment treaties, consistent with the new UNCITRAL Arbitration Rules;
- (4) proposed that such UNCITRAL optional clauses, whilst not forming part of the new UNCITRAL Arbitration Rules, be made available to States and investors in particular for use in negotiating dispute resolution provisions in future investment treaties;
- (5) would welcome a further debate and a wider examination of the overall topic open to the broader international arbitration community before closing this debate within the Working Group.

## Annex III

[Original: English, French, Spanish]

### **Statement by the Center for International Environmental Law (CIEL) and the International Institute for Sustainable Development (IISD)**

CIEL and IISD seek a very limited number of additions to the UNCITRAL Arbitration Rules in order to take account of the important public interest aspects of investor-State arbitrations, while at the same time leaving untouched the Rules' application to other types of arbitrations and avoiding undue delay, disruption or cost. The principles underlying our suggestions, and how they might be handled, are described below.

**The public interest aspects of investor-State arbitrations can be accommodated in the UNCITRAL Arbitration Rules without affecting the Rules' application to other types of arbitrations.**

- This can be done by introducing language to just four provisions.
- These amendments would apply only to investor-State arbitrations and leave other types of arbitrations completely unaffected.
- Investor-State arbitrations can be simply defined as arbitrations brought by an investor against a State under the terms of a treaty.

**The fact that an investor-State arbitration has been initiated should be public, so that citizens know that their State is involved in a binding dispute settlement proceeding.**

- This can be accomplished by providing that the investor-State tribunal once constituted dispatch a copy of the notice of arbitration and the composition of the tribunal to the UNCITRAL secretariat.
- The UNCITRAL secretariat would then post this information on its website.

**The issues in an investor-State arbitration should be public, so that citizens know what is at stake.**

- This can be accomplished by requiring the disclosure of pleadings received by the tribunal, and by providing that hearings in investor-State arbitrations will be open to the public, e.g., in person, via closed-circuit TV or web casting.
- Proprietary or privileged information deserving confidential treatment can be redacted.

**The results of an investor-State arbitration should be public, so that citizens and other States can be informed about the outcome.**

- This can be accomplished by providing that the investor-State tribunal dispatch copies of its decisions to the UNCITRAL secretariat.
- The UNCITRAL secretariat would then post these decisions on its website.



**The public should have the opportunity to provide input to an investor-State tribunal.**

- The public should have the right to petition the investor-State tribunal for permission to file an amicus curiae brief.
- If it grants such a petition, the tribunal may impose conditions to reduce delay or cost, such as with respect to timing and length.

**Suggested texts for the above proposals, demonstrating how the public interest aspects of investor-State arbitrations can be simply accommodated without affecting the Rules' application to other arbitrations, are set out below.**

<i>Article</i>	<i>Existing Rule</i>	<i>Proposed Changes</i>
3 (5)	[new]	3 (5) <u>Following the appointment of an arbitral tribunal in an arbitration brought by an investor against a State under the terms of a treaty, the tribunal shall forthwith dispatch a copy of the notice of arbitration and communicate the composition of the tribunal to the UNCITRAL secretariat, which shall post this information on its website without delay.</u>
15 (3)	15 (3) All documents or information supplied to the arbitral tribunal by one party shall at the same time be communicated by that party to the other party.	15 (3) All documents or information supplied to the arbitral tribunal by one party shall at the same time be communicated by that party to the other party. <u>In an arbitration brought by an investor against a State under the terms of a treaty, the tribunal shall forthwith dispatch a copy of all pleadings received by the tribunal to the UNCITRAL secretariat, subject to redaction of confidential business information and information which is privileged or otherwise protected from disclosure under a party's domestic law. The UNCITRAL secretariat shall post all such documents on its website without delay.</u>
15 (4)	[new]	15 (4) <u>In an arbitration brought by an investor against a State under the terms of a treaty, the arbitral tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the "non-disputing party") to file a written submission with the tribunal. In determining whether to allow such a filing, the tribunal shall consider, among other things, the extent to which:</u>  (a) <u>the non-disputing party submission would assist the tribunal in the determination of a factual or legal issue related to the proceeding by bringing a particular perspective, knowledge or insight; and</u>  (b) <u>the non-disputing party submission would address a matter within the scope of the dispute.</u>

Article	Existing Rule	Proposed Changes
		<u>The tribunal shall ensure that the non-disputing submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.</u>
25 (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. The arbitral tribunal is free to determine the manner in which witnesses are examined.	25 (4) <u>Except in an arbitration brought by an investor against a State under the terms of a treaty,</u> 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. The arbitral tribunal is free to determine the manner in which witnesses are examined.
25 (4) bis	[new]	<u>25 (4) bis In an arbitration brought by an investor against a State under the terms of a treaty, hearings shall be open to the public. The arbitral tribunal shall establish appropriate logistical arrangements, including procedures for the protection of confidential business information or information which is privileged or otherwise protected from disclosure under a party's domestic law.</u>
32 (5)	The award may be made public only with the consent of both parties.	32 (5) <u>Except in an arbitration brought by an investor against a State under the terms of a treaty,</u> the award may be made public only with the consent of both parties.
32 (5) bis	[new]	<u>32 (5) bis In an arbitration brought by an investor against a State under the terms of a treaty, any award, order or decision of the arbitral tribunal may be made public by either of the parties without the consent of the other party; and the tribunal shall forthwith dispatch a copy of all awards, orders and decisions to the UNCITRAL secretariat, which shall without delay post them on its website.</u>

**D. 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-eighth session  
(A/CN.9/WG.II/WP.149) [Original: English]**

**CONTENTS**

	<i>Paragraphs</i>
Introduction . . . . .	1-4
Notes on a draft of revised UNCITRAL Arbitration Rules . . . . .	5
Section III. Arbitral proceedings (article 22 to 30). . . . .	6-44
Section IV. The award (article 31 to 37) . . . . .	45-80

## **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”).<sup>1</sup> At its fortieth session (Vienna, 25 June-12 July 2007), 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.<sup>2</sup>

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, on the basis of documents A/CN.9/WG.II/WP.143 and Add.1. The report of that session is contained in document A/CN.9/614.

3. At its forty-sixth session (New York, 5-9 February 2007), the Working Group discussed articles 1 to 21 of the draft revised Rules, as contained in documents A/CN.9/WG.II/WP.145 and Add.1. At its forty-seventh session (Vienna, 10-14 September 2007), the Working Group continued its consideration of articles 22 to 37 of the draft revised Rules, as contained in document A/CN.9/WG.II/WP.145/Add.1. The reports of the forty-sixth and forty-seventh sessions are contained in documents A/CN.9/619 and A/CN.9/641, respectively.

4. This note contains an annotated draft of revised UNCITRAL Arbitration Rules, based on the deliberations of the Working Group at its forty-seventh session and covers articles 22 to 37 of the UNCITRAL Arbitration Rules. Unless otherwise indicated, all references to deliberations by the Working Group in the note are to deliberations made at the forty-seventh session of the Working Group.

<sup>1</sup> *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17 (A/61/17)*, paras. 182-187.

<sup>2</sup> *Ibid.*, A/62/17, part I, para. 174.

## Notes on a draft of revised UNCITRAL Arbitration Rules

5. All suggested modifications to the UNCITRAL Arbitration Rules are indicated in the text below. Where the original text has been deleted, the text is struck through and new text is indicated by being underlined.

### Section III. Arbitral proceedings

6. Draft article 22

#### Further written statements

##### Article 22

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

7. The Working Group agreed to adopt article 22 in substance (A/CN.9/641, para. 19).
8. Draft article 23

#### Periods of time

##### Article 23

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

9. The Working Group agreed to adopt article 23 in substance (A/CN.9/641, para. 20).

#### ~~Evidence and hearings (Articles 24 and 25)~~

10. Draft article 24

#### Evidence

##### Article 24

1. Each party shall have the burden of proving the facts relied on to support ~~his~~ its claim or defence.
2. ~~The arbitral tribunal may, if it considers it appropriate, require a party to deliver to the tribunal and to the other party, within such a period of time as the arbitral tribunal shall decide, a summary of the documents and other evidence which that party intends to present in support of the facts in issue set out in his statement of claim or statement of defence.~~

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

### *Title to articles 24 and 25*

11. In order to reflect the decision of the Working Group to clarify that article 25 deals with witnesses, including expert witnesses appointed by the parties, whereas article 27 deals with experts appointed by the arbitral tribunal, the title of articles 24, 25 and 27 are proposed to be modified (see below, paragraphs 16 and 33) (A/CN.9/641, paras. 27 and 61). In the original 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 “Witnesses”.

### *Paragraph (1)*

12. The Working Group agreed to adopt paragraph (1) in substance (A/CN.9/641, para. 21).

### *Paragraph (2)*

13. Paragraph (2) is deleted for the reason that it might not be common practice for an arbitral tribunal to require parties to present a summary of documents. The Working Group emphasized that 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 (A/CN.9/641, paras. 22-25).

### *Paragraph (3)*

14. The Working Group agreed to adopt paragraph (3) in substance (A/CN.9/641, para. 26).

### *References to previous UNCITRAL documents*

A/CN.9/614, para. 103

A/CN.9/WG.II/WP.143/Add.1, para. 15

A/CN.9/641, paras. 21-26, 64

A/CN.9/WG.II/WP.145/Add. 1, para. 23

15. Draft article 25

## Witnesses

### **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.

1bis Witnesses 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 or expertise, whether or not that individual is a party to the arbitration.

2. If witnesses are to be heard, [at least fifteen days before the hearing] each party shall communicate to the arbitral tribunal and to ~~the~~ all other parties the names and addresses of the witnesses ~~he~~ it intends to present, the subject upon and the languages in which such witnesses will give their testimony.
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.
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 arbitration. The arbitral tribunal is free to determine the manner in which witnesses are examined.
5. Evidence of witnesses may also be presented in the form of either written statements signed by them or oral statements by means that do not require the physical presence of witnesses.
6. The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.

## Remarks

### *Title*

16. The Working Group might wish to consider whether a title should be provided for article 25, in order to clarify that it applies to witnesses presented by a party, including expert-witnesses (see paragraphs 11 above and 33 below) (A/CN.9/641, para. 27).

### *Paragraph (1)*

17. The Working Group agreed to adopt paragraph (1) in substance (A/CN.9/641, para. 28).

### *Paragraph (1bis)*

18. Paragraph (1bis) (formerly numbered paragraph (2bis) in document A/CN.9/WG.II/WP.145/Add.1) 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 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 could be heard and the discretion of the arbitral tribunal in relation to the hearing of witnesses as currently laid out in paragraph (1bis), and only thereafter to expand on procedural details regarding witnesses (A/CN.9/641, para. 34).

19. 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).

*Right of a party to present expert evidence on its own initiative*

20. The Working Group agreed that the Rules should not cast doubt on the right of a party to present expert evidence on its own initiative irrespective of whether the arbitral tribunal appointed an expert (A/CN.9/641, para. 61). The question is dealt with under draft article 15 (2) which provides that: “If, at an appropriate stage of the proceedings, ~~either any~~ party so requests ~~at any appropriate stage of the proceedings~~, 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.”(A/CN.9/WG.II/WP.147/Add.1, para. 5). The Working Group might wish to consider whether that question is sufficiently addressed by draft article 15 (2) or whether provisions should be added, along the following lines: “A party may rely on a party-appointed expert as a means of providing evidence on specific issues.”

*Paragraph (2)*

21. The Working Group might wish to consider whether the 15-day time period in paragraph (2) should be kept. It is recalled that it was suggested in the Working Group that that time period might be too long in some cases (A/CN.9/641, para. 34).

*Paragraph (3)*

22. The Working Group agreed to adopt paragraph (3) in substance (A/CN.9/641, para. 39).

*Paragraph (4)*

23. The words “save when the witness is a party to arbitration” are proposed to be added to the second 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).

*Paragraph (5)*

24. 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 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 the physical presence of witnesses (A/CN.9/641, para. 43).

*Paragraph (6)*

25. The Working Group agreed to adopt paragraph (6) in substance (A/CN.9/641, para. 45).

**References to previous UNCITRAL documents**

A/CN.9/641, paras. 27-45, 61

A/CN.9/WG.II/WP.145/Add.1, para. 24

26. Draft article 26**Interim measures****Article 26**

~~1.— At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject matter of the dispute, including measures for the conservation of the goods forming the subject matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.~~

~~2.— Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the costs of such measures.~~

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) 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 temporarily ordering 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 request.



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 shall be liable for any costs and damages caused by the measure or the order to any party if the arbitral tribunal later determines that, in the circumstances, the measure or the order should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.

3 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.

#### Remarks

##### *Paragraphs 1 to 4, and 6 to 9*

27. 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 on International Commercial Arbitration (“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).

##### *Paragraph (5)*

28. 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).

29. Paragraph (5) avoids terminology such as “preliminary order” as suggested in the Working Group (A/CN.9/641, paras. 53-60) and seeks to reflect the language of section 2 of chapter IV A of the Model Law.

30. 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 (1), the Rules, in and of themselves, did not prevent the arbitral tribunal from issuing preliminary orders (A/CN.9/641, para. 59).

*Paragraph (10)*

31. Paragraph (10) corresponds to the original text of article 26 (3), 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).

***References to previous UNCITRAL documents***

A/CN.9/614, paras. 104-105

A/CN.9/WG.II/WP.143/Add.1, para. 16

A/CN.9/641, paras. 46-60

A/CN.9/WG.II/WP.145/Add.1, paras. 25 and 26

32. Draft article 27**Experts appointed by the arbitral tribunal****Article 27**

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 who 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 ~~either~~ 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 ~~either~~ 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*****Title***

33. 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).

***Relation between experts appointed by the arbitral tribunal and the parties***

34. The Working Group might wish to consider whether, in order to facilitate the hearing of the tribunal-appointed experts, it would be useful to add a provision stating that, before the hearing of the tribunal-appointed expert, the arbitral tribunal may require that any party-appointed expert produce a report determining the contentious issues.

**References to previous UNCITRAL documents**

A/CN.9/614, paras. 106-107  
A/CN.9/WG.II/WP.143/Add.1, paras. 17-20  
A/CN.9/641, para. 61

35. Draft article 28**Default****Article 28**

1. If, within the period of time fixed by the arbitral tribunal, without showing sufficient cause:

(a) the claimant has failed to communicate ~~his~~ its statement of claim ~~without showing sufficient cause for such failure~~, the arbitral tribunal shall issue an order for the termination of the arbitral proceedings, unless the respondent has submitted a counter-claim;

(b) the respondent has failed to communicate ~~his~~ its statement of defence ~~without showing sufficient cause for such failure~~, 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 paragraph also apply to a claimant's failure to submit a defence to a counter-claim.

2. If ~~one of the parties~~ 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 ~~one of the parties~~ a party, duly invited by the arbitral tribunal to produce documents, exhibits or other documentary 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.

**Remarks***Paragraph (1)*

36. The Working Group agreed to add the words “unless the respondent has submitted a counter-claim” in article 28 (1). A consequence of that modification could be that arbitral proceedings would not terminate even if the claimant, after submitting the notice of arbitration, did not submit the statement of claim or if the claim was withdrawn, provided that a counter-claim had been submitted. In such a situation, the arbitral tribunal should continue to deal only with the counter-claim. To address that situation, the Working Group might 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 counter-claim. That proposal follows the structure of article 25 of the Model Law (A/CN.9/641, para. 62).

37. The Working Group agreed to add the words “without treating such failure in itself as an admission of the claimant's allegations”, so as to reflect the language contained in article 25 (b) of the Model Law (A/CN.9/641, para. 63).

*Paragraph (2)*

38. The Working Group agreed to adopt paragraph (2) in substance.

*Paragraph (3)*

39. 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).

**References to previous UNCITRAL documents**

A/CN.9/641, paras. 62-64

A/CN.9/WG.II/WP.145/Add.1, para. 28

40. Draft article 29

**Closure of hearings****Article 29**

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**

41. The Working Group agreed to adopt article 29 in substance (A/CN.9/641, para. 65).

**References to previous UNCITRAL documents**

A/CN.9/641, para. 65

42. Draft article 30

**Waiver of ~~rules~~ right to object****Article 30**

A party who knows that any provision of these Rules, or any requirement under the arbitration agreement, ~~these Rules~~ has not been complied with and yet proceeds with the arbitration without ~~promptly~~ stating ~~his~~-its objection to such non-compliance without undue delay or, if a time-limit is provided therefore, within such period of time, shall be deemed to have waived ~~his~~-its right to object.

**Remarks****Title**

43. As agreed by the Working Group, the title of article 30 refers to “waiver of right to object” for the sake of conformity with the corresponding provision contained in article 4 of

the Model Law and to better reflect the content of article 30 (A/CN.9/641, para. 66).

### Article 30

44. 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).

### References to previous UNCITRAL documents

A/CN.9/641, paras. 66 and 67

## Section IV. The award

### 45. Draft article 31

#### Decisions

#### Article 31

1. *Option 1:* When there ~~are three~~ 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 ~~on his own~~ alone, subject to revision, if any, by the arbitral tribunal.

### Remarks

#### *Paragraph (1)*

46. 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.

47. 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. It was cautioned in the Working Group that such an option could be understood by the parties to limit their choice to either majority or unanimity decision-making (A/CN.9/641, para. 73). In that option, the words “three arbitrators” are proposed to be replaced with the words “more than one arbitrator” to take account of the situation permitted under draft article 7bis 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/WG.II/WP.147, paras. 41 and 42) (A/CN.9/641, para. 76).

48. 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).

49. Depending on the solution retained, consequential amendments to article 32, paragraph (4), relating to the signing of the award might also need to be considered.

*Paragraph (2)*

50. The Working Group agreed to adopt paragraph (2) in substance.

**References to previous UNCITRAL documents**

A/CN.9/614, paras. 108-112

A/CN.9/WG.II/WP.143/Add.1, paras. 21-24

A/CN.9/641, paras. 68-77

A/CN.9/WG.II/WP.145/Add.1, paras. 30 and 31

51. Draft article 32

**Form and effect of the award**

**Article 32**

1. ~~In addition to making a final award, the arbitral tribunal shall be entitled to make interim, interlocutory, or partial awards. 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.~~

2. ~~The An~~ award shall be made in writing and shall be final and binding on the parties. The parties undertake to carry out the award 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, save for their right to apply for setting aside an award, which may be waived only if the parties so agree.

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.

4. An award shall be signed by the arbitrators and it shall contain the date on which ~~and the place where~~ the award was made and indicate the [[legal] place] [seat] of arbitration. Where there ~~are three~~ is more than one arbitrators and one of them fails to sign, the award shall state the reason for the absence of the signature.

5. The award may be made public ~~only~~ with the consent of ~~both~~ 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.

6. Copies of the award signed by the arbitrators shall be communicated to the parties by the arbitral tribunal.

7. ~~If the arbitration law of the country where the award is made requires that the award be filed or registered by the arbitral tribunal, the tribunal shall comply with this requirement within the period of time required by law.~~

## Remarks

### *Paragraph (1)*

#### *Form of the award*

52. 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 (“LCIA Rules”) (A/CN.9/641, paras. 78-80).

### *Paragraph (2)*

#### *Final and binding*

53. 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, para. 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.”

#### *Waiver of recourse to courts*

54. 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).

### *Paragraph (3)*

55. The Working Group agreed to adopt paragraph (3) in substance (A/CN.9/641, para. 93).

### *Paragraph (4)*

56. The Working Group agreed to modify the first sentence of paragraph (4) for the sake of consistency with draft article 16 (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 draft article 7bis 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/WG.II/WP.147, paras. 41 and 42) (A/CN.9/641, para. 94).

*Paragraph (5)*

57. 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).

*Paragraph (6)*

58. The Working Group agreed to adopt paragraph (6) in substance (A/CN.9/641, para. 100).

*Paragraph (7)*

59. The Working Group agreed to delete paragraph (7) 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).

**References to previous UNCITRAL documents**

A/CN.9/614, paras. 113-121

A/CN.9/WG.II/WP.143/Add.1, paras. 25-29

A/CN.9/641, paras. 93-105

A/CN.9/WG.II/WP.145/Add.1, paras. 32-36

60. Draft article 33

**Applicable law, amiable compositeur****Article 33**

1. The arbitral tribunal shall apply the ~~law~~ 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 ~~determined by the conflict of laws rules which it considers applicable~~ [*variant 1: with which the case has the closest connection*] [*variant 2: which it determines to be appropriate*].

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.

3. In all cases, the arbitral tribunal shall decide in accordance with the terms of ~~the~~ any applicable contract and shall take into account ~~the~~ any usages of the trade applicable to the transaction.

**Remarks***Paragraph (1)*

61. 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).

62. 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 (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).

63. 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).

*Paragraph (2)*

64. The Working Group agreed to adopt paragraph (2) in substance.

*Paragraph (3)*

65. 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 (e.g., investor-State disputes), by referring to the words “any applicable” in relation to “contract” and “any” in relation to “usage of trade”. The Working Group agreed to further consider that proposal in the context of discussions on the application of the Rules to investor-State disputes (A/CN.9/641, para. 113).

***References to previous UNCITRAL documents***

A/CN.9/614, paras. 122-124.

A/CN.9/WG.II/WP.143/Add.1, paras. 30-31.

A/CN.9/641, paras. 106-113

A/CN.9/WG.II/WP.145/Add.1, paras. 37-38

66. Draft article 34

**Settlement or other grounds for termination**

**Article 34**

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 ~~both~~ 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 7, shall apply.

**Remarks***Paragraph (1)*

67. Consistent with its decision to encompass multi-party arbitrations, the Working Group agreed to replace the word “both parties” by “the parties” (A/CN.9/641, para. 114).

*Paragraph (2)*

68. The Working Group agreed to adopt paragraph (2) in substance.

*Paragraph (3)*

69. The deletion of the reference to paragraph (7) of article 32 is consistent with the decision of the Working Group to delete that paragraph (see above, paragraph 59).

*References to previous UNCITRAL documents*

A/CN.9/641, para. 114

70. Draft article 35

**Interpretation of the award****Article 35**

1. Within 30 days after the receipt of the award, ~~either a party~~, with notice to the other ~~party parties~~, may request that the arbitral tribunal give an interpretation of the award.

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 ~~7~~, shall apply.

**Remarks***Paragraph (1)*

71. 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).

*Paragraph (2)*

72. The deletion of the reference to paragraph (7) of article 32 is consistent with the decision of the Working Group to delete that paragraph (see above, paragraph 59).

*References to previous UNCITRAL documents*

A/CN.9/614, paras. 125-126

A/CN.9/WG.II/WP.143/Add.1, para. 32

A/CN.9/641, para. 115

73. Draft article 36**Correction of the award****Article 36**

1. Within 30 days after the receipt of the award, ~~either any~~ any party, with notice to the other ~~party 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~~7, shall apply.

**Remarks***Paragraph (1)*

74. The Working Group agreed to adopt paragraph (1) in substance (A/CN.9/641, para. 116).

*Paragraph (2)*

75. The deletion of the reference to paragraph (7) of article 32 is consistent with the decision of the Working Group to delete that paragraph (see above, paragraph 59).
76. 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 (2).

**References to previous UNCITRAL documents**

- A/CN.9/614, para. 127  
A/CN.9/WG.II/WP.143/Add.1, para. 33  
A/CN.9/641, para. 116  
A/CN.9/WG.II/WP.145/Add.1, para. 41

77. Draft article 37**Additional award****Article 37**

1. Within 30 days after the receipt of the award, ~~either a~~ a party, with notice to the other ~~party 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 ~~and considers that the omission can be rectified without any further hearings or evidence~~, 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~~7, shall apply.

**Remarks***Paragraph (1)*

78. The Working Group agreed to adopt paragraph (1) in substance.

*Paragraph (2)*

79. 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).

*Paragraph (3)*

80. The deletion of the reference to paragraph (7) of article 32 is consistent with the decision of the Working Group to delete that paragraph (see above, paragraph 59).

***References to previous UNCITRAL documents***

A/CN.9/614, paras. 128-129

A/CN.9/WG.II/WP.143/Add.1, para. 34

A/CN.9/641, paras. 117-121

A/CN.9/WG.II/WP.145/Add.1, para. 42

## IV. INSOLVENCY LAW

### A. Report of the Working Group on Insolvency Law on the work of its thirty-third session (Vienna, 5-9 November 2007)

(A/CN.9/643) [Original: English]

#### CONTENTS

	<i>Paragraphs</i>
I. Introduction . . . . .	1-3
II. Organization of the session . . . . .	4-9
III. Deliberations and decisions. . . . .	10
IV. Treatment of enterprise groups in insolvency . . . . .	11-130
A. Glossary . . . . .	11-14
B. The onset of insolvency: domestic issues . . . . .	15-129
1. Commencement of insolvency proceedings . . . . .	15-24
Joint application for commencement . . . . .	16-24
2. Treatment of assets on commencement of insolvency proceedings. . . . .	25-60
(a) Procedural coordination. . . . .	25-34
(b) Protection and preservation of the insolvency estate . . . . .	35
(c) Post-commencement finance . . . . .	36-48
(d) Post-application financing . . . . .	49-51
(e) Treatment of contracts . . . . .	52-54
(f) Avoidance . . . . .	55-57
(g) Set-off . . . . .	58
(h) Subordination . . . . .	59-60
3. Remedies – substantive consolidation . . . . .	61-94
(a) Additional questions on substantive consolidation. . . . .	79-94
4. Participants . . . . .	95-110
(a) Appointment of an insolvency representative. . . . .	95-99
(b) Coordination of multiple proceedings with respect to members of an enterprise group. . . . .	100-106
(c) Creditors . . . . .	107-110
5. Reorganization plan . . . . .	111-120
Additional questions on reorganization . . . . .	118-120

6. Form of current work . . . . .	121
7. Glossary . . . . .	122-129
C. International issues . . . . .	130

## 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, 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 considerations (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 held in New York from 14 to 18 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.

## II. Organization of the session

4. Working Group V (Insolvency Law), which was composed of all States members of the Commission, held its thirty-third session in Vienna from 5 to 9 November 2007. The session was attended by representatives of the following States members of the Working Group: Algeria, Australia, Austria, Belarus, Bolivia, Canada, China, Colombia, Czech Republic, France, Germany, Greece, Guatemala, Iran (Islamic Republic of), Italy, Latvia, Lebanon, Malaysia, Mexico, Nigeria, Norway, Poland, Republic of Korea, Russian Federation, Senegal, Spain, Switzerland, Thailand, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela (Bolivarian Republic of) and Zimbabwe.

5. The session was also attended by observers from the following States: Denmark, Dominican Republic, Indonesia, Iraq, Netherlands, Panama, Philippines, Portugal, Qatar, Slovakia, Slovenia, Tunisia and Turkey.

6. The session was also attended by observers from the following international organizations:
- (a) *Organizations of the United Nations system*: the World Bank;
  - (b) *Intergovernmental organizations*: the European Commission (EC);
  - (c) *International non-governmental organizations invited by the Working Group*: American Bar Association (ABA), American Bar Foundation (ABF), Centre for International Legal Studies (CILS), Groupe de réflexion sur l'insolvabilité et sa prévention (GRIP 21), INSOL International (INSOL), International Bar Association (IBA), International Insolvency Institute (III), International Women's Insolvency & Restructuring Confederation (IWIRC) and the International Working Group on European Insolvency Law.
7. The Working Group elected the following officers:
- Chairman*: Mr. Wisit Wisitsora-At (Thailand)
- Rapporteur*: Ms. Shamni Arulanandam (Malaysia)
8. The Working Group had before it the following documents:
- (a) Annotated provisional agenda (A/CN.9/WG.V/WP.77); and
  - (b) A note by the secretariat on the treatment of enterprise groups in insolvency (A/CN.9/WG.V/WP.78 and Add. 1).
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 the treatment of enterprise groups in insolvency;
  - 5. Other business;
  - 6. Adoption of the report.

### III. Deliberations and decisions

10. 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.78 and Add.1, and other documents referred to therein. The Working Group considered the glossary and draft recommendations 1-24 and requested the Secretariat to prepare a revised text on the basis of its deliberations and decisions. Following a preliminary discussion of the timing of its consideration of international issues relating to the treatment of enterprise groups in insolvency, the Working Group was of the view that it would be appropriate to consider those issues at an early stage of its next session. The deliberations and decisions of the Working Group are reflected below.

## IV. Treatment of enterprise groups in insolvency

### A. Glossary

11. The Working Group considered the terms set forth in paragraph 2 of document A/CN.9/WG.V/WP.78. Some concerns were expressed with respect to the domestic element of the definition of “domestic [commercial] [business] enterprise group”, as no explanation was provided for “domestic”. A further concern related to the relationship between the elements of capital and control and the need to give due consideration to control.

12. It was said that the explanation of “enterprise” contained in paragraph 2 (b), encompassed certain entities not previously included, such as trusts. However, another view suggested limiting the use of “enterprise” to refer only to entities with legal personality, thus excluding contractual arrangements, such as franchising and distribution agreements, and certain family-based entities.

13. With respect to the explanation of “capital” contained in paragraph 2 (c), it was suggested that the notion of “partnership interests” be included. Specific concern was expressed with the explanation of control as currently drafted in paragraph 2 (d) on the basis that certain types of secured credits might be included.

14. The Working Group agreed that the terms set forth in paragraph 2 provided a sound working basis for future deliberations.

### B. The onset of insolvency: domestic issues

#### 1. Commencement of insolvency proceedings

15. The Working Group discussed the commencement of insolvency proceedings in enterprise groups in the domestic context on the basis of document A/CN.9/WG.V/WP.78, sub III.A.1, paras. 1-10.

#### **Joint application for commencement**

16. It was observed that the purpose of a joint application for insolvency proceedings was to facilitate coordinated consideration of the insolvency of enterprise group members from the outset. It was noted that joint application, while possibly ensuring procedural coordination, did not affect the individuality of insolvency proceedings with respect to each group member, based upon satisfaction of the applicable commencement standard for that member. Any recommendation on joint application should be in line with the relevant provisions of the UNCITRAL Legislative Guide on Insolvency Law.

#### *Draft recommendation 1*

17. It was suggested that draft recommendation 1 could, in addition to a single joint application, allow individual applications with a joint purpose to be made with respect to members of an enterprise group. It was noted that in practice the applications would often be distinct for each member for administrative or other similar reasons.

18. It was further suggested that draft recommendation 1 could include a requirement for the group member to indicate its position in a group, particularly where the insolvent member was the controlling entity.



19. With respect to involuntary filing of a joint application, it was suggested that the current text, requiring a contractual arrangement between the applying creditor and the concerned members of the group, might lead to other members of the group being excluded from the joint application.

20. The Working Group agreed that draft recommendation 1 should be revised to clarify the possibility of group members filing separate applications with a joint purpose.

*Draft recommendation 2*

21. It was suggested that draft recommendation 2 should require a creditor to give notice of its joint application for commencement to other creditors of the group. In reply, it was noted that that requirement might be overly difficult to satisfy in practice, especially where there was a large number of unknown creditors. It was added that such a requirement might have a negative impact on the commercial standing of solvent members of the group.

22. It was further suggested that, in the event procedural coordination was ordered when part or all of the relevant insolvency proceedings had already been commenced, notice of the application for procedural coordination should be given to the insolvency representatives of those relevant proceedings.

23. It was said that draft recommendation 2 introduced a duty for the creditor to give notice to the debtor when a joint application for commencement had been made. It was added that such a duty had already been mandated under recommendation 19 of the Legislative Guide for applications by creditors for commencement of insolvency proceedings. In light of the complementarity of the present text with the Legislative Guide, it was suggested that draft recommendation 2 should be deleted.

24. The Working Group agreed that draft recommendation 2 should be deleted.

**2. Treatment of assets on commencement of insolvency proceedings**

**(a) Procedural coordination**

*Draft recommendation 3*

25. It was suggested that draft recommendation 3 should be revised to take into account the different approaches of the various jurisdictions in granting courts the power to initiate the procedural coordination of insolvency proceedings.

*Draft recommendation 4*

26. The substance of draft recommendation 4 was generally acceptable.

*Draft recommendation 5*

27. It was agreed that draft recommendation 5 should specify that the insolvency representative should be permitted to file for procedural coordination, as the representative often possessed the most relevant information for making such a decision. It was indicated that the drafting should make it clear that any of the subjects indicated in the existing draft of the recommendation may file an application for procedural coordination.

28. It was also suggested that the draft recommendation should be aligned with draft recommendation 4, in particular paragraph 4 (a), and include a reference to any member with respect to which an application for commencement had been made.

*Draft recommendation 6*

29. It was noted that, while procedural coordination entailed gathering multiple insolvency proceedings before one court, no indication of the criteria for determining or choosing the competent court had been provided in the draft text. In response, it was explained that a range of different criteria, such as priority of filing, size of indebtedness or centre of control, might be chosen to establish the prevailing competence of one court in the domestic setting. It was therefore suggested that the matter should be left to domestic procedural rules.

*Draft recommendation 7*

30. It was agreed that the word “affected” should be deleted from draft recommendation 7, and that the word “when” should be replaced by the word “if”.

31. It was clarified that the duty of notice to all creditors under draft recommendation 7 may be satisfied with collective notification, such as by notice in a particular legal publication, when domestic legislation so permitted, for instance in case of a large number of creditors with very small claims.

*Draft recommendation 8*

32. Several suggestions were made with respect to the additional information that might be included as contemplated by draft recommendation 8, such as coordination of hearings, arrangements to be made with respect to lending arrangements and so forth. Explanation of that additional information might be included in commentary to this work.

33. In accordance with a suggestion made at its thirty-second session, the Working Group considered whether the possibility of modifying or reversing an order for procedural coordination should be included in the draft recommendations or in commentary to those draft recommendations. It was noted that the purpose of procedural coordination was to promote procedural convenience and cost efficiency. When circumstances changed, it might be useful to have the flexibility to adjust the initial order to take account of the current situation. That might be the case, for example, if reorganization was not successful and the individual members should be liquidated separately. After discussion, the Working Group agreed to include text on the reversal or modification of an order for procedural coordination and to provide further explanation in the commentary.

34. With respect to commencement of insolvency proceedings, the question was raised as to whether the commencement standard of recommendation 15 of the Legislative Guide was broad enough to encompass notions of imminent insolvency that might be encountered in a group context. For example, it was pointed out that it might often be the case that the insolvency of several or many members of the group would lead inevitably to the insolvency of all members (the “domino effect”). The imminence of the insolvency might be judged by reference to the group situation. Therefore, it was suggested that the standard for commencement of insolvency proceedings in the Legislative Guide might need to be broadened to take into account circumstances arising from the enterprise group context. After discussion, it was

agreed that additional considerations concerning imminent insolvency in a group context might be addressed in commentary to this work.

**(b) Protection and preservation of the insolvency estate**

35. The Working Group considered the issues discussed in paragraphs 20-24 of document A/CN.9/WG.V/WP.78, and in particular whether there were any circumstances, such as outlined in paragraph 23, in which a stay of proceedings in insolvency might be extended to a solvent member of an enterprise group. Some support was expressed in favour of a stay being available on a discretionary basis to protect the assets of a solvent member of the group, which could be used to finance insolvent members, provided the need for that stay was substantiated. Further clarification was required with respect to the question of whether a stay might be available to protect a group member from additional liability in situations such as those outlined in paragraph 23. After discussion, it was agreed that the issues could be explained in commentary to this work, without introducing a recommendation at this stage.

**(c) Post-commencement finance**

36. The Working Group considered post-commencement finance on the basis of draft recommendations 9-13 of document A/CN.9/WG.V/WP.78.

*Draft recommendations 9-11*

37. As a preliminary issue, it was noted that draft recommendations 9-11 repeated key elements of the corresponding recommendations of the Legislative Guide, raising the question of how the current work of the Working Group related to the Legislative Guide and whether those recommendations relating to post-commencement finance would apply in the group context. It was confirmed that the goal of the current work was to complement the Legislative Guide by addressing issues that were particular to enterprise groups. Unless otherwise specified, it was suggested that the recommendations of the Legislative Guide generally would apply to enterprise groups. It was noted, for example, that recommendation 67 should apply to post-commencement finance in the group context. While repetition of the recommendations of the Legislative Guide might therefore not be required, draft recommendations 9-11 did serve to identify those recommendations of the Legislative Guide relevant to post-commencement finance and to place them in a group context. It was agreed that issues relating to drafting techniques might need to be reconsidered when the form of the current work of the Working Group, and in particular whether it was integrated with the Legislative Guide or constituted a stand-alone text, had become clearer.

38. The substance of draft recommendations 9-11 was generally found to be acceptable. As a matter of drafting, it was proposed that the words “subject to insolvency proceedings” be added after the words “member of an enterprise group” in draft recommendation 11.

*Draft recommendations 12 and 13*

39. A number of issues common to both draft recommendations were discussed. A key question related to the provision of finance, whether by way of security or guarantee, by a solvent group member. It was observed that although the provision of finance by a solvent entity might cause prejudice to its creditors, it was not a matter

of insolvency law, but rather one of the law regulating companies, which might require approval of shareholders or directors. However, it was also observed that even though it might be an issue of company law, a rule might be useful to ensure that post-commencement finance could be made available by a solvent entity in a group context in States where such lending might otherwise be ultra vires.

40. Where an insolvent member of the group provided finance, the concern was expressed that the transfer of assets might suggest substantive consolidation of the lender and borrower. In response it was pointed out that if the entities had been substantively consolidated, there would be no need to provide a security or guarantee.

41. With respect to the situations in which finance might be available, one view was that finance should be limited to cases of reorganization, and not be available in liquidation. In response, it was pointed out that that approach was too narrow, as very often the value of the debtor's estate was maximized through liquidation processes such as sale of the debtor's business as a going concern. It was noted in that regard that the Legislative Guide provided that post-commencement finance should be available for the continued operation or survival of the business of the debtor or the preservation or enhancement of the value of the estate (recommendation 63). After discussion, it was agreed that the approach of the Legislative Guide should apply to the group context.

42. The question was raised as to the way in which the provision of finance by members of the group, i.e. intra-group lending and borrowing, should be treated in comparison to the provision of such finance by an entity external to the group, in terms of priority, avoidance, subordination and so forth. One solution proposed was that the question might be addressed in terms of incentives for providing post commencement finance, as noted in draft recommendation 9. For example, intra-group lending might be given priority or legislative prohibitions on securing the assets of one group member for the benefit of another member could be relaxed in the group context.

43. To address concerns with respect to the provision of a security interest by a potentially solvent entity under draft recommendation 12, it was proposed that the draft recommendation be more closely aligned with draft recommendation 13 so that the entity providing the security interest should also be subject to insolvency proceedings. That proposal was supported.

44. The Working Group focused on the safeguards included in paragraphs (a) and (b) of draft recommendation 13. It was agreed that those paragraphs, with appropriate revision to reflect the context of provision of a security interest, as opposed to a guarantee, might also be included in draft recommendation 12. Different suggestions were made with respect to the substance of those paragraphs. It was noted that where a single insolvency representative was appointed to the insolvency proceedings of a number of group members, the insolvency representative consenting to the finance might also be the insolvency representative of the receiving member, creating a conflict of interest. It was also noted that while paragraph (b) included a standard relating to the effect of the finance on creditors, paragraph (a) did not establish a basis for the insolvency representative's consent. To remedy that situation, it was proposed that the insolvency representative should also be required to satisfy the same standard as in paragraph (b).

45. With respect to paragraph (b), it was observed that the determination that creditors "will not" be adversely affected might be too difficult to achieve. Alternatives proposed were that the creditors "were not likely" to be adversely

affected or that the court “was satisfied” that creditors would not be adversely affected. Some support was expressed in favour of adopting one of those approaches, although a different view was that neither would establish a sufficiently high standard. A different solution proposed that the focus should be upon demonstrating the benefit or the prospect of benefit to be derived from the provision of finance, rather than upon any adverse affect on creditors. It was noted in response that determining potential benefits in what was a highly risky situation, i.e. providing finance to an insolvent debtor, might be very difficult and might preclude such finance being provided. After discussion it was agreed that a formulation such as “the court was satisfied” could be adopted.

46. A related suggestion was that the requirements in paragraphs (a) and (b) should be cumulative. In response to that suggestion, it was observed that since different States adopted different approaches with respect to the level of involvement of courts in insolvency proceedings, as acknowledged in the Legislative Guide, draft recommendations 12 and 13 should not be too prescriptive and paragraphs (a) and (b) should be maintained as alternatives. For example, it was noted that the Legislative Guide recognized that not all States would require approval of the court with respect to confirmation of a reorganization plan (recommendations 152 and 153). After discussion, the prevailing view was that the more flexible approach of (a) or (b) should be adopted, with the possibility of including both if required by a State.

47. It was observed that paragraphs (a) and (b) did not address the rationale for, or identify criteria that could guide, the provision of finance, for example, to facilitate reorganization of the group of which the debtors were members or to maximize the value of that group. Such a requirement could be included in an additional subparagraph. That proposal received support.

48. The Working Group approved the substance of draft recommendations 12 and 13 with the revisions as agreed. The Working Group considered that the draft recommendations could be combined as they addressed provision of a security interest or guarantee in similar circumstances. It was noted, however, that the commentary should point to the different effect of each form of financing, particularly with respect to the consequences for creditors.

**(d) Post-application financing**

49. It was observed that once an application for insolvency proceedings was made, access to finance generally became more difficult. Moreover, post-commencement finance was not available until after the commencement of insolvency proceedings. The lack of finance in the period of time between the application for and the commencement of insolvency proceedings could jeopardize the chances of economic recovery of the concerned entity. It was therefore suggested that the possibility of obtaining finance on a privileged basis should be extended to that period of time, possibly as a provisional measure as contemplated by recommendation 39 of the Legislative Guide.

50. In response, it was noted that while a delay between the application for and commencement of insolvency proceedings was normal, the unpredictability of the outcome of the application would prevent the benefits of an insolvency measure from extending to the pre-insolvency phase.

51. After a preliminary discussion, the Working Group decided to consider the matter further at a future session.

**(e) Treatment of contracts**

52. The Working Group considered recommendations 69-86 of the Legislative Guide, which address the treatment of contracts. It was pointed out that the treatment of contracts in the Legislative Guide was based on the assumption that the counterparty to the contract was solvent and that, as a basic concept, the focus was on whether continuation of a contract would be beneficial for the debtor. The first assumption might not always apply in the context of enterprise groups. The question of benefit might relate to the group as a whole in addition to the individual debtor.

53. It was noted that there were a number of intra-group contracts, such as distribution agreements, that might form the basis of the group (as explained in the term “control”). Consideration of those contracts might require parameters different from those adopted in the Legislative Guide. As a minimum, it was suggested that a group member should be prevented from opting out of the enterprise group by means of the provisions on treatment of contracts. In response, it was proposed that the balance of interests between the group and individual members needed further consideration, and could be explored in the commentary to the current work.

54. The Working Group decided to consider the matter further at a future session.

**(f) Avoidance**

55. It was recalled that, under the Legislative Guide provisions on avoidance, the members of an enterprise group would be considered to be related persons. Accordingly, transactions between them would be subject to avoidance, with the possible exception of those entities which were group members at the moment of the commencement of the proceedings, but not at the time the transaction to be avoided took place. A suggestion to reconsider the definition of “related person” in the Legislative Guide was not supported.

56. It was indicated that the treatment of avoidance in the enterprise group context should take into consideration the difference between, on the one hand, reorganization proceedings and sale of the entity as a going concern in liquidation proceedings and, on the other hand, piecemeal sale of the assets in liquidation. It was added that such a distinction might be reflected in considerations of the element of detriment, i.e. that of the group, individual debtors or creditors. A further issue in the group context might relate to whether transactions were entered into in the ordinary course of business.

57. The Working Group approved the substance of draft recommendations 14 and 15 as a basis for future deliberations, noting that the language at the end of draft recommendation 15 might be made clearer by reference to recommendation 97 of the Legislative Guide.

**(g) Set-off**

58. It was observed that intra-group balancing of liabilities occurred regularly during insolvency proceedings of enterprise groups, and that the provisions of the Legislative Guide on set-off provided sufficient guidance to deal with them effectively. It was further added that reference should be made also to those provisions of the Legislative Guide dealing with netting and other set-off issues specific to financial contracts.

**(h) Subordination**

59. The Working Group had a preliminary discussion on the question of subordination, an issue that had been raised a number of times with respect to avoidance and set-off. It was indicated that certain jurisdictions had adopted a general rule on subordination of intra-group claims, the effect of which was to rank those claims below those of unsecured creditors. It was added that the adoption of such a rule would reflect a policy choice discouraging intra-group lending. It was further said that such a rule would be alternative to those on avoidance and set-off in the group context.

60. It was recalled that the Legislative Guide treated subordination in the context of the treatment of claims, but did not include any recommendations. After discussion, it was agreed that the Legislative Guide treatment was sufficient.

**3. Remedies – substantive consolidation**

61. The Working Group considered substantive consolidation on the basis of draft recommendations 16-18 of document A/CN.9/WG.V/WP.78/Add.1.

*Draft recommendation 16*

62. It was generally agreed that the principle of the separate legal identity of each member of an enterprise group should be upheld. Further, it was emphasized that that principle should be the general rule and substantive consolidation should be an exception, which would apply only in very limited circumstances where the interests of creditors so required. It was acknowledged that the opening words of draft recommendation 16 would apply to the Working Group's consideration of enterprise groups generally and, accordingly, the specific references to draft recommendations 17 and 18 might not be required. The Working Group approved the substance of draft recommendation 16.

*Draft recommendation 17 (a)*

63. It was proposed that the chapeau of draft recommendation 17 be revised in order to confirm that the result of substantive consolidation was a single insolvency proceeding concerning only one entity and to avoid any confusion with procedural coordination.

64. With respect to the alternatives in square brackets in the chapeau, the use of "may" was widely supported on the basis that it would better stress the exceptional nature of the remedy of substantive consolidation. It was also suggested that the words "but only" should be added after "single entity", in order to further emphasize that substantive consolidation would only apply in exceptional circumstances.

65. With respect to paragraph (a), it was proposed that the words "subject to insolvency proceedings" should be deleted, as the intermingling of assets in a group might also include solvent members and members apparently solvent, but actually insolvent because of the intermingling of assets.

66. Another suggestion was to replace the word "was" with the word "is", in order to indicate that the impossibility of identifying the ownership of individual assets should be ascertained after the commencement of insolvency proceedings. That suggestion was widely supported.

*Draft recommendation 17 (b)*

67. The view was expressed that paragraph (b) as drafted was too broad. To limit the scope, it was proposed that the words “and as a means of” be added after “for the purpose”. In addition, it was suggested that the type of fraud contemplated was not sufficiently clear; it was not fraud occurring in the daily operations of a debtor, but rather total absence of a legitimate business purpose. Other explanations of what might be meant by fraud in that context were provided. After discussion, the general view was that defining fraud more specifically than set forth in paragraph (b) would prove difficult and the current approach should be retained for further consideration.

68. Reservations were expressed with respect to the intent of paragraph (b) as the creditors would not be privy to the fraudulent purposes contemplated and therefore should not bear the consequences of substantive consolidation. In addition, unless there was intermingling of assets, a situation covered by paragraph (a), it was difficult to understand what situations of harm to creditors paragraph (b) was intended to address. The view was also expressed that it was not necessary to adopt a remedy that departed from the primacy of the single entity principle in order to address fraud, as other remedies were available under the law of most States, such as extending liability within the group or avoiding individual transactions. In response, it was pointed out that different remedies varied in requirement and effect, and that some remedies involved time-consuming suits against individual debtors. In comparison, insolvency remedies provided a much faster solution. It was further pointed out that reliance upon individual remedies would inevitably mean that solvent members of the group were pursued individually, with the benefits provided by collective insolvency proceedings being lost.

69. It was observed that although the focus of paragraph (b) was upon the establishment of a particular structure for the purposes of fraud, it was also possible that an entity established for legitimate purposes could later be used for fraudulent purposes or simulation. Accordingly, paragraph (b) could focus upon entities “used” for such purposes to cover both situations. That proposal received support.

70. A further view was that requiring substantive consolidation to be “appropriate” for rectifying the fraudulent structure was too broad in light of the exceptional nature of the remedy and should be replaced by a requirement that substantive consolidation be “essential”.

71. It was observed that the group members affected by substantive consolidation could include members that were affected by the insolvency of other members, members who satisfied a test of imminent insolvency as contemplated by the Legislative Guide and members that appeared to be solvent but on further investigation were not solvent because of intermingling of assets. A different view was that insolvency was not a prerequisite for substantive consolidation and a solvent entity might therefore be involved. In support of that view, it was noted that if substantive consolidation included only insolvent members of a group, few assets would be available for consolidation. For that reason, the focus of substantive consolidation should be the detriment caused to creditors and its remedy.

72. To address some of the concerns expressed, it was proposed that paragraph (b) should be deleted. Alternative proposals included: adding the substance of paragraph (b) to paragraph (a) and focusing on situations where there was intermingling of assets; adding the concept of detriment to creditors caused by fraud to paragraph (a); or addressing the issue of fraud in commentary to paragraph (a). In response, it was pointed out that many instances of fraud would not fall within



the scope of paragraph (a) where the focus was on intermingling of assets and paragraph (b) should therefore be retained.

73. Another proposal with respect to the structure of the draft recommendations on substantive consolidation consisted of combining draft recommendations 16, 17 and 18, thus presenting draft recommendations 17 and 18 as rarely applicable exceptions to the general principle of respect for the separate legal identity of each member of an enterprise group.

74. After discussion, the Working Group agreed that paragraph (b) should be revised to reflect the views expressed.

75. It was suggested that the explanation contained in paragraphs 14-16 of document A/CN.9/WG.V/WP.78/Add.1 should emphasize recognition and respect for the rights of secured creditors in insolvency. It was also suggested that substantive consolidation and other remedies, such as extension of liability, should be discussed in commentary to the recommendations, clarifying the goals of each remedy and how each was different to the others.

#### *Draft recommendation 18*

76. The view was expressed that the discretion provided to the court in draft recommendation 18 was too broad, focusing on the subjective views of creditors rather than on the objective behaviour of the group that had led creditors to believe that they were dealing with a single entity, rather than with a member of an enterprise group. For that reason, it was proposed that the draft recommendation should focus on the conduct of the group and how it presented itself externally. An example was provided of a case in which substantive consolidation had been ordered when creditors had dealt with what appeared to be a single entity and were unaware of the identity of individual members with which they had dealt or even of the existence of a group. It was noted that that case was independent of the existence of fraud. Focusing on the group's behaviour received some support, although concern was expressed as to the time at which that behaviour should be considered. It was pointed out that that behaviour might change over time and with respect to different creditors.

77. It was proposed that the chapeau of draft recommendation 18 should be aligned more closely with draft recommendation 17, with "should" being substituted for "may". It was also proposed that draft recommendation 18 could be added to draft recommendation 17. The Working Group did not propose any further examples for inclusion in the draft recommendation.

78. After discussion, the Working Group agreed that draft recommendation 18 should focus on the behaviour of the group as a single entity. The Secretariat was requested to prepare drafting suggestions combining draft recommendations 17 and 18.

#### **Additional questions on substantive consolidation**

79. The Working Group discussed additional questions on substantive consolidation on the basis of document A/CN.9/WG.V/WP.78/Add.1, paras. 23 and 24.

(i) *Treatment of competing interests*

*Security interests*

80. The Working Group agreed that recognizing and respecting security interests should be a key principle in substantive consolidation. It was added that there might be exceptions to that principle in certain limited cases. In that respect, it was suggested that intra-group securities might be cancelled or subordinated to unsecured claims, and that security interests created to pursue fraudulent schemes should be subject to avoidance or otherwise disposed of.

(ii) *Partial substantive consolidation*

81. Support was expressed for retaining the possibility of ordering a partial substantive consolidation that might exclude certain assets.

(iii) *Persons permitted to apply for substantive consolidation*

82. It was indicated that since the insolvency representative would often be in the best position to apply for substantive consolidation, it should be permitted to apply. Creditors too might possess relevant information and therefore should also be permitted to apply.

83. There was general agreement that the courts should not be permitted to order substantive consolidation on their own initiative. The serious impact of substantive consolidation required a fair and equitable process to be followed. It was noted that in some States, courts could not act on their own initiative. It was recalled that the Legislative Guide did not generally provide for courts to act on their own initiative in insolvency matters of that gravity.

(iv) *Time of application and for inclusion of additional group members*

84. It was indicated that no time limits should be included with respect to the possibility of applying for substantive consolidation, as the existence of the various entities to be consolidated might be discovered at different moments and even after lengthy investigation. Preventing those entities from being consolidated because of time limits would be unfair. It was added that the same principle should apply to the inclusion of additional group members in the substantive consolidation. It was noted that, in practice, limits to the possibility of applying for substantive consolidation might arise from the state of the insolvency proceedings, and, in particular, from the execution of a reorganization plan. The introduction of a hotchpot rule might be needed if substantive consolidation were to be ordered after a partial distribution of assets.

(v) *Notice of application*

85. It was indicated that notice of application for substantive consolidation should be given to insolvency representatives, if the entities to be consolidated were insolvent, and to the appropriate representatives of solvent enterprise group members. Notice should be given in an effective and timely manner in the form determined by domestic law. Support was also expressed for notifying creditors of the concerned entities of the application, in light of the impact that substantive consolidation might have on their claims. However, the view was also expressed that providing notice of an application for substantive consolidation to the creditors of a solvent entity might significantly affect the commercial standing of that entity. It was added that the matter

should be dealt with in line with recommendations 22 and 23 of the Legislative Guide, which did not mandate notification of the application for commencement of insolvency proceedings to the creditors of the concerned entity. In response, it was noted that equal treatment should be provided with respect to notice to creditors of solvent and insolvent entities.

(vi) *Competent court*

86. The Working Group discussed the issues relating to the court competent to order substantive consolidation and other related measures.

87. It was recalled that where jurisdiction for insolvency matters fell under the competence of special courts or, in certain cases, of administrative authorities, the same bodies would be competent for matters relating to substantive consolidation. It was added that, in the event of a conflict of competence, a number of criteria to allocate jurisdiction would be available, such as priority, location of the parent company or the centre of main interests, and that the choice of that criterion should be left to domestic law. That approach was in line with the one adopted in recommendation 13 of the Legislative Guide.

(vii) *Varying an order for substantive consolidation*

88. The Working Group agreed that the possibility of varying an order for substantive consolidation should be included.

(viii) *Effect of consolidation on calculation of the suspect period*

89. Where substantive consolidation was ordered at the same time as commencement of insolvency proceedings with respect to relevant members of a group, the Working Group agreed that the provisions of the Legislative Guide on calculation of the suspect period would apply.

90. Where substantive consolidation was ordered after the commencement of proceedings or where group members were added to a substantive consolidation at different times, it was acknowledged that difficult issues arose with respect to the choice of the date from which the suspect period would be calculated, particularly when the period of time between application for or commencement of those proceedings and substantive consolidation was long.

91. Criteria proposed for calculation of the suspect period included: (a) taking the earliest date of application for or commencement of insolvency proceedings with respect to those members to be consolidated; (b) allowing the court to determine the most appropriate date in the substantive consolidation order; or (c) preserving a date for each group member calculated by reference to the Legislative Guide.

92. It was observed that choice of the date of substantive consolidation for calculation of the suspect period would 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. The need to provide certainty for lenders and other third parties was stressed. A longer suspect period might be desirable in case of fraud or intermingling of assets.

93. After discussion, it was agreed that alternatives based upon options (a) and (c) above should be prepared for future consideration.

(ix) *Contribution orders*

94. It was proposed that the Working Group might consider the issue of contribution orders. Such an order might 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. In response, it was suggested that those issues could be addressed by remedies already available under other law, such as liability and wrongful trading. Accordingly, it was felt that such a remedy might not be required.

**4. Participants**

**(a) Appointment of an insolvency representative**

95. The Working Group considered the appointment of a single insolvency representative on the basis of draft recommendations 19-20 of document A/CN.9/WG.V/WP.78/Add.1.

*Draft recommendation 19*

96. It was proposed that the last words of draft recommendation 19 “to conduct that procedural coordination” were unnecessary and could be deleted. It was noted that use of the word “against” with respect to insolvency proceedings suggested involuntary proceedings and should be avoided. A suggestion to substitute “may” with “should” was not supported on the basis that it might cause problems in States with more than one domestic jurisdiction. The Secretariat was requested to prepare a revised draft of draft recommendation 19.

97. A further suggestion was that an additional draft recommendation could be included before draft recommendation 19 to the effect that coordination of two or more proceedings could be achieved by appointment of a single insolvency representative or other means of coordination. It was also suggested that the commentary should address situations where the debtor remained in possession and no insolvency representative was appointed.

98. With respect to the second sentence of paragraph 25 of document A/CN.9/WG.V/WP.78/Add.1, it was proposed that the words “would ensure” be revised.

*Draft recommendation 20*

99. The Working Group approved the substance of draft recommendation 20.

**(b) Coordination of multiple proceedings with respect to members of an enterprise group**

100. The Working Group discussed the coordination of multiple proceedings with respect to members of an enterprise group on the basis of draft recommendations 21-23 of document A/CN.9/WG.V/WP.78/Add.1.

*Draft recommendation 21*

101. It was explained that draft recommendation 21 dealt with coordination of insolvency proceedings in general, while draft recommendation 22 dealt with coordination of insolvency proceedings in the context of procedural coordination. Accordingly, the two draft recommendations should reflect different levels of coordination of proceedings. In that regard, it was suggested that in draft recommendation 21 the word “establish” should replace the word “facilitate”.

102. It was noted that in certain jurisdictions, courts, rather than insolvency representatives, would have the authority to coordinate insolvency proceedings, and that that should be reflected in draft recommendations 21-23.

103. The possibility of one insolvency representative, such as the representative of the parent company, taking a leading role in the coordination of the proceedings relating to members of an enterprise group was noted. While such a leading role might reflect the economic reality of the enterprise group, it was agreed that equality under the law of all insolvency representatives should be preserved. It was noted that coordination under the leadership of one insolvency representative may nevertheless be achieved on a voluntary basis, to the extent possible under applicable law. Accordingly, that possibility should be added to the forms of cooperation permitted under draft recommendation 23.

104. Since insolvency representatives might be reluctant to engage in coordination of proceedings before an order for procedural coordination was entered into, it was proposed that draft recommendation 21 should be permissive rather than prescriptive.

*Draft recommendation 22*

105. It was noted that since in certain jurisdictions the judicial order for procedural coordination would indicate the related measures required for coordination, reference to the terms of the judicial order should be inserted in draft recommendation 22.

*Draft recommendation 23*

106. It was said that certain forms of cooperation listed in draft recommendation 23, such as cooperation on issues relating to the exercise of powers and allocation of responsibilities between insolvency representatives, coordination on the use and disposition of assets, use of avoidance powers and so forth, were regulated by the law in a number of jurisdictions, and therefore could not be disposed of by the insolvency representatives. Accordingly, it was suggested that the words “to the extent permitted by law” be inserted in the draft recommendation.

**(c) Creditors**

107. The Working Group discussed the participation of creditors on the basis of document A/CN.9/WG.V/WP.78/Add.1, para. 35.

108. It was noted that there was a significant difference between the treatment of creditor participation in substantive consolidation and procedural coordination. It was suggested that where substantive consolidation was ordered, a single creditors meeting could be convened for all creditors of the consolidated entity and a single creditor committee could be established. In contrast, in procedural coordination, the interests of creditors diverged and could not be represented in a single committee. It was noted, however, that in cases of procedural coordination involving many group

members, providing a separate committee for the creditors of each member might prove to be extremely costly and inefficient for administration of the proceedings. Accordingly, in some States, the courts might have the discretion not to establish a creditor committee for each separate entity. After discussion, the Working Group agreed that as a general principle a single committee was not appropriate in procedural coordination.

109. With respect to intra-group creditors, it was observed that those creditors would be considered related persons under recommendation 131 of the Legislative Guide, leading to their disqualification from participation in a creditor committee. A further concern related to the treatment of intra-group claims and the effect on intra-group creditors. If the rights of intra-group creditors were affected, such as by the subordination of intra-group claims, those relying on the assets of those creditors would in turn be affected.

110. It was agreed that recommendation 137-138 of the Legislative Guide should apply in the group context to external and intra-group creditors in the same manner.

## 5. Reorganization plan

111. The Working Group considered draft recommendation 24 and paragraph 42 of document A/CN.9/WG.V/WP.78/Add.1.

### *Draft recommendation 24*

112. The Working Group agreed that the provisions of the Legislative Guide with respect to reorganization plans would apply in the enterprise group context.

113. Support was expressed in favour of adopting “should” with respect to paragraph (a) and “may” with respect to paragraph (b).

114. It was proposed that paragraph (a) should clarify that it contemplated the filing of a single reorganization plan in each of the proceedings concerning group members covered by the plan. That plan would be voted upon by the creditors of each group member, in accordance with the voting requirements applicable to a plan for a single debtor. Approval of such a plan would be considered on a member-by-member basis and would require agreement of the creditors of each entity; it would not be possible 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 the benefits to be derived from such 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 might relevantly be disclosed in the group context included details with respect to group operations and functioning of the group as such. However, caution should be exercised in providing information relating to a solvent group member covered by the reorganization plan.

115. A different scheme for voting was proposed that would allow the majority of creditors of the majority of group members to approve a plan, overriding the objections of the minority of group members. After discussion, that proposal was not supported and the Working Group agreed that the creditors of each member of the group covered by the plan should approve the plan in accordance with the voting requirements applicable to individual entities.

116. With respect to paragraph (b), it was proposed that the text should clarify what was intended by the words “include” and “with consent”. It was noted that reorganization plans might be either a contract or a quasi-contract, which required court confirmation to become effective. With respect to consent, it was questioned whether that referred to the consent of creditors or of the relevant officers or owners of the group member in accordance with applicable company law. The prevailing view was that since the decision of a solvent entity to participate in a reorganization plan was an ordinary business decision of that entity, the consent of creditors was not necessary unless required by applicable company law. It was noted that insolvency law was not relevant to such consent.

117. Regarding the meaning of “include”, it was pointed out that the solvent entity might provide financing or assets to the reorganization, the details of which would be included in relevant disclosure statements, or be merged with insolvent entities to form a new entity under the reorganization plan. In the latter instance, the effect on the creditors of the solvent entity would have to be disclosed and their rights clarified. After discussion, the Working Group approved the substance of paragraph (b) with the revisions proposed.

#### **Additional questions on reorganization**

118. The Working Group noted that the commentary might include material on a number of issues relating to reorganization, such as the situations in which variable rates of return might be justified for creditors of different group members and related person provisions might cause difficulty in reorganization, such as when a parent company had only creditors classified as related persons who were thereby disqualified from voting on a reorganization plan.

119. Concerning liquidation value for the purposes of recommendation 152 (b) of the Legislative Guide, the Working Group was of the view that in substantive consolidation that value would be the liquidation value of the consolidated entity, and not the liquidation value of the individual members before substantive consolidation.

120. With respect to failure of implementation of a reorganization plan it was agreed that recommendations 155-156 of the Legislative Guide were sufficient to address the matter in the enterprise group context.

### **6. Form of current work**

121. The Working Group discussed the possible form of its work on enterprise groups in insolvency and its effects on structure and drafting style. It was generally agreed that the work should be in the form of a legislative guide for various reasons, including the complexity of the topic, the diversity of approaches to it and the connection to the Legislative Guide. The Working Group also considered whether the resulting text should be published as an addendum to the Legislative Guide or as a stand-alone work. Some views favoured a stand-alone publication for reasons of simplicity and ease of distribution, whereas others supported an addendum to the Legislative Guide because of the relationship between the two texts.

## 7. Glossary

122. Having completed its discussion of draft recommendations 1-24, the Working Group turned its attention to further consideration of the terms included in the glossary (see above, paras. 11-14).

123. It was agreed that the term “enterprise group” should be more generic and not limited to domestic situations. Further explanation concerning international aspects of a group might be added later. It was also agreed that the explanation of the term “enterprise” provided sufficient connection to business or commercial activity and the words “domestic”, “business” and “commercial” could therefore be deleted.

124. The Working Group approved the substance of the explanation of “enterprise”, with a clarification to be added that an enterprise was not intended to include consumers, consistent with the approach adopted in the Legislative Guide.

125. With respect to “capital”, it was proposed that the definition should distinguish between incorporated and unincorporated entities, both of which could be included in an “enterprise group”. It was indicated that “capital” could include assets in the context of an unincorporated entity and shareholding in the context of an incorporated entity. Similarly, control by contractual arrangement would only be relevant in the context of unincorporated entities. In response to a query with respect to the inclusion of “credits”, it was suggested that that would be included in the notion of “debts”. A proposal to add a reference to “trust units” was supported.

126. It was suggested that since, in a number of States, groups could be formed by an agreement that did not involve capital, that concept might be included in the explanation of the term “control”. A question was raised as to whether control should be limited to contractual arrangements and exclude implied control. After discussion, the Working Group agreed that those issues should be further considered.

127. The Working Group agreed that the term “member of an enterprise group” needed to be clarified to ensure that the reference to eligibility under the insolvency law referred only to the scope of the insolvency law and the types of entities covered by it and not to satisfaction of the commencement standards of the insolvency law by a specific debtor.

128. A number of revisions were proposed with respect to “procedural coordination”. Firstly, it was generally agreed that the third and fourth sentences of the explanation should be included in commentary rather than forming part of the glossary. It was also agreed that the last words of the second sentence, commencing with “and the substantive rights” should be deleted. It was proposed that the explanation of procedural coordination should clarify that it involved coordination between courts, as well as insolvency representatives.

129. It was recalled that A/CN.9/WG.V/WP.74 proposed additional terms that might be relevant to the glossary. In particular, the attention of the Working Group was drawn to “substantive consolidation”. The Secretariat was requested to prepare a revision of the explanation of that term, taking into account the deliberations in the Working Group. The Secretariat was also requested to consider other terms from that working paper that might be appropriate for future consideration.



### C. International issues

130. The Working Group had a preliminary discussion of the timing of its consideration of international issues relating to the treatment of enterprise groups in insolvency. It was agreed that resolving issues concerning the treatment of groups in insolvency in a domestic context was both a logical first step for the Working Group to take and a prerequisite for consideration of international issues. Having achieved substantial progress with respect to those domestic issues, the Working Group was of the view that it would be appropriate to consider international issues at an early stage of its next session. That consideration would be based upon document A/CN.9/WG.V/WP.76/Add.1 and should take into account issues of post commencement and post-application finance, as well as cross-border protocols.

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**B. Note by the Secretariat on the treatment of corporate groups in  
insolvency, submitted to the Working Group on Insolvency Law  
at its thirty-third session**

**(A/CN.9/WG.V/WP.78 and Add.1) [Original: English]**

## **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, 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 and thirty-second sessions (A/CN.9/618 and A/CN.9/622 respectively).

2. At its thirty-second session,<sup>1</sup> the Working Group agreed that a decision on the form of its work was not possible at that stage. However, it also agreed that the approach adopted in working papers prepared for the thirty-first and thirty-second sessions should continue to be adopted. Accordingly, this note includes three sections on each issue – general remarks, recommendations and notes on recommendations.

## **II. Glossary**

### **A. General Remarks**

(Reference to previous UNCITRAL documents: A/CN.9/WG.V/WP.74, para. 1(a)-(o); A/CN.9/618, paras. 48-49; A/CN.9/WG.V/WP.76, para. 1; A/CN.9/622, paras. 12, 77-84)

1. In addition to explaining a number of terms that occur in the law and literature relating to enterprise groups, paragraph 1 of A/CN.9/WG.V/WP.74 notes that those terms may have different meanings in different jurisdictions or may be common to one legal tradition and not to others. A number of terms are included in this note to provide orientation to the reader and facilitate a common understanding of the issues, but not to provide legal definitions.

### **B. Terms**

2. The Working Group has discussed some of the terms included below; several new terms have been added to provide further explanation. Other terms included in A/CN.9/WG.V/WP.74, but not repeated here, may also be relevant to the issues discussed in this note.

(a) “Domestic [commercial] [business] enterprise group”: two or more enterprises, which may include enterprises that are not incorporated, that are bound together by means of capital or control.

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<sup>1</sup> Report of Working Group V (Insolvency Law) on the work of its thirty-second session, A/CN.9/622, paras. 93-94.

(b) “Enterprise”: any entity, regardless of its legal form, engaged in economic activities,<sup>2</sup> including entities engaged on an individual or family basis, partnerships or associations.<sup>3</sup>

(c) “Capital”: investment in an enterprise as assets, share capital or debt.

(d) “Control”: the power normally associated with the holding of a strategic position within the enterprise group that enables its possessor to dominate directly or indirectly those organs entrusted with decision-making authority; slight control or influence is not sufficient. Control could also exist pursuant to a contractual arrangement that provides for the requisite degree of domination.

(e) “Member of an enterprise group”: an enterprise that is bound to other enterprises in the manner indicated in the term “enterprise group” and which for the purposes of this work is eligible for insolvency under the insolvency law.<sup>4</sup>

(f) “Procedural coordination”: coordinated administration of insolvency proceedings commenced against separate enterprises that are members of the same enterprise group in order to promote procedural convenience and cost efficiency. The assets and liabilities of each member remain separate and distinct, thus preserving the integrity of the individual enterprises of the enterprise group, and the substantive rights of claimants are unaffected. Procedural coordination may facilitate comprehensive information being obtained on the business operations of the group members subject to the insolvency proceedings; facilitate the valuation of assets and the identification of creditors and others with legally recognized interests; avoid duplication of effort; and [...]. Procedural coordination may involve some or all of the following: the appointment of a single insolvency representative to administer the individual insolvency proceedings; combined meetings and hearings; joint deadlines; a single list for the provision of notices; a single creditor committee; and [...].

## C. Notes on terms

### *Domestic [commercial] [business] enterprise group*

3. Although the deliberations of the Working Group have proceeded on the basis that what is being addressed is the treatment of “corporate groups” in insolvency, the inclusion of unincorporated entities in the scope of the work suggests that a broader term, such as “commercial enterprise group” or “business enterprise group”, taking into account the explanation of “enterprise” provided above, might be more appropriate. The Working Group may wish to consider whether one of those terms or some other term might be used in preference to “corporate group”.

4. Paragraphs 7-15 and 35-38 of A/CN.9/WG.V/WP.74 identify a number of concepts and features common to groups and their definition in different legislation. The Working Group may wish to consider whether any of those additional concepts, such as coordinated organization and management, commonality of business direction and purpose, use of common trademarks and advertising to promote a single public

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<sup>2</sup> For an explanation of “economic activities” see Legislative Guide, part two, chap. I, footnote 1.

<sup>3</sup> Based upon the European Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (2003/361/EC).

<sup>4</sup> Recommendation 8 of the Legislative Guide provides that “The insolvency law should govern insolvency proceedings against all debtors that engage in economic activities, whether natural or legal persons...”.

identity, should be added to the explanation of the term or whether reference to those paragraphs in any commentary to be included in this work would be sufficient.

#### *Capital*

5. Use of the term “capital” in the explanation of what constitutes a domestic enterprise group may require further elaboration, as set forth in paragraph 2 (c). The need to explain that term might be avoided, however, if the explanation of what is meant by the term “group” relied only upon a reference to “control”, where “control” would be understood to include control based upon ownership.

#### *Control*

6. The reference to those groups established by reference to contractual arrangements, previously included in the explanation of “corporate group” (A/CN.9/WG.V/WP.76, para. 3), has been moved to the explanation of “control”, in accordance with the suggestion at the thirty-second session of the Working Group<sup>5</sup> that contractual arrangements should only be included in the concept of a group where the contract addresses issues of control of the group.

#### *Enterprise*

7. If the explanation of the term “enterprise” is to be included in this work, inclusion of the words “which may include enterprises that are not incorporated” in the explanation of the term “group” may not be required; the explanation of the term “enterprise” makes it clear that entities with different legal forms would be included.

#### *Member of a group*

8. The explanation of the term “member of a group” is included to indicate the manner in which it is used in this work, particularly with respect to the coverage of that enterprise by the insolvency law. It may be, however, that with respect to some issues, for example reorganization, the limitation of the scope to enterprises subject to the insolvency law may be too narrow (see below, A/CN.9/WG.V/WP.78/Add.1, para. 41). The Working Group may wish to consider how the term “member of a group” should be used in this work and whether an explanation is required.

#### *Procedural coordination of two or more insolvency proceedings*

9. Previously referred to as “joint administration”, the term “procedural coordination” has been adopted to avoid any confusion between this type of order and joint application for commencement of insolvency proceedings, as well as to avoid using a term that may have a specific meaning in a limited number of jurisdictions.

#### *Modification of explanations for different substantive provisions*

10. The general explanations of terminology above are proposed for the purposes of considering substantive issues of joint application for commencement; procedural coordination; avoidance proceedings; substantive consolidation; a single reorganization plan; and post-commencement financing as discussed in the recommendations set forth below. Where these explanations are inappropriate or insufficiently detailed for application to any particular substantive issue, the Working

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<sup>5</sup> A/CN.9/622, para. 83.

Group may wish to consider how those general explanations might be modified. It was noted at the thirty-second session<sup>6</sup> of the Working Group that, for example, a broad notion of “group” might be desirable for the purpose of procedural coordination and a narrower concept for avoidance.

*Additional terms*

11. The Working Group may wish to consider whether terms additional to those set forth in document A/CN.9/WG.V/WP.74 and in paragraph 2 above might be required to facilitate a common understanding of this work.

### **III. The onset of insolvency: domestic issues**

#### **A. Commencement of insolvency proceedings**

##### **1. Joint application for commencement**

(References to previous UNCITRAL documents: A/CN.9/WG.V/WP.74/Add.1, para. 12; A/CN.9/618, paras. 15-24; A/CN.9/WG.V/WP.76, paras. 10, 15; A/CN.9/622, paras. 14-20)

##### **(a) General remarks**

1. As a general rule, insolvency laws respect the separate legal status of each member of an enterprise group and a separate application for commencement of insolvency proceedings is required to be made for each member satisfying the standard for commencement of insolvency proceedings. There are some limited exceptions that allow a single application to be extended to other members of the group where, for example, all interested parties consent to the inclusion of more than one member of the group; the insolvency of one group member has the potential to affect other members of the group; the parties to the application are closely economically integrated, such as 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 for reorganization plans

2. The recommendations of the Legislative Guide concerning application for and commencement of insolvency proceedings would apply to debtors that are members of an enterprise group in the same manner as they would apply to debtors that are individual commercial enterprises. Recommendations 15 and 16 of the Legislative Guide 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 member of a group 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 so that its insolvency is imminent. That situation is likely to be covered by the terms of recommendation 15 if, at the time of the application of the parent, it could be said of the subsidiary that it would be unable to pay its debts as they mature.

3. Permitting those members of a group 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

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<sup>6</sup> A/CN.9/622, para. 81.

separate identity of the applicants. Such a joint application might include a single application covering all members of the group that satisfy the commencement standard or parallel applications made at the same time in respect of each of those members. In both cases the insolvency law should facilitate the court undertaking a coordinated consideration of satisfaction of the commencement standards with respect to the individual group members, taking into account the group context.

4. A joint application for commencement by two or more members of an enterprise group may raise issues of jurisdiction, even in the domestic context, if members of the group 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.

5. 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. It does not 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.

**(b) Recommendations**

*Joint application for commencement of insolvency proceedings*

(1) [1]<sup>7</sup> The insolvency law [should][may] specify that a joint application for commencement of [insolvency] [reorganization] proceedings may be made (a) by two or more members of an enterprise group where each of those members satisfies the commencement standard in recommendation 15 of the Legislative Guide or (b) by an entity that is a creditor of two or more members of an enterprise group that satisfy the commencement standard in recommendation 16 of the Legislative Guide.

*Creditor application: notice to the debtor*

(2) [7] The insolvency law should specify that when an application is made by a creditor for commencement of insolvency proceedings against two or more members of an enterprise group, notice of the application is to be given to all members of the group included in the application.

**(c) Notes on recommendations**

*Joint application for commencement of insolvency proceedings*

6. At its thirty-second session, the Working Group agreed to retain draft recommendation (1),<sup>8</sup> which addresses the issue of whether a joint application for

<sup>7</sup> Recommendation numbers in square brackets refer to the numbers those recommendations were given as they appeared in document A/CN.9/WG.V/WP.76 and Add.1.

<sup>8</sup> Report of Working Group V (Insolvency Law) on the work of its thirty-second session, A/CN.9/622, para. 20.

commencement of insolvency proceedings may be made in respect of two or more members of a group. It does not address the question of whether, if the joint application leads to commencement of proceedings, those proceedings should be administered together; that issue is addressed separately below (see paras. 11-14, recommendations (3)-(8)).

7. The Working Group was also of the view<sup>9</sup> that a recommendation addressing the possibility that a creditor may make an application for commencement covering two or more members of a group might be useful and that the secretariat could prepare a draft for future consideration. Accordingly, in addition to the possibility of a joint application being made by two or more members of a group that satisfy the applicable commencement standard in recommendation 15 of the Legislative Guide, draft recommendation (1) also addresses application by an entity that is a creditor of two or more members of the group that satisfy the commencement standard in recommendation 16 of the Legislative Guide.

8. Draft recommendation (1) includes the alternative of “insolvency” or “reorganization” proceedings. The Working Group may wish to recall the suggestion made at its thirty-second session,<sup>10</sup> that there was a need to differentiate between liquidation and reorganization in the case where an application for both types of proceedings were made against members of a group. Accordingly, the Working Group may wish to consider whether a joint application may include both liquidation and reorganization proceedings against different member of the group, in which case the more general formulation “insolvency proceedings” might be appropriate, or whether a joint application may only be made where the proceedings sought to be commenced in respect of each member of the group are the same, whether liquidation or reorganization.

*Creditor application: notice to the debtor*

9. In accordance with recommendation 19 of the Legislative Guide, notice of an application by a creditor for commencement of insolvency proceedings against two or more members of a group would be provided to those members and notice of commencement of insolvency proceedings against members of a group should be provided in accordance with recommendations 22-25 of the Legislative Guide. Draft recommendation [7] of A/CN.9/WG.V/WP.76, concerning notice to be provided to the debtor where a creditor makes an application for commencement, although approved by the Working Group at its thirty-second session<sup>11</sup> is essentially a restatement of recommendation 19 (a) of the Legislative Guide, providing that notice should be given only to those members of the group included in the application. On that basis, the Working Group may wish to consider whether recommendation (2) should be included in this work.

10. With respect to the provision of notice, the Working Group may also wish to consider whether there are any circumstances in the enterprise group context in which notice might be given to a wider group than contemplated by recommendations 19 and 22 of the Legislative Guide. For example, where another member of the group is solvent but is implicated in the financing arrangements of one or more of the members

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<sup>9</sup> A/CN.9/622, para. 21.

<sup>10</sup> A/CN.9/622, para. 13.

<sup>11</sup> A/CN.9/622, para. 25.

against which an application has been made or proceedings have commenced, should notice be given also to that other member?

## **B. Treatment of assets on commencement of insolvency proceedings**

### **1. Procedural coordination**

(References to previous UNCITRAL documents: A/CN.9/WG.V/WP.74/Add.1, para. 12; A/CN.9/618, para. 32; A/CN.9/WG.V/WP.76, paras. 32-37; A/CN.9/622, paras. 25-35)

#### **(a) General remarks**

11. Procedural coordination, as noted in the glossary, may refer to varying degrees of integration of insolvency proceedings for the ease and convenience of administration and reduction of costs. 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.

12. Procedural coordination may facilitate streamlining of the proceedings in various ways, through sharing of information to obtain a more comprehensive picture of the situation of the various debtors; combining hearings and meetings; establishing a single list for the provision of notice; setting joint deadlines; and holding joint meetings of creditors. It may also be facilitated by appointment of a single insolvency representative (see below, A/CN.9/WG.V/WP.78/Add.1, paras. 25 and following).

13. Procedural coordination may also raise the issues of jurisdiction noted above with respect to joint applications for commencement (see above, para. 4), where different courts have competence over the various members of the group subject to insolvency proceedings. In jurisdictions where those issues arise, they would generally be determined by reference to domestic procedural law.

14. 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 member of the group subject to insolvency proceedings or a creditor of such member. Whether the order is made at the time of commencement of proceedings or subsequently, it is desirable that notice of that order be given to affected creditors.

#### **(b) Recommendations**

##### *Procedural coordination of two or more insolvency proceedings*

(3) [8] The insolvency law should specify that the court may decide, at any time, either on its own initiative or on the basis of an application under recommendation (4), that the administration of insolvency proceedings against two or more members of an enterprise group that have commenced in the same or different courts should be coordinated for procedural purposes.



*Timing of an application for procedural coordination*

(4) The insolvency law should specify that an application for procedural coordination may be made (a) at the time an application for commencement of insolvency proceedings is made under recommendations 15 or 16 of the Legislative Guide; or (b) at any time after the commencement of insolvency proceedings against members of an enterprise group.

*Parties permitted to apply for procedural coordination*

(5) The insolvency law should specify that an application for procedural coordination may be made (a) by any member of the enterprise group against which insolvency proceedings have commenced; or (b) by a creditor of any of those members of the enterprise group.

*Simultaneous hearings*

(6) The insolvency law should specify that the court may hold simultaneous hearings to determine the extent to which an order for procedural coordination should be granted.

*Notice of procedural coordination*

(7) [5] The insolvency law should specify that, when the court orders the procedural coordination of [some or all of] the insolvency proceedings, notice of the order is to be given to all affected creditors of those members of the enterprise group included in the procedural coordination.

*Content of notice of procedural coordination*

(8) [6] The insolvency law should specify that the notice of an order for procedural coordination is to include, in addition to the information specified in recommendation 25 of the Legislative Guide, information on the conduct of the procedural coordination of relevance to creditors.

**(c) Notes on recommendations***Application for procedural coordination of two or more insolvency proceedings*

15. Draft recommendation (3) (previously draft recommendation [8] of A.CN.9WG.V/WP.76) has been revised in accordance with the decision of the Working Group at its thirty-second session<sup>12</sup> to take account of the possibility of ordering procedural coordination where the insolvency proceedings are commenced either in the same court or in different courts in the same domestic jurisdiction. As drafted, the recommendation is not intended to alter the domestic provisions relating to judicial competence over insolvency matters. The Working Group may wish to consider, however, whether it would be desirable to recommend that domestic procedural law should facilitate procedural coordination by adopting appropriate provisions.

16. Draft recommendation (3) provides that the court may consider ordering procedural coordination on its own initiative or in response to an application made by parties specified under the insolvency law, as addressed in recommendation (5).

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<sup>12</sup> A/CN.9/622, para. 32.

17. In accordance with a suggestion made at its thirty-second session,<sup>13</sup> the Working Group may wish to consider whether the possibility of reversing an order for procedural coordination, returning the estates to separate administration, should be included in the draft recommendations or in notes to those recommendations. The Working Group may also wish to consider the circumstances in which reversing an order for procedural coordination might be appropriate.

*Draft recommendations (4)-(6)*

18. Draft recommendations (4)-(6) have been added to specify the time at which the application might be made and the parties that might apply for procedural coordination. An application may be made at the same time as an application for commencement against two or more members of the group or against one member of the group when one or more other members of the group are already in insolvency proceedings. An application may also be made at any time after commencement of insolvency proceedings against two or more members of the group. To facilitate procedural convenience and cost efficiency, draft recommendation (6) permits the court to hold simultaneous hearings to determine the extent to which the proceedings could be procedurally coordinated. Those hearings may be held in response to an application under recommendation (5) or at the initiative of the court.

*Draft recommendation (7)-(8)*

19. Draft recommendations (7) and (8) (previously draft recommendations [5] and [6] of A.CN.9WG.V/WP.76) have been revised in accordance with the decision of the Working Group at its thirty-second session.<sup>14</sup> Draft Recommendation (7) is intended to apply irrespective of the time at which the order is made, i.e. at commencement or subsequently. The Working Group may wish to consider whether examples of the additional information of particular relevance to creditors might be included in draft recommendation (8).

## **2. Protection and preservation of the insolvency estate**

20. At its thirty-first session, the Working Group considered application of the stay on commencement of insolvency proceedings, as provided in recommendations 39-51 of the Legislative Guide, in the context of insolvency proceedings commenced against two or more members of a group and concluded that those recommendations would apply equally in that context.

21. The Working Group also considered whether relief should be available to protect and preserve the value of assets of a solvent member of the group, where doing so may be in the interests of group members subject to insolvency proceedings. That issue was raised at the thirty-first session of the Working Group<sup>15</sup> and was the subject of draft recommendation [12] of A/CN.9/WG.V/WP.76. Although the Working Group concluded at its thirty-second session<sup>16</sup> that recommendation 12 was not required, it was suggested that in certain limited circumstances, such as to protect an intra-group guarantee, such relief might be available at the discretion of the court and subject to certain conditions.

<sup>13</sup> A/CN.9/622, para. 28.

<sup>14</sup> A/CN.9/622, paras. 22-24.

<sup>15</sup> A/CN.9/618, para. 31.

<sup>16</sup> A/CN.9/622, para. 36.

22. That issue had not been considered in the Legislative Guide, as it did not arise with respect to an individual debtor. However, it may be of particular relevance to enterprise groups because of the interrelatedness of the business of the group. Where financing is 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 solvent group members 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. These situations may thus raise issues of both provisional relief and relief on commencement of proceedings.

23. One example of a situation in which provisional relief might be considered might involve 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. Similarly, a security interest may be enforced 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.

24. Those situations may raise questions as to whether the lender's right to enforce its security interest or guarantee should be stayed, on a provisional basis, to protect the estate of the group members subject to an application for insolvency proceedings. 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". The Working Group may wish to consider whether recommendation 39 of the Legislative Guide would be sufficient in such circumstances.

### **3. Post-commencement finance**

(References to previous UNCITRAL documents: A/CN.9/WG.V/WP.74/Add.1, para. 19; A/CN.9/618, para. 34; A/CN.9/WG.V/WP.76, paras. 54-57; A/CN.9/622, paras. 39-60)

#### **(a) General remarks**

25. Post-commencement finance, acknowledged as being critical for an individual commercial enterprise in insolvency proceedings, may be even more critical in the enterprise group context. In both liquidation, especially where there is the possibility of sale as a going concern, and reorganization, the lack of ongoing funds practically prevents a successful result for an insolvent group being achieved.

26. In the enterprise group context, the question of post-commencement finance raises a number of issues that are different to those arising in the case of a single enterprise. These would include: the potential for conflict of interest between the needs of the different debtors with respect to ongoing finance, particularly where a single insolvency representative is appointed for several members of the group; involving solvent members of the group in post-commencement finance, especially where the solvent member is controlled by the insolvent parent of the group; using the assets of a solvent special purpose entity with a single creditor for the purposes of obtaining finance for other insolvent members of the group; balancing the interests of individual members of the enterprise group with the reorganization of the group; 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 to obtain finance that was channelled through a centralized group entity with treasury functions.

27. The use of group assets to obtain post-commencement finance raises few issues not already addressed by the Legislative Guide where all members of the group are subject to insolvency proceedings. One issue that does need clarification is the conditions that would apply and the approvals required where one member provides finance for the use of another member, whether based on the granting of a security interest, guarantee or other assurance of repayment. Another issue to be clarified concerns those situations where the granting of a guarantee by one member subject to insolvency proceedings to another such member might constitute a preferential transaction.

28. Difficulties arise, however, where the assets of a solvent member of the group are used to fund a member subject to insolvency proceedings. A solvent group member might have an interest in the financial stability of the parent, other members of the group or the group as a whole in order to ensure its own financial stability and the continuation of its business. However, use of the assets of a solvent member of a group as a basis for obtaining finance for an insolvent member from an external source or for funding the insolvent member directly may raise a number of questions, especially where that solvent member subsequently becomes insolvent.

29. Issues may include whether the solvent subsidiary would be entitled to priority under recommendation 64 of the Legislative Guide; whether such a transaction might be subject to subordination as intra-group lending; 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. In the context of procedural coordination, the appointment of a single insolvency representative might raise conflicts of interest (see below, A/CN.9/WG.V/WP.78/Add.1, paras. 27-28).

30. While the consequences of the provision of finance by a solvent member may be regulated by the insolvency law, the solvent entity would provide that finance on its own authority under company law in a commercial context and not under the insolvency law. 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.

**(b) Recommendations**

*Attracting and authorizing post-commencement finance*

(9) [14] The insolvency law should facilitate and provide incentives for post-commencement finance to be obtained, in the context of insolvency proceedings commenced against two or more members of an enterprise group, for the reasons and on the basis set forth in recommendation 63 of the Legislative Guide.

(10) [13] The insolvency law should specify that, in accordance with recommendations 64-68 of the Legislative Guide, any member of an enterprise group that is subject to insolvency proceedings can obtain post-commencement financing under the circumstances and standards set forth in recommendations xx-xx, below.

*Priority for post-commencement finance*

(11) [16] Recommendation 64 of the Legislative Guide should apply to the priority that may be accorded to post-commencement finance provided to a member of an enterprise group in the same way that it applies to post-commencement finance provided in the context of a debtor that is not a member of a group.

*Security for post-commencement finance*

(12) [17] 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 one member of an enterprise group for repayment of post-commencement finance provided to another member of that group [in accordance with the requirements of the insolvency law][provided]:

[(a) The insolvency representative of the guarantor consents to the provision of that security interest; or

(b) The court with jurisdiction over the guarantor determines that the creditors of the guarantor will not be adversely affected by the security interest.]

*Guarantee or other assurance for repayment of post-commencement finance*

(13) [15] The insolvency law should specify that a member of an enterprise group that is subject to insolvency proceedings may guarantee or provide other assurance of repayment for post commencement finance obtained by another member of the group subject to insolvency proceedings, provided:

(a) The insolvency representative of the guarantor consents to the provision of that guarantee or other assurance of repayment; or

(b) The court with jurisdiction over the guarantor determines that the creditors of the guarantor will not be adversely affected by the guarantee or other assurance of repayment.

**(c) Notes on recommendations***Attracting and authorizing post-commencement finance*

31. The Working Group approved the substance of draft recommendation (9) (previously draft recommendation [14] of A/CN.9/WG.V/WP.76) at its thirty-second session,<sup>17</sup> based as it is upon recommendation 63 of the Legislative Guide. The draft recommendation has been revised to avoid repeating the substance of recommendation 63 and to clarify the link with that text.

32. Recommendation (10) (previously draft recommendation [13] of A/CN.9/WG.V/WP.76) has been revised in accordance with the decision of the Working Group at its thirty-second session<sup>18</sup> and to indicate the link with the recommendations of the Legislative Guide.

*Priority for post-commencement finance*

33. The Working Group approved the substance of draft recommendation (11) (previously draft recommendation [16] of A/CN.9/WG.V/WP.76) at its previous

<sup>17</sup> A/CN.9/622, paras. 42-46.

<sup>18</sup> A/CN.9/622, para. 41.

session.<sup>19</sup> The recommendation has been revised to avoid repeating the substance of recommendation 64 and to clarify the link with that text. However, to the extent that recommendation (11) applies recommendation 64 to the group context without changing the terms of that recommendation, recommendation (11) might not be required and its content could instead be covered by a general recommendation to the effect that the Legislative Guide would apply to a group member in the same way as it would apply to a single debtor not a member of a group, unless changes are recommended in this work.

*Security for post-commencement finance*

34. Draft recommendation (12) (previously draft recommendation [17] of A/CN.9/WG.V/WP.76) was approved in substance at the previous session of the Working Group,<sup>20</sup> based as it is on recommendation 65 of the Legislative Guide. The draft recommendation has been revised to avoid repetition of the substance of recommendation 65 and to clarify the link with that text, at the same time making it clear that a group member other than the member to whom the post-commencement finance is provided grants the security interest.

35. As currently drafted, recommendation (12) does not indicate whether the group member granting the security interest is subject to insolvency proceedings. Recommendation (13), in contrast, specifies that the member granting the guarantee should be subject to insolvency proceedings. The Working Group may wish to consider whether draft recommendations (12) and (13) should apply in the same situation, i.e. that the member granting the security interest be subject to insolvency proceedings, and whether both recommendations should be subject to the conditions set forth in paragraphs (a) and (b) of draft recommendation (13).

*Guarantee or other assurance for repayment of post-commencement finance*

36. Draft recommendation (13) (previously draft recommendation [15] of A/CN.9/WG.V/WP.76) has been revised to take account of the concerns of the Working Group at its thirty-second session,<sup>21</sup> clarifying that it would apply to a group member subject to insolvency proceedings and not to a solvent member, and establishing the necessary conditions. In that regard, the previous subparagraph (a) concerning the receipt of benefit has been deleted as establishing a standard that would be too vague and therefore difficult to satisfy.

37. With respect to paragraph (b), the Working Group may wish to consider whether the recommendation sets a standard for approval of post-commencement finance that demands all creditors individually considered not be affected or rather that the court should make an overall evaluation, taking into account the interests of creditors collectively.

38. If the Working Group is of the view that recommendations (12) and (13) should be subject to the same conditions, they may be combined into a single recommendation referring to the granting of “a security interest, guarantee or other assurance for repayment of post-commencement finance”.

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<sup>19</sup> A/CN.9/622, para. 55.

<sup>20</sup> A/CN.9/622, para. 56.

<sup>21</sup> A/CN.9/622, paras. 47-54.

39. Draft recommendations [18] and [19] of A/CN.9/WG.V/WP.76 have been deleted on the basis that they repeated the text of recommendations 66 and 67 of the Legislative Guide.

#### **4. Treatment of contracts**

40. Paragraph 49 of document A/CN.9/WG.V/WP.76/Add.1 raises the issue of the application of recommendations 69-86 of the Legislative Guide, which address the treatment of contracts, in the case of insolvency of two or more members of an enterprise group, particularly where those contracts were entered into between group members. In particular, the Working Group may wish to consider the treatment with respect to continuation and rejection of contracts that have been entered into between two members of the group against which insolvency proceedings have commenced or between such a member and a solvent member of the group.

#### **5. Avoidance proceedings**

(References to previous UNCITRAL documents: A/CN.9/WG.V/WP.74/Add.1, paras. 46-48; A/CN.9/618, paras. 43-45; A/CN.9/WG.V/WP.76/Add.1, paras. 1-8; A/CN.9/622, paras. 61-65)

##### **(a) General remarks**

41. The recommendations of the UNCITRAL Legislative Guide on Insolvency Law 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 members of the group. 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 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.<sup>22</sup> 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.

42. 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 a company to a creditor of a related company; a guarantee or mortgage given by one group company to support a loan by an outside party to another group company; 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 member of the group. Although this might not always be in the best interests of the subsidiary, some laws permit

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<sup>22</sup> For an explanation of transfer pricing, see A/CN.9/WG.V/WP.74, para. 1(m).

directors of wholly owned subsidiaries, for example, to act in that manner, provided it is in the best interests of the parent.

43. 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.

44. 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 members of a group might be covered by those provisions of an insolvency law dealing with transactions between related persons. The Legislative Guide defines "related person" to include members of an enterprise group such as a parent, subsidiary, partner or affiliate of the insolvent member of the group against which insolvency proceedings have commenced or a person, including a legal person, that is or has been in control of the debtor. Those 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.

45. The Working Group may wish to consider whether (a) such contracts should be treated as being between insiders, as defined in the Legislative Guide; (b) the standards applying to contracts between unrelated parties should be applied to contracts entered into in a group context; and (c) whether recommendation 87 of the Legislative Guide is sufficient to address the treatment of such contracts in the group context.

46. One approach to the burden of proof in the case of transactions with related persons might be to provide that the requisite intent or bad faith is deemed or presumed to exist where certain types of transaction 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 transactions among group members and between those members and the shareholders of that group would be detrimental to creditors and therefore subject to avoidance. Additionally, the claims of the related group member may be subjected to special treatment and the rights of related group members under intra-group debt arrangements deferred or subordinated to the rights of external creditors of the insolvent members.

47. With respect to the commencement of avoidance actions, the level of integration of the group may also have the potential to significantly affect the ability of creditors



to identify the group member with which they dealt where the insolvency law permits them to commence avoidance proceedings.

**(b) Recommendations**

*Avoidable transactions*

(14) [20] 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 a group context should be avoided, the court may have regard to the circumstances of the group in which the transaction took place. Those circumstances may include: the degree of integration between the members of the group that are party to the transaction; the purpose of the transaction; and whether the transaction granted advantages to members of the group that would not normally be granted between unrelated parties.

(15) [21] The insolvency law may specify that, with respect to the elements referred to in recommendation 97 of the Legislative Guide and their application in the context of a group, special provisions concerning defences and presumptions apply.

**(c) Notes on recommendations**

48. At its thirty-second session, the Working Group approved the substance of recommendations (14) and (15) as set forth above. It was suggested<sup>23</sup> that a reference to fraudulent transactions be added to draft recommendation (19) (previously draft recommendation [20] of A/CN.9/WG.V/WP.76/Add.1). Recommendation 87 (a) of the Legislative Guide, which specifies the categories of transactions that should be subject to avoidance, was intended to cover fraudulent transactions, but a longer description of those transactions was adopted, focussing on particular characteristics of those transactions, rather than relying on broader labels such as “fraud”, which might carry with them different interpretations or standards in different jurisdictions. See for example, Legislative Guide, part two, chapter II, para. 171.

**6. Rights of set-off**

(References to previous UNCITRAL documents: Legislative Guide, part two, chap. II, paras. 204-207 and recommendation 100)

49. The Working Group may wish to consider whether issues additional to those addressed in the Legislative Guide with respect to rights of set-off arise in the enterprise group context.

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<sup>23</sup> A/CN.9/622, para. 65.

**A/CN.9/WG.V/WP.78/Add.1 (Original: English)****Note by the Secretariat on the treatment of corporate groups in insolvency, submitted to the Working Group on Insolvency Law at its thirty-third session**

## ADDENDUM

**C. Remedies – substantive consolidation**

(References to previous UNCITRAL documents: A/CN.9/WG.V/WP.74/Add.1, paras. 35-45; A/CN.9/618, paras. 36-42; A/CN.9/WG.V/WP.76/Add.1, paras. 21-38; A/CN.9/622, paras. 61-65)

**1. General remarks**

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 members of the group, 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 member of the group 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 against one or more of the members of that group, 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 include: extending liability for external debts to other solvent members of the group, 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”, by which shareholders, who are generally shielded from liability for the enterprise’s

activities, can be held liable for certain activities. The other remedies discussed here do not, although in some circumstances the effect may appear to be similar.

4. As noted above, where procedural coordination occurs, the assets and liabilities of the debtors remain separate and distinct, with the substantive rights of claimants unaffected. Consolidation, however, permits the court, in insolvency proceedings involving two or more members of the same enterprise group, 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 all consolidated group members. Consolidation would generally involve the group members against which insolvency proceedings had commenced, but in some cases might extend to a solvent group member, where 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. While typically requiring a court order, consolidation may also be possible on the basis of consensus of the relevant interested parties or by way of a reorganization plan.

5. Few jurisdictions provide statutory authority for consolidation orders and where the remedy is available, in general it is not widely used. Notwithstanding the absence of direct statutory authority or a prescribed standard for the circumstances in which such orders can be 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 very limited and tend to be those where a high degree of integration of the members of a group, through control or ownership, would make it difficult, if not impossible, to disentangle the assets and liabilities of the different group members and administer the estate of each debtor separately.

6. Consolidation is typically discussed in the context of liquidation and the legislation that does authorize such orders 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.

7. Consolidation might be appropriate where it leads to greater return of value for creditors, either because of the structural relationship between the members of the group 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 situation might occur where there is no real separation between the members of a group, and the group structure is being maintained solely for dishonest or fraudulent purposes.

8. 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. Creditors opposing consolidation could argue that as they relied on the separate assets of a particular group member when trading with it, they should not be denied a full payout because of their trading partner's relationship with another

member of the same group. Creditors supporting consolidation could argue that they had relied upon the assets of the whole group and that it would be unfair if they were limited to recovery against the assets of a single group member.

9. 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 review of the order, thus prolonging the insolvency proceedings; and damage the certainty and foreseeability 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).

**(a) Circumstances supporting consolidation**

10. 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 where the courts have played a role in developing those orders. In each case it is a question of balancing the various elements; no single element is necessarily conclusive and all of the elements do not need to be present in any given case. Those elements include: 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.

11. While these many factors remain relevant, some courts have started to focus on several factors in particular, namely, whether creditors dealt with the group as a single economic unit and did not rely on the separate identity of individual group members in extending credit, and whether the affairs of the group members are so intermingled that separating asset and liabilities can only be achieved at extraordinary cost and expenditure of time and consolidation will benefit all creditors.

**(b) Competing interests in consolidation**

12. In addition to the competing interests of the creditors of different members of a group, 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 members of a consolidated group.

(i) *Owners and equity holders*

13. 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.

(ii) *Secured creditors*

14. With respect to secured creditors, both internal and external to the group, there is a question of how their rights should be treated in a consolidation. The Legislative Guide on Insolvency Law discusses the position of secured creditors in insolvency proceedings and adopts the approach that while as a general principle the effectiveness and priority of a security interest should be recognized and the economic value of the encumbered assets should be preserved in insolvency proceedings, an insolvency law may nevertheless modify the rights of secured creditors in order to implement business and economic policies, subject to appropriate safeguards.

15. 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 claim the remaining debt against the pooled assets as unsecured creditors; and whether internal secured creditors (i.e. creditors that are other members of the same group) 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.

16. 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. The interests of internal secured creditors also need to be considered. Different approaches might include cancelling internal security interests, leaving the creditors with an unsecured claim, or modifying or subordinating those interests.

(iii) *Priority creditors*

17. 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.

**(c) Notification of creditors**

18. The potential impact of consolidation on creditor rights suggests that affected creditors should have the right to be notified of any application for consolidation and the right to object. The interests of individual creditors who may have relied upon the separate identity of each group member in their dealings would have to be weighed against the overall benefit to be gained by consolidation. One issue to be considered is whether a single objection would be sufficient to prevent consolidation or whether consolidation could nevertheless be ordered. It may be possible, for example, to provide objecting creditors who will be significantly disadvantaged by the consolidation relative to other creditors with a substantially 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.

**(d) Timing and inclusion of additional group members over time**

19. Additional issues to be considered with respect to consolidation orders include the timing of such an order (whether it could only be made at an early stage of the proceedings or later when it emerged that to do so would enhance the value to be distributed to creditors) and whether an additional group member could be added to an existing consolidation. 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.

**2. Recommendations**

*Substantive consolidation*

(16) The insolvency law should respect the separate legal identity of each member of an enterprise group, except as provided in recommendations 17 and 18.

(17)<sup>1</sup> [22] The insolvency law [may] [should] specify that the court may order insolvency proceedings against two or more members of a group to proceed together

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<sup>1</sup> The recommendations in A/CN.9/WP.76/Add.1 were incorrectly numbered and recommendation (21) should have been (22) – the revised numbering has been used in the Report of Working Group V (Insolvency Law) on the work of its thirty-second session, A/CN.9/622.

and consolidate the assets and liabilities of those members as if they were incurred by a single entity in the following limited circumstances:

(a) Where there was such an intermingling of assets between the group members subject to insolvency proceedings that it was impossible to identify the ownership of individual assets; or

(b) Where the debtor[s] established different entities for the purpose of engaging in simulation or fraudulent schemes or created fictitious structures with no legitimate business purpose and consolidation is appropriate to rectify the fraudulent or fictitious structure.

(18) [22] The insolvency law should specify that the court may also order consolidation in appropriate circumstances, for the [overall] benefit of creditors where:

(a) Creditors had dealt with the members of a group as a single economic unit and did not rely upon the separate identity of members in extending credit; or

(b) [...].

### 3. Notes on recommendations

20. Draft recommendation (16) has been added to emphasize a key point made with respect to consolidation by the Working Group at its thirty-second session<sup>2</sup> that the insolvency law should respect the separate legal identity of each member of a group. As drafted, recommendation (16) is of general application and, although of key importance in the context of consolidation, the Working Group might wish to consider whether it could form a general recommendation in the introduction to this work. It might also wish to consider whether that recommendation should refer to the insolvency law or to the law more generally.

21. Draft recommendation (17) (previously recommendation [22] of A/CN.9/WG.V/WP.76/Add.1) has been revised to emphasize that consolidation should be available by order of the court only in the limited circumstances specified in paragraphs (a) and (b). While the Working Group agreed at its thirty-second session that overall benefit to creditors should be a key factor in a court ordering consolidation,<sup>3</sup> there are circumstances in which consolidation may be warranted irrespective of the benefit provided to creditors. Those situations, set forth in draft recommendation (17), occur where the assets are intermingled to such a degree that it is impossible to identify ownership, and where there are fraudulent schemes. In both of those situations, the question of whether or not consolidation will be of benefit to creditors is not the primary consideration as there will be limited alternatives to address those specific situations.

22. Accordingly, the factor of overall benefit to creditors has been removed from draft recommendation (17) and placed in a new draft recommendation (18), which is intended to address situations additional to those set forth in draft recommendation (17), where benefit to creditors will be the determining factor in making an order for consolidation. One example is given, which was previously paragraph (b) of recommendation [22]. The question of whether a sufficient number of creditors relied on the single economic unit to justify an order for consolidation is a matter of evidence for the court to determine. Accordingly, no qualifying element

<sup>2</sup> A/CN.9/622, para. 67.

<sup>3</sup> A/CN.9/622, para. 71.

has been added to the draft recommendation in order to avoid uncertainties of interpretation that may be a consequence of such qualifications. Any commentary to the draft recommendation could make clear however, that, as consolidation should only be ordered in limited circumstances, reliance of a significant number or of the majority of creditors should be required for a consolidation order. The Working Group may wish to consider whether there are additional circumstances in which the court might exercise the power to order consolidation under recommendation (18).

#### **4. Additional questions on substantive consolidation**

23. The Working Group may wish to consider a number of additional issues with respect to substantive consolidation. Some of those issues were previously included in document A/CN.9/WG.V/WP.76/Add.1 as follows:

(a) Paragraphs 31-35 of document A/CN.9/WG.V/WP.76/Add.1 raise questions with respect to the treatment of competing interests in consolidation, including those of owners and equity holders, secured creditors and priority creditors. Paragraph 34 raises the possibility of ordering partial consolidation and excluding certain interests or assets from the pool of consolidated assets;

(b) Paragraph 37 of document A/CN.9/WG.V/WP.76/Add.1 raises the issue of providing notice of an application for consolidation and to whom it should be given. It also discusses how creditors' objections to consolidation might be treated; and

(c) Paragraph 38 of document A/CN.9/WG.V/WP.76/Add.1 raises the issue of the timing of an order for consolidation and whether additional members could be added to an existing consolidation. The Working Group may wish to consider whether consolidation might be ordered at any time before, for example, a distribution in liquidation or the approval of a reorganization plan or sale of the business as a going concern, or whether such a limit is not necessary. In reorganization, for example, the plan might include provision for consolidation that creditors would approve or reject as part of the plan approval process.

24. Other issues might include:

(a) The parties that may make an application for consolidation, such as for example, the insolvency representative, the court on its own motion or a creditor; and

(b) The effect of consolidation on calculation of the suspect period for the purpose of avoidance proceedings. Recommendation 89 of the Legislative Guide refers to the suspect period being calculated retrospectively from a specified date, being either the date of application for, or commencement of, insolvency proceedings. The Working Group may wish to consider whether establishing a single date from which the suspect period would be calculated for all of the consolidated entities would be desirable, bearing in mind the effect that a single date might have upon third and relying parties.

### **D. Participants**

#### **1. Appointment of an insolvency representative**

(References to previous UNCITRAL documents: A/CN.9/WG.V/WP.74/Add.1, paras. 14-15; A/CN.9/618, paras. 25-26; A/CN.9/WG.V/WP.76, paras. 33-37; A/CN.9/622, paras. 32-35)



**(a) General remarks**

25. Procedural coordination of the different estates of group members subject to insolvency proceedings would be facilitated by the appointment of a single insolvency representative. 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.

26. 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.

27. 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, conflict may arise, for example, with respect to cross guarantees, intra-group debts or the wrongdoing by one group member with respect to another group member. As a safeguard against possible conflict, 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. 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.

28. If appointment of a single insolvency representative is not possible, or if more than one insolvency representative is required to be appointed because of an apparent conflict, an insolvency law could specify obligations additional to those applicable to insolvency representatives under the Legislative Guide (recommendations 111, 116-117, 120) to facilitate coordination of the different proceedings. These obligations might 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 use of avoidance powers; obtaining of post-commencement finance; coordination of filing and admission of claims and distributions to creditors.

29. The insolvency law could also address timely resolution of disputes between the different insolvency representatives appointed. Consideration might be given to the question of whether, in a group context, where different insolvency representatives are appointed to administer the parent and various subsidiaries, the insolvency representative appointed to the parent should have any additional coordinating role with respect to the other insolvency representatives or additional powers to resolve disputes or conflicts.

**(b) Recommendations***Appointment of a single insolvency representative*

(19) [9] The insolvency law should specify that, where the court determines that insolvency proceedings against two or more members of a group should be procedurally coordinated, a single insolvency representative may be appointed, consistent with recommendations 115-125 of the Legislative Guide, to conduct that procedural coordination.

*Conflict of interest*

(20) [10] The insolvency law should specify measures to address a conflict of interest that might arise between the estates of two or more members of an enterprise group in a procedural coordination where only one insolvency representative is initially appointed. Such measures may include the appointment of one or more additional insolvency representatives.

**(c) Notes on recommendations**

30. Draft recommendation (19) (previously draft recommendation [9] of A.CN.9WG.V/WP.76) has been revised to incorporate a reference to the provisions of the Legislative Guide concerning appointment of the insolvency representative, as those recommendations should apply equally to the context of insolvency proceedings against members of an enterprise group.

31. Draft recommendation (20) (previously draft recommendation [10] of A.CN.9WG.V/WP.76) has been revised in accordance with the decision of the Working Group at its thirty-second session<sup>4</sup> to include the possibility of appointing more than one insolvency representative in the situation where there is a conflict of interest between the estates of two or more members of an enterprise group.

**2. Coordination of multiple proceedings against members of an enterprise group**

(References to previous UNCITRAL documents: A/CN.9/WG.V/WP.74/Add.1, para. 14; A/CN.9/WG.V/WP.76, para. 36; A/CN.9/622, para. 35)

**(a) Recommendations***Cooperation between two or more insolvency representatives in a group context*

(21) The insolvency law should specify that where insolvency proceedings are commenced against two or more members of an enterprise group, the insolvency representatives appointed to those proceedings should cooperate to the maximum extent possible to facilitate coordination of those proceedings

*Cooperation between two or more insolvency representatives in procedural coordination*

(22) [11] The insolvency law should specify that, where more than one insolvency representative is appointed in insolvency proceedings subject to procedural coordination, the insolvency representatives should cooperate to the maximum extent possible to facilitate coordination of those proceedings.

*Forms of cooperation*

(23) The insolvency law should specify that cooperation to the maximum extent possible may be implemented by any appropriate means, including:

- (a) Sharing and disclosure of information, in accordance with applicable law;
- (b) Approval or implementation of agreements with respect to division of the exercise of powers and allocation of responsibilities between insolvency representatives;

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<sup>4</sup> A/CN.9/622 para. 34.

(c) Coordination with respect to proposal and negotiation of reorganization plans; and

(d) Coordination with respect to administration and supervision of the debtors' affairs and continuation of its business, including post commencement financing; safeguarding of assets; use and disposition of assets; use of avoidance powers; filing and approval of claims and distributions to creditors.

**(b) Notes on recommendations**

*Cooperation between two or more insolvency representatives in a group context*

32. Draft recommendation (21) establishes a general principle that insolvency representatives appointed to different proceedings involving two or more members of an enterprise group should cooperate to facilitate coordination of those proceedings, even where there is no order for procedural coordination. Such cooperation would be in the interests of efficiency and cost effectiveness, as well as of achieving the best solution for the insolvent members of the group and other interested parties.

*Cooperation between two or more insolvency representatives in procedural coordination*

33. Draft recommendation (22) (previously draft recommendation [11] of A/CN.9/WG.V/WP.76) reflects the same principle as draft recommendation (21) in the context of procedural coordination.

*Forms of cooperation*

34. Draft recommendation (23) reflects the decision of the Working Group at its thirty-second session that practical examples of the manner in which cooperation to the maximum extent could be achieved, as set forth in paragraph 36 of A/CN.9/WG.V/WP.76, should be added to the draft recommendations.<sup>5</sup> These examples draw upon article 27 of the UNCITRAL Model Law on Cross-Border Insolvency. The reference in paragraph (a) to “in accordance with applicable law” is intended to include the approach of those laws that permit certain actions provided they are specified, as well as that of other laws that permit any actions not specifically prohibited.

**3. Creditors**

35. Paragraph 49 of document A/CN.9/WG.V/WP.76/Add.1 identifies a number of issues relating to the treatment of creditors that have not yet been discussed by the Working Group. Those issues are repeated here for ease of reference:

(a) Particular considerations that would apply to creditor participation in insolvency proceedings in a group context where that creditor is a members of the same group as the entity subject to insolvency proceedings;

(b) The possibility of establishing a single creditor committee for creditors of each member of a group or each type of creditor across a group;

(c) With respect to creditor representation, the special considerations that might apply to the application of recommendations 126-136 of the Legislative Guide, which address creditor participation. Members of a group that are creditors of other

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<sup>5</sup> A/CN.9/622 para. 35.

members of the group might be considered to be related parties for the purpose of recommendation 131 and therefore disqualified from participating in creditor committees (see above, avoidance of contracts involving related parties, A/CN.9/WG.V/WP.78, paras 44-45); and

(d) The application of recommendations 137-138 of the Legislative Guide, which address rights of parties in interest to be heard and to appeal, to a member of a group: “party in interest” as explained in the Legislative Guide would include a member of a group in various possible ways, whether as a fellow debtor in joint proceedings, as a creditor, an equity holder, or simply as another member of the same group.

## **E. Reorganization**

(References to previous UNCITRAL documents: A/CN.9/WG.V/WP.74/Add.1, paras. 21-23; A/CN.9/618, para. 35; A/CN.9/WG.V/WP.76/Add.1, paras. 40-45; A/CN.9/622, paras. 74-75)

### **1. General remarks**

36. Where reorganization proceedings are commenced against two or more members of an enterprise group, irrespective of whether or not those proceedings are to be procedurally coordinated, there is a question of whether it will be possible to reorganize the debtors through a single reorganization plan that 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. 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. Where that is not permitted, a single reorganization plan would generally only be possible where the proceedings could, as a matter of practice, be coordinated on a voluntary basis.

37. If the insolvency law were to permit a single reorganization plan to be prepared and approved, 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. Relevant provisions might include those relating to: parties competent to propose the plan or participate in its proposal; nature and content of a plan; safeguards concerning a plan; 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; objections to approval of the plan (or confirmation where it is required); and implementation of a plan.

38. 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 and the consequences such rejection would apply. 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.

39. An insolvency law might also include provisions addressing the consequences of failure to approve such a reorganization plan as addressed by recommendation 158. One law, for example, provides that the consequence of failure to approve a plan is the liquidation of all insolvent members of the group. Where solvent members are included in the plan by consent, special provisions may be required to prevent undue advantages arising from that liquidation.

## 2. Recommendations

### *Reorganization plan*

(24) [23-24] Subject to recommendations 139-159 of the Legislative Guide, the insolvency law [may][should]:

(a) Permit the approval of a [single][joint] reorganization plan for two or more members of an enterprise group that are subject to insolvency proceedings; and

(b) Permit a reorganization plan proposed for two or more members of an enterprise group subject to insolvency proceedings to include, with consent, any other member of the enterprise group that is not subject to the insolvency proceedings. This paragraph does not affect the rights under applicable corporate rules of shareholders or creditors of that other member.

## 3. Notes on recommendations

40. Recommendation 24 (previously recommendations [23] and [24] of A/CN.9/WG.V/WP.76/Add.1) has been revised to reflect the concerns of the Working Group at its previous session,<sup>6</sup> in particular that a solvent entity could be included in the plan on a voluntary basis provided the shareholders and creditors of that solvent entity agreed in accordance with applicable corporate rules. A reference has also been included to the recommendations of the Legislative Guide relating to proposal, content, voting mechanisms and approval of a reorganization plan. That reference is intended to clarify that the considerations addressed in those recommendations, such as that the draft plan should recognize the interests and rights of different creditors, would also apply to reorganization plans in the group context. The Working Group may wish to consider whether those considerations should be more explicitly stated with reference to the enterprise group context, particularly since the creditors involved will be both different classes of creditors, as well as creditors of different members of the group, not simply different classes of creditors of a single debtor and since the same claim may be carried against several members of the group.

41. Paragraph (b) permits a reorganization plan to include a solvent member of the group, provided that the provisions of law applicable to such participation are met. Those might include, for example, that the shareholders and creditors of that entity have agreed to its inclusion in the plan. As drafted, the reference to another “member”

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<sup>6</sup> A/CN.9/622, paras. 74-75.

of the group is limited to those members that could be subject to insolvency proceedings under the insolvency law (see above, explanation of “member of an enterprise group”). However, it might be desirable to provide that other types of entities that are part of the group, but not subject to the insolvency law, might also be included in a reorganization plan. In practice, for example, it may be required that those other entities be classified separately under the plan and an explanation of their relationship to the debtor(s) and the treatment they are to receive under the plan be included in the plan, in accordance with recommendations 143 and 144 of the Legislative Guide.

#### 4. Additional questions on reorganization

42. Paragraph 48 of document A/CN.9/WG.V/WP.76/Add.1 notes that, with respect to reorganization, the Working Group may wish to consider other issues arising in the context of reorganization. These might include:

(a) The content of a reorganization plan and disclosure statement. The Working Group may wish to consider whether information additional to that specified in recommendations 143 and 144 would be required in the group context (see, for example, para. 41 above);

(b) Equitable treatment of creditors. Recommendation 1 (d) of the Legislative Guide requires an insolvency law to ensure equitable treatment of similarly situated creditors and recommendation 149 provides that all creditors and equity holders in a class should be offered the same treatment in a reorganization plan. With respect to a single debtor, those recommendations clearly apply as between the members of individual classes of creditors. In the group context, however, there may also be a need to achieve fairness more broadly between the creditors of the different group members involved in the plan. The Working Group may wish to consider whether, for example, there may be circumstances in which it would be appropriate to provide varying rates of return for creditors of different group members, without that treatment constituting a ground upon which the plan might be challenged in accordance with recommendations 152-153 of the Legislative Guide;

(c) The process of approval of the plan and achieving a balance between creditors of different group members subject to the plan, particularly with respect to defining the voting majorities required for approval. The Working Group may wish to consider whether those majorities should be the same as for approval of a reorganization plan for a single debtor, or whether different majority requirements that are specifically designed to facilitate approval in the group context might be appropriate;

(d) Treatment of related party claimants for voting purposes. Recommendations 127 and 145-149 of the Legislative Guide address voting mechanisms for approval of a plan and recommendation 184 addresses treatment of claims by related persons. Where an insolvency law restricts or removes the right of related party claimants to vote on approval of a plan, the Working Group may wish to consider what impact that would or should have in the group context where those related parties were other members of the same group. In some groups, for example those with more internal than external creditors, such treatment might significantly limit the number of eligible creditors for voting purposes;

(e) Protections for minority creditors. Recommendations 152 and 153 of the Legislative Guide establish the conditions to be satisfied in order for a plan to be confirmed by the court or, in the case where confirmation is not required, the

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conditions against which any challenge can be assessed. The conditions required in each case are as set forth in paragraphs (a)-(e) of recommendation 152. The Working Group may wish to consider whether those conditions provide adequate protection for minority creditors in a group context; and

(f) Failure of implementation of the plan. Recommendations 158-159 of the Legislative Guide address the grounds for conversion of reorganization to liquidation and the consequences of a failure of implementation of a plan. The Working Group may wish to consider whether those recommendations are sufficient or appropriate in the group context or whether some other consequence of failure of implementation might be required where two or more members of the group are included in a single plan.

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**C. Report of the Working Group on Insolvency Law on the work of its thirty-fourth session (New York, 3-5 March 2008)**

(A/CN.9/647) [Original: English]

**Contents**

	<i>Paragraphs</i>
I. Introduction . . . . .	1-4
II. Organization of the session . . . . .	5-10
III. Deliberations and decisions . . . . .	11
IV. Treatment of enterprise groups in insolvency . . . . .	12-91
A. Glossary . . . . .	12-29
B. The onset of insolvency: domestic issues . . . . .	30-84
1. Application and commencement: joint application . . . . .	30-35
2. Procedural coordination . . . . .	36-44
3. Post-commencement finance . . . . .	45-54
4. Avoidance proceedings . . . . .	55
5. Substantive consolidation . . . . .	56-65
6. Additional recommendations on substantive consolidation . . . . .	66-75
7. Appointment of the insolvency representative . . . . .	76-84
C. The onset of insolvency: international issues . . . . .	85-91

**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 in 2006 and that the Working Group should be given the flexibility to make appropriate recommendations to the Commission regarding the scope of its future work and the form it should take, depending upon the substance of the proposed solutions to the problems the Working Group would identify under that topic.

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 (the Legislative Guide) and the UNCITRAL Model Law on Cross Border Insolvency (the Model Law) 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, 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). Following a preliminary discussion of the timing of its consideration of international issues relating to the treatment of enterprise groups in insolvency, the Working Group decided to consider those issues at its thirty-fourth session in March 2008.

## II. Organization of the session

5. Working Group V (Insolvency Law), which was composed of all States members of the Commission, held its thirty-fourth session in New York from 3 to 7 March 2008. The session was attended by representatives of the following States members of the Working Group: Australia, Belarus, Benin, Cameroon, Canada, Chile, China, Czech Republic, El Salvador, Fiji, France, Germany, Guatemala, India, Iran (Islamic Republic of), Italy, Japan, Kenya, Latvia, Madagascar, Malaysia, Mexico, Mongolia, Nigeria, Norway, Pakistan, Paraguay, Poland, Republic of Korea, Russian Federation, Senegal, Singapore, 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: Belgium, Croatia, Denmark, Holy See, Ireland, Mali, Mauritania, Netherlands, Peru, Romania, Slovenia, Trinidad and Tobago, and Turkey.

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

(a) *Organizations of the United Nations system*: the World Bank;

(b) *Intergovernmental organizations*: Asian-African Legal Consultative Organization (AALCO), Council of the Interparliamentary Assembly of Member Nations of the Commonwealth of Independent States (CIS), European Commission (EC), International Association of Insolvency Regulators (IAIR);

(c) *International non-governmental organizations invited by the Working Group*: American Bar Association (ABA), American Bar Foundation (ABF), Asian Clearing Union (ACU), Commercial Finance Association (CFA), 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 National Law Center for Inter-American Free Trade (NLCIAFT).

8. The Working Group elected the following officers:  
*Chairman:* Mr. Wisit Wisitsora-At (Thailand)  
*Rapporteur:* Mr. Rodrigo Rodriguez (Switzerland)
9. The Working Group had before it the following documents:
  - (a) Annotated provisional agenda (A/CN.9/WG.V/WP.79); and
  - (b) A note by the secretariat on the treatment of enterprise groups in insolvency (A/CN.9/WG.V/WP.80 and Add.1).
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 the treatment of enterprise groups in insolvency;
  5. Other business;
  6. Adoption of the report.

### **III. Deliberations and decisions**

11. 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.80 and Add.1, and other documents referred therein. The deliberations and decisions of the Working Group on this topic are reflected below.

## **IV. Treatment of enterprise groups in insolvency**

### **A. Glossary**

12. The Working Group considered the glossary on the basis of document A/CN.9/WG.V/WP.80.

#### **General remarks**

13. It was noted that the function of the glossary should not be to provide statutory definitions of the relevant terms, but rather to provide readers with a general idea of how the concepts were used. The Working Group was reminded that the terms included in the glossary could be used in various ways for a range of purposes, including in the insolvency law context, and that different jurisdictions could have different viewpoints on those terms. It was suggested that the explanation of the terms in the glossary should be drafted as simply as possible and that related policy issues and relevant examples should be addressed in the commentary or the explanatory note to those terms. After discussion, the Working Group agreed that an introductory section similar to that found in paragraph 6 of the glossary section of the Legislative Guide should be included to inform readers of the purpose of the glossary along with an explanatory note that would provide more detailed information about the policies underlying the individual terms.

**(a) Enterprise group**

14. A proposal to delete the reference to incorporation on the basis that it was addressed in the explanation of “enterprise” was supported.

15. A further proposal to delete the reference to capital and to substitute the notion of ownership was also supported. It was noted that capital was an example of what might lead to control and it was control that should be the focus of the explanation. In response, a view was expressed that reference to “ownership” should not be used in the explanation of the term “enterprise group” as the concept of “ownership” was just one of the methods of obtaining “control” and should not be a separate criterion.

16. Several proposals were made to revise the draft explanation. Those included that an enterprise group could be (a) two or more enterprises that were connected because they were subject to full or partial ownership or control; (b) two or more enterprises that constituted related persons pursuant to paragraph (jj) of the glossary of the Legislative Guide; or (c) two or more enterprises that could be subject to insolvency proceedings (as indicated in the second sentence of footnote 1 to the explanation of “enterprise”) and were linked by factors such as significant capital participation and unity of management.

17. After discussion, the Working Group agreed that the term enterprise group should be explained as two or more enterprises that were bound together by means of ownership or control and that the reference to “capital” should be deleted.

**(b) Enterprise**

18. Proposals made to revise the explanation included: limiting the reference to economic activities to those that were conducted for profit; replacing the word “entity” with “productive unit” or “establishment”; and moving the reference to consumers in the footnote to the text of the explanation.

19. Reference was made to recommendation 8 of the Legislative Guide, which addressed those debtors eligible for insolvency. It was noted that that recommendation might inform the discussion of the terms of the glossary and in particular, since it included economic activities that were not conducted for profit, that approach should be maintained. The proposals with respect to the use of the word “entity” and the reference to consumers did not receive support.

**(c) Capital**

20. The Working Group agreed that the term “capital” should be deleted from the glossary.

**(d) Control**

21. With regard to the explanation of the term “control”, it was widely felt that the explanation in its present form was too broad and ambiguous. Another concern expressed was that the term encompassed not only the actual exercise of control but also the capacity to control and that the focus should be on the former, not the latter. In response, it was noted that whether control was exercised or not could prove difficult to verify. What could be included in the draft was a presumption that there might be control where there was major ownership and a requirement for proof where there was actual exercise of control.

22. Several proposals were made to simplify the explanation. Those included: (a) deleting all of the text after the words “decision-making authority”; (b) deleting the

words “normally associated with the holding of a strategic position within the enterprise group”; (c) deleting the reference to “strategic position”; and (d) revising the explanation to “the ability or power derived from law, by-laws or contract to determine – directly or indirectly – the management of an enterprise or a group of enterprises.” In response to the last proposal, it was noted that there was a need to differentiate between exercising power over the management body of the enterprise and the day-to-day management of the enterprise; the former might constitute control, the latter would not. It was also suggested that control derived through contractual arrangements should be included in the commentary or an explanatory note.

23. After discussion, the Working Group agreed to simplify the explanation of the term “control” by deleting the word “normally” and adopting the proposal noted in paragraph (a) above, with further explanation to be included in an explanatory note.

**(e) Procedural coordination**

24. A concern was raised as to whether procedural coordination addressed the situation of a single court dealing with various insolvency proceedings of various members of a group or whether it addressed various courts coordinating with each other. In response, it was pointed out that procedural coordination included both situations and that footnote 3 on the explanation of the term included the reference to “cooperation between two or more courts”. After discussion, the Working Group agreed to move that reference in footnote 3 into the explanation under paragraph (e).

25. In that context, the importance of communication between courts was also emphasized. Although a suggestion was made to include a reference to communication in the text of the explanation of procedural coordination, it did not receive sufficient support. However, it was agreed that a reference be included in the footnote and the issue discussed in the commentary.

26. With regard to the terms in square brackets “separate” and “individual”, one view expressed was that both should be included to reflect the flexibility of procedural coordination. Another view expressed was that both terms should be deleted, because they did not add any substance to the explanation and might be confusing. In response, the concern was expressed that the deletion might not fully reflect that there were different insolvency proceedings taking place at the same time. However, that concern did not find support, because the term coordination in itself implied different proceedings. The Working Group agreed to retain the terms in square brackets.

**(f) Substantive consolidation**

27. The Working Group agreed to consider the explanation of the term “substantive consolidation” in the context of discussing draft recommendations 16 to 23, but did not commence that discussion because of lack of time.

**(g) Parent enterprise**

28. The Working Group agreed to delete the term “parent enterprise” from the glossary.

**(h) Subsidiary enterprise**

29. The Working Group agreed to delete the term “subsidiary enterprise” from the glossary.

## **B. The onset of insolvency: domestic issues**

### **1. Application and commencement: joint application**

30. The Working Group discussed the application and commencement of insolvency proceedings in enterprise groups in the domestic context on the basis of draft recommendation 1 of document A/CN.9/WG.V/WP.80.

#### *Purpose of legislative provisions*

31. The Working Group agreed that the purpose clause was useful and should be retained.

#### *Draft recommendation 1*

32. Concerns were expressed that the scope of the chapeau of draft recommendation 1 was not sufficiently clear with respect to what was contemplated by a joint application. In response, it was explained that the chapeau covered two different situations: a single application with respect to multiple debtors and multiple applications with respect to multiple debtors in the enterprise group. It was stated that since the first scenario should be covered by draft recommendation 2, the reference to the first situation could be deleted from the chapeau. After discussion, the Working Group agreed to delete the words beginning “an application” to “Legislative Guide or”.

33. Some concerns were raised that draft recommendation 1 should clarify the competent court to which the joint application should be made. It was suggested that an additional recommendation was needed that would require the local insolvency law to address that issue. It was observed that although recommendation 13 of the Legislative Guide referred the issue of the competent court to the local insolvency law, it might not be sufficient to address the issue of judicial competence over a joint application in the enterprise group context. After discussion, it was generally agreed that recommendation 13 of the Guide was not sufficient and did not provide any guidance to legislators on criteria for the determination of the competent court.

34. It was suggested that an additional recommendation could be included to indicate criteria for such determination or that the first sentence of footnote 14 to draft recommendation 3 could be revised as a recommendation. After discussion, the Working Group agreed to include an additional recommendation along the lines of the first sentence of footnote 14 and to discuss examples of possible criteria in the commentary.

35. In the context of commencement of insolvency proceedings on the basis of a joint application, it was discussed whether an additional recommendation was needed to specify the factors that linked the group together and the position in the group of each member covered by the application, particularly where one of them was the controlling entity or parent. A concern was expressed that provision of such detail might be difficult in the case of a creditor application under subparagraph (b), because a creditor might not be in a position to know the relationship between the group members. After discussion, it was noted that since the basis of the joint application was that the debtors were members of a group, information substantiating the existence of the group would generally be required in order for the court to commence insolvency proceedings. It was agreed that an additional recommendation was not required, but that the issue should be discussed in the commentary.

## 2. Procedural coordination

36. The Working Group considered procedural coordination on the basis of draft recommendations 2-8 of document A/CN.9/WG.V/WP.80.

### *Purpose of legislative provisions*

37. The Working Group approved the substance of the purpose clause and agreed to remove the square brackets.

### *Draft recommendations 2 and 3*

38. The Working Group considered the revised draft recommendations 2 and 3 and approved them in substance.

### *Draft recommendation 4*

39. General support was expressed in favour of subparagraphs (a) and (b) of draft recommendation 4 as currently drafted. It was suggested that subparagraph (c) should be aligned with paragraph 14 of document A/CN.9/WG.V/WP.80, making it clear that a creditor could make an application for procedural coordination only in respect of those members of the group of which it was a creditor. It was also suggested that the draft recommendation should include the possibility for the court to initiate procedural coordination, subject to the relevant notice provisions. The substance of the second sentence of footnote 14 to draft recommendation 3 might be included in draft recommendation 4.

### *Draft recommendation 5*

40. It was widely agreed that draft recommendation 5 might cover a number of different variants of procedural coordination and should therefore be as flexible as possible, including references to proceedings that were not only simultaneous, but also joint, concurrent or coordinated.

### *Draft recommendations 6 and 7*

41. The Working Group considered whether, in addition to draft recommendation 6, provision should be made for notice of an application for procedural coordination to be given to relevant creditors. One view was that since procedural coordination was not intended to affect the substantive right of creditors, notice of the application was not required. Another view was that a distinction could be drawn between applications heard at the time of the application for commencement of insolvency proceedings and those heard subsequent to commencement of insolvency proceedings. In the former case, notice was not required, but in the latter case giving notice would be appropriate. It was proposed that a flexible approach could be adopted, prescribing the need for notice but leaving it to domestic law to determine whether that notice should relate not only to the order for procedural coordination, but also to the application for procedural coordination. After discussion, that flexible approach was supported.

42. Concern was expressed with respect to the meaning of the closing words of draft recommendation 7 "of relevance to creditors". The view was expressed that those words did not make it clear what information, in addition to the types of information set forth in recommendation 25 of the Legislative Guide, should be included in the notice. One view was that the notice of an application should include the content of the application and that notice of the order should set forth the terms of the order. After discussion,

support was expressed in favour of the draft recommendation requiring the insolvency law to prescribe the content of the notice.

*Draft recommendation 8*

43. While general support was expressed in favour of the current text of draft recommendation 8, it was suggested that reversal of an order for procedural coordination might also be included. It was pointed out that a distinction could be drawn between reversal of an order for procedural coordination and an order for substantive consolidation. Reversal of an order for procedural coordination might be possible since it should not affect the rights of interested parties in the same way as they would be affected in the case of substantive consolidation. It was noted that reversal of an order for procedural coordination would occur in rare circumstances and might be acceptable if it was without prejudice to rights already affected by the initial order. After discussion, a proposal to address that issue in the commentary received some support.

44. The question of giving notice of an application to modify or terminate an order for procedural coordination and the order modifying or terminating was raised. While some support was expressed in favour of giving notice of the application as well as the order, support was also expressed in favour of giving notice only of the order. It was proposed that the same flexible approach could be adopted as with respect to procedural coordination, prescribing the need for notice but leaving it up to domestic law to determine whether that notice should relate not only to the order for modification or termination, but also to the application for modification or termination. The secretariat was requested to prepare a draft recommendation for consideration by the Working Group at a future session.

**3. Post-commencement finance**

45. The Working Group considered post-commencement finance on the basis of draft recommendations 9-13 of document A/CN.9/WG.V/WP.80.

*Purpose of legislative provisions*

46. It was suggested that although the purpose clause relating to post-commencement finance from the Legislative Guide was relevant, it did not specifically address the enterprise group context and, in particular, the provision of finance by one member of a group to support another member of that group. After discussion, the Working Group agreed that the purpose clause from the Legislative Guide should be included before draft recommendations 9-13 and further paragraphs should be added to reflect the provision of post-commencement finance in the enterprise group context.

*Draft recommendations 9 and 10*

47. After discussion, the Working Group approved draft recommendations 9 and 10 in substance.

*Draft recommendation 11*

48. The Working Group considered various ways in which financing might be provided to a group member subject to insolvency proceedings. That finance might be provided by a lender external to the group and by another member of the group, where that member might be either solvent or subject to insolvency proceedings. The Working Group agreed that post-commencement finance provided by a lender external to the

group or by a solvent member of the group would be covered by the recommendations of the Legislative Guide. Draft recommendations 11-13 were intended to address the situation where post-commencement finance was provided to one member subject to insolvency proceedings by another member also subject to insolvency proceedings.

49. It was recalled that recommendation 64 of the Legislative Guide specified the need to establish the priority to be accorded to post-commencement finance and the level of that priority. Whilst noting the importance of priority as an incentive for such financing, it was questioned whether the level of priority recommended would be appropriate in the context of the provision of finance by members subject to insolvency proceedings to other members also subject to insolvency proceedings. One view was that the same priority would be appropriate; other views suggested it might not be appropriate. After discussion, the Working Group agreed that the draft recommendation should specify the need for the insolvency law to accord priority to such lending, but that the recommendation itself should not specify the level of that priority.

50. A further proposal with respect to draft recommendation 11 was that it should contain the same safeguards as provided in draft recommendation 13. It was noted in response that since the focus of draft recommendation 11 was the priority that might be accorded to lending rather than the process for approval of such lending, safeguards concerning approval were not required. After discussion, the proposal to add safeguards was not supported.

#### *Draft recommendations 12 and 13*

51. It was suggested that draft recommendations 12 and 13 might be combined as the safeguards established in draft recommendation 13, subparagraphs (a) and (b), should also apply to draft recommendation 12. It was noted that although recommendations 66 and 67 of the Legislative Guide provided certain safeguards with respect to the provision of a security interest for post-commencement finance, they were not sufficient for the enterprise group context as they did not contemplate the provision of cross-entity support. The proposal to combine the two draft recommendations was not supported, but the Working Group agreed that the safeguards of draft recommendation 13 should also apply to draft recommendation 12. As a matter of drafting, it was noted that both members of the group referred to in draft recommendation 12 should be subject to insolvency proceedings.

52. It was observed that the provision of post-commencement finance in the situations contemplated by these draft recommendations raised important issues of the balance to be achieved between sacrificing one member of the group for the benefit of other members and achieving a better overall result for all members. The general view was that although the appropriate balance might be difficult to achieve, the goal should be a fair apportionment of the harm in the short term with a view to the long term gain, rather than a sacrifice of one member for the benefit of others.

53. With respect to the words in square brackets in subparagraphs (a) and (b) of draft recommendation 13, support was expressed in favour of the word “determines” and the words “are not likely to be”. A suggestion was made that the test of adverse effect be replaced by a test of unfair prejudice. Various views were expressed with respect to whether the subparagraphs should be cumulative or exclusive. Agreement was reached on the need for flexibility, recognizing the possibility that approval of the insolvency representative might be sufficient without the need for court approval. However, support for a subsequent proposal to combine the paragraphs and adopt a more general test that the rights of creditors should not be harmed removed the necessity of considering that



issue further. It was proposed that the commentary should address the question of who should make the determination with respect to harm to creditors e.g., the insolvency representative, the court or both according to national law or the creditor committee. It was recalled that recommendation 137 of the Legislative Guide addressed rights of appeal with respect to decisions taken by the insolvency representative. With respect to the role of the creditor committee, it was observed that although important, the creditor committee should not be given authority to decide on the granting of post-commencement finance.

54. The Working Group agreed that subparagraphs (a) and (b) should be deleted and the draft recommendation revised to focus on the need to protect creditors from harm. The Working Group further agreed that the commentary should explain the details of the safeguards, including the role to be played by the insolvency representative, the court and the creditor committee.

#### **4. Avoidance proceedings**

55. The Working Group considered avoidance proceedings on the basis of draft recommendations 14 and 15 of document A/CN.9/WG.V/WP.80/Add.1 and approved the substance of those two recommendations.

#### **5. Substantive consolidation**

56. The Working Group considered substantive consolidation on the basis of draft recommendations 16-17 of document A/CN.9/WG.V/WP.80/Add.1.

##### *Purpose of legislative provisions*

57. It was observed that the purpose clause was very useful and should be retained in substance. In order to emphasize the permissive character of the provisions with respect to substantive consolidation, it was suggested that in subparagraph (c) the word “is” should be replaced with “may be made available”. That proposal was supported.

58. A further proposal was made to insert the words “and predictability” at the end of subparagraph (d). It was noted that the concepts of transparency and predictability were used together in the Legislative Guide as key objectives in paragraph 7, part one. Although predictability was agreed to be an implicit goal of all of the draft recommendations, it was noted that with respect to substantive consolidation a distinction could be drawn between the question of whether the standards were predictable or whether the situations in which substantive consolidation would be ordered would always be predictable, given that there was an element of judicial discretion in the applicable standards. After discussion, the Working Group agreed to add the words “and predictability” to the end of subparagraph (d).

##### *Draft recommendation 16*

59. Support was expressed for the draft text, as it established the basic principle of the separate entity and the exception. However, a suggestion was made to delete the words in square brackets and insert a second sentence as follows: “The insolvency law may provide for exceptions in accordance with recommendation 17.” That suggestion found broad support on the basis that it would enhance the clarity of the provision and the Working Group agreed to revise draft recommendation 16 accordingly. It was observed that the reference to the separate legal identity of each member of the enterprise group might need to be reconsidered in light of the explanation of the term “enterprise” and the flexibility of the legal form of the entity.

*Draft recommendation 17*

60. A proposal to delete the phrase “to proceed together as if they were proceedings with respect to a single entity”, retain the words in square brackets in the chapeau and add the words “substantive consolidation of” after the words “the court may order” was widely supported. It was noted that there might be situations where the proceedings might need to be kept separate to resolve certain issues even when the assets were pooled to create a single estate. It was proposed that a connection between draft recommendations 17 and 23 should be made in order to emphasize that the rights of secured creditors would not be prejudiced by an order for substantive consolidation.

61. Various concerns were expressed with respect to the standards established in subparagraph (a). Those were: (a) that the standard of impossibility was too high and would be hard to satisfy before identification had been attempted; and (b) that the meaning of the word “undue” was uncertain and should be replaced with a concept of disproportionality of expense and delay to the amount that could be recovered for creditors or to the benefit to be derived from undertaking the identification. Although some support was expressed in favour of retaining standards of both impossibility and disproportionality, after discussion it was agreed that a standard based upon disproportionality of expense and delay should be used.

62. A number of issues were raised with respect to the scope of substantive consolidation. In particular, it was questioned whether the assets of a solvent or apparently solvent group member might be included in the assets substantively consolidated. It was agreed that paragraph (a) could result in that inclusion and should be permitted. It was further questioned whether draft recommendation 17 should refer to both assets and liabilities, as it might only be necessary to refer to liabilities. Support was expressed in favour of retaining the reference to both assets and liabilities.

63. Concerns were expressed with respect to the terms used in subparagraph (b) and in particular with the conduct sought to be addressed in each case. It was agreed that those terms should be explained in the commentary. After discussion, it was generally agreed that “simulation” might be deleted, with an explanation to be included in the explanation of fraudulent schemes in the commentary.

64. A proposal to delete subparagraph (c) on the basis that it did not meet the standard of objectivity was widely supported. It was observed that the concepts referred to in subparagraph (c) of appearance and reliance might give rise to other remedies, but should not lead to substantial consolidation. Though some views were expressed in favour of retaining subparagraph (c), the Working Group agreed to its deletion. It also agreed that no reference to the concept contained in paragraph (c) should be included in any commentary to draft recommendation 17.

65. The Working Group considered the proposal in paragraph 15 of document A/CN.9/WG.V/WP.80/Add.1 to add a recommendation addressing the consequences of an order for substantive consolidation. It was generally agreed that such a recommendation would be useful. As to its content, it was agreed that such an order would extinguish intra-group claims and debts, but would not establish a single consolidated entity. Consideration of a more general proposal to include in the recommendation some of the effects addressed in draft recommendations 18-23 was deferred, pending discussion of the content of those draft recommendations.

## 6. Additional recommendations on substantive consolidation

66. The Working Group considered additional recommendations on substantive consolidation on the basis of draft recommendations 18-23 of document A/CN.9/WG.V/WP.80/Add.1.

### *Draft recommendation 18*

67. With respect to the scope of draft recommendation 18, it was clarified that partial substantive consolidation provided the possibility of excluding certain assets or claims from an order for consolidation, but did not refer to the exclusion of certain group members from that order. What was intended, for example, was that where ownership of an asset was clear in the case of intermingling of assets, it could be excluded from the consolidation. Although it was acknowledged that in some cases the same result might be achieved through other remedies available under the Legislative Guide, for example, the provisions on abandonment, it might be simpler to provide for those assets to be excluded from the order for consolidation. In response to a concern with respect to the protection of encumbered assets and the wording of paragraph 17, it was agreed that a clearer explanation of partial consolidation would be provided in the commentary. Deletion of the text in square brackets was supported. The Working Group approved the substance of draft recommendation 18 with that deletion.

### *Draft recommendation 19*

68. A proposal to align draft recommendation 19 with draft recommendation 4 was not supported on the basis that procedural coordination could not be equated with substantive consolidation and although it might be appropriate to permit the debtor to apply for the former, it would not be appropriate in the circumstances supporting substantive consolidation under draft recommendation 17. With respect to a proposal that the court might initiate substantive consolidation, the Working Group recalled that it had agreed at its thirty-third session that the court should not be permitted to do so (see A/CN.9/643, para. 83).

69. A suggestion was made to replace the word “should” in the latter part of the paragraph with the word “could” or “may” to broaden the scope of applicants permitted to make the application. Another drafting suggestion was to end draft recommendation 19 after the term “substantive consolidation”, so that it would be left to local insolvency law to specify the persons permitted to make the application. After discussion, the Working Group agreed to substitute the word “may” as proposed and approved the substance of the draft recommendation.

### *Draft recommendation 20*

70. After discussion, the Working Group agreed that draft recommendation 20 should be simplified to provide that in the event substantive consolidation was ordered, a single or first meeting of creditors (where such a meeting was required under the insolvency law) might be convened. It was also agreed that the commentary should address the flexibility of approaches adopted by insolvency laws to the participation of creditors and, in particular, to meetings of creditors.

### *Draft recommendation 21*

71. Broad support was expressed in favour of subparagraph (a) based on recommendation 89 of the Legislative Guide. Some concerns were expressed with

respect to subparagraph (b). One view expressed was that the court should be given the flexibility to decide upon the suspect period in such situations. In response, it was pointed out that the Legislative Guide recommended that the date from which the suspect period would be calculated should be stipulated in the insolvency law. Another view was that subparagraph (b)(ii) would be hard to apply and the result unpredictable. In response, it was observed that subparagraph (b)(ii) did no more than state the usual approach based on subparagraph (a) and recommendation 89 of the Legislative Guide, that there would be a suspect period with respect to each member of the group subject to insolvency proceedings. Subparagraph (b)(i), on the other hand, provided an exception, establishing a common date for all enterprise group members when substantive consolidation was ordered subsequent to commencement of insolvency proceedings. After discussion, the Working Group approved the substance of draft recommendation 21 with: (a) the order of subparagraphs (b)(i) and (b)(ii) to be reversed; and (b) the word “single” in subparagraph (b)(ii) to be replaced with the word “different.”

#### *Draft recommendation 22*

72. In response to a suggestion that an order for substantial consolidation might be difficult to modify, the Working Group recalled that it had agreed in its previous session to include such a recommendation, on the basis that it might be necessary when there were circumstantial changes or new information became available. Broad support was expressed for draft recommendation 22. It was suggested that notice should be provided when modification of an order for substantive consolidation was ordered and that a recommendation along the lines of recommendation 6 should be included. The Working Group approved the substance of draft recommendation 22 and agreed that the issue of notice should be addressed.

#### *Draft recommendation 23*

73. It was suggested that draft recommendation 23 should follow draft recommendation 17, as it addressed an important issue. Another suggestion made was that the commentary should note that a secured creditor could surrender its security interest following consolidation and the debt would become payable by all of the consolidated entities. Both suggestions found support. It was further proposed to include in subparagraph (b) after the term “fraud” the phrase “in which the creditor had participated”. It was noted that since recommendations 4 and 88 of the Legislative Guide would also apply in the group context, subparagraph (b) might not be required. In response, it was suggested that a reference to recommendation 88 should be made in subparagraph (b). A further suggestion made was to extend draft recommendation 23 to include other rights giving priority or advantages over other creditors such as priorities, as well as guarantees and liens. After discussion, the Working Group agreed to all of the proposals made with respect to draft recommendation 23.

74. Recalling the proposal to include a recommendation addressing some of the effects of substantive consolidation referred to in draft recommendations 18-23, the Working Group agreed that such a recommendation should be included and should address the effect on intra-group claims, security interests and other rights as noted above.

#### *Competent court*

75. The Working Group discussed the necessity of defining the competent court for purposes of substantive consolidation. It was suggested that the approach provided in recommendation 13 of the Legislative Guide and the conclusion reached with respect to

procedural coordination that local insolvency law should determine the competency of the court, should be followed. Consequently, the Working Group agreed that the recommendation on the competent court with respect to procedural coordination, which the Working Group had agreed to base on footnote 14 of document A/CN.9/WG.V/80, should also include substantive consolidation.

## **7. Appointment of the insolvency representative**

76. The Working Group considered the appointment of the insolvency representative on the basis of draft recommendations 24-28 of document A/CN.9/WG.V/WP.80/Add.1.

### *Purpose of legislative provisions*

77. The Working Group approved the substance of the purpose clause.

### *Draft recommendation 24*

78. The Working Group approved the substance of draft recommendation 24, with the text currently included in square brackets to be retained without the brackets. It was observed that the commentary should make it clear that the concept of a single insolvency representative might be interpreted as meaning that the same insolvency representative was appointed to each group member.

### *Draft recommendation 25*

79. It was proposed that the text in square brackets should be retained without the brackets, with the words “or may exist” being added at the end of the draft recommendation. That proposal was supported and the Working Group approved the substance of draft recommendation 25. It was noted that a reference to the recommendations of the Legislative Guide addressing requirements for disclosure in relation to conflicts of interest should be included in the commentary.

### *Draft recommendations 26-28*

80. The Working Group approved the substance of draft recommendations 26-28. It was noted that some revision might be required to ensure consistency of the language of subparagraph (d) of draft recommendation 28 with the context.

### *Draft recommendation 29*

81. The Working Group agreed that the focus of draft recommendation 29 was that a single reorganization plan covering two or more members of an enterprise group might be approved in insolvency proceedings concerning those members. To that end, it was agreed that the text in the first and second sets of square brackets should be deleted and the text in the third set of square brackets be retained without the brackets. It was noted that the recommendations of the Legislative Guide with respect to approval of the reorganization plan would apply to the separate approval of the plan by the creditors of each group member covered by the plan.

### *Draft recommendation 30*

82. With respect to the second sentence, it was agreed that the text in the first set of square brackets should be retained without the brackets and that the text in the second and third sets of brackets should be deleted. The Working Group approved the substance of draft recommendation 30.

83. Concern was expressed with respect to whether draft recommendations 29 and 30 referred to both procedural coordination and substantive consolidation, since reorganization in the latter context had not been discussed. For lack of time that issue was not considered, although it was noted that a third possibility included a single reorganization plan being used where there was neither procedural coordination nor substantive consolidation.

84. For lack of time, the issues raised in paragraphs 33 and 34 with respect to post-application financing and treatment of contracts were not considered.

### **C. The onset of insolvency: international issues**

85. The Working Group considered the treatment of enterprise groups in a cross border context on the basis of the issues raised in documents A/CN.9/WG.V/WP.74/Add.2 and A/CN.9/AG.V/WP.76/Add.2. The Working Group noted developments with respect to the project to compile practical experience on negotiation, use and content of cross-border protocols and agreements on the basis of document A/CN.9/629 and the foreshadowed report to the forty-first session of the Commission to be contained in document A/CN.9/654.

86. At the outset, it was suggested that the Working Group should consider the objectives it wished to achieve in the international sphere. The formulation of minimum recommendations on the exercise of jurisdiction, substantive issues and conflict of laws were identified as potential objectives. Whilst acknowledging that conflict of laws rules might be the most difficult of those goals, it was suggested that the formulation of minimum recommendations on the first two might be achievable.

87. A different approach suggested taking the UNCITRAL Model Law on Cross-Border Insolvency as the starting point and considering how it might be supplemented to address the enterprise group context, following the Working Group's approach with the Legislative Guide. That approach might include issues of coordination, involving, for example, procedural coordination of insolvency proceedings and cooperation between courts and insolvency representatives, the benefits of which were widely acknowledged. Other issues proposed for consideration in addition to those addressed by the Model Law included commencement of proceedings, centre of main interests with respect to a group, and post-commencement finance.

88. With respect to coordination, it was questioned how the approach of the Model Law might apply to a group context, given that it operated only as an interface between different legal regimes, respecting the differences between national procedural laws and not seeking to unify insolvency laws. It was suggested that that approach disregarded the economic reality of the group. A different view suggested that the principles of the Model Law, which could be used to address a single debtor with assets in more than one country, might be extended to address two or more debtors with assets in multiple countries. In response, it was pointed out that the example of the single debtor with assets in more than one country involved coordinating different parts of one insolvency estate, while the group situation required coordination of different insolvency estates, unless the notion of a unified group estate could be developed.

89. On the topic of post-commencement finance, it was suggested that some of the structural impediments encountered included issues of authority, personal liability on the part of office holders and insolvency representatives with respect to new debt, the application of avoidance provisions, and issues of priority and its cross-border

recognition. It was noted that finance in the group situation might involve the provision of finance from an external lender that was structured as intra-group finance, being channelled by the initial borrower to other group members, with security provided on the assets of group members, some of which may not receive any of the financing. In the event of the insolvency of two or more members of the group, post-commencement finance might be provided by an external lender and used in the same way. It was observed that that scenario raised issues not considered in the Legislative Guide or in the Working Group's consideration of post-commencement finance in the context of a group in a domestic situation. In response, it was suggested that the recommendations of the Legislative Guide and draft recommendations 9-13 addressed that situation – the Legislative Guide applying where one of the parties to the post-commencement financing transaction was solvent and draft recommendations 11-13 applying where both parties were insolvent.

90. It was proposed that one approach to addressing international issues might be to identify the barriers to facilitating the coordinated treatment of international enterprise groups in insolvency and consider whether it was possible to address those barriers and in what manner. For that purpose, the Model Law, the Legislative Guide and the working papers prepared for Working Group V might be helpful in terms of identifying issues and considering the applicability of solutions already adopted or proposed in order to identify possible gaps. It was suggested that the focus of that task might include issues of commencement of proceedings, jurisdiction, provision of finance, centre of main interests, and coordination and cooperation between courts and insolvency representatives. It was also suggested that the objective of that task would be to consider how to maximize the value of the group and the importance, in that regard, of reorganization.

91. The Working Group agreed with that approach and requested the secretariat to proceed with the preparation for the thirty-fifth session of the Working Group on that basis.

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**D. Note by the Secretariat on the treatment of corporate groups in  
insolvency, submitted to the Working Group on Insolvency Law  
at its thirty-fourth session**

**(A/CN.9/WG.V/WP.80 and Add.1) [Original: English]**

## **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; 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, thirty-second and thirty-third sessions (A/CN.9/618, A/CN.9/622 and A/CN.9/643 respectively). It includes a revision of the recommendations discussed at the thirty-third session of the Working Group (Vienna, 5-9 November 2007), together with notes explaining the revisions and raising additional questions for the consideration of the Working Group.

2. Recommendations bear two numbers: the new number is in parentheses; the previous number from A/CN.9/WG.V/WP.78 and Add.1 is in square brackets.

3. As explained in the Notes on Recommendations, purpose clauses have been introduced with respect to those topics not previously addressed in the Legislative Guide (for example, joint application, procedural coordination and substantive consolidation). The purpose clauses from the Legislative Guide would continue to be relevant with respect to recommendations on other topics (for example, avoidance proceedings) and have not been repeated in this note.

4. It is proposed that the commentary (the material appearing as General Remarks in A/CN.9/WG.V/WP.78 and addenda and as introductory material in documents A/CN.9/WG.V/WP.76 and addenda and A/CN.9/WG.V/WP.74 and addenda) be revised and consolidated for consideration by the Working Group at its thirty-fifth session in 2008. The Working Group may wish to consider that proposal.

## **II. Glossary**

### **A. Terms and explanations**

(a) “Enterprise group”: two or more enterprises, which may include enterprises that are not incorporated, that are bound together by means of capital or control.

(b) “Enterprise”: any entity, regardless of its legal form, engaged in economic activities, including entities engaged on an individual or family basis, as a partnership or an association.<sup>1</sup>

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<sup>1</sup> 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.



(c) “Capital”: contributions to an enterprise, including assets and equity interests.<sup>2</sup>

(d) “Control”: the power normally associated with the holding of a strategic position within the enterprise group that enables its possessor to dominate directly or indirectly those organs entrusted with decision-making authority; slight control or influence is not sufficient. Control could also exist pursuant to a contractual arrangement that provides for the requisite degree of domination.

(e) “Procedural coordination”: coordination of the administration of [separate][individual] insolvency proceedings in respect of two or more members of an enterprise group. Each member, including its assets and liabilities, remains separate and distinct, thus preserving the integrity of the individual enterprises.<sup>3</sup>

(f) Substantive consolidation: [the pooling of the assets and liabilities of two or more members of an enterprise group to create a single insolvency estate for the benefit of creditors of the substantively consolidated members.]<sup>4</sup>

(g) “Parent enterprise”: an enterprise that directly or indirectly controls management and operations of another enterprise by influencing or electing its board of directors. The term may signify an enterprise that does not produce goods or services itself, but was formed for the purpose of owning shares of other enterprises (or owning other enterprises outright). [from A/CN.9/WG.V/WP.74, para. 1 (c)]

(h) “Subsidiary enterprise”: an enterprise that is owned or controlled by another enterprise belonging to the same enterprise group. Usually, a subsidiary is incorporated under the laws of the State in which it is established. [from A/CN.9/WG.V/WP.74, para. 1 (d)]

## B. Notes on terms

### *Enterprise group*

1. At its thirty-third session, the Working Group agreed that the term to be explained should be “enterprise group”, without any limitation to a domestic context or to one of business or commercial activity. International aspects of an enterprise group, such as

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<sup>2</sup> Equity interests would include both trust units and partnership interests.

<sup>3</sup> [taken from A/CN.9/WG.V/WP.78, para. 2 (f), page 3] 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; facilitate the valuation of assets and the identification of creditors and others with legally recognized interests; and avoid duplication of effort. Procedural coordination may include some or all of the following: cooperation between one or more courts, or in the domestic context, administration of the proceedings concerning group members in a single court; the appointment of a single insolvency representative to administer the insolvency proceedings or coordination between insolvency representatives where two or more are appointed; combined hearings and meetings, including joint meetings of creditors; joint deadlines; a single list for the provision of notices and coordinated provision of notice; a joint claims procedure; coordinated sale of assets; and a single creditor committee or coordination among creditors’ committees.

<sup>4</sup> Substantive consolidation generally results in the extinguishment of intra-group liabilities and any issues concerning ownership of assets among the consolidated entities, as well as guarantee claims against any consolidated entity that guaranteed the obligations of another consolidated entity. A single insolvency representative is typically appointed, although that may depend on the stage in the proceedings at which the order is made.

application of the legislation of different States or conduct of business activities in different States, might require additional explanation at a future stage.<sup>5</sup>

#### *Enterprise*

2. At the thirty-third session of the Working Group, it was noted that the explanation of enterprise would include entities such as trusts, which could be part of an enterprise group under the law of certain States. The substance of the explanation was approved by the Working Group with the addition of a footnote to explain the exclusion of consumers and the limitation to entities that would be governed by an insolvency law pursuant to recommendations 8 and 9 of the Legislative Guide.<sup>6</sup> That limitation was previously included in the explanation of the term “*member of an enterprise group*”,<sup>7</sup> which has now been deleted on the basis that it is unnecessary.

#### *Capital*

3. At its thirty-third session, the Working Group agreed that “partnership interests” and “trust units” should be added to the list of what might constitute capital in an enterprise context. To further refine those concepts, the explanation has been revised to refer to equity interests, which is intended to cover both partnership interests and trust units. This is clarified by the footnote. The word “investment”, which creates confusion in some languages, has been changed to the more generic “contribution”. Equity interests would include shares, partnership interests and trust units, while assets would include cash and receivables.

4. The Working Group may wish to consider whether the suggestion made at the thirty-third session to draw a distinction between incorporated and unincorporated entities should be pursued in this explanation.<sup>8</sup>

#### *Control*

5. At its thirty-third session, the Working Group agreed that several issues with respect to the explanation of “control” required further consideration, including whether control should be limited to contractual arrangements; whether distribution and franchising agreements would be included; whether implied control should be excluded; and whether it was intended that certain types of secured transactions that might place a secured creditor in a position of control should be included.<sup>9</sup> The Working Group may also wish to consider whether the phrase “slight control or influence is not sufficient” is required in the explanation.

#### *Member of an enterprise group*

6. This term has been deleted and the reference to entities subject to the insolvency law is now included in the term “enterprise”.

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<sup>5</sup> Report of Working Group V (Insolvency Law) on the work of its thirty-third session, A/CN.9/643, para. 123.

<sup>6</sup> *Ibid.*, para. 124.

<sup>7</sup> See A/CN.9/WG.V/WP.78, paras. 2 (e) and 8.

<sup>8</sup> A/CN.9/643, para. 125.

<sup>9</sup> *Ibid.*, see paras. 13 and 126.

*Procedural coordination*

7. The explanation has been revised in accordance with the deliberations of the Working Group at its thirty-third session.<sup>10</sup> The footnote makes it clear that procedural coordination involves coordination between courts as well as insolvency representatives.

*Substantive consolidation*

8. The explanation of “substantive consolidation” is based upon the explanation included in the glossary, paragraph 1 (j)(ii), of document A/CN.9/WG.V/WP.74. It adopts the structure of the explanation of procedural coordination and includes a footnote setting forth the consequences of such an order.

*Parent enterprise and subsidiary enterprise*

9. These additional terms have been taken from document A/CN.9/WG.V/WP.74 and revised to align them with the other terms of the glossary.

### **III. The onset of insolvency: domestic issues**

#### **A. Application and commencement: joint applications**

##### **1. Purpose of legislative provisions**

[The purpose of provisions on joint application for commencement of insolvency proceedings is:

- (a) To facilitate coordinated consideration of applications for commencement of insolvency proceedings concerning two or more members of an enterprise group; and
- (b) To facilitate efficiency and reduce the costs associated with commencement of insolvency proceedings.]

##### **2. Contents of legislative provisions**

*Joint application for commencement of insolvency proceedings*

(1) The insolvency law may specify that an application for commencement of insolvency proceedings may be made with respect to a single debtor within the meaning of the Legislative Guide or a joint application for commencement of insolvency proceedings may be made with respect to two or more members of an enterprise group. Such a joint application may be made by:

- (a) Two or more members of an enterprise group, 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 members of an enterprise group provided that each of those members satisfies the commencement standard in recommendation 16 of the Legislative Guide.

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<sup>10</sup> Ibid., para. 128.

### 3. Notes on recommendations

10. To better explain the purpose of the draft recommendations on joint application for commencement, an aspect of application and commencement not addressed in the Legislative Guide, the approach of the Legislative Guide has been adopted and a purpose clause introduced. The Working Group may wish to consider the purposes to be included in this clause.

11. Draft recommendation (1) provides that an application for commencement of insolvency proceedings with respect to two or more members of an enterprise group may be made individually for each member (in accordance with the recommendations of the Legislative Guide) or by way of a joint application covering a number of members. Where individual applications are made in accordance with the provisions of the Legislative Guide, those applications may be made at the same time and indicate a shared purpose, i.e. coordinated consideration of applications for commencement of proceedings with respect to a number of members of a group. The Working Group may wish to consider whether a sentence to that effect could usefully be added to the draft recommendation, or whether it would be sufficient for an explanation to be included in the commentary.

12. The revised recommendation adopts a permissive approach to the content of the insolvency law (the insolvency law “may” specify) and the broad approach of the Legislative Guide with respect to the types of proceedings that might be covered by a joint application, referring to commencement of “insolvency” proceedings, rather than “reorganization” proceedings.

13. Paragraph (a) clarifies that each member of the group that is the subject of a joint application must satisfy the relevant commencement standard. That standard includes, pursuant to recommendation 15 (a), imminent insolvency in the case of a debtor application. The Working Group noted at its thirty-third session that additional considerations might arise with respect to imminent insolvency in the group context and that these should be discussed in the commentary.<sup>11</sup>

14. Paragraph (b) permits a creditor to make a joint application for commencement, but limits the application to those group members against which the creditor has a claim; other group members could not be included in a joint application by a creditor.

15. A suggestion made at the thirty-third session of the Working Group was to require a joint application to include facts concerning the existence of the group and the position in the group of each member covered by the application, particularly where one of them is the controlling entity or parent.<sup>12</sup> The Working Group may wish to consider whether a recommendation to that effect should be included.

16. Draft recommendation (2), which addressed provision of notice on the making of a joint application, has, as agreed by the Working Group at its thirty-third session, been deleted.<sup>13</sup> Accordingly, notice of such an application would be given in accordance with the recommendations of part two, chapter I of the Legislative Guide.

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<sup>11</sup> *Ibid.*, para. 34.

<sup>12</sup> *Ibid.*, para. 18.

<sup>13</sup> *Ibid.*, paras. 23-24.

## B. Procedural coordination

### 1. Purpose of legislative provisions

[The purpose of provisions on procedural coordination is:

- (a) To facilitate coordination of proceedings in the interests of creditors and the debtors, while respecting the separate legal identity of each group member; and
- (b) To promote procedural convenience and cost efficiency and avoid duplication of effort.]

### 2. Contents of legislative provisions

*Timing of an application for procedural coordination*

(2) [4] The insolvency law should specify that an application for procedural coordination may be made at the time of an application for commencement of insolvency proceedings under recommendations 15 or 16 of the Legislative Guide or at any subsequent time.

*Procedural coordination of two or more insolvency proceedings*

(3) The insolvency law should specify that the court may decide, on the basis of an application under recommendation (2), that the administration of insolvency proceedings with respect to two or more members of an enterprise group should be coordinated for procedural purposes.<sup>14</sup>

*Parties permitted to apply for procedural coordination*

(4) [5] The insolvency law should specify that an application for procedural coordination may be made by:

(a) A member of an enterprise group that has applied for or is subject to insolvency proceedings;

(b) The insolvency representative of a member of an enterprise group that is subject to insolvency proceedings;] or

(c) A creditor of a member of an enterprise group [in respect of which that creditor has made an application for commencement of insolvency proceedings or that is subject to insolvency proceedings.]

*Simultaneous hearings*

(5) [6] The insolvency law should specify that the court may hold simultaneous hearings on an application for procedural coordination.

*Notice of procedural coordination*

(6) [7] The insolvency law should specify that, if the court orders procedural coordination of insolvency proceedings, notice of the order is to be given to all creditors of the members of the enterprise group included in the procedural coordination.

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<sup>14</sup> When the proceedings to be coordinated are taking place in different courts, it is a matter for domestic law to determine which court should consider the application. It is also a matter for domestic law to determine the power courts may have with respect to initiating procedural coordination of insolvency proceedings.

*Content of notice of procedural coordination*

(7) [8] The insolvency law should specify that the notice of an order for procedural coordination is to include, in addition to the information specified in recommendation 25 of the Legislative Guide, information on the conduct of the procedural coordination of relevance to creditors.

*Modification or termination of procedural coordination*

[(8) 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.]

**3. Notes on recommendations**

17. To better explain the purpose of the draft recommendations on procedural coordination, a topic not addressed in the Legislative Guide, the approach of the Legislative Guide has been adopted and a purpose clause introduced. The Working Group may wish to consider the purposes to be included in this clause.

*Timing of an application for procedural coordination*

18. At its thirty-third session, the Working Group approved the substance of draft recommendation (2) (previously draft recommendation (4), A/CN.9/WG.V/WP.78).<sup>15</sup> It has been revised to clarify that an application for procedural coordination may be made at the same time as an application for commencement or at any time thereafter.

*Procedural coordination of two or more insolvency proceedings*

19. Draft recommendation (3) provides the court with discretion to make an order for procedural coordination on the basis of an application by the parties specified in draft recommendation (4).

20. When the insolvency proceedings concerning two or more group members are being administered in different courts (in a domestic context), it is a question for local law to determine issues of judicial competence over the insolvency proceedings and the application for coordination. It is also a matter for domestic law to determine the power that courts may have with respect to initiating procedural coordination of insolvency proceedings. These two issues are included in a footnote to draft recommendation (3).

21. To facilitate judicial coordination, the commentary might indicate criteria relevant to determining which court should coordinate the proceedings. The criteria might include: the priority in which the applications for commencement of insolvency proceedings were filed; the size of the indebtedness or value of assets of the insolvent group members; or the location of the centre of control of the enterprise group. One State, for example, provides that it should be the court competent to hear the insolvency proceedings of the party with the most substantial assets, determined by reference to the latest balance sheet.

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<sup>15</sup> A/CN.9/643, para. 26.

*Parties permitted to apply for procedural coordination*

22. In accordance with the deliberations of the Working Group at its thirty-third session,<sup>16</sup> draft recommendation (4) (previously draft recommendation (5), A/CN.9/WG.V/WP.78) identifies the parties that may apply for procedural coordination, including a group member that has applied for commencement of proceedings or is already subject to proceedings; the insolvency representative of a group member; or a creditor of a member already subject to insolvency proceedings or of a member subject to an application by that creditor for commencement of insolvency proceedings. It may be presumed that the application for procedural coordination would include the group member making the application or the group member of which the applicant is the insolvency representative or a creditor.

*Simultaneous hearings*

23. The purpose of draft recommendation (5) (previously draft recommendation (6), A/CN.9/WG.V/WP.78) is to simplify the consideration of an application for procedural coordination of proceedings being conducted in different courts, by authorizing simultaneous hearings. It is a question for domestic law to determine which court would be competent to conduct or coordinate the simultaneous hearings.

*Notice of procedural coordination*

24. Draft recommendation (6) (previously draft recommendation (7), A/CN.9/WG.V/WP.78) has been revised in accordance with the decisions of the Working Group at its thirty-third session.<sup>17</sup> The commentary might refer to the relevant discussion in the Legislative Guide,<sup>18</sup> noting that the requirement for provision of notice might be satisfied with collective notification, such as by publication in an official government gazette, a particular legal publication or commercial or widely circulated newspaper, when domestic legislation so permits.

25. The current version of draft recommendation (6) refers only to the provision of notice of an order for procedural coordination. The Working Group may wish to consider whether the provision of notice should be extended to an application for procedural coordination. Where the application for procedural coordination is made at the same time as the application for commencement of insolvency proceedings, the question of notice may raise issues related to the recommendations of the Legislative Guide concerning provision of notice of an application for commencement of insolvency proceedings. Those recommendations provide that while notice of a creditor application for commencement should be provided to the debtor (recommendation 19), notice of a debtor application for commencement is not required to be given to creditors. If notice of the application for procedural coordination were to be provided to creditors in that situation, it may be inconsistent with the approach of the Legislative Guide with respect to notification of the application for commencement.

26. However, where the application for procedural coordination is made after insolvency proceedings have commenced, the Working Group may wish to consider whether it might be appropriate to provide that all creditors of those members likely to be concerned by the application for procedural coordination should be notified.

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<sup>16</sup> Ibid., paras. 27-28.

<sup>17</sup> Ibid., paras. 30-31.

<sup>18</sup> For example, part two, chap. 1, paras. 69-70.

*Content of notice of procedural coordination*

27. Additional information of relevance to creditors referred to in draft recommendation (7) (previously draft recommendation (8), A/CN.9/WG.V/WP.78) might include information on coordination of hearings, filing and processing of claims, financing arrangements and so forth. The Working Group may wish to consider, recalling recommendation 25 of the Legislative Guide, whether more specific examples of that information might be included in the recommendation.

*Modification or termination of procedural coordination*

28. At its thirty-third session, the Working Group agreed to include a draft recommendation on modification or reversal of an order for procedural coordination,<sup>19</sup> which is reflected in draft recommendation (8). Reversal is not included as an option on the basis that it is likely to prove not only impossible to return the individual group members to the position they were in at the time the order was made, but also undesirable where it involves unwinding actions taken in the administration of the insolvency proceedings that might potentially affect creditors and other parties in interest. Where an order is to be modified or terminated, actions already taken pursuant to the order should be respected and not unwound or changed retroactively by the order for modification or termination. The commentary may include a discussion of the reasons justifying such a modification or termination, for example, that circumstances have changed since the order was made.

**C. Post-commencement finance****1. Contents of legislative provisions***Attracting and authorizing post-commencement finance*

(9) The insolvency law should facilitate and provide incentives for post-commencement finance to be obtained, in the context of insolvency proceedings with respect to members of an enterprise group, for the reasons and on the basis set forth in recommendation 63 of the Legislative Guide.

(10) The insolvency law should specify that, in accordance with recommendations 64-68 of the Legislative Guide, post-commencement finance may be obtained by a member of an enterprise group that is subject to insolvency proceedings.

*Priority for post-commencement finance*

(11) The insolvency law should specify that the priority for post-commencement finance referred to in recommendation 64 of the Legislative Guide should also apply to post-commencement finance provided to a member of an enterprise group that is subject to insolvency proceedings.

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<sup>19</sup> A/CN.9/643, para. 33.



*Security for post-commencement finance*

(12) The insolvency law should specify that the security interests referred to in recommendation 65 of the Legislative Guide may also be granted by a member of an enterprise group that is subject to insolvency proceedings for repayment of post-commencement finance provided to another member of that group.<sup>20</sup>

*Guarantee or other assurance for repayment of post-commencement finance*

(13) The insolvency law should specify that a member of an enterprise group that is subject to insolvency proceedings may guarantee or provide other assurance of repayment for post-commencement finance obtained by another member of the enterprise group subject to insolvency proceedings, provided:

(a) The insolvency representative of the guarantor [is satisfied][determines] that the creditors of the guarantor will not be [are not likely to be] adversely affected by the guarantee or other assurance of repayment and consents to the provision of that guarantee or other assurance of repayment; or

(b) The court with jurisdiction over the guarantor [is satisfied][determines] that the creditors of the guarantor will not be [are not likely to be] adversely affected by the guarantee or other assurance of repayment.

**2. Notes on recommendations**

29. At its thirty-third session, the Working Group noted that draft recommendations (9)-(11) repeated key elements of the recommendations of the Legislative Guide and discussed, as a matter of drafting, how the current work should be integrated with the Legislative Guide.<sup>21</sup> The draft recommendations have been retained pending further discussion on drafting techniques. The Working Group approved the substance of draft recommendations (9)-(11), agreeing that the approach of the Legislative Guide with respect to the availability of post-commencement finance in insolvency proceedings generally should be followed.

30. Since draft recommendations (9) and (10) are of a general nature, essentially referring to those recommendations of the Legislative Guide relevant to post-commencement finance, the Working Group may wish to consider whether they could be combined so that a single draft recommendation would refer generally to post-commencement finance being available in the enterprise group context in accordance with recommendations 63-68 of the Legislative Guide.

*Priority for post-commencement finance*

31. The language of draft recommendation (11), based upon recommendation 64 of the Legislative Guide, has been aligned with the format of the other draft recommendations.

*Security for post-commencement finance*

32. Draft recommendation (12) is based upon recommendation 65 of the Legislative Guide. It permits one group member subject to insolvency proceedings to grant a security

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<sup>20</sup> 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.

<sup>21</sup> A/CN.9/643, para. 37.

interest for repayment of post-commencement finance paid to another group member also subject to insolvency proceedings. It was observed at the thirty-third session of the Working Group that although the provision of finance by a solvent entity might cause prejudice to its creditors, it was not a matter of insolvency law, but rather one of the law regulating companies, which might require approval of shareholders or directors. However, it was also observed that even though it might be an issue of company law, a rule might be useful to ensure that post-commencement finance could be made available by a solvent entity in a group context in States where such lending might otherwise be ultra vires.<sup>22</sup>

33. The Working Group discussed the safeguards that might apply to the provision of a security interest under draft recommendation (12), which might parallel those provided under draft recommendation (13). Recommendations 66 and 67 of the Legislative Guide, however, provide safeguards applicable to the granting of a security interest. These include the consent of existing secured creditors and, where that is not given, consent of the court. Accordingly, the Working Group might wish to consider whether the safeguards set forth in recommendations 66 and 67 would be sufficient in the enterprise group context, or whether additional safeguards, such as provided in paragraph (a) of draft recommendation (13) would also be required. If additional conditions are to be added, the Working Group may wish to consider including an explanation of the need for those additional conditions in the commentary.

*Guarantee or other assurance for repayment of post-commencement finance*

34. Draft recommendation (13) addresses a situation not covered directly by the Legislative Guide, i.e. the granting of a guarantee or other assurance of payment by one group member subject to insolvency proceedings for post-commencement finance paid to another group member subject to insolvency proceedings. Since that situation is not covered directly by the safeguards provided by recommendations 66 and 67 of the Legislative Guide, paragraphs (a) and (b) have been added. Those paragraphs have been revised to take account of the deliberations of the Working Group at its thirty-third session<sup>23</sup> with respect to the test to be satisfied by both the insolvency representative and the court. The Working Group may wish to consider the alternative texts included in square brackets. It was noted at the thirty-third session that where a single insolvency representative was appointed to the insolvency proceedings of several group members, a conflict might arise with respect to the requirements of paragraph (a).<sup>24</sup> Such a conflict should be addressed under draft recommendation (25) below.

35. Paragraphs (a) and (b) are currently drafted as alternatives. Although the Working Group approved that approach, it was acknowledged that the possibility of including both, if required by a State, might be noted in the commentary.<sup>25</sup>

36. At the thirty-third session of the Working Group, a suggestion to include a further requirement that addresses the rationale for, or identifies criteria that could guide, the provision of finance.<sup>26</sup> Both the purpose clause for the recommendations on post-commencement finance and recommendation 63 of the Legislative Guide provide the rationale for post-commencement finance, including that it may be obtained by the

<sup>22</sup> Ibid., para. 39.

<sup>23</sup> Ibid., paras. 44-48.

<sup>24</sup> Ibid., para. 44.

<sup>25</sup> Ibid., para. 46.

<sup>26</sup> Ibid., para. 47.

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insolvency representative where it is determined to be necessary for the continued operation or survival of the business of the debtor or the preservation of the value of the insolvency estate of the debtor. Since that purpose clause and recommendation would apply in the enterprise group context by virtue of draft recommendations (9) or (10),<sup>27</sup> it might not need to be added to draft recommendation (13), depending upon the Working Group's decision with respect to integration of the current text into the Legislative Guide.

37. A further proposal that draft recommendations (12) and (13) might be merged<sup>28</sup> has not been followed on the basis that draft recommendation (12) is based directly upon recommendation 65 of the Legislative Guide, while draft recommendation (13) introduces a means of securing post-commencement finance in the group context that is not addressed in the Legislative Guide.

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<sup>27</sup> Ibid.

<sup>28</sup> Ibid., para. 48.

**A/CN.9/WG.V/WP.80/Add.1 (Original: English)****Note by the Secretariat on the treatment of corporate groups in insolvency, submitted to the Working Group on Insolvency Law at its thirty-fourth session****ADDENDUM****II. The onset of insolvency: domestic issues** (*continued*)**D. Avoidance proceedings****1. 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 members of the enterprise group that are parties to the transaction; the purpose of the transaction; and whether the transaction granted advantages to members of the enterprise group 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 members of an enterprise group.<sup>1</sup>

**2. Notes on recommendations**

1. At its thirty-third session, the Working Group approved the substance of draft recommendations (14) and (15) as a basis for future deliberations and suggested that recommendation (15) should more clearly indicate the connection with recommendation 97 of the Legislative Guide. The elements of recommendation 97 are therefore included in a footnote. The Working Group may wish to consider whether that reference is sufficient.

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<sup>1</sup> 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 ensure respect, as a basic principle, for the separate legal identity of each member of an enterprise group;
- (b) To provide legislative authority for substantive consolidation; and
- (c) To specify the very limited the 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.]

### 2. Contents of legislative provisions

*Separate legal identity in enterprise groups*

(16) The insolvency law should respect the separate legal identity of each member of an enterprise group[, except as provided in recommendation 17].

*Substantive consolidation*

(17) The insolvency law may specify that the court may order insolvency proceedings with respect to two or more members of an enterprise group to proceed together as if they were proceedings with respect to a single entity[, pooling the assets and liabilities of those members to create a single insolvency estate], but only in the following limited circumstances:

(a) Where the court is satisfied that there was such an intermingling of assets of the enterprise group members that [it is impossible to identify the ownership of individual assets][the ownership of individual assets cannot be identified without undue expense or delay]; or

(b) Where two or more members of an enterprise group are engaged in simulation, 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; or

[(c) Where the court is satisfied that the enterprise group presented itself as a single enterprise or otherwise behaved in a manner that encouraged third parties [to deal with it as a single enterprise][to believe they were dealing with a single enterprise] [and blurred the legal boundaries between group members].]

### 3. Notes on recommendations

2. To better explain the draft recommendations on substantive consolidation, the approach of the Legislative Guide has been adopted and a purpose clause introduced. The Working Group may wish to consider the purposes to be included in that clause.

3. At its thirty-third session, the Working Group approved the substance of draft recommendation (16),<sup>2</sup> noting that the principle it reflected should apply as a general

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<sup>2</sup> A/CN.9/643, para. 62.

rule. On that basis, the cross-reference to draft recommendations (17) might not be required, and it is therefore included in square brackets for further consideration. The deletion of that qualification suggests that the draft recommendation could form part of a general introduction to this work.

4. To better explain the purpose of the draft recommendations on substantive consolidation, a topic not addressed in the Legislative Guide, the approach of the Legislative Guide has been adopted and a purpose clause introduced. The Working Group may wish to consider the purposes to be included in this clause.

#### *Substantive consolidation*

5. Draft recommendation (17) has been revised in accordance with decisions taken by the Working Group at its thirty-third session.<sup>3</sup> Following a suggestion that the chapeau of the draft recommendation should include confirmation that the result of substantive consolidation is a single insolvency proceeding concerning a single insolvency estate, that wording has been included in the chapeau, as well as in the explanation of substantive consolidation in the glossary. Further explanation concerning substantive consolidation could be included in the commentary.

#### *Intermingling of assets*

6. Paragraph (a) applies to intermingling of assets among members of the group, without specifying that those members must be subject to insolvency proceedings. Accordingly, the intermingled assets may relate to insolvent members as well as to solvent and apparently solvent members,<sup>4</sup> in accordance with a suggestion made in the Working Group.

7. Various alternatives are proposed for the relevant test with respect to identification of individual ownership of assets. In jurisdictions that include intermingling of assets as a basis for substantive consolidation, courts have adopted different approaches to the question of how difficult the process of disentanglement must be before justifying substantive consolidation. Some have required that disentanglement must be impossible or have adopted a test related to costs. For example, that the expense of unscrambling would threaten any recovery by the creditors; that it would be so costly as to consume the assets of the estates; or that it would be prohibitively expensive.

8. The standard of “impossible to identify” could be very difficult to prove and may not be workable. While such identification might require the expenditure of a significant amount of resources (for example, all of the available assets), extended legal proceedings and considerable uncertainty for all parties, it may nevertheless not be “impossible”. Such an outcome would, however, defeat the key goals of insolvency, including maximizing the value of the assets. In practice, courts faced with an “impossibility” standard may adopt the approach of interpreting the standard to mean “cannot be accomplished without undue expense and delay”, where the court would balance expense and delay to determine what was in the best interests of the insolvency estate and the creditors. An alternative to the standard of “impossible to identify” might therefore be that individual ownership cannot be identified without undue cost or delay. The relevant tests and the practical issues related to them, such as the burden of proof, could be further discussed in the commentary. The Working Group may wish to consider which approach should be taken.

<sup>3</sup> Ibid., paras. 63-75.

<sup>4</sup> Ibid., para. 65.

9. A further issue the Working Group may wish to consider with respect to intermingling of assets relates to the question of ownership. While it might be possible to identify the actual ownership of assets at the time of commencement of the insolvency proceedings, the key question might be whether assets had been converted and transferred among enterprise group members in a way that ignored a member's separate legal existence, thus defeating reasonable expectations upon which the member's creditors extended credit. Identifying ownership in those circumstances might involve unravelling a web of intra-group transactions. For that reason the Working Group may wish to consider whether it might be desirable to describe ownership for the purposes of paragraph (a), as "rightful" or "equitable".

*Simulation, fraudulent schemes and activities with no legitimate business purpose*

10. Paragraph (b) focuses on the use of group members for three particular types of activity – simulation, fraudulent schemes and those with no legitimate business purpose. As such, it focuses on the actual conduct of such activities through group members and would include entities established and used to conduct those schemes and activities, as well as entities established for legitimate purposes, but later used for those schemes and activities. At its thirty-third session the Working Group agreed that although it might be desirable give more definition to the type of fraud contemplated, it would be difficult to do so and that the current approach should be retained for further consideration.<sup>5</sup>

11. In addition to conduct of the specific schemes and activities, draft paragraph (b) requires the court to be satisfied that substantive consolidation of the relevant entities is essential to remedy the three types of activity; if another remedy is available to achieve that result, it should generally be adopted. Where the activity referred to under paragraph (b) involved intermingling of assets within the scope of paragraph (a), substantive consolidation could be ordered under paragraph (a).

*Where a group presents itself as a single entity*

12. Paragraph (c) incorporates the ideas previously reflected in draft recommendation [18] of A/CN.9/WG.V/WP.78/Add.1 and focuses on behaviour of the enterprise group that has given creditors a deceptive appearance of unity, leading them to believe they were dealing with a single entity, rather than with different members of a group. The Working Group may wish to consider whether such behaviour should be limited to fraudulent behaviour, or might include situations where through, for example, incompetence or bad management, the same appearance of unity is conveyed.

13. Factors relevant to considering whether paragraph (c) is satisfied might include: how the group promoted its public image through advertising, marketing and correspondence generally; financial arrangements, such as payment of invoices to one group member by other group members or payment of invoices to a number of group members by one group member; commonality of directors and company secretaries between members of the group; the use of a single bank account for all members; treatment of creditors of one group member as if they were creditors of other group members or of the group more generally, so that creditors lost their connection with specific debtors; and confusion with respect to the treatment of employees, in particular with respect to the identity of the employing entity. While many of these factors are commonplace occurrences within an enterprise group, they would provide grounds for substantive consolidation only in limited circumstances where reasonable due diligence

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<sup>5</sup> Ibid., paras. 63-75.

on the part of creditors would not have ascertained the identity of the entity with which they were dealing.

14. It was suggested at the Working Group's thirty-third session that some clarification might be required as to the time at which the behaviour referred to in paragraph (c) took place, as it might have changed over time and with respect to different creditors.<sup>6</sup> The Working Group may wish to consider whether that issue requires further discussion and should be addressed in the commentary.

15. To clarify the consequences of substantive consolidation, the Working Group may wish to consider whether an additional recommendation to that effect is required. That recommendation might indicate, for example, that an order for substantive consolidation creates a single consolidated entity; extinguishes each debt payable by a group member or members to any other group member or members; or extinguishes each claim that a group member or members has against any other group member or members and so forth.

#### **4. Additional recommendations on substantive consolidation**

##### **(a) Contents of legislative provisions**

###### *Partial substantive consolidation*

[(18) The insolvency law may specify that the court may exclude specified assets or claims from an order for substantive consolidation [may make an order for partial substantive consolidation by excluding specified assets or claims from the consolidated assets].]

###### *Application for substantive consolidation*

[(19) The insolvency law should specify the persons permitted to make an application for substantive consolidation, which should include the insolvency representative of any enterprise group member or a creditor of any such group member.]

###### *Meetings of creditors*

[(20) The insolvency law should specify that if a first meeting of creditors is to be convened within a specified period of time after commencement of insolvency proceedings and substantive consolidation is ordered, a single creditor meeting [for all creditors of the enterprise groups members subject to substantive consolidation] may be convened.]

###### *Calculation of suspect period in substantive consolidation*

[(21) 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;

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<sup>6</sup> Ibid., para. 76.



(b) When substantive consolidation is ordered subsequent to commencement of insolvency proceedings, the specified date from which the suspect period is calculated retrospectively with respect to the enterprise group members included in the substantive consolidated may be:

- (i) 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; or
- (ii) A single 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 group member, in accordance with recommendation 89 of the Legislative Guide.]

*Modification of an order for substantive consolidation*

[(22) 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].]

*Treatment of security interests in substantive consolidation*

[(23) The insolvency law should respect the rights and priorities of a creditor holding a security interest over an asset of a member of an enterprise group that is subject to an order for substantive consolidation, unless:

- (a) The secured indebtedness is owed solely between members of the enterprise group and is eliminated on substantive consolidation; or
- (b) The court determines the security was obtained by fraud.]

**(b) Notes on recommendations**

16. At its thirty-third session, the Working Group agreed that drafts of several additional recommendations should be prepared for future consideration.<sup>7</sup>

*Partial substantive consolidation*

17. Draft recommendation (18) addresses the possibility that an order for partial substantive consolidation may be made, where certain assets or claims would be excluded from the assets to be pooled. Consistent with draft recommendation (17), draft recommendation (18) is permissive, both with respect to what the insolvency law may stipulate and whether or not the court makes an order for partial substantive consolidation. The order for partial substantive consolidation might exclude, for example, secured creditors to the extent they relied on the encumbered assets to satisfy their claims or those assets whose ownership is undoubtedly clear. With respect to solvent group members, the order for substantive consolidation might include only the net equity (if any) of those solvent members, leaving their creditors unaffected. The manner in which the order might be partial could be explained in the commentary.

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<sup>7</sup> Ibid., paras. 81, 93, 108.

*Application for substantive consolidation*

18. Draft recommendation (19) reflects the agreement of the Working Group at its thirty-third session with respect to persons permitted to apply for substantive consolidation.<sup>8</sup> The time at which an application might be made was also discussed and a number of issues identified.<sup>9</sup> In particular, it was noted that while there should be sufficient flexibility for additional group members to be added over time, it would be difficult, once certain stages in the insolvency proceedings had been reached, such as a reorganisation plan had been approved or partial distributions made, to add further members. The Working Group may wish to consider whether a further recommendation is required or whether those issues should be addressed in the commentary.

*Meetings of creditors*

19. Draft recommendation (20) relates to recommendation 128 of the Legislative Guide concerning convening of creditors meetings on commencement of proceedings. The draft recommendation provides that a single meeting may be convened for all creditors of the group members included in the substantive consolidation. The principal purpose of a single meeting would be to save time and costs. Where creditors are required to vote, the insolvency law may specify that a resolution passed by creditors at a consolidated meeting may be regarded as having been passed by the creditors of each of the group members included in the substantive consolidation.

*Calculation of suspect period in substantive consolidation*

20. At its thirty-third session, the Working Group noted the particular difficulties that might arise with respect to avoidance and calculation of the suspect period when substantive consolidation has been ordered.<sup>10</sup> When substantive consolidation was ordered at the same time as commencement of insolvency proceedings with respect to those group members to be substantively consolidated, recommendation 89 of the Legislative Guide was sufficient. However, where substantive consolidation was ordered after commencement of insolvency proceedings and group members were added to the substantive consolidation at different times, difficult issues might arise, especially where the period of time between the application for or commencement of proceedings and the order for consolidation was long. It was also noted that if the date of the order for substantive consolidation was chosen as the relevant date for calculation of the suspect period, problems might arise with respect to transactions entered into by or between group members between that date and the date of application for or commencement of the insolvency proceedings, creating uncertainty for creditors and lenders. Draft recommendation (21) has been prepared for further consideration by the Working Group, as requested.

*Modification of an order for substantive consolidation*

21. Draft recommendation (22) reflects agreement at the thirty-third session of the Working Group that an order for substantive consolidation may be modified.<sup>11</sup> The draft recommendation includes a specific reference to an order for partial substantive consolidation. The recommendation does not indicate the ground for such modification, but the commentary could explain that such a modification might be appropriate where,

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<sup>8</sup> Ibid., para. 82.

<sup>9</sup> Ibid., para. 84.

<sup>10</sup> Ibid., paras. 89-93.

<sup>11</sup> Ibid., para. 88.

for example, circumstances change, new information about the debtors becomes available after substantive consolidation, or material information was not made available at the time of the order for substantive consolidation. The words included in square brackets are also included in draft recommendation (8) above (see A/CN.9/WG.V/WP.80) on procedural coordination, to ensure acts and decisions taken pursuant to the order for substantive consolidation would be unaffected by modification of that order.

*Treatment of security interests in substantive consolidation*

22. At its thirty-third session, the Working Group agreed that recognizing and respecting security interests should be a key principle in substantive consolidation, although noting that there might be exceptions to that principle in certain limited cases.<sup>12</sup> Draft recommendation (23) establishes the general principle and the two possible exceptions discussed by the Working Group.

*Provision of notice of substantive consolidation*

23. At its thirty-third session the Working Group discussed, but did not reach a conclusion on, the issue of provision of notice of an application for substantive consolidation.<sup>13</sup> The Working Group may wish to confirm that recommendations 19 (a), 22 and 23 of the Legislative Guide are sufficient for that purpose, or whether a draft recommendation along the lines of draft recommendation (6) above (see A/CN.9/WG.V/WP.80) concerning procedural coordination might be included. Under the recommendations of the Legislative Guide, group members affected by a creditor application for substantive consolidation would be notified of that application and parties in interest would be informed when, on an application by the insolvency representative of a group member, the court orders substantive consolidation.

24. Draft recommendation (7) above (see A/CN.9/WG.V/WP.80) addresses the information that, in addition to what is required under recommendation 25 of the Legislative Guide, should be included in the notice where procedural coordination is ordered. A similar approach might be desirable when substantive consolidation is ordered, to ensure creditors and other parties in interest are informed of the effect of the order for substantive consolidation. The Working Group may wish to consider whether a recommendation similar to recommendation (7) above should be included in the recommendations on substantive consolidation.

## **F. The insolvency representative**

### **1. 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 members of an enterprise group; and

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<sup>12</sup> Ibid., para. 80.

<sup>13</sup> Ibid., para. 85.

(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 insolvency representative*

(24) [19] 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 members of an enterprise group] a single insolvency representative may be appointed.

### *Conflict of interest*

(25) [20] The insolvency law should specify measures to address a conflict of interest that might arise between the estates of two or more members of an enterprise group where only one insolvency representative is appointed. Such measures may include the appointment of one or more additional insolvency representatives [for each estate with respect to which a conflict exists].

### *Cooperation between two or more insolvency representatives in a group context*

(26) [21] The insolvency law may specify that where insolvency proceedings are commenced with respect to two or more members of an enterprise group, the insolvency representatives appointed to those proceedings should cooperate to the maximum extent possible.<sup>14</sup>

### *Cooperation between two or more insolvency representatives in procedural coordination*

(27) [22] The insolvency law should specify that, where 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*

(28) [23] To the extent permitted by law, cooperation to the maximum extent possible may 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 lead role;
- (c) Coordination with respect to proposal and negotiation of reorganization plans; and
- (d) Coordination with respect to administration and supervision of the debtors' affairs and continuation of its business, including post-commencement financing;

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<sup>14</sup> 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.

safeguarding of assets; use and disposition of assets; use of avoidance powers; filing and approval of claims; and distributions to creditors.

### 3. Notes on recommendations

25. To better explain the draft recommendations on appointment of a single insolvency representative and the desirability of coordination of multiple proceedings commenced with respect to members of the same enterprise group, the approach of the Legislative Guide has been adopted and a purpose clause introduced. The Working Group may wish to consider the purposes to be included in that clause.

26. Draft recommendation (24) (previously draft recommendation [19] of A/CN.9/WG.V/WP.78/Add.1) has been revised in accordance with a request by the Working Group at its thirty-third session.<sup>15</sup> It is not limited to cases where procedural coordination is ordered, referring instead to cases where the court determines it to be in the best interests of the administration of the relevant insolvency estates that a single insolvency representative be appointed.

27. Draft recommendation (25) (previously draft recommendation [20], A/CN.9/WG.V/WP.78/Add.1) has been revised to align it with draft recommendation (24) and remove the limitation to conflicts of interest that arise only in cases of procedural coordination. The Working Group approved the substance of draft recommendation (25) at its thirty-third session.<sup>16</sup>

28. Draft recommendation (26) (previously draft recommendation [21], A/CN.9/WG.V/WP.78/Add.1) has been revised to take account of concerns expressed at the thirty-third session of the Working Group.<sup>17</sup> Since different jurisdictions adopt different approaches to cooperation between insolvency representatives, whether in general or in respect of procedural coordination in particular, the draft recommendation adopts the permissive approach of “the insolvency law may”. The goal of the recommendation is to encourage cooperation, in the interests of efficiency and cost effectiveness, as well as of achieving the best solution for the insolvent members of the group and other interested parties. The closing words in both draft recommendations (26) and (27) (previously draft recommendation [22], A/CN.9/WG.V/WP.78/Add.1) have been deleted to avoid confusion with the notion of procedural coordination. Draft recommendation (26) applies to any instance of insolvency proceedings with respect to two or more members of an enterprise group; draft recommendation (27) is specific to procedural coordination.

29. Draft recommendation (28) (previously draft recommendation [23], A/CN.9/WG.V/WP.78/Add.1) has been revised to make the forms of cooperation available to the insolvency representative subject to applicable domestic law, recognizing that some of the forms of cooperation listed might be regulated by law and could not therefore be disposed of by agreement between the insolvency representatives. Paragraph (b) has been revised to include the possibility that the insolvency representatives appointed to members of an enterprise group may agree between themselves that one of them should take a lead or coordinating role, in accordance with a suggestion made at the thirty-third session of the Working Group.<sup>18</sup>

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<sup>15</sup> A/CN.9/643, paras. 96-97.

<sup>16</sup> *Ibid.*, para. 99.

<sup>17</sup> *Ibid.*, paras. 101-104.

<sup>18</sup> *Ibid.*, para. 103.

## G. Reorganization

### 1. Contents of legislative provisions

#### *Reorganization plan*

(29) [24(a)] The insolvency law should, in addition to recommendations 139-159 of the Legislative Guide, permit a single reorganization plan [covering all relevant members of an enterprise group] to be approved [by the creditors of each member of an enterprise group subject to insolvency proceedings] [in insolvency proceedings with respect to two or more members of an enterprise group].

(30) [24(b)] The insolvency law may provide that a member of an enterprise group that is not subject to insolvency proceedings may participate in a reorganization plan proposed for two or more members of the enterprise group subject to insolvency proceedings. This paragraph [does not affect][is without prejudice to] the rights [under applicable corporate rules] of shareholders or creditors of that member.

### 2. Notes on recommendations

30. Draft recommendation (29) (previously draft recommendation [24](a), A/CN.9/WG.V/WP.78/Add.1) has been revised to clarify the issues raised by the Working Group at its thirty-third session<sup>19</sup> and includes possible additional or alternative text in square brackets that the Working Group may wish to consider. It was noted at the previous session that a single plan (in the sense of the same or a similar plan) would be proposed in each of the proceedings relating to group members covered by the plan and that the creditors of each member would vote on its approval separately, in accordance with the voting requirements applicable to individual debtors. It is not proposed that the plan would be approved on a group basis with creditors voting in classes across the group. The process for preparation and solicitation of its approval should take into account the desirability of approval by all relevant members and the benefits to be derived from such approval. Those issues are covered by recommendations 143-144 of the Legislative Guide concerning content of the plan and the accompanying disclosure statement. Additional details to be included in the disclosure statement might relate to group operations and the functioning of the group as such, as well as information concerning the participation in the reorganization of any solvent members of the enterprise group.

31. Draft recommendation (30) (previously draft recommendation [24](b), A/CN.9/WG.V/WP.78/Add.1) has been revised to clarify the role of insolvency law with respect to the participation of a solvent group member in a plan of reorganization for insolvent members of a group. The Working Group noted that the decision of a solvent group member to participate in the plan was an ordinary business decision for that entity to take in accordance with applicable law; it was not a matter for creditors of that entity (unless required under applicable law) or for regulation by the insolvency law. That participation by the solvent entity might include, for example, provision of financing or assets to the reorganization or merger with insolvent entities to form a new entity under the plan, the details of which, including the effects on creditors of the solvent entity, should be included in the relevant disclosure statements. The last sentence of the recommendation is intended to ensure that the participation of the solvent entity in the reorganization plan does not prejudice the rights of creditors or shareholders of the solvent member. The Working Group may wish to consider whether the rights of both

<sup>19</sup> Ibid., paras. 113-117.

creditors and shareholders should be limited to those under applicable corporate rules or should refer to those rights more generally.

32. The Working Group may wish to consider whether the additional information that might be required in the enterprise group context with respect to the disclosure statement under recommendation 143 of the Legislative Guide should be specified in a supplementary recommendation.

## **H. Issues to be further considered by the Working Group**

33. The Working Group may wish to recall that at its thirty-third session it decided to further consider two issues at a future session: post-application financing and treatment of contracts.<sup>20</sup>

34. With respect to post-application finance, the Working Group may wish to consider whether the addition of a recommendation enabling a member of an enterprise group to seek and obtain financing between the application and commencement of insolvency proceedings might be included, subject to certain conditions. Those conditions might include: the debtor can demonstrate that, without such financing, it would be unable to continue operations; the lender has received notice of the application for commencement of insolvency proceedings and nevertheless consents to the terms of the post-application loan; and the court determines, for example, that the terms of the post-application finance are necessary, fair and in the best interests of creditors.

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<sup>20</sup> Ibid., paras. 49-51 and 52-54 respectively.





## V. SECURITY INTERESTS

### A. Report of the Working Group on Security Interests on the work of its thirteenth session (New York, 19-23 May 2008)

(A/CN.9/649) [Original: English]

#### CONTENTS

	<i>Paragraphs</i>
I. Introduction . . . . .	1-6
II. Organization of the session . . . . .	7-12
III. Deliberations and decisions . . . . .	13
IV. Security rights in intellectual property . . . . .	14-109
A. General . . . . .	14-15
B. Creation of a security right (effectiveness as between the parties) . . . . .	16-28
1. The concept of creation . . . . .	16-17
2. Creation and registration . . . . .	18-20
3. Legal or contractual limitations to the transferability of an intellectual property right . . . . .	21-22
4. The creation of security rights in future intellectual property rights . . . . .	23
5. Ownership in encumbered intellectual property rights . . . . .	24
6. Nature of encumbered asset . . . . .	25
7. Acquisition financing and licence agreements . . . . .	26
8. Intellectual property rights related to tangible assets . . . . .	27-28
C. Third-party effectiveness of a security right . . . . .	29-31
1. The notion of third-party effectiveness . . . . .	29
2. Third-party effectiveness of security rights in intellectual property rights that are registrable in an intellectual property rights registry . . . . .	30
3. Third-party effectiveness of security rights in intellectual property rights that are not registrable in an intellectual property rights registry . . . . .	31
D. The registry system . . . . .	32-40
1. Coordination of registries . . . . .	32-34
2. Registration of notices about security rights in future intellectual property rights . . . . .	35
3. Dual registration or search . . . . .	36-38

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4.	Time of effectiveness of registration . . . . .	39
5.	Registration of security rights in trademarks . . . . .	40
E.	Priority of a security right. . . . .	41-56
1.	Identification of competing claimants . . . . .	41-43
2.	Relevance of knowledge of prior transfers of security rights . . . . .	44
3.	Priority of a right registered in an intellectual property rights registry . . . . .	45-48
4.	Priority of a right that is not registrable in an intellectual property rights registry . . . . .	49
5.	Rights of transferees of encumbered intellectual property rights . . . . .	50
6.	Rights of licensees in general. . . . .	51
7.	Rights of ordinary-course-of-business non-exclusive licensees . . . . .	52-56
F.	Rights and obligations of the parties to a security agreement . . . . .	57-59
1.	Application of the principle of party autonomy . . . . .	57
2.	Obligation of the secured creditor to pursue infringers or renew registrations . . . . .	58
3.	Right of the secured creditor to pursue infringers or renew registrations . . . . .	59
G.	Rights and obligations of third-party obligors. . . . .	60
H.	Enforcement of a security right. . . . .	61-73
1.	Deferral to intellectual property law. . . . .	61
2.	Taking “possession” of an encumbered intellectual property right . . . . .	62-64
3.	Disposition of an encumbered intellectual property right . . . . .	65-68
4.	Proposal by the secured creditor to accept an encumbered intellectual property right . . . . .	69
5.	Collection of royalties . . . . .	70
6.	Enforcement of a security right in a tangible asset related to an intellectual property right . . . . .	71
7.	Rights acquired through disposition . . . . .	72
8.	Enforcement of a security right in a licensee’s rights . . . . .	73
I.	Acquisition financing . . . . .	74-76
J.	Law applicable to a security right . . . . .	77-80
1.	Law applicable to proprietary matters . . . . .	77-79
2.	Law applicable to contractual matters . . . . .	80
K.	Scope of application and other general rules. . . . .	81-87
1.	Outright assignments or transfers of intellectual property rights. . . . .	81
2.	Rights arising under licence agreements. . . . .	82-83
3.	Claims against infringers of intellectual property rights . . . . .	84

4.	Right to register an intellectual property right . . . . .	85
5.	Intellectual property rights related to tangible assets . . . . .	86
6.	Application of the principles of party autonomy and electronic communications to security rights in intellectual property rights. . . . .	87
L.	Key objectives and fundamental policies . . . . .	88-97
1.	Application of the key objectives and fundamental policies of the Guide to intellectual property financing transactions . . . . .	88-89
2.	Additional key objectives and fundamental policies . . . . .	90-97
M.	The impact of insolvency on a security right . . . . .	98-103
1.	The treatment of security rights granted by the licensee in the insolvency of the licensor . . . . .	98-99
2.	The treatment of security rights granted by the licensor in the insolvency of the licensee . . . . .	100-102
3.	Conclusion . . . . .	103
N.	Terminology . . . . .	104-107
1.	“[Assignment] [Transfer] of an intellectual property right” . . . . .	104
2.	“Intellectual property right” . . . . .	105
3.	“Claims”, “receivables” and “licence” . . . . .	106
4.	“Competing claimant” . . . . .	107
O.	Examples of intellectual property financing practices . . . . .	108
P.	The treatment of security rights in intellectual property rights under current law . . . . .	109

## I. Introduction

1. At its present session, Working Group VI began its work on the preparation of an annex to the UNCITRAL Legislative Guide on Secured Transactions (hereinafter referred to as “the Guide”) specific to security rights in intellectual property pursuant to a decision taken by the Commission at its fortieth session, in 2007.<sup>1</sup> The Commission’s decision to undertake work on security interests 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.<sup>2</sup>

2. At its thirty-ninth session, in 2006, the Commission considered its future work on secured financing law. It was noted that intellectual property (e.g. a copyright, patent and trademark) was 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

<sup>1</sup> *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17 (A/62/17 (Part I))*, para. 162.

<sup>2</sup> *Ibid.*, para. 157.

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.<sup>3</sup>

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 colloquia as necessary.<sup>4</sup> 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.<sup>5</sup>

4. Pursuant to the decision of the Commission, the Secretariat organized in cooperation with WIPO a colloquium on security rights in intellectual property (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.<sup>6</sup>

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. 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.<sup>7</sup>

6. At its 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 would subsequently be prepared.<sup>8</sup>

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<sup>3</sup> *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17 (A/61/17)*, paras. 81 and 82.

<sup>4</sup> *Ibid.*, para. 83.

<sup>5</sup> *Ibid.*, para. 86.

<sup>6</sup> See <http://www.uncitral.org/uncitral/en/commission/colloquia/2secint.html>.

<sup>7</sup> *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17 (A/62/17 (Part I))*, paras. 156, 157 and 162.

<sup>8</sup> *Ibid.*, *Sixty-second session, Supplement No. 17 (A/62/17 (Part II))*, paras. 99-100.

## II. Organization of the session

7. The Working Group, which was composed of all States members of the Commission, held its thirteenth session in New York from 19 to 23 May 2008. The session was attended by representatives of the following States members of the Working Group: Algeria, Australia, Canada, Chile, China, El Salvador, Fiji, France, Germany, Guatemala, Honduras, India, Iran (Islamic Republic of), Italy, Kenya, Malaysia, Malta, Morocco, Namibia, Nigeria, Norway, Pakistan, 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).

8. The session was attended by observers from the following States: Argentina, Belgium, Burundi, Democratic Republic of the Congo, Indonesia, Jordan, Lithuania, Peru, Philippines, Slovenia, Trinidad and Tobago, Turkey and Yemen.

9. 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*: Asian-African Legal Consultative Organization (AALCO) and European Union (EU);

(b) *International non-governmental organizations invited by the Commission*: American Bar Association (ABA), Commercial Finance Association (CFA), Forum for International Conciliation and Arbitration (FICACIC), Independent Film & Television Alliance (IFTA), International Bar Association (IBA), International Federation of Phonographic Industry (IFPI), International Insolvency Institute (III), International Trademark Association (INTA), New York City Bar Association and Union internationale des avocats (UIA).

10. The Working Group elected the following officers:

*Chairman*: Ms. Kathryn SABO (Canada)

*Rapporteur*: Ms. Melati ABDUL HAMID (Malaysia)

11. The Working Group had before it the following documents: A/CN.9/WG.VI/WP.32 (Provisional Agenda) and A/CN.9/WG.VI/WP.33 and Addendum 1 (Security rights in intellectual property rights).

12. 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**

13. 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). The deliberations and decisions of the Working Group are set forth below in chapter IV. The Secretariat was requested to prepare a draft of the annex to the Guide on security rights in intellectual property rights (hereinafter referred to as “the Annex”) reflecting the deliberations and decisions of the Working Group.

## **IV. Security rights in intellectual property**

### **A. General**

14. The Working Group noted that the Commission, at its resumed fortieth session in December 2007, had adopted the Guide. The Working Group also noted that the Guide did not apply to intellectual property in so far as the provisions of the law were inconsistent with national law or international agreements, to which the State is a party, relating to intellectual property (see recommendation 4, subparagraph (b)). In addition, the Working Group noted that its mandate was to develop an annex to the Guide that would include specific comments and recommendations on security rights in intellectual property rights. It was widely felt that, while due deference should be expressed to intellectual property law, the point of reference for the discussion of the Annex should be the Guide and not national secured financing law.

15. At the outset, the Working Group expressed its appreciation to the Secretariat for the clarity and the balance of the discussion contained in documents A/CN.9/WG.VI/WP.33 and Add.1. With a view to expediting its work in reviewing those documents, the Working Group decided to begin its deliberations with a discussion of the creation of a security right in an intellectual property right and to consider the terminology, the key objectives and the scope of the annex in the appropriate context in which those issues arose or only after it had considered the other substantive issues (such as creation, third-party effectiveness, registry system, priority, enforcement and insolvency).

### **B. Creation of a security right (effectiveness as between the parties)**

#### **1. The concept of creation**

16. The Working Group considered the question whether a distinction should be drawn in the Annex between the creation and the third-party effectiveness of a security right in an intellectual property right. It was stated that making such a distinction would be consistent with the approach taken in the Guide. However, it was also observed that, under intellectual property law in many States, reference was made to assignments of intellectual property rights with respect to which no such distinction was made. After discussion, it was agreed that, in line with the principle of deference to intellectual property law (see recommendation 4, subparagraph (b)), if intellectual property law addressed the issue, intellectual property law would apply; otherwise, the Guide would apply.

17. The Working Group considered next the question whether the Annex should address outright assignments of intellectual property rights. The Working Group noted

that outright assignments of intellectual property rights were normally covered by intellectual property law, which dealt mainly with competing transfers of title and to which the Guide deferred. Therefore, the Working Group adopted the working assumption that outright assignments of intellectual property rights should not be covered in the Annex, unless there was a priority competition with a security right in an intellectual property right.

## **2. Creation and registration**

18. The Working Group considered the question whether registration should be a requirement for the creation or the third-party effectiveness of a security right in an intellectual property right. It was noted that, if intellectual property law required the registration of an assignment of an intellectual property right (including an assignment by way of security) in the relevant intellectual property registry, the Guide would not interfere with such a requirement (see recommendation 4, subparagraph (b)). If, however, intellectual property law did not require such registration, the general approach of the Guide would apply and registration (in the general security rights registry or the relevant intellectual property registry) would be only a requirement for the third-party effectiveness but not for the creation of a security right (see recommendation 42).

19. The view was expressed that, for reasons of certainty as to who would be the rights holder with respect to an intellectual property right (and could, for example, sue infringers), it would be preferable to make registration of a security right in an intellectual property right in the general security rights registry a condition of the creation of a security right. It was observed, however, that the question of who was the rights holder was a matter of intellectual property law. It was also pointed out that the creation of an intellectual property right, which was a matter of intellectual property law, was separate from the creation of a security right in an intellectual property right, which was a matter of secured financing law. In addition, it was stated that making the creation of a security right more difficult would run counter to one of the key objectives of the Guide (see recommendation 1, subparagraph (c)).

20. After discussion, it was agreed that the Guide would apply to the creation of a security right in an intellectual property right and thus registration would not be required for creation purposes, if intellectual property law did not require registration of an assignment of an intellectual property right (including an assignment by way of security) for creation purposes. If, however, intellectual property law required registration of an assignment as a condition for the creation of a security right in an intellectual property right, the Guide would defer to that law (see recommendation 4, subparagraph (b)).

## **3. Legal or contractual limitations to the transferability of an intellectual property right**

21. The Working Group noted that the commentary of the Annex should address a number of matters, including that the Guide respected any legal or contractual limitations to the transferability of intellectual property rights (see recommendation 18). The Working Group also noted that the commentary should explain that the only contractual or statutory limitations that the Guide affected were those relating to the transferability of receivables (see recommendations 23-25).

22. In that connection, the Working Group considered whether receivables were part of the intellectual property right, the sale or licence of which generated the receivables. After discussion, the Working Group adopted the working assumption that, while for

the purposes of protection under intellectual property law receivables could be treated as part of the intellectual property right from which they flowed, for the purposes of secured transactions law such receivables were, like any other receivable, proceeds of the intellectual property right.

#### **4. The creation of security rights in future intellectual property rights**

23. The Working Group considered the question whether a security right could be created in a future intellectual property right. It was noted that the Guide would respect any statutory limitations in that regard (see recommendation 18). It was suggested, however, that the commentary of the Annex should explain that such limitations were rare and, in any case, did not prevent the conclusion of a security agreement, as the security right would be created only when the intellectual property right would be established. The economic value of security rights in future intellectual property rights was particularly emphasized.

#### **5. Ownership in encumbered intellectual property rights**

24. As already noted (see para. 19 above), the Working Group adopted the working assumption that who was a rights holder with respect to an intellectual property right (the grantor or the secured creditor) was a matter of intellectual property law. It was also noted that, in that regard, there was no difference between rights in tangible and rights in intangible assets.

#### **6. Nature of encumbered asset**

25. With respect to the nature of an encumbered asset, it was noted that the commentary of the Annex should clarify a number of matters, including that: (a) a security right could be created in the right of ownership of an intellectual property right or in the rights arising under a licence agreement to use intellectual property under the terms of the licence agreement; and (b) the scope of a security right granted by a licensee would be limited by the terms of the licence.

#### **7. Acquisition financing and licence agreements**

26. The Working Group noted that, while a licence agreement had some of the characteristics of a secured transaction, it was not a secured transaction. It was agreed that the matter could be further discussed in the context of the Working Group's deliberations on the priority of a licensor (see paras. 51 and 74-76 below).

#### **8. Intellectual property rights related to tangible assets**

27. It was generally agreed that a security right in a tangible asset, in connection with which an intellectual property right was used, did not extend to the intellectual property right, unless the parties agreed otherwise. At the same time, it was agreed that, upon default, 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. In that connection, it was suggested that, while the concept of "exhaustion" could be retained, use of the particular term could be avoided as it was not universal (see also para. 71 below).

28. Differing views were expressed as to whether the encumbered asset should be described in the security agreement in somehow specific terms (e.g. "my inventory of TV sets with all related intellectual property rights") or only generally (e.g. "my



inventory of TV sets”). One view was that a specific description would provide certainty not only to the owner but also the owner’s creditors. Another view was that a general description that would reflect the expectations of the parties would be more in line with the Guide (see recommendation 14). The Working Group agreed to revert to that issue.

## **C. Third-party effectiveness of a security right**

### **1. The notion of third-party effectiveness**

29. It was widely felt that the commentary of the Annex should explain that, in an intellectual property context, the notion of third parties included not only competing claimants but also other third parties such as infringers of an intellectual property right. The commentary should also explain that, while effectiveness against competing claimants was a matter of secured financing law, effectiveness against other third parties such as infringers was a matter of intellectual property law.

### **2. Third-party effectiveness of security rights in intellectual property rights that are registrable in an intellectual property rights registry**

30. The concern was expressed that the Guide might appear as recommending registration in both the relevant intellectual property rights registry and the general security rights registry. It was pointed out that such an approach might create inefficiencies, delays and costs. In response, it was stated that the Guide merely addressed the question as a matter of priority of security rights, if they were registrable in both registries. It was also observed that secured creditors for whom the intellectual property right constituted the main security and who wanted to have priority over all possible competing claimants would check and need to register only in the relevant intellectual property rights registry, while secured creditors who wanted to have priority only over other secured creditors who registered in the general security rights registry and the insolvency representative would check and need to register only in the general security rights registry.

### **3. Third-party effectiveness of security rights in intellectual property rights that are not registrable in an intellectual property rights registry**

31. It was suggested that a distinction should be drawn between intellectual property rights registries, in which security rights in intellectual property rights could be registered, and intellectual property rights registries, in which security rights in intellectual property rights could not be registered. It was stated that the recommendations concerning registration in a specialized registry of a security right in an intellectual property right should apply only to the registries in which security rights could be registered.

## **D. The registry system**

### **1. Coordination of registries**

32. Several suggestions were made with a view to ensuring effective coordination of specialized intellectual property rights registries and general security rights registries. One suggestion was that the commentary of the Annex should discuss the possibility of information registered in one registry being made available in the other registry automatically.

33. Another suggestion was that an encumbered intellectual property right might be described specifically in a notice registered in a general security rights registry, as was normally the case with registrations in specialized registries. That suggestion was objected to. It was stated that there was no need to introduce an exception to the general rule of reasonable description of encumbered assets which was sufficient for the purpose of achieving third-party effectiveness. Otherwise, it was observed, the coherence and the practical character of the registry system facilitating financing transactions relating to a changing pool of assets or future assets could be compromised.

34. Yet another suggestion was that best practices should be discussed in the commentary of the Annex along with the impact of the application of the recommendations of the Guide to specific transactions.

## **2. Registration of notices about security rights in future intellectual property rights**

35. It was noted that the commentary of the Annex could explain that, if, under intellectual property law, future intellectual property rights were not transferable, the Guide would not interfere with that prohibition. At the same time, it was noted that the commentary could explain that, in the absence of such a prohibition, the Guide would apply and allow the registration of notices about security rights in future intellectual property rights in the general security rights registry.

## **3. Dual registration or search**

36. The Working Group considered the question of dual registration or search with regard to security rights in intellectual property rights. In order to avoid the inefficiencies and costs of dual registration and search, the suggestion was made that, if there was an intellectual property rights registry, registration of a security right in that registry should be mandatory. It was stated that such an approach would be easier to implement for States that did not have a general security rights registry. It was also observed that, in States that had a general security rights registry, registration in that general registry would be possible but would take place only rarely. That suggestion was objected to. It was stated that, depending on the type of competing claimant over whom a potential secured creditor would need to obtain priority and the cost- and risk-assessment made by a potential secured creditor in each case, registration would take place in one or the other registry or both (see para. 30 above). It was also observed that such an approach would run counter to the permissive rather than prescriptive character of the Guide. In addition, it was pointed out that the Guide provided for a balanced approach avoiding any interference with specialized registries that normally evidenced title, involved document registration, had not only third-party effectiveness but also creation or declaratory effects and were asset-based registries.

37. In the discussion, the suggestion was made that the Guide should discuss security rights in intellectual property rights that were not registrable (e.g. trade secrets), but for which another system of verification existed (e.g. a technology escrow-based system).

38. After discussion, it was agreed that, while the current approach of the Guide should be maintained, the commentary of the Annex should be developed to discuss the issue without referring to “dual” registration.

#### **4. Time of effectiveness of registration**

39. As to the issue whether, in the case of a priority conflict between two security rights, one of which was registered in the relevant intellectual property registry and the other in the general security rights registry, the time of effectiveness of registration had an impact on third-party effectiveness and priority differing views were expressed. One view was that the time of effectiveness was relevant and would be different (i.e. the time of creation for security rights registered in an intellectual property registry and the time when the registered notice became available to searchers in a general security rights registry). Another view was that, once it was provided that a security right registered in the relevant intellectual property registry would prevail, even if it was registered later than a right registered in the general security rights registry, the time of effectiveness of the two registrations would be irrelevant for the purposes of third-party effectiveness and priority.

#### **5. Registration of security rights in trademarks**

40. The Working Group noted with appreciation best practices recommended by the International Trademark Association (INTA) with respect to the registration of security rights in trademarks.

### **E. Priority of a security right**

#### **1. Identification of competing claimants**

41. The Working Group noted that, while the notion of “competing claimant” in a secured financing context meant a secured creditor, a transferee of an encumbered asset, a judgement creditor or an insolvency representative, in an intellectual property context it also included other third parties such as infringers of an intellectual property right. It was widely felt that the matter needed to be explained in the commentary of the Annex.

42. It was also stated that a conflict between a transferee of an encumbered asset, who took the asset from a secured creditor upon default and enforcement and another secured creditor, who received a right in the same asset from the same grantor, was not a real priority conflict. It was also observed that the commentary should clarify that the Guide would not apply to a priority conflict between transferees or licensees of intellectual property rights if there was no conflict with a security right granted by the immediate or previous transferor or licensor.

43. The suggestion was made that the Annex should make it clear that, with respect to security rights in intellectual property rights, the only mode of third-party effectiveness was registration.

#### **2. Relevance of knowledge of prior transfers of security rights**

44. It was noted that knowledge of the existence of a prior transfer of an encumbered asset or of a prior security right was irrelevant for the purposes of determining priority under the Guide. By contrast, it was also noted that, under intellectual property law, a later transfer or security right could often gain priority if it was registered first and taken without knowledge of a prior conflicting transfer. It was stated that the commentary could usefully test whether the deference to intellectual property law under recommendation 4, subparagraph (b), would be sufficient to preserve such a knowledge-based priority rule of intellectual property law.

### **3. Priority of a right registered in an intellectual property rights registry**

45. The Working Group noted that, under the Guide, in a priority conflict between a security right registered in an intellectual property rights registry and a security right registered in the general security rights registry, the former would prevail (see recommendation 77). There was general agreement that the rule was appropriate even in the case of security rights in intellectual property rights.

46. A question was raised as to whether registration in an intellectual property rights registry in the case of tangible assets, with respect to which an intellectual property right was used, referred to the intellectual property right only or also to the tangible asset. In response, it was observed that that was a matter of the law governing the relevant registry, but that such registration would normally refer only to the intellectual property right. The Secretariat was requested to study the matter and report at a future meeting.

47. It was widely felt that the Guide neither encouraged nor discouraged registration of security rights in intellectual property rights in the relevant intellectual property registry. The Guide simply accommodated such registries where they already existed with a view to preserving their reliability. Thus, it was generally thought that the Guide did not preclude the possibility of registration of security rights in all types of tangible and intangible assets in the general security rights registry.

48. In that connection, the suggestion was made that the Annex might recommend a priority rule that a security right in an intellectual property right that was described specifically in a notice registered in the general security rights registry would have priority over a security right in an intellectual property right that was not described specifically in a notice registered in the general security rights registry. That suggestion was objected to. It was stated that there was no good policy reason to introduce such an exception to the first-to-register priority rule that would be based on the specificity of the description of the encumbered asset in the registered notice. It was also observed that, in the case of rights registered in specialized registries, the reason for the priority rule was the need to preserve the reliability of specialized registries. In addition, it was pointed out that the approach of the Guide was coherent and should not be understood as the second-best approach compared with an approach based on one registry, since title registries were necessary to serve the useful function of determining ownership, while the general security rights registry had a different function.

### **4. Priority of a right that is not registrable in an intellectual property rights registry**

49. It was noted that, if a security right in an intellectual property right was not registrable in the relevant intellectual property rights registry, in the absence of another priority rule of intellectual property law, the priority of that right would be determined according to the order of registration in the general security rights registry.

### **5. Rights of transferees of encumbered intellectual property rights**

50. It was noted that a transferee of an encumbered asset (including an intellectual property right) would normally take the asset subject to security rights that were effective against third parties (see recommendation 79). In that connection, the suggestion was made that the commentary of the Annex should clarify whether, for a security right to remain effective against third parties, an amendment notice should be registered in the general security rights registry. It was noted that such analysis should take into account any relevant intellectual property law rule and, in the absence of such

a rule, the various possibilities under recommendation 65 (impact of a transfer of an encumbered asset on the effectiveness of registration).

## **6. Rights of licensees in general**

51. It was noted that intellectual property rights were routinely licensed and that the retained rights of a licensor such as the ownership right or the right to receive royalties, as well as the rights of a licensee to use the intellectual property under the terms of the licence agreement, could be used as collateral for credit. It was also noted that a licensee of an encumbered intellectual property right would in principle take its rights subject to a security right that was effective against third parties at the time of the licence agreement (see recommendation 79).

## **7. Rights of ordinary-course-of-business non-exclusive licensees**

52. It was noted that, under the Guide, a non-exclusive licensee, who took a licence in the ordinary course of business of the licensor without knowledge that the licence violated a security right, would take the licence free of a security right previously granted by the licensor (see recommendation 81, subparagraph (c)). It was also noted that that rule would apply only if the security agreement neither authorized nor prohibited the granting of a licence by the licensor.

53. The concern was expressed, however, that the mere use of the term “ordinary course-of-business licensee” might inadvertently give the impression that the Guide justified unauthorized or compulsory licences. It was also observed that, under intellectual property law, a licence would be either authorized by the secured creditor who would normally be the rights holder and thus the licensee would take the licence free of the security right or unauthorized and thus the licensee would take the licence subject to the security right.

54. In response, it was pointed out that the rule in recommendation 81, subparagraph (b), was a default rule that would apply only if the security agreement was silent as to an authorization or a prohibition of licences. It was also said that the secured creditor could prevent the application of the rule in recommendation 81, subparagraph (b), by including appropriate language in the security agreement. In addition, it was stated that the focus should be not on the terminology used but rather on the actual result of the application of the rule.

55. As a technical matter, it was suggested that a clear distinction should be drawn between the licence agreement and the licence, and reference should be made to exclusive or non-exclusive licences (not licence agreements).

56. The Working Group noted the concerns and views expressed and requested the Secretariat to provide in the commentary of the Annex a detailed analysis of the issue.

## **F. Rights and obligations of the parties to a security agreement**

### **1. Application of the principle of party autonomy**

57. It was widely felt that the application of the principle of party autonomy to secured transactions relating to intellectual property rights should be explained in the commentary of the Annex along with any specific limitations. It was stated that one

possible limitation that would need to be discussed was that the right to sue infringers could be exercised only by a rights holder or an exclusive licensee.

## **2. Obligation of the secured creditor to pursue infringers or renew registrations**

58. It was widely felt that the secured creditor should not be obliged to pursue infringers or renew registrations of an encumbered intellectual property right, but that the matter should be left to intellectual property law and to the agreement of the parties if permitted by intellectual property law.

## **3. Right of the secured creditor to pursue infringers or renew registrations**

59. It was generally felt that, as a matter of secured transactions law, the secured creditor should have the right to pursue infringers and renew registrations of an encumbered intellectual property right, if so agreed between the grantor (rights holder) and the secured creditor. There was also agreement that such a rule would apply only in the absence of rule of intellectual property law to the contrary.

## **G. Rights and obligations of third-party obligors**

60. It was noted that, in cases where a licensor assigned 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. It was stated that, if the licensee assigned its claim for the payment of royalties under a sub-licence agreement, the sub-licensee would be the debtor of the assigned receivable and thus a third-party obligor under the Guide.

## **H. Enforcement of a security right**

### **1. Deference to intellectual property law**

61. It was stated that, while there was no objection to the principle of deference to intellectual property law (see recommendation 4, subparagraph (b)), it might not need to be repeated in each chapter of the Annex, in particular since the principle of deference to general property law applied equally to types of asset other than intellectual property rights. It was noted, however, that reference to that principle in the chapter on enforcement should serve as an introduction to a more detailed discussion of the intellectual property law and practice in accordance to which the commercial reasonableness of an enforcement action would be determined.

### **2. Taking “possession” of an encumbered intellectual property right**

62. The question was raised whether the notion of “control”, used in the Guide with respect to other intangible assets (e.g. rights to payment of funds credited to a bank account), should also be used with respect to an encumbered intellectual property right. In response, it was stated that such an approach would not be necessary as the remedies given to a secured creditor would be sufficient. It was also observed that, if a secured creditor wished to obtain control over an encumbered intellectual property right, the secured creditor could obtain a security right in the rights of the rights holder.

63. The Working Group next considered the question whether a creditor with a security right in an intellectual property right used with respect to a tangible asset

(e.g. a patent used in a piece of equipment) should have a right to take possession of the tangible asset. It was widely felt that the matter should be left to the security agreement and the description of the encumbered asset therein. In the absence of a specific provision in the security agreement, it was stated that such a secured creditor should not have the right to take possession of the tangible assets (with the exception of tangible assets that embodied only the encumbered intellectual property right, such as compact discs or digital video discs).

64. As to the question whether the secured creditor should be able to obtain possession of any documents necessary to enforce its right in the encumbered intellectual property right, it was widely felt that that matter also should be left to the security agreement. It was also stated that the secured creditor should be able to take possession of documents that were accessory to the intellectual property right, whether those documents were mentioned in the security agreement or not.

### **3. Disposition of an encumbered intellectual property right**

65. Differing views were expressed as to the requirements for the secured creditor to have the right to dispose of an encumbered intellectual property right either by transferring it or by granting a licence in it.

66. One view was that, under intellectual property law, the secured creditor would have the right to dispose of an encumbered intellectual property right either if the secured creditor was a rights holder (i.e. had received a transfer of the rights of the rights holder) or if the secured creditor was acting as an agent on behalf of the rights holder. It was stated that, for the secured creditor to be entitled to sell or license an encumbered intellectual property right, the secured creditor's rights as a rights holder should be registered in the relevant intellectual property rights registry.

67. Another view was that, under secured transactions law, the secured creditor would be entitled to dispose of an encumbered intellectual property right by virtue of the application of secured transactions law. It was stated that the secured creditor's rights in the encumbered asset would be limited to the value of the secured obligation. It was also observed that, under the Guide, even a transfer of ownership for security purposes would be treated as a secured transaction. In addition, it was pointed out that the same principles applied not only to security rights in tangible assets but even to encumbrances to immovable property.

68. In response to a question whether, for a security right in an intellectual property right to be enforceable against competing claimants with rights acquired under intellectual property law (e.g. transferees and licensees), it should be registered in the relevant intellectual property registry, it was stated that registration was a matter of third-party effectiveness and priority, but not a matter of enforcement.

### **4. Proposal by the secured creditor to accept an encumbered intellectual property right**

69. It was noted that the remedy of a proposal by the secured creditor to accept an encumbered asset in total or partial satisfaction of the secured obligation would apply in cases where the encumbered asset would be an intellectual property right. It was widely felt that the matter should be discussed in the commentary of the Annex in a way that would be consistent with the Guide.

## **5. Collection of royalties**

70. It was noted that, in cases where the encumbered asset was the licensor's right to receive payment of royalties under a licence agreement, the secured creditor would be entitled to collect payment of the royalties. It was also noted that the rights of the licensor, for example to terminate the licence, under the intellectual property law, would not be affected by the secured creditor's rights in the royalties.

## **6. Enforcement of a security right in a tangible asset related to an intellectual property right**

71. It was widely felt that a security right in a tangible asset with respect to which an intellectual property right was used could be enforced either if the rights holder authorized the enforcement or the intellectual property right was exhausted under the applicable intellectual property law (see para. 27 above). While some concern was expressed about the term "exhaustion", it was stated that it was widely used in various texts, including the Agreement on Trade-related Aspects of Intellectual Property Rights ("TRIPS"), and well understood. At the same time, it was widely felt that, as the meaning of the "exhaustion doctrine" was neither clear nor uniform, the Annex should refrain from attempting to define it, but limit itself to simply referring to national law in that regard. The suggestion was made that the commentary of the Annex could encourage States to clarify their law with regard to the "exhaustion doctrine".

## **7. Rights acquired through disposition**

72. It was noted that, if a secured creditor sold or licensed an encumbered intellectual property right in a judicial or other officially supervised process, rights acquired by a transferee or licensee would be regulated by the relevant law applicable to the enforcement of court judgements. It was also noted that, in the case of extrajudicial enforcement, a transferee or licensee would take the intellectual property right subject to rights that had priority as against the right of the enforcing secured creditor but free of the right of the enforcing secured creditor and any competing claimant with lower priority ranking (see recommendations 161-163). It was also stated that whether the security right could be enforced in subsequent enhancements of the encumbered intellectual property right was a matter of the description of the encumbered asset in the security agreement.

## **8. Enforcement of a security right in a licensee's rights**

73. It was noted that the commentary of the Annex might need to address situations where the encumbered asset was a licensee's right to use the encumbered intellectual property or to claim payment of royalties from a sub-licensee.

## **I. Acquisition financing**

74. The Working Group considered the question whether, in cases where a licensor "financed" the acquisition of a licence by a licensee in the sense that payment was made in future royalty instalments, the licensor's right in the royalties should have priority over a security right granted by the licensee in all its present and future assets (including



royalty payments from sub-licensees with which the licensee would pay the royalties owed to the licensor).

75. Differing views were expressed as to how that result might be achieved. One view was that that result could be achieved without a special priority rule in view of the fact that the licensor could protect its rights by: (a) prohibiting the licensee from assigning 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; or (c) obtaining a security right in royalty claims of the licensee against sub-licensees.

76. Another view was that the right of the licensor for the payment of royalties should have the super-priority recognized to an acquisition security right under the Guide. It was stated that the ways for the licensor to protect its rights just mentioned might not be sufficient, as: (a) it was not clear whether anti-assignment provisions would be upheld by the Guide; (b) the licensor could not terminate the licence in the case of the insolvency of the licensee; and (c) even if the licensor obtained a security right, it might not be protected as the priority of that right would be determined by the order of registration and thus another security right might gain priority (e.g. if a licensee created a security right in all its present and future assets before it obtained the licence). It was agreed that the right of a licensor with respect to a licensee's claim for royalties under a sub-licence agreement was not an acquisition security right.

## **J. Law applicable to a security right**

### **1. Law applicable to proprietary matters**

77. It was noted that intellectual property law was based on the principle of territoriality and that, as a result, the law applicable to a transfer of an intellectual property right was the law of the State in which protection of the right was sought (*lex protectionis*). It was also stated, however, that the application of the *lex protectionis* to the proprietary aspects of a security right was not generally accepted. It was observed, for example, that, in some States, the law of the grantor's location was the law applicable to a security right. In that connection, it was noted that a variation of the approach based on the *lex protectionis* would be to apply the law of the grantor's location generally, with the exception of priority conflicts in which a competing claimant had obtained a security right under the *lex protectionis*. A further variation of that approach, it was noted, would be to limit the application of the *lex protectionis* to security rights that could be created by registration in an intellectual property rights registry.

78. A further variation of the *lex protectionis* was proposed. According to that variation, the *lex protectionis* would apply to a security right in a single intellectual property right, while the law of the grantor's location would apply to a security right in various assets of a grantor (including intellectual property rights) located in various countries. Doubt was expressed with regard to the efficiency of such an approach, as, in the case where rights such as the ones just described were competing between themselves, two different conflict-of-laws rules would apply to the priority conflict.

79. At the conclusion of the discussion, it was suggested that the efficiency of one or the other approach should be tested against various fact patterns, taking into account the cost of registration and search. Two fact patterns were mentioned as examples: (a) situations where a security right was registered in a general security rights registry and in an intellectual property registry, and the grantor was located in another country;

(b) situations in which the owner was in country A, while licensees and sub-licensees were in different jurisdictions. There was broad support for the suggestion to test the various applicable law approaches against specific fact patterns.

## **2. Law applicable to contractual matters**

80. It was noted that the mutual rights and obligations of the grantor and the secured creditor could be left to the law of their choice and, in the absence of a choice of law, to the law governing the security agreement (see recommendation 216).

## **K. Scope of application and other general rules**

### **1. Outright assignments or transfers of intellectual property rights**

81. The Working Group recalled its working assumption that outright assignments or transfers of intellectual property rights would not be addressed in the Guide (see para. 17 above). It was widely felt that such transfers were already sufficiently covered and, in the case of some types of intellectual property right, made subject to registration in specialized registries.

### **2. Rights arising under licence agreements**

82. It was noted that a licensor could grant a security right in its right to claim payment of royalties or in any other contractual right of value. It was also noted that the Guide's provision on anti-assignment agreements applied only to an agreement between the licensor and the licensee prohibiting the licensor from assigning its royalty claims against the licensee. It did not apply to an agreement between the licensor and the licensee prohibiting the licensee from assigning its royalty claims against sub-licensees or to an agreement prohibiting the licensee from granting a sub-licence.

83. It was also noted that, under intellectual property law, a licensee could grant with the permission of the licensor a security right in its right to use the intellectual property or in its royalty claims against sub-licensees. It was stated that the permission of the licensor was necessary under intellectual property law to ensure that the licensor would maintain its control over the licensed intellectual property, as well as protect the confidentiality and the value of the information associated with the intellectual property right.

### **3. Claims against infringers of intellectual property rights**

84. It was noted that, in some jurisdictions, under intellectual property law, claims against infringers were transferable and could be used as collateral for credit, while, in other jurisdictions, such claims were not transferable and thus could not be encumbered by a security right independent of the ownership right. It was also noted that whether such claims were part of the encumbered intellectual property right was a matter of the description of the encumbered asset in the security agreement. In any case, under secured transactions law, claims would be proceeds of the encumbered intellectual property right and thus the secured creditor could exercise the grantor's rights to sue infringers.

#### **4. Right to register an intellectual property right**

85. It was noted that whether the right to renew a registration was a transferable right or an inalienable right of the owner was a matter of intellectual property law. It was also noted that, if that right was transferable, whether the secured creditor acquired it or not was a matter of the description of the encumbered asset in the security agreement.

#### **5. Intellectual property rights related to tangible assets**

86. It was noted that a security right in a tangible asset, with respect to which an intellectual property right was used, did not extend to the intellectual property right, unless the description of the encumbered asset included the intellectual property right. Still, it was noted, the secured creditor could enforce its security right in the tangible asset, provided that the rights holder authorized such enforcement or the rights of the rights holder in the intellectual property right related to the tangible asset were exhausted (see paras. 27 and 71 above).

#### **6. Application of the principles of party autonomy and electronic communications to security rights in intellectual property rights**

87. The Working Group recalled its assumption that the principle of party autonomy and appropriate limitations would be discussed in the Annex to the Guide (see para. 57 above).

### **L. Key objectives and fundamental policies**

#### **1. Application of the key objectives and fundamental policies of the Guide to intellectual property financing transactions**

88. It was widely felt that the commentary of the Annex could discuss the impact of the application of the key objectives and fundamental policies of the Guide to intellectual property financing transactions giving practical examples. It was stated that such analysis would be particularly useful for States, in which the law did not allow intellectual property rights to be used as collateral for credit or in which such practices were very limited.

89. It was noted that an example of such analysis might be to explain that the key objective of the Guide to promote secured credit, in an intellectual property financing context, might be achieved if unauthorized use of intellectual property were discouraged and innovation were protected. Differing views were expressed in that regard. One view was that it was not for secured financing law to discourage unauthorized use of intellectual property or to protect innovation. It was stated that those objectives were objectives of intellectual property law, but not of secured financing law. Another view was that secured financing law could, for example, avoid rules that could inadvertently result in justifying compulsory licences or even piracy. It was also stated that rules on the enforcement of security rights could protect the deterioration of the value of intellectual property rights.

#### **2. Additional key objectives and fundamental policies**

90. The Working Group engaged in a discussion about possible additional key objectives and fundamental policies of a regime on intellectual property financing such as the one envisaged in the Guide. Several examples were given.

91. One example of a possible additional fundamental policy mentioned was to ensure coordination between secured financing and intellectual property law, so as to preclude any conflicts from arising. It was stated that no assumptions should be made as to whether there were conflicts between secured financing and intellectual property law, but that conflicts should be addressed, if and when any were identified. On the other hand, it was observed that the tension between currently existing secured financing law and intellectual property law that was identified in chapter III of the working paper before the Working Group (see A/CN.9/WG.VI/WP.33) was the reason why recommendation 4, subparagraph (b), provided that the Guide would not apply to the extent of any inconsistency with intellectual property law. It was also pointed out that the whole purpose of the Guide was to ensure effective coordination between the secured financing regime envisaged in the Guide and intellectual property law.

92. Another example mentioned related to the question whether a secured creditor needed to be also a rights holder under intellectual property law. It was stated that the secured creditor should have the right to preserve the value of an encumbered intellectual property right, for example, by suing infringers and renewing registrations. On the other hand, it was observed that those were matters of intellectual property law and no assumptions should be made as to whether intellectual property law associated those rights with ownership. Recalling its earlier discussion of that matter (see paras. 24, 58-59 and 65-67), the Working Group decided to revisit it at a future meeting.

93. Yet another example mentioned related to the fact that the Guide deferred to general property law principles, such as the principle that nobody could grant to another person more rights than he or she had (*nemo dat quod non habet*). It was noted that the commentary could explain the relationship between the *nemo dat* principle and priority rules of the Annex. While there was no objection to the application of those principles to secured financing transactions related to intellectual property rights (or to appropriate explanations in the commentary), the concern was expressed that treating those principles as key objectives or fundamental policies of the Annex might inadvertently give the impression that they did not apply to security rights in other types of asset.

94. Yet another example mentioned related to the question whether a security right in an intellectual property right would be effective against a transferee or a licensee of that intellectual property right. It was widely felt that that matter should be discussed in the section of the Annex dealing with priority.

95. Yet another example mentioned was the relationship of financing devices under intellectual property law (involving a transfer of ownership or a licence) and financing devices under the Guide. It was widely felt that, if financing devices were part of intellectual property law, the Guide would not apply. If, however, such devices were part of general property law, the Guide would apply. It was also stated that the commentary could draw the attention of States to the need to adjust their intellectual property law.

96. Other examples mentioned included that: (a) the secured transactions law should neither diminish the value of intellectual property rights nor result in the inadvertent abandonment of intellectual property rights (e.g. failure to use a trademark properly, or to use it on goods or services or to maintain adequate quality control might result in loss of value or even abandonment); (b) in the case of trademarks, consumer confusion should be avoided (e.g. where a secured creditor removed trademarks from goods and sold them); and (c) 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 assignment of such rights without the consent of the owner.

97. Differing views were expressed as to the possible key objectives or fundamental policies mentioned in the preceding paragraph. One view was that they should not be mentioned as key objectives or fundamental policies, as they gave the impression that there was a conflict between secured financing and intellectual property law. It was stated that they could be mentioned in the commentary on specific issues or recommendations. Another view was that the protection of the value of intellectual property rights, the need to avoid consumer confusion and the assignment of personal licences only with the consent of the owner were of sufficient general importance to be cast as general principles or policies of the Annex.

## **M. The impact of insolvency on a security right**

### **1. The treatment of security rights granted by the licensee in the insolvency of the licensor**

98. It was noted that, under chapter XII of the Guide (which was consistent with the *UNCITRAL Legislative Guide on Insolvency Law*), in the case of the insolvency of a licensor, the insolvency representative had the right to continue the licence agreement, performing it, or to reject it. It was also noted that some insolvency laws dealt with the issue by allowing the licensee to continue using the intellectual property, provided that the licensee complied with all the terms of the licence agreement. While it was stated that such an approach would preserve the licence agreement and any security rights granted by the licensee in its rights under the licence agreement, it was also observed that that was a matter of insolvency law.

99. In response to a question, it was noted that, if the licensee paid the royalties upfront, the agreement would be fully performed (i.e. there would be no executory contract) and thus the insolvency representative could not terminate the licence agreement (see recommendation 70 of the *UNCITRAL Legislative Guide on Insolvency Law*).

### **2. The treatment of security rights granted by the licensor in the insolvency of the licensee**

100. It was noted that, in the insolvency of the licensee, any termination or acceleration clause would be unenforceable (see recommendation 70 of the *UNCITRAL Legislative Guide on Insolvency Law*). It was also noted that the insolvency representative could continue performance of the licence agreement, provided that any past-due royalties were paid or any other breach was cured, the non-breaching counter-party (the licensor) was returned to the economic position it was before the breach and the estate could perform under the continued licence agreement (see recommendation 79 of the *UNCITRAL Legislative Guide on Insolvency Law*).

101. The Working Group considered the situation where a licensor granted a licence to a licensee, the licensee granted a sub-licence to a sub-licensee, and the licensee (or both the licensor and the licensee) granted security rights to secured creditors. It was stated that, under the *UNCITRAL Legislative Guide on Insolvency Law*, that fact pattern would be addressed as follows:

“In the case of the insolvency of the licensee of intellectual property, the insolvency representative of the licensee is empowered to elect to continue the contract (notwithstanding any automatic termination-upon-bankruptcy clause in the contract). If continued, the payments provided for by the licence agreement

must be made on an ongoing current basis (and a mere promise of an administrative payment in the future would not suffice). Thus, if the insolvency representative elects to continue the contract, the obligation to make the royalty payments provided for by the contract is an ongoing obligation of the insolvency estate of the licensee. If the licensee did not make current payments post-continuation, that would be grounds for the licensor to go into the insolvency court and seek termination of the license for non performance of the post-insolvency obligation to pay.

If the licensee had sublicensed the intellectual property and had also entered into a financing arrangement pursuant to which the licensee/sub licensor granted a security right in its right to receive sub-royalty payments, the payments to the licensor under the continued prime licence agreement out of the sub-royalties would be free and clear of any claim of the secured creditor of the licensee/sub-licensor. Any authorization to use a secured creditor's cash collateral would be subject to the normal applicable insolvency rules, including notice to the secured creditor and its right to be heard and protection of the economic value of the security interest. If there were sub-royalty payments under a sub-licence agreement in excess of those utilized in making payments under the prime licence agreement, that excess would be retained in the insolvency estate of the licensee/sub-licensor, the insolvency stay against creditor actions would apply to the secured creditor, and the secured creditor's rights to those excess monies would be determined by the normal insolvency rules applicable to cash proceeds of collateral.

If subsequent to the continuation of the prime licence agreement by the insolvency representative of the licensee there were a breach of the prime licence agreement by the licensee (e.g. a sub-licence to a non-permitted third party), the licensor's claim for damages arising from the breach would be an administrative claim against the licensee's insolvency estate."

102. There was support for that analysis. It was stated that it would be useful to include it in the Annex to the *UNCITRAL Legislative Guide on Secured Transactions* as a supplement to the insolvency discussion in chapter XII that would be consistent with the *UNCITRAL Legislative Guide on Insolvency Law*. However, a note of caution was struck in that regard. It was stated that that analysis had to be considered and confirmed by insolvency experts and perhaps Working Group V (Insolvency Law). It was also observed that the analysis involved issues of insolvency law that did not belong in a secured transactions regime.

### 3. Conclusion

103. As the Working Group was not able to reach agreement as to whether the above-mentioned matters (see paras. 98-102) were sufficiently linked with secured transactions law so as to justify their discussion in the Annex to the *UNCITRAL Legislative Guide on Secured Transactions*, it decided to revisit those matters at a future meeting. The Working Group recommended to the Commission that Working Group V (Insolvency Law) might be asked to consider those matters.

## **N. Terminology**

### **1. “[Assignment] [Transfer] of an intellectual property right”**

104. Recalling that it had adopted the working assumption that outright assignments or transfers of intellectual property rights would not be covered by the Annex (see para. 17 above), the Working Group agreed that an explanation of the term assignment or transfer of an intellectual property right would not be necessary. In response to a question as to the treatment of an outright assignment for security purposes, it was stated that it would be covered in the Annex as a security device, irrespective of how it was denominated.

### **2. “Intellectual property right”**

105. Several suggestions were made. One suggestion was to retain the term “intellectual property right” limiting its scope to ownership rights and use other terms to express other rights (e.g. rights under licence agreements). Another suggestion was to retain the term “intellectual property” to refer to ownership rights and use the term “intellectual property rights” to refer to all other rights. It was stated, however, that there was no real distinction between intellectual property and intellectual property rights, as intellectual property rights were exclusive rights to permit or prevent the use of intellectual property. It was widely felt, therefore, that only the term “intellectual property” should be retained with appropriate explanations in the commentary with respect to the bundle of rights covered by that term.

### **3. “Claims”, “receivables” and “licence”**

106. Similarly, it was widely felt that the terms “claims”, “receivables” and “licence” should be explained in the commentary but did not need to be defined. With respect to receivables, the Working Group recalled its earlier decision (see para. 22 above) that, for the purposes of secured transactions law, they formed an asset that was separate from the intellectual property from which they flowed, without prejudice, however, to their possibly different treatment for the purposes of other law such as intellectual property law (see recommendation 4, subparagraph (b)).

### **4. “Competing claimant”**

107. While some doubt was expressed as to whether the different meaning of the term “competing claimant” under intellectual property law should be explained in the Annex, it was agreed that such explanation would be useful, but should not be expanded to a discussion of priority issues.

## **O. Examples of intellectual property financing practices**

108. It was widely felt that a discussion of the practices to be covered in the Guide was useful and should be expanded to cover practices in which different rights were used as collateral for credit, including the licensor’s rights under a licence agreement.

**P. The treatment of security rights in intellectual property rights under current law**

109. It was widely felt that the discussion of the relationship between secured financing and intellectual property law should be retained with a view to indicating how the various issues were addressed in the Annex. Some doubt was expressed as to whether the discussion of the different security devices under intellectual property law should be retained in view of the understanding of the Working Group that the background of the Annex should be the secured financing regime in the Guide. It was widely felt, however, that in the Annex the options available to States enacting the Guide in that regard should be discussed. It was stated that those options would be: (a) to harmonize intellectual property law governing security devices relating to intellectual property (e.g. mortgages or pledges in intellectual property registered in the relevant intellectual property registry); or (b) to retain security devices under currently existing intellectual property law with the understanding that the Guide would defer to such law (see recommendation 4, subparagraph (b)) and provide appropriate coordination through its priority rules (see recommendations 77 and 78).

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**B. Note by the Secretariat on security rights in intellectual property rights, submitted to the Working Group on Security Interests at its thirteenth session**

**(A/CN.9/WG.VI/WP.33 and Add.1) [Original: English]**

**CONTENTS**

	<i>Paragraphs</i>
I. Introduction . . . . .	1-7
II. Examples of intellectual property financing practices . . . . .	8-21
III. The treatment of security rights in intellectual property rights under current law . . . . .	22-38
IV. The treatment of security rights in intellectual property rights under the <i>UNCITRAL Secured Transactions Guide</i> and possible asset-specific adjustments . . . . .	39-161
A. Terminology. . . . .	39-60
1. The general approach of the <i>UNCITRAL Secured Transactions Guide</i> . . . . .	39-41
2. Possible additional definitions . . . . .	42-60
B. Key objectives and fundamental policies . . . . .	61-75
1. The general approach of the <i>UNCITRAL Secured Transactions Guide</i> . . . . .	61
2. Possible asset-specific adjustments . . . . .	62-75
C. Scope of application and other general rules. . . . .	76-108
1. The general approach of the <i>UNCITRAL Secured Transactions Guide</i> . . . . .	76-81
2. Possible asset-specific adjustments . . . . .	82-108
D. Creation of a security right (effectiveness as between the parties) . . . . .	109-133
1. The general approach of the <i>UNCITRAL Secured Transactions Guide</i> . . . . .	109-111
2. Possible asset-specific adjustments . . . . .	112-133
E. Third-party effectiveness of a security right . . . . .	134-145
1. The general approach of the <i>UNCITRAL Secured Transactions Guide</i> . . . . .	134-136
2. Possible asset-specific adjustments . . . . .	137-145
F. The registry system . . . . .	146-161
1. The general approach of the <i>UNCITRAL Secured Transactions Guide</i> . . . . .	146-148
2. Possible asset-specific adjustments . . . . .	149-161

## I. Introduction

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)<sup>1</sup> 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.<sup>2</sup>

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.<sup>3</sup> 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.<sup>4</sup>

3. Pursuant to the 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.<sup>5</sup>

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 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

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<sup>1</sup> The asset that is encumbered is described as an “intellectual property right” rather than as “intellectual property” (see para. 47 below).

<sup>2</sup> *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17 (A/61/17)*, paras. 81 and 82.

<sup>3</sup> *Ibid.*, para. 83.

<sup>4</sup> *Ibid.*, para. 86.

<sup>5</sup> See <http://www.uncitral.org/uncitral/en/commission/colloquia/2secint.html>.

(Security Interests) with the preparation of an annex to the draft Guide specific to security rights in intellectual property rights.<sup>6</sup>

5. At its resumed fortieth session (Vienna, 10-14 December 2007), the Commission finalized and adopted the UNCITRAL Legislative Guide on Secured Transactions (“the *UNCITRAL Secured Transactions Guide*”) on the understanding that an annex to the *UNCITRAL Secured Transactions Guide* specific to security rights in intellectual property rights would subsequently be prepared.<sup>7</sup>

6. The purpose of the present note is to discuss briefly how the *UNCITRAL Secured Transactions Guide* intersects with existing intellectual property regimes and to explore ways in which the benefits of an efficient and effective secured transactions law can be extended to collateral consisting of intellectual property rights through appropriate asset-specific adjustments to the *UNCITRAL Secured Transactions Guide*. The note builds on the general policy approaches of the *UNCITRAL Secured Transactions Guide* and the United Nations Convention on the Assignment of Receivables in International Trade (hereinafter referred to as “the United Nations Assignment Convention”).<sup>8</sup> At the same time, the note is based on the fact that the *UNCITRAL Secured Transactions Guide* defers to national law and international agreements “relating to intellectual property” and does not change intellectual property law (see recommendation 4, subparagraph (b)).

7. In order to clarify the context and the type of transactions to be covered, the note first presents typical examples in which intellectual property rights may become subject to secured transactions (chapter II). The note then discusses briefly the treatment of security rights in intellectual property rights under current law in various legal systems (chapter III). In chapter IV, the note, summarizing the treatment of security rights in intellectual property rights in the *UNCITRAL Secured Transactions Guide*, suggests for consideration by the Working Group several adjustments to the asset-specific part of the *UNCITRAL Secured Transactions Guide*. The note concludes with suggestions for future work on security rights in intellectual property rights (chapter V).

## II. Examples of intellectual property financing practices

8. As the focus of this note is to stimulate thinking on ways of promoting secured credit for businesses that own or have the right to use intellectual property while also protecting the legitimate interests of the owners (or rights holders) or licensees of the intellectual property, it is useful to have a number of hypothetical fact patterns to provide a backdrop for the analysis.

9. The following examples have been designed to reflect typical financings that involve intellectual property rights in some way, although they represent only a small sampling of the many and varied examples that arise in actual practice. Certain of the examples presented below involve situations in which the party seeking financing is the owner of the intellectual property that are to secure the requested financing, while the other examples involve situations where the party seeking financing is the licensee of the intellectual property.

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<sup>6</sup> *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17 (A/62/17 (Part I))*, paras. 156, 157 and 162.

<sup>7</sup> *Ibid.*, *Sixty-second session, Supplement No. 17 (A/62/17 (Part II))*, paras. 99-100.

<sup>8</sup> United Nations publication, Sales No. E.04.V.14.

### **Examples in which the grantor is the owner of intellectual property**

#### **Example 1 (portfolio financing – revolving credit)**

10. 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 existing patents and patent applications, as well as their chain of title, valuation and royalty receivables. Bank A evaluates which ones it will include in the "borrowing base" and at what value. In connection therewith, Bank A obtains an appraisal from an independent appraiser of intellectual property. Bank A then obtains a security right in the portfolio of patents and patent applications and files a notice of its security right in the appropriate national patent registries. As Company A invents 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 credit it will extend, and adjusts the borrowing base. Company A then makes appropriate filings in the patent offices reflecting its security right in the new patent.

#### **Example 2 (single asset financing)**

11. Company B, a well-known manufacturer of photocopy machines, wishes to borrow money from Bank B secured in part by its trademark, patents used in connection with the photocopy machines and trade secrets used in its manufacturing process which have 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 to repay the loan. The trademark and patents are included in an "enterprise loan" for all the assets of Company B. 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. Upon completion of the loan documentation, and at a (small) part of the loan fee, Bank B registers its security right in the appropriate national trademark and patent registers.

#### **Example 3 (royalty financing)**

12. 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 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 licences. Company C provides Bank C with a list of the licences, their credit profile, and the status of each contract. Bank C then requires Company C to obtain an "estoppel certificate" from each licensee verifying the existence of the licence, the absence of default, the amount due, and the agreement to pay future royalties to Bank C until further notice.

#### **Example 4 (project financing)**

13. 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, director(s) and actors. The production company obtains a loan from Bank D secured by the copyright, service contracts and all revenues earned from exploitation of the motion picture. The production company then enters into licence agreements with Licensees 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 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 it will not terminate the licence so long as Licensee makes payments and otherwise abides by the licence.

### **Examples in which the grantor is the licensee of intellectual property rights**

#### **Example 5**

14. 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 goods. 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 goods. Company E provides Bank E with its trademark licence agreements evidencing its right to use the trademarks.

#### **Example 6**

15. 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 E 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 its supplier, Company E, evidencing that the jeans distributed by Company F are genuine.

#### **Example 7**

16. Company G, a retail book store, seeks a loan from Bank G secured by Company G’s inventory of hard cover and paperback books. Company G acquires its books in two ways. First, it buys individual copies from publishers. Second, recently, Company G has been taking possession of the books “on consignment” and agreeing to provide shelf space and advertising. Company G 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 8**

17. Company H is the licensee of a patent under a licence agreement that gives Company H the right to manufacture and sell equipment including technology covered by the patent. Company H wishes to obtain financing for its business secured by the equipment it manufactures and the receivables arising from sales of the equipment to Company H’s customers. Company H is willing to provide a lender with a copy of its patent licence (subject to any confidentiality restrictions).

18. Each of the above-mentioned examples illustrates how owners or licensees of intellectual property can use their rights as security for a loan. The main question is what rights exactly can be used as collateral. A related practical question is how the borrower can ensure that it receives the highest appraisal of the value of those rights. Secured transactions law cannot address this question, but the annex might discuss as it affects the use of intellectual property rights as collateral for credit. In this context, the commentary might explain that appraising the value of an intellectual property right

may raise significant difficulties. Different criteria have to be taken into account, such as the value of the right itself and the expected cash flow, but there does not seem to be a universally accepted formula. However, in part as a result of the increasing importance of intellectual property as collateral for credit, in some countries, lenders and borrowers are often able to seek guidance from independent appraisers of intellectual property.

19. For prospective lenders, due diligence requires the lenders 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 their 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, and other parties having rights in, the intellectual property, will affect the lender's willingness to extend the requested credit and the cost of such credit. In so doing, however, the lender can often rely on appropriate due diligence already conducted by the prospective borrower. Moreover, in most cases the cost of conducting due diligence is a one-time fee included in the initial cost of the loan.

20. Examples 1 through 4 involve situations in which the party seeking financing is the owner, rather than a licensee, of the intellectual property in question, and the intellectual property ownership right itself is to serve as collateral for the loans. This circumstance presents issues for the prospective lender that are somewhat different from the issues presented by Examples 5 through 8. Some of these issues are as follows:

(a) Is there an efficient and straightforward method for creating a security right in all 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 grantor? Are these costs justified because of the increased benefits the lender receives through protection of the intellectual property rights that form the basis for its collateral, which can reduce the cost and increase the amount of the credit that the lender is willing to make available to the grantor because of this increased protection? Is there a way for the bank 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 to register its security rights in all of the jurisdictions? What benefits or detriments arise from so doing?

(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 country?

(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 E automatically extend to new drug patents obtained by Company A and new patent applications filed by Company A?

(e) Is there a straightforward procedure for Company C and Company D to grant a security right in the revenue streams under the royalty producing licences in Examples 3 and 4? What is the effect of a prohibition on assignment contained in the licences referred to in Examples 3 and 4?

(f) In each of the examples, 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?

21. Examples 5 through 8 all involve situations in which the collateral includes intellectual property not owned by the grantor of the security right, but rather by a third party. In Examples 5 and 6, some of the goods that are to serve as security for the loans to Company E (the manufacturer of the goods) and Company F (a distributor of the goods) bear trademarks owned by third parties and licensed to Company E under a licence to manufacture and sell goods bearing the marks. The book publisher in Example 7 acquires books in a legitimate sale that “exhausts” certain intellectual property rights, and in consignment transactions that may not do so. The equipment manufacturer in Example 8 is a licensee of patents that are essential to the functioning of the equipment. Each of these examples presents important due diligence issues for the prospective lender concerning the extent to which the lender will be able to obtain, and enforce if necessary, a security right in the proffered collateral. Certain of these issues are as follows:

(a) If Bank E in Example 5 wishes to realize on its security consisting of the 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 E under the licence agreements? Alternatively, does Bank E have a right to dispose of the trademarked goods without consent of the trademark owners? These issues will require Bank E to examine the licence agreements under which its borrower obtained the licence to use the trademarks on the goods from the trademark owners.

(b) What would happen if, while Bank E’s financing to Company E 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 E? If, on the other hand, the licensor is not insolvent, but is nevertheless in default to its own lender, and that lender assigns the trademark to a third party in connection with the enforcement of its security right, would that assignment terminate the licence to Company E? Would the result depend on whether Company E’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 E, upon a default by Company E under its credit facility with Bank E, to dispose of existing goods that were manufactured under the licence while the licence agreement was in effect?

(c) If Company E becomes insolvent, would it nevertheless be able to continue to operate under the licences if Company E 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 E have the right under applicable insolvency law to assign the licences to a third party in connection with a sale of its business, with the approval of the insolvency court, to a third party?

(d) Do the licence agreements in favour of Company E impose any limitations on Company E’s ability to disclose confidential information to Bank E that Bank E might require in order to evaluate the trademarks as collateral? In other words, does Bank E have a right to obtain confidential information of the licensor that is subject to non-disclosure? And can Bank E then use the confidential information without restriction?

(e) In Examples 6 and 7, the bank is faced with similar due diligence issues as the bank in Example 5. Are the answers in Example 6 any different because

Company F is a distributor of the goods in question rather than a manufacturer? Are the answers in Example 7 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),<sup>9</sup> while other copies are consigned? Are the answers in Example 8 any different because the intellectual property rights in question consist of patents rather than trademarks?

### III. The treatment of security rights in intellectual property rights under current law

22. National intellectual property laws differ in many respects (e.g. the meaning, the scope of intellectual property rights, the requirements and legal effects of registration of intellectual property rights). Harmonization of intellectual property law is within the mandate of organizations, such as WIPO, under the auspices of which several intellectual property law treaties have been prepared (the next paragraph includes a list of some of those treaties). As already mentioned, the *UNCITRAL Secured Transactions Guide* defers to national law and international agreements “relating to intellectual property” (see recommendation 4, subparagraph (b)).

23. In most legal systems patents, trademarks and copyrights are generally recognized as different types of intellectual property rights. For example, for the purposes of the Agreement on Trade-related Aspects of Intellectual Property Rights (Marrakesh, 1994; hereinafter referred to as “TRIPS”), the term “intellectual property rights” refers to: (a) copyright and related rights; (b) trademarks; (c) geographical indications; (d) industrial designs; (e) patents; (f) layout designs (topographies) of integrated circuits; and (g) protection of undisclosed information (see article 1, para. 2). According to the Convention Establishing the World Intellectual Property Organization (Stockholm, 1967, as amended in 1979; 184 States Parties; hereinafter referred to as “the WIPO Convention”), intellectual property rights includes the rights relating to: (a) literary, artistic and scientific works; (b) performances of performing artists, phonograms and broadcasts; (c) inventions in all fields of human endeavour; (d) scientific discoveries; (e) industrial designs; (f) trademarks, service marks, and commercial names and designations; (g) protection against unfair competition; and (h) all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields (see article 2, para. (viii)).

24. In addition to TRIPS and the WIPO Agreement, there are a number of treaties promulgated under the auspices of WIPO on intellectual property law, including but not limited to: (a) the Patent Law Treaty (Geneva, 2000; 17 Contracting Parties); (b) the Patent Cooperation Treaty (Washington, D.C., as most recently amended in 2001; 138 Contracting Parties); (c) the Trademark Law Treaty (Geneva, 1994; 39 Contracting Parties); (d) the Madrid Convention for the Repression of False or Deceptive Indications of Source on Goods (Madrid, 1891, as revised most recently in 1958; additional act, Stockholm, 1967; 35 Contracting Parties); (e) Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (Madrid, adopted in 1989 and amended in 2006; 74 Contracting Parties); (f) Lisbon Agreement for the Protection of Appellations of Origin and their International Registration (Lisbon, as most recently amended in 1979; 26 Contracting Parties); (g) the Hague Agreement Concerning the International Registration of Industrial Designs (Geneva, 1999; 47

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<sup>9</sup> For an explanation of the meaning of the “exhaustion doctrine”, see para. 105 below.



Contracting Parties); (h) the WIPO Copyright Treaty (Geneva, 1996; 64 Contracting Parties); (i) the Berne Convention for the Protection of Literary and Artistic Works (Berne, 1886, as revised most recently in 1979; 163 Contracting Parties); (j) the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome, 1961; 86 Contracting Parties); (k) the WIPO Performances and Phonograms Treaty (Geneva, 1996; 62 Contracting Parties); (l) the International Convention for the Protection of New Varieties of Plants (Geneva, 1961, as revised most recently in 1991; 64 Contracting Parties; prepared under the auspices of the Union internationale pour la protection des obtentions végétales).

25. As the *UNCITRAL Secured Transactions Guide* indicates (see Chapter I, Section B, Basic approaches to security), there are great divergences in the approaches taken in the various legal systems to security rights in movable property (tangible and intangible). These divergences create obstacles to the availability of credit and thus to both domestic and international trade. The *UNCITRAL Secured Transactions Guide* is an effort to modernize and harmonize secured financing law. The increasing use of intellectual property rights as collateral for credit creates additional difficulties of coordination between currently existing secured financing and intellectual property law. The proposed annex is an effort to address these difficulties that already exist outside the *UNCITRAL Secured Transactions Guide*. The following paragraphs indicate some of these difficulties.

26. In many jurisdictions, the practice of using intellectual property rights as security for credit is totally unknown or very limited. In some jurisdictions, views diverge as to whether intellectual property rights are proprietary rights (in rem) or reinforced personal claims (in personam). Accordingly, in some jurisdictions, there is no special law regulating the use of intellectual property rights as security for credit; the general provisions for security rights in intangible assets apply. In other jurisdictions, these general rules are supplemented by general rules dealing with transfers of title, pledges or mortgages of intellectual property rights. Transfers of title can be either outright transfers or transfers for security purposes (in which the transferee will have an obligation to retransfer the intellectual property right back to the transferor upon payment of the secured obligation). In some jurisdictions, copyrights are non-registered rights, divided into moral rights (that are not transferable and thus not capable of being used as collateral for credit) and economic rights (that are transferable and thus may be subject to a security right). In some jurisdictions, domain names are treated as assets that may be subject to property rights, while in other jurisdictions they are treated as personal claims.

27. The status of the law in this regard is as described in the section of the *UNCITRAL Secured Transactions Guide* on the basic approaches to security. Generally, in the absence of a comprehensive law, in many countries, practice developed different devices, such as an outright or conditional transfer of title for security purposes and pledge of intangible assets.

28. In a few countries, intellectual property rights are financed by an outright transfer of full title (ownership) to the creditor, subject to a contractual obligation to retransfer the intellectual property rights upon satisfaction of the obligation. Outright-transfer-based financing transactions of this type typically happen outside the national secured financing regime and, as such, are subject only to whatever contractual rights the transferor negotiates. As a matter of principle, this practice is often discouraged as a circumvention of the national financing regime. As a practical matter, it is often limited to special cases and thus has limited commercial utility.

29. In some countries, pledge-based concepts have been applied to intellectual property rights financing. As the typical pledge pre-supposes transfer of possession of the pledged assets to the secured creditor, the pledge has to be fictive or non-possessory as intangibles are not subject to possession (and possession of software encoded on a CD or chip does not constitute possession of the software). In these countries, it is often the case that filing evidence of the pledge in an available national intellectual property rights registry, such as a national patent office, serves to create the fictive possession required for the financing. Where such a specialized registry is not available for a specific type of intellectual property right, such as for copyrights, the law is often unsettled whether the intellectual property rights can be effectively financed.

30. In other countries, mortgage-based concepts are applied to intellectual property financing. In mortgage-based financing practices in some jurisdictions, the creditor is deemed to be holding the effective title while the financing is in place. This gives the creditor the right to control licences and use to prevent waste, but also obligates the creditor to pursue any infringer and deal as necessary with governmental authorities. If the creditor does not wish to deal with these matters, it is necessary for the creditor to grant a "licence back" to the debtor to do so. While workable in concept, this approach requires additional documentation and monitoring costs. In other jurisdictions, these differences are addressed through the particular type of financing instrument. Thus, in some common law countries, a "legal" mortgage allows the creditor to retain title and consequent ability to deal with the intellectual property rights, while an "equitable" mortgage allows the grantor to do so. In these situations, different priority rules apply to the different types of financing devices.

31. In many of the jurisdictions that permit fictive or non-possessory pledges of intellectual property rights, certain types of intellectual property rights may be the subject of such transactions (e.g. patents and trademarks) but not others (e.g. copyrights or trade secrets) that lack registration systems. In jurisdictions that permit mortgages and similar title-based devices, a wider range of intellectual property rights is usually covered by the financing regime. With respect to some types of intellectual property rights (e.g. patents or trademarks), evidence of the agreement has to be registered in an asset-specific intellectual property rights registry (different for patents and trademarks). Registration usually has constitutive or declaratory effects, although there are some registries in which registration has third-party effects. The encumbered intellectual property right has to be described specifically in the document registered in an asset-based registry. In some cases, the entire financing agreement has to be registered, while in other cases a memorandum of essential terms sufficient to identify the interest affected and the parties will suffice. The operation of these registries has specific consequences on "future" intellectual property rights (see paras. 123-125 below). There are also various registries for different types of intellectual property right. Some laws permit the registration of title only. Other laws permit the registration of title transfers and licences of intellectual property rights. Yet other laws permit also the registration of security rights in intellectual property rights.

32. In some common law jurisdictions, a distinction is drawn between fixed charges (on specifically described assets) and floating charges (on an unspecified pool of assets). Generally, fixed charges have priority over floating charges. Floating charges crystallize upon the occurrence of specified events (e.g. default or insolvency) and become fixed charges on specific assets in existence at the time of crystallization (subject to various priority claims that may then be in existence or to a carve-out for unsecured creditors). Floating charges have the additional characteristic that they allow the grantor to remain in possession or control of and to deal with the encumbered assets. In these jurisdictions,

fixed or floating company charges are registrable in the company registry. What is registered is the full transaction document, and not just a notice; the transactions document is checked by the registrar and a certificate is issued that provides conclusive evidence of the rights created by the transaction.

33. With respect to assignments, in common law jurisdictions, a distinction is often drawn between an assignment in law, which transfers ownership, and an assignment in equity, which amounts to a conditional transfer of ownership. In this framework, a secured creditor may obtain a conditional right (“equitable title”) to take full title to the encumbered intellectual property right in case of default and enforcement, or the secured creditor may take the full title and leave the debtor with the conditional right (“equity of redemption”) to recover the full title upon satisfaction of the secured obligation. Similarly, often a distinction is drawn between legal ownership and beneficial or equitable ownership (a trustee in a trust has legal ownership, while the beneficiaries hold beneficial or equitable ownership). In intellectual property practice, these formal distinctions about which party holds “title” can have consequences with respect to standing to sue infringers and exercise the intellectual property right.

34. In a few jurisdictions, enterprise mortgages or pledges of all assets of an enterprise are permitted. Where the enterprise is the owner or proprietor of the intellectual property rights, then in the usual case an owner is considered empowered to make transfers, so the enterprise security device extends to the intellectual property rights. In a few countries, the intellectual property right itself cannot be assigned, but it can be the subject of exclusive licences, and the security device can operate as such a transfer. Where the enterprise’s interest is only a licence of intellectual property, however, the practice differs. In some countries, it is suggested that, given the personal nature of licences, a licence is not transferable without the consent of the licensor. Therefore, a licensor should be able to terminate a licence upon the granting of an enterprise security right, or, in any case, should be able to do so upon an attempted enforcement that would result in a transfer of the licence to another party. However, in other jurisdictions, there is an exception to the usual rule of non-transferability in the case of a transfer of all assets of an enterprise, and an enterprise security device would seem to fall within this exception. Where an enterprise mortgage is recognized, it may be ineffective against prior or even subsequent transferees or security rights in specific intellectual property rights, especially when these specific transfers or security rights are registered in the relevant intellectual property rights registry.

35. In some jurisdictions, an additional complication is the intersection of transfer of title and pledge law with intellectual property law, and the addition of various rules and different registries. Secured credit law and intellectual property law often do not work well together. There are two main reasons for this situation. Secured credit law with respect to intellectual property rights has the same problems as secured credit law with respect to other types of encumbered asset, as described in the *UNCITRAL Secured Transactions Guide* in the section on basic approaches to security (the law is often unclear, scattered in various laws, presenting inconsistencies and gaps); in some jurisdictions, there may even be no secured credit law with respect to intellectual property rights. The other factor is that intellectual property rights can be hard to evaluate, with the result that it is not used at all as security for credit or its use is very limited (see para. 18 above).

36. In legal systems that have a regime similar to the regime recommended in the *UNCITRAL Secured Transactions Guide*, a security right in an intellectual property right may be created, made effective against third parties, obtain priority and be enforced in the same way as a security right in any other intangible asset, subject to any appropriate

limitations introduced by intellectual property law. The details of the treatment of security rights in intellectual property rights given below with respect to the *UNCITRAL Secured Transactions Guide* apply to these regimes as well. In short, a security right is created by agreement, which has to be in writing if a non-possessory security right is created (as is ordinarily the case with security rights in intellectual property rights). The security right extends to proceeds and future assets (i.e. assets produced or acquired after creation of the security right). It becomes effective against third parties by registration, possession (in the case of possessory security rights in tangible assets) or control (in the case of security rights in intangible assets such as the right to receive payment of the funds credited to a bank account).

37. Priority is generally based on the time of registration or third-party effectiveness. The security right may be enforced judicially (including expedited proceedings) or extra-judicially subject to safeguards to protect the rights of the grantor and the grantor's other creditors. The basic effectiveness of a security right is respected in the case of insolvency of the grantor, subject to avoidance actions (see recommendation (88) of the *UNCITRAL Insolvency Guide*). The priority of a security right under general law before commencement of an insolvency proceeding is recognized, subject to preferential claims and to court decisions permitting security rights securing post-commencement finance to take priority over pre commencement security rights (see recommendation 239). Special priority is recognized for security rights securing the purchase price of tangible assets (see recommendations 180 and 192). If law other than insolvency law treats them as ownership devices, in the case of insolvency, assets subject to such rights may be treated either as encumbered by a security right or as third-party owned assets (see recommendations 186 and 201).

38. The preceding paragraphs indicate: (i) the diversity of existing intellectual property regimes; (ii) the diversity of approaches to secured financing; and (iii) the current situation in which the two regimes are not well adjusted. Harmonizing intellectual property law is outside the scope of the *UNCITRAL Secured Transactions Guide* and any annex on security rights in intellectual property rights. Harmonization of approaches to secured financing is certainly one of the objectives of the *UNCITRAL Secured Transactions Guide*. With respect to the coordination between intellectual property and secured financing law, it should be noted that the *UNCITRAL Secured Transactions Guide* does not create this lack of coordination. The *UNCITRAL Secured Transactions Guide* is rather an effort to address this problem that already exists under law applicable outside the *UNCITRAL Secured Transactions Guide*.

#### **IV. The treatment of security rights in intellectual property rights under the *UNCITRAL Secured Transactions Guide* and possible asset-specific adjustments**

##### **A. Terminology**

###### **1. The general approach of the *UNCITRAL Secured Transactions Guide***

39. The *UNCITRAL Secured Transactions Guide* already defines the term "intellectual property" as follows:

"Intellectual property" means copyrights, trademarks, patents, service marks, trade secrets and designs and any other asset considered to be intellectual

property under the domestic law of the enacting State or under an international agreement to which the enacting State is a party.”

40. The *UNCITRAL Secured Transactions Guide* also includes the following commentary to the definition:

“The definition of ‘intellectual property’ is intended to ensure consistency of the *UNCITRAL Secured Transactions Guide* with intellectual property laws and treaties, while at the same time respecting the right of the legislator in a State enacting the recommendations of the *UNCITRAL Secured Transactions Guide* to align the definition with its own law and international obligations.

An enacting State may add to this list or subtract from it types of intellectual property to conform it to national law. The reference to international agreements is intended to refer to agreements, such as the Convention Establishing the World Intellectual Property Organization and the Agreement on Trade-Related Aspects of Intellectual Property (‘TRIPS’).<sup>10</sup>

In order to clarify that the definitions of the terms ‘acquisition security right’, ‘acquisition financing right’, ‘retention-of-title right’ and ‘financial lease’ (and the recommendations referring to them) apply only to tangible assets (and not to intangible assets such as intellectual property), reference is made in these definitions to ‘tangible assets’.

In the definition of the term ‘receivable’, reference to ‘the performance of non-monetary obligations’ has been deleted to clarify the understanding that the definition and the recommendations relating to receivables apply only to receivables and not, for example, to the rights of a licensee or the obligations of a licensor under a contractual licence of intellectual property rights.”

41. The commentary also clarifies that references to “law” throughout the *UNCITRAL Secured Transactions Guide* include both statutory and non-statutory law. In view of recommendation 4, subparagraph (b), if a State adds to the list of types of intellectual property, the deference to law relating to intellectual property law will be broader. If a State subtracts from the list types of intellectual property, the deference to law relating to intellectual property will be narrower.

## 2. Possible additional definitions

42. The Working Group may wish to consider whether the definition of intellectual property and related commentary are sufficient or whether additional definitions and clarifications in the commentary are necessary. For example, the Working Group may wish to consider whether the particular types of intellectual property right should be defined or whether reference should be made to definitions in generally recognized intellectual property law treaties. In this regard, the Working Group may wish to note that the definitions are included in the commentary of the *UNCITRAL Secured Transactions Guide* (and in the Annex to the Guide including the recommendations) to assist the reader and are not part of the recommendations.

43. As the definitions of the term “assignment” and the related terms “assignor”, “assignee” and “debtor of the receivable” refer to receivables, they (and the relevant commentaries and recommendations) do not apply to intellectual property. To use terminology that would be consistent with intellectual property law and practice, the

<sup>10</sup> Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, annex IC (United Nations, Treaty Series, vol. 1867, No. 31874).

Working Group may wish to consider whether a new definition of the term “assignment of an intellectual property right” should be added to the *UNCITRAL Secured Transactions Guide* or whether reference should be made to a more neutral term, such as the term “transfer of an intellectual property right” or “disposition of an intellectual property right” to avoid confusion or misunderstanding with the meaning of similar terms as used in intellectual property law. A definition along the following lines might be considered:

“[Assignment] [Transfer] of an intellectual property right’ means the transfer by agreement from one person ([‘transferor’] [‘assignor’]) to another person [‘transferee’] [‘assignee’]) of all, part or an undivided interest in the transferor’s rights in the intellectual property. A transfer may be outright or conditional or by way of security. A transfer of an intellectual property right by way of security amounts to the creation of a security right in the intellectual property right.”

44. Reference in the definition to the encumbered asset (i.e. the intellectual property right) would be necessary to avoid the conclusion that recommendations applicable to the assignment of receivables apply also to the assignment of an intellectual property right.

45. The Working Group may also wish to consider whether the key term to be used in the *UNCITRAL Secured Transactions Guide* should be the term “assignment” (or transfer of an intellectual property right), as is the case with receivables, or the term “security right”. In either case, in line with the approach followed in the *UNCITRAL Secured Transactions Guide*, it should be ensured that an assignment by way of security is treated in the same way as a transaction creating a security right in an intellectual property right (as to outright transfers of intellectual property rights, see paras. 83-85 below).

46. Such a definition would be in line with intellectual property law, which generally recognizes two types of voluntary conveyance of intellectual property rights: assignments and licences. Assignments, in turn, can be outright assignments, or assignments by way of security and security rights, which are often treated as conditional assignments. An assignment thus results in the transfer of ownership or the creation of a security right. A licence, in principle, creates an authorization to use, however, in some cases (especially in the case of copyrights), an exclusive licence may amount to a transfer of ownership.

47. The Working Group may also wish to define the encumbered asset. In this context, the Working Group may wish to consider that what is encumbered is not the intellectual property (e.g. a trademark, patent or copyright), but the ownership right or the right to use intellectual property. The definition may be an indicative definition referring to generally acceptable treaties, such as TRIPS or the WIPO Agreement or a more descriptive definition, bearing in mind that the definitions are not real definitions that are part of a law, but rather descriptions or explanations of terms used on the *UNCITRAL Secured Transactions Guide* that are part of the commentary and not the recommendations. The Working Group may wish to consider alternatives along the following lines:

#### **Alternative A**

“‘Intellectual property right’ is a right to intellectual property conferred by law relating to intellectual property. Such a right generally includes the right to own and a licence to use intellectual property under the terms of the licence, as well as claims.”

**Alternative B**

“‘Intellectual property right’ means an ownership right to intellectual property and a licence to use intellectual property under the terms of the licence.”

48. If the Working Group prefers to adopt Alternative A, it may also wish to define the term “claim” along the following lines:

“‘Claim’ means a right to seek relief against any infringement or misappropriation of an intellectual property right.”

49. However, in view of the broad definition of “proceeds” in the *UNCITRAL Secured Transactions Guide*, claims may be treated as proceeds of intellectual property rights (“‘proceeds’ means whatever is received in respect of encumbered assets, including what is received as a result of sale or other disposition or collection, lease or licence of an encumbered asset, proceeds of proceeds, civil and natural fruits, dividends, distributions, insurance proceeds and claims arising from defects in, damage to or loss of an encumbered asset”). Similarly, royalties arising from the assignment or a licence agreement would be treated as proceeds of intellectual property rights.

50. In this connection, the view is expressed that receivables should be treated as forming part of the intellectual property right from which they flow, as the essence of an intellectual property right may lie in the income stream it generates and there is a need for the owner to control use and payment streams of intellectual property rights. This treatment is important, they maintain, to ensure that applicable principles in the international intellectual property law conventions, including minimum rights, effective remedies, and applicable non-discrimination principles, also apply to royalty entitlements. According to this view, security rights in receivables from intellectual property transactions, such as licence royalties, should be subject to the same intellectual property law rules as those applicable to security rights in intellectual property rights themselves. Intellectual property law experts also argue that the royalties arising from intellectual property transactions are treated differently for accounting purposes from trade receivables arising from the sale of tangible commodities (see International Accounting Standard No. 38, <http://www.iasb.org>). These differences impact when royalties are “earned” (or “recognized”). For example, unlike trade receivables earned upon shipment of goods, even after the shipment of CDs, royalties may not have been earned unless the software is installed in the recipient’s computer. According to this view, only earned royalties may be treated as assets that are separate from the intellectual property rights from which they flow.

51. However, the treatment of royalties as part of an intellectual property right that enjoys the protection afforded to intellectual property rights under international treaties is a matter for those treaties. Similarly, the treatment of royalties for accounting purposes is a matter for the relevant accounting rules. In the same way, the treatment of royalties as collateral for credit is a matter of secured transactions law. Typically, secured transactions law treats royalties as receivables and proceeds (i.e. as separate assets from a legal point of view, but not from an economic point of view) of the intellectual property right from the use of which they flow (just as rents are treated as separate assets from the movable or immovable property from which they flow). This is the approach followed in the United Nations Assignment Convention, and reflected in the *UNCITRAL Secured Transactions Guide*.

52. In addition, the Working Group may wish to define the term “licence”, drawing a distinction, first between the licence agreement and the licence (i.e. the right to use) and, second, between exclusive licences and non-exclusive ones along the following lines:

“‘Licence’ means the right of a person (‘licensee’) to use intellectual property under the terms of the licence. The licence may be given by agreement with the person holding rights to the intellectual property (‘licensor’) or by law. The licensor may be the owner of the intellectual property rights or a licensee with a right to grant a sub-licence. The term includes both exclusive and non-exclusive licences.”

“‘Exclusive licence’ means the right of a person (‘licensee’) to use intellectual property under the terms of the licence to the exclusion of all other persons, including the licensor or other rights holder.”

“‘Non-exclusive licence means the right of a person (‘licensee’) to use intellectual property under the terms of the licence, where the licensor or other rights holder may use or grant to another person similar rights.”

In these definitions, the terms “under the limits of the licence” refer to the particular description of the specific intellectual property rights, the authorized or restricted uses, geographic area of use, and the duration of use. Thus, an exclusive licence to exercise the “theatrical rights” in Film X in Country A for “10 years starting 1 Jan. 2008” is different from one to exercise the “video rights” in Film X in Country A for “10 years starting 1 Jan. 2008”.

53. An issue that commonly arises is whether an exclusive licence is a proprietary transfer in the sense that it allows the licensee such an extensive use of the intellectual property that it is treated as an assignment under intellectual property law. In some jurisdictions, an exclusive licence may amount to a transfer of ownership. In other jurisdictions, it does not amount to a transfer of ownership as the owner may always revoke it if the licensee violates the terms of the licence agreement. In any case, whether an exclusive licence is a transfer of ownership is a matter of intellectual property law. In any case, under the *UNCITRAL Secured Transactions Guide*, an exclusive (or non-exclusive) licence does not create a security right.

54. Finally, the Working Group may wish to consider whether definitions of additional terms or commentary to explain the application of existing definitions might be necessary. For example, with respect to the term “grantor”, it might be usefully explained that: the grantor may be the owner, in which case the encumbered asset is the right of ownership in the intellectual property rights; that the grantor may be a licensee in which case the licensee’s right to use the intellectual property rights in accordance with the terms of the licence agreement is the encumbered asset; and that, as in the case of any other asset, the grantor may be a third party granting a security right to secure the obligation of the debtor towards the secured creditor on the basis of a contractual relationship with the debtor of the secured obligation.

55. Another definition that the Working Group may wish to review is the definition of the term “competing claimant”. In secured transactions law, the concept of a “competing claimant” is used in the context of priority rules to deal with other parties that might claim a right in the encumbered assets, or the proceeds from its disposition, in preference to the secured creditor. In intellectual property law, priority rules typically deal with conflicting transfers rather than competing claimants. The *UNCITRAL Secured Transactions Guide* does not deal with such conflicts between outright transferees only; a security right or the right of a transferee under a transfer for security purposes, which is treated as a security right, has to be involved. Thus, the *UNCITRAL Secured Transactions Guide* deals with a conflict between the rights of a transferee, lessee or licensee of an encumbered asset and a security right of a secured creditor. In such a case, in principle, the transferee, lessee or licensee will, in principle, take the encumbered asset subject to the security right (see recommendation 79).



56. In addition, in an intellectual property law context, a priority conflict may arise between rights of transferees and rights of licensees. The *UNCITRAL Secured Transactions Guide* leaves such a conflict to intellectual property law (unless a transfer by way of security is involved). If one of the competing rights is the right of a transferee under a transfer by way of security, the rules explained in the preceding paragraph apply. Accordingly, a prior licensee takes free of the right of the transferee/secured creditor (as the grantor cannot transfer more rights than it has), while a subsequent licensee takes, in principle, subject to the security right (see recommendation 79).

57. Moreover, in an intellectual property law context, a priority conflict may involve rights of creditors of owners (or other licensors) and rights of creditors of licensees (or sub-licensees) of intellectual property rights. Again, the *UNCITRAL Secured Transactions Guide* applies only when one of the competing rights is a security right (including a security transfer). Furthermore, the conflict has to relate to the same asset, which is not the case when the owner transfers or creates a security right in its right of ownership and a licensee creates a security right in its right of use. Similarly, the encumbered asset is not the same when a licensor creates a security right in any royalties owed to the licensor by the licensee and the licensee creates a security right in royalties owed to the licensee by sub-licensees. Thus, the conflict between the creditors of the licensor and the creditors of the licensee is not a true priority conflict under the *UNCITRAL Secured Transactions Guide* and is left to other law.

58. However, if a licensor grants a security right in an intellectual property right and then grants a licence, and the licensee in turn grants a security right in its right to use the licensed intellectual property, then in principle there can be a conflict between the rights of the secured creditors in the licensed intellectual property. Under the *UNCITRAL Secured Transactions Guide*, the result is that the licensor's secured creditor has superior rights as the licensee took subject to that security right and the secured creditor of the licensee could not have taken from the licensee more rights than the licensee had (according to the generally applicable rules of property law that nobody can transfer to another person more rights than the transferor has). This principle may be derived also from recommendation 82 (a contrario), which provides that, if a licensee takes free of a security right, any sub-licensee takes also free of the security right (see recommendation 82).

59. The Working Group may wish to note that the *UNCITRAL Secured Transactions Guide* recognizes that, for purposes of secured financing law, secured creditors and other creditors of the grantor (other than transferees in a transfer by way of security) are not treated as transferees. When a secured creditor acquires a security right under the *UNCITRAL Secured Transactions Guide*, that secured creditor is not presumed to obtain ownership. Not only do secured creditors not obtain ownership of the encumbered assets, they typically not even want to obtain ownership, as ownership is associated with responsibilities and costs. Even when the secured creditor disposes of the encumbered asset to enforce its security right after default, the secured creditor is not 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 exercises the remedy of proposing to acquire ownership 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 ownership by purchasing the asset at a public sale may the secured creditor become an owner. Similarly, as already mentioned, the *UNCITRAL Secured Transactions Guide* does not treat a right of use under a licence agreement as a security right. Of course, intellectual property law may have different treatment for its purposes; and nothing in secured transactions law

prevents a secured creditor from agreeing with an owner or other rights holder to become an owner or other rights holder.

60. The Working Group may wish to adopt a working assumption with respect to the above-mentioned definitions for the purpose of the discussion of the substantive issues below and come back to the definitions when it has reached an agreement in principle on the substantive issues discussed below.

## **B. Key objectives and fundamental policies**

### **1. The general approach of the *UNCITRAL Secured Transactions Guide***

61. The *UNCITRAL Secured Transactions Guide* contains a general statement of key objectives and fundamental principles. The overall objective of the *UNCITRAL Secured Transactions Guide* is to promote secured credit. In order to achieve this general objective, the *UNCITRAL Secured Transactions Guide* discusses several sub-objectives, including the objective of predictability and transparency. The *UNCITRAL Secured Transactions Guide* also promotes several fundamental policies, including the comprehensive scope of secured transactions laws, the integrated and functional approach, the possibility of granting a security right in future assets, the extension of security rights into proceeds, the distinction between effectiveness as between the parties and effectiveness as against third parties, the establishment of a general security rights registry, the possibility that multiple security rights may be created in the same assets by the same grantor, the need to cover priority conflicts in a clear and comprehensive way, the possibility for extrajudicial enforcement of security rights and the equal treatment of all creditors granting acquisition financing.

### **2. Possible asset-specific adjustments**

62. The Working Group may wish to consider whether or how all these key objectives and fundamental policies apply to secured transactions with respect to intellectual property rights. For example, the Working Group may wish to consider emphasizing, for example, the following key objectives in the context of secured transactions relating to intellectual property rights:

(a) Allow intellectual property rights holders to use intellectual property rights as collateral for credit (see Key objective 1, subparagraph (a));

(b) Allow intellectual property rights holders to use the full value of their assets to obtain credit (see Key objective 1, subparagraph (b); this may mean that credit can be obtained through a secured transaction and not through an outright assignment);

(c) Enable intellectual property rights holders to create a security right in their intellectual property rights in a simple and efficient manner (see Key objective 1, subparagraph (c));

(d) Enable parties to secured transactions relating to intellectual property rights maximum flexibility to negotiate the terms of their security agreement (see Key objective 1, subparagraph (i));

(e) Enable interested parties to determine in a clear and predictable way the existence of security rights in intellectual property rights (see Key objective 1, subparagraph (f));

(f) Enable secured creditors to determine their priority in a clear and predictable way (see Key objective 1, subparagraph (g)); and

(g) Facilitate efficient enforcement of creditor's rights (see Key objective 1, subparagraph (h)).

63. The Working Group may also wish to consider whether additional key objectives or fundamental policies should be elaborated.

64. For example, a central purpose of intellectual property rights is to benefit the public by providing legal protection to works of the mind so as to encourage further innovation and creativity. An elaboration for the commentary of the key objective of promoting secured credit with respect to intellectual property rights may be to ensure that that key objective is achieved in a way that discourages unauthorized use and utilization of intellectual property and promotes legal protection of innovation.

65. An example of a possible additional fundamental policy might be to ensure coordination between secured financing and intellectual property law, which should prevail to the extent of any inconsistency. The *UNCITRAL Secured Transactions Guide* in recommendation 4, subparagraph (b), states that the law proposed in the *UNCITRAL Secured Transactions Guide* should not apply to "intellectual property in so far as the provisions of the law are inconsistent with national law or international agreements, to which the State is a party, relating to intellectual property". In addition, the definition of "intellectual property" refers to national law and international agreements relating to intellectual property. The Working Group may wish to consider that the definition and recommendation 4, subparagraph (b), reflect a fundamental policy of the *UNCITRAL Secured Transactions Guide* to defer to law relating to intellectual property rights. The commentary could explain that "law relating to intellectual property" includes both statutory and non-statutory law and is broader than "intellectual property law" but narrower than general property law. The commentary may wish to provide examples of how this principle would apply in the various legal systems.

66. Another example may relate to the question whether a secured creditor that obtains a "security right" under the *UNCITRAL Secured Transactions Guide* by so doing becomes a "right holder" with respect to any intellectual property rights encumbered by the security right (under article 42 of TRIPS, "right holders" may assert their rights "in civil judicial procedures concerning the enforcement of any intellectual property right covered by this Agreement"). The commentary could explain that in addressing this issue, States should consider the different approaches in secured financing law and intellectual property law. For secured financing purposes, the *UNCITRAL Secured Transactions Guide* is primarily concerned with the rights of the secured creditor as against the grantor (and other obligors) and third parties that may claim a right in the encumbered assets.

67. To deal with these matters, the *UNCITRAL Secured Transactions Guide* dispenses with formal notions of the location of "title" to the encumbered assets. Instead, under the *UNCITRAL Secured Transactions Guide*, when the secured creditor disposes of the encumbered asset in enforcing its security right after default, it exercises the grantor's rights as an owner (or rights holder). Thus, for resolving issues germane to secured financing law, the secured creditor is not treated as an "owner" of the encumbered asset, until and unless, after default, it acquires the encumbered asset. This principle applies both to tangible and intangible assets.

68. Intellectual property law, however, is concerned with ownership and the notion of "third parties" has a different meaning, as it refers to authorized users (e.g. licensees),

unauthorized users (i.e. infringers) and transferees. Intellectual property law often decides which party, grantor or secured creditor, has legal authority to deal with these third parties under formal notions of title. For these purposes, which are separate and apart from the concerns of secured financing law, it is important to decide whether a secured creditor is a “right holder” in the sense used in TRIPS while the financing is in place. In these situations, the *UNCITRAL Secured Transactions Guide*, of course, leaves questions of which party is a “right holder” to intellectual property law. Thus, it can happen that, for intellectual property law purposes, a secured creditor can be an “owner” or “right holder” of the encumbered asset, especially when the issue involves such matter as dealing with infringers, while for secured financing purposes such a classification is unnecessary as it does not impact the relative rights of the parties when dealing with issues specific to secured financing law, such as the requirements for an effective security agreement. It will be important for the Annex to distinguish these differing perspectives.

69. Another example of a possible additional key objective or fundamental policy may relate to the fact that the *UNCITRAL Secured Transactions Guide* defers to general property law with respect to principles such as the principle of *nemo dat quod non habet*, i.e. nobody gives what he or she does not have. The commentary could explain that a secured creditor obtains no greater rights in any intellectual property rights encumbered by a security right under the *UNCITRAL Secured Transactions Guide* than the actual interest of the grantor of the security right in the encumbered intellectual property rights. The rights of the secured creditor are subject to all enforceable terms and conditions regarding the use of the encumbered intellectual property rights to which the grantor is subject. In particular, all terms and conditions regarding the use and exercise of intellectual property rights set out in a disposition document (including an assignment, licence or transfer by succession) are subject to intellectual property law and secured transactions law does not affect them.

70. In this regard, it is crucial to distinguish property rules, such as the *nemo dat* principle, from priority rules. The property law rules determine whether a party has a right in an asset, while the priority rules then determine which party prevails among competing rights holders. The *nemo dat* principle may lead to a priority rule (i.e. “first in time”) but is not itself a priority rule. To illustrate, assume A owns a patent in country X but not in country Y. Then:

Case 1: A assigns the patent in Country X to B. Later, B assigns the patent in Country Y to C.

Case 2: A assigns the patent in Country X to B. Later, A assigns the patent in Country X to C.

Case 1 is a pure application of the *nemo dat* rule. As B never had any right to the patent in Country Y, C gets nothing, and no priority rule can ever vest rights in C. Case 2 is a pure priority conflict. If the priority rule is “first in time,” then C gets nothing. Alternatively, if the priority rule is “first to file in the patent office in Country X” then C could prevail. *Nemo dat* does not provide an answer in Case 2 since it would mean that B always prevails (i.e. C “takes nothing” due to the prior transfer to B) whereas in fact C can prevail if C qualifies under the priority rule. In either case, the *UNCITRAL Secured Transactions Guide* does not apply unless one of the assignments is a security right or an assignment by way of security and it has been made effective against third parties by registration in the general security rights registries.

71. A further example of a key objective or fundamental policy may relate to the question whether a security right under the *UNCITRAL Secured Transactions Guide* is

effective against the rights of any assignee, licensee or transferee of intellectual property rights encumbered by that security right. The matter may be addressed in the commentary on priority. Two general situations must be distinguished. In the first situation, a rights holder transfers its intellectual property rights and then creates a security right. In this case, the subsequent secured creditor would obtain nothing as the grantor could not grant a right that the grantor did not have. However, if the applicable intellectual property law protects a secured creditor in good faith, then a later security right that was registered first in an intellectual property rights registry could prevail. In the second situation, a rights holder creates a security right and then transfers its intellectual property rights. In this case, following generally applicable property law principles that a property right follows the asset in the hands of a transferee, lessee or licensee (*droit de suite* of property rights), the *UNCITRAL Secured Transactions Guide* provides that the transferee, lessee or licensee takes the encumbered asset subject to the security right (see recommendation 79; the exceptions are discussed in the priority section in A/CN.9/WG.VI/WP.33/Add.1). It should also be noted that, under the *UNCITRAL Secured Transactions Guide*, the prior security right only prevails if it has also gained third-party effectiveness by a proper filing in the general security rights registry.

72. The Working Group may wish to note that, in light of recommendation 4, subparagraph (b), if the intellectual property law rule gives priority to the first party to duly record its right in the national intellectual property rights registry, then priority would be based on this rule. The Working Group may wish to consider whether this matter should be discussed in the commentary on priority or be upgraded to a general policy approach. The Working Group may also wish to consider whether the commentary should discuss the difference between third-party effectiveness under the *UNCITRAL Secured Transactions Guide* (which relates to effectiveness against competing claimants) and third-party effectiveness under intellectual property law (which relates to effectiveness as against transferees, licensees and infringers of an intellectual property right).

73. Another example of a fundamental approach may relate to the question whether States should be able to continue to utilize their existing specific methods of financing of intellectual property rights by a conditional assignment, mortgage, fixed charge, fixed pledge or other comparable device. This may be a specific expression of the principle of deferral to intellectual property law, which would require that these methods are authorized by law relating to intellectual property (and not general property law). Whether such a financing device should have priority over a security right under the *UNCITRAL Secured Transactions Guide* may be better dealt with as a priority issue, although it may also have an impact on the way of achieving third-party effectiveness. In any case, under the *UNCITRAL Secured Transactions Guide*, a security or other right registered in a specialized registry has priority over a security right registered in the general security rights registry (see recommendations 77 and 78).

74. Under the *UNCITRAL Secured Transactions Guide*, this priority does not extend to security rights that are not registered in the relevant intellectual property rights registry. However, if a security right is created in an intellectual property right and then that right is transferred or licensed, the transferee or licensee will take the intellectual property right subject to the security right (see recommendation 79). Both priority rules are subject to the principle of recommendation 4, subparagraph (b), which means that, if they are inconsistent with a priority rule of intellectual property law, that rule prevails. The Working Group may wish to consider whether a distinction should be drawn between security rights in ownership rights and security rights in the rights of a licensee

of intellectual property. In addition, the Working Group may wish to consider whether security rights in specific intellectual property rights should be subject to different third-party effectiveness and priority rules from security rights in pools of assets, including intellectual property rights.

75. Examples of other key objectives and fundamental policies may include the following: the secured transactions law should neither diminish the value of intellectual property rights nor result in the inadvertent abandonment of intellectual property rights (e.g. failure to use a trademark properly, or to use it all on goods or services or to maintain adequate quality control may result in loss of value or even abandonment); in the case of trademarks, consumer confusion should be avoided (e.g. where a secured creditor removes trademarks from goods and sells them); secured transactions law should not, and does not, provide that the granting of a security right in the rights of a licensee under a personal licence could result in the assignment of such rights without the consent of the owner.

## C. Scope of application and other general rules

### 1. The general approach of the *UNCITRAL Secured Transactions Guide*

76. The *UNCITRAL Secured Transactions Guide* applies to security rights in all types of movable asset, including intellectual property (see recommendation 2, subparagraph (a)). However, it does not apply to intellectual property “in so far as the provisions of the [secured transactions] law are inconsistent with national law or international agreements, to which the State is a party, relating to intellectual property (see recommendation 4, subparagraph (b)).

77. As mentioned above (see para. 65), “law relating to intellectual property” includes both statutory and non-statutory law and, while its exact scope is a matter of intellectual property law, it seems to be broader than strictly speaking “intellectual property law” but narrower than general property or contract law (as set out in a code in civil law countries or in case law in common law countries).

78. So, for example, if national law provides that a certain intellectual property right must be registered in a designated registry in order to be effective against third parties, this rule of national law would prevail over any inconsistent rule enacted by a State pursuant to the recommendations of the *UNCITRAL Secured Transactions Guide*. However, if general property or contract law in a State were to provide that contracts relating to property rights generally have to be in notarial form (and this rule were consequently applicable to contracts transferring intellectual property rights), such a rule would not fall within the exception stated in recommendation 4, subparagraph (b). The reason is that this is not a rule that constitutes “national law relating to intellectual property”. It is a rule of national law that may have a collateral impact on the regime of intellectual property, but it is not a rule that elaborates any particular feature of the intellectual property regime as such.

79. Similarly, the question of who has title in a chain of transferees (including transferees in an assignment by way of security) is a matter of intellectual property law. At the same time, the question whether an assignment by way of security is a security device is a matter of general property and secured transactions law.

80. Again, intellectual property law may provide for specialized rules governing the manner in which a creditor may seize and sell intellectual property rights in satisfaction of a judgement against the rights holder. In this case, the *UNCITRAL Secured*

*Transactions Guide*'s enforcement regime would defer to intellectual property law. However, if there is no 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 *UNCITRAL Secured Transactions Guide* would take precedence over general national rules relating to the compulsory enforcement of obligations and judgements.

81. Finally, the *UNCITRAL Secured Transactions Guide* generally recognizes the principle of party autonomy with certain exceptions and promotes electronic communications (see recommendations 10 and 11). The Working Group may wish to discuss special expressions of these principles in secured transactions relating to intellectual property rights. For example, the commentary could provide that the grantor and the secured creditor may agree that the secured creditor may be a rights holder under intellectual property law and thus entitled to register or renew registrations, as well as to sue infringers, if intellectual property law would recognize a secured creditor as a rights holder.

## **2. Possible asset-specific adjustments**

82. The Working Group may wish to consider whether the commentary on the scope to the annex to the *UNCITRAL Secured Transactions Guide* on security rights in intellectual property rights should clarify that the purpose of the annex is to explain where inconsistencies might exist between the approach in the *UNCITRAL Secured Transactions Guide* and laws relating to intellectual property rights and to avoid such inconsistencies by providing the necessary adjustments with intellectual property rights-specific recommendations and commentary. In addition, the Working Group may wish to consider the issues discussed briefly in the following paragraphs.

### **(a) Outright assignments or transfers of intellectual property rights**

83. The Working Group may wish to consider whether the *UNCITRAL Secured Transactions Guide* should apply to outright assignments (or transfers) of intellectual property rights and, if so, to what extent. In this connection, the Working Group may wish to note that the only outright transfers, to which the *UNCITRAL Secured Transactions Guide* applies, are outright transfers of receivables. The *UNCITRAL Secured Transactions Guide* thus applies to issues of creation, third-party effectiveness and priority of rights of transferees of receivables. However, this approach is limited to the application of the standard of conduct in the case of enforcement (good faith and commercial reasonableness) and the right of the assignee to collect an assigned receivable and rights securing payment of an assigned receivable (see recommendations 3 and 167). As already noted (see paras. 49-51 above), receivables arising from intellectual property rights are generally considered to be proceeds of intellectual property rights.

84. The main reasons for the approach of the *UNCITRAL Secured Transactions Guide* with respect to outright transfers of receivables are: (i) the need to have a comprehensive set of priority rules where there are multiple assignments of the same receivables by the same assignor mainly based on registration (with the exception of receivables embodied in negotiable instruments with respect to which possession gives a superior security right); (ii) the need to address a priority conflict between an assignment by way of security, an outright assignment and the creation of a security right in a receivable; and (iii) the difficulty of third parties to determine whether an assignment is by way of security, an outright assignment or a transaction creating a security right in a receivable. In determining whether outright assignments (or transfers) of intellectual property rights

should be covered in the *UNCITRAL Secured Transactions Guide* and, if so, to what extent, the Working Group may wish to consider whether the above-mentioned reasons apply to intellectual property rights or whether other considerations should prevail.

85. In the context of intellectual property law, the concepts of “third-party effectiveness”, “priority” and “competing claimant” may differ mainly in the sense it relates to competing title transfers and to the exercise of rights flowing from title (or ownership). In the context of secured transactions law, as already mentioned (see paras. 66-67 above), the secured creditor is not treated as an owner (unless and until it exercises its remedy after default to acquire the encumbered asset); even if the secured creditor disposes of the encumbered asset, it merely exercises the grantor’s ownership rights. So, in deference to intellectual property law, the *UNCITRAL Secured Transactions Guide* may not need to address outright transfers, unless there is a priority competition with a security right.

**(b) Rights arising under licence agreements**

86. As already mentioned (see para. 53 above), a licence agreement is not a secured transaction and it does not create a security right (or an acquisition security right or a retention-of-title right). However, under the *UNCITRAL Secured Transactions Guide*, a security right may be created in a licensor’s or licensee’s right under a licence agreement. In cross-licensing arrangements, a licensee may develop the licensed intellectual property rights and license it back to the licensor. In such arrangements, each party is both a licensor and a licensee.

*(i) Rights of the licensor*

87. A licensor has a right to claim royalties and possibly other contractual rights of value that could be used as security for credit (e.g. the right to claim that the licensee advertises the licensed intellectual property or product, with respect to which the intellectual property right is used).

88. Following the approach taken in most legal systems and reflected in the United Nations Assignment Convention, the *UNCITRAL Secured Transactions Guide* treats receivables as an asset that is separate from the asset from which they flow, just as rents are separate assets from the movable or immovable property from which they flow. The *UNCITRAL Secured Transactions Guide* then applies the same treatment to license royalties. This means that the general recommendations apply as modified by the receivables-specific recommendations. Thus, under the *UNCITRAL Secured Transactions Guide*, statutory prohibitions that relate to the assignment of future receivables or receivables assigned in bulk or partial assignments are set aside (see recommendation 23). However, other statutory prohibitions are not affected (see recommendation 18). Of course, this treatment would be subject to laws relating to intellectual property rights in accordance with recommendation 4, subparagraph (b).

89. Questions that may be discussed by the Working Group include: (i) whether a description of encumbered assets as “intellectual property rights” would be sufficient to include royalties as a form of proceeds, or whether it would be necessary to describe royalties as separate collateral (i.e. “intellectual property rights including royalties”); (ii) what steps are needed to make a security right in royalties effective against third parties, and do they differ from those for the intellectual property rights from which the royalties are derived; (iii) what steps are needed to give a security right in royalties priority against competing claimants, and do they differ from those for the intellectual



property rights from which the royalties are derived; and (iv) what conflict-of-laws rules apply to these issues.

90. Under the *UNCITRAL Secured Transactions Guide*, if a licensee (or sub-licensee) includes in the licence agreement (or a sub-licence agreement) under which the royalties are payable 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, the licensee (as a debtor of the assigned receivables) may 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 *UNCITRAL Secured Transactions Guide* does not affect any liability that the licensor may have under other law for breach of the anti-assignment agreement (see recommendation 24).

91. It is important to note that these provisions do not apply to an agreement between the licensor and the licensee that the licensee will not assign sub-licence royalties payable to the licensee from sub-licensees. This may be the case where the licensor and the licensee agree that sub-licence royalties will be used by the licensee to further develop the licensed intellectual property rights. Thus, the *UNCITRAL Secured Transactions 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 rights or the flow of royalties from the licensee and sub-licensees.

92. Similarly, the *UNCITRAL Secured Transactions Guide* does not affect the right of the licensor to protect its right to receive the royalties payable by the licensee by agreeing with the licensee that the licensee will not assign royalties to be paid to the licensee upon its sub-licence of its rights under the licence. In this context, it should be noted that the right of the licensor to terminate the licence if the licensee breaches this agreement gives the sub-licensees a strong incentive to make sure that the licensor gets paid. In addition, the *UNCITRAL Secured Transactions Guide* does not affect the right of the licensor to agree with the licensee that part of the licensee’s royalties (representing the royalties the licensee owes to the licensor) be paid to an account in the name of the licensor, or to obtain, under the *UNCITRAL Secured Transactions Guide*, 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. However, such priority cannot be automatic. It follows the rules of the *UNCITRAL Secured Transactions Guide* for obtaining third-party effectiveness and priority of security rights.

93. Finally, it should be noted that the *UNCITRAL Secured Transactions Guide*’s provisions with respect to limitations to the assignment of receivables only apply to contractual 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 payments expressly non-assignable or practicably so by treating them as non-waivable. The *UNCITRAL Secured Transactions Guide*’s provisions with respect to limitations to the assignment of receivables does not apply to these or other legal limitations.

(ii) *Rights of the licensee*

94. A licensee has the right to use the intellectual property in line with the terms of the licence. In addition, if a licensee has under the terms of the licence the authority to grant sub-licences, the licensee has a right to claim royalties from sub-licensees. Under intellectual property law, it is commonly provided that the licensee may not create a security right in its right 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. The *UNCITRAL Secured Transactions Guide* does not affect these licence practices (see para. 122 below).

(c) **Claims against infringers of intellectual property rights**

95. In some jurisdictions, claims against infringers of intellectual property rights are transferable and may be used as collateral for credit. In other jurisdictions, such claims are not transferable without the right of ownership. If there is a statutory prohibition to the transferability of claims, the *UNCITRAL Secured Transactions Guide* does not affect it (see recommendation 18). Thus, a security right to an intellectual property right would not extend to claims against infringers.

96. If claims are transferable, the question arises whether a security right in an intellectual property right extends to claims against infringers. The Working Group may wish to consider that this is a matter of intellectual property law. If intellectual property law does not address it or leaves it to the security agreement, another question arises, namely whether, as a matter of secured transactions law, claims should be part of the encumbered intellectual property right even if the description of the encumbered assets in security agreement does not explicitly include claims or only if claims are explicitly referred to in the security agreement. The reference to the security agreement could take the form of the appropriate description of the encumbered asset so as to include the relevant intellectual property right and claims against infringers. It could also take the form of a description of default so as to include failure of the owner to launch a suit against infringers of the encumbered intellectual property right.

97. Whatever the answer to this question, even if claims are not part of the originally encumbered intellectual property right, they are proceeds under the *UNCITRAL Secured Transactions Guide* and thus the secured creditor could exercise the grantor's rights and sue infringers.

98. However, the following situations should be distinguished. If, at the time a security right is created in an intellectual property right, an infringement has been committed, the holder of the intellectual property right has sued infringers and infringers have paid compensation, the amount paid would not be part of the intellectual property right and the secured creditor could not claim it in the case of default as part of the original collateral. However, the secured creditor could claim it as proceeds of the original collateral. If the compensation has not been paid, the receivable could be part of the intellectual property right as an associated right 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 rights in the case of default standing to continue the lawsuit (if the security agreement so provides or unless the security agreement otherwise provides).

99. Where the encumbered asset is the licensee rights, similar questions arise, namely: (i) whether the licensor or the licensee and its secured creditors may exercise rights against infringers; and (ii) whether, if intellectual property law does not address it and leaves it to the parties, there should be a default rule applicable in the absence of a contrary agreement of the parties.

**(d) Right to register intellectual property rights**

100. Another question is whether the right to register an intellectual property right or renew a registration is an inalienable right of the owner or may be transferred and thus become part of the encumbered intellectual property right. If the latter were the case, the secured creditor may wish to have the right to register or renew a registration. The Working Group may wish to consider whether this matter should be treated as a matter of intellectual property law. If intellectual property law does not address it and leaves it to the parties, similar questions arise as with respect to claims, namely whether the right to register or renew a registration would be part of the encumbered intellectual property right even if not mentioned in the security agreement at all or only if specifically mentioned in the security agreement. The reference to the security agreement could take the form of the appropriate description of the encumbered asset so as to include the relevant intellectual property right, claims against infringers and rights to register. It could also take the form of a description of default so as to include failure of the owner to register or renew the registration of the encumbered intellectual property right.

101. Where the encumbered asset is the licensee rights, similar questions arise, namely: (i) whether the licensor or the licensee and its secured creditors may register or renew a registration; and (ii) whether, if intellectual property law does not address it and leaves it to the parties, there should be a default rule applicable in the absence of a contrary agreement of the parties that the licensee and its secured creditors could register or renew a registration of an intellectual property right.

**(e) Intellectual property rights related to tangible assets**

102. The relationship between intellectual property rights and tangible assets is often complex. Sometimes, the tangible asset is manufactured according to a patented process, or through the exercise of patented rights. Sometimes, a tangible asset clearly bears an intellectual property right (e.g. jeans bearing a trademark or cars containing a chip which includes a copy of copyrighted software). Sometimes, a tangible asset is the physical form in which an intellectual property right is contained (e.g. a CD containing a software programme or a heat pump containing a patented product). In each of these cases, however, as a matter of intellectual property law, the intellectual property right exists independently from those tangible assets and is a separate intangible property right.

103. The question that arises is whether a secured creditor with a security right in the relevant tangible asset would obtain an enforceable security right in the tangible assets only where the security agreement specifically includes the related intellectual property right in the description of the encumbered asset (e.g. all inventory and any associated intellectual property rights) or even if the description of the encumbered asset is general (e.g. all inventory). If a specific description were necessary, a secured creditor that took a security right in inventory unaware of the related intellectual property rights would be left without protection. This result could undermine inventory financing without benefiting the holders of intellectual property rights (as there are other ways in protecting the rights holder). The Working Group may wish to consider the following examples.

104. If a trademark owner sells trademarked goods (e.g. soft drinks) and the buyer creates a security right in the goods, a question arises as to the ability of the secured creditor to dispose of the goods in case of default. The answer depends on the right obtained by the buyer/grantor. If the buyer/grantor obtained the goods in a transaction that exhausted the relevant trademark rights of the trademark owner, then the secured creditor upon enforcement could dispose the goods to the extent of the exhausted right. For example, if the sale only exhausted rights in one country, the secured creditor could resell the goods in that country, but not another country where the rights were not exhausted. Alternatively, it may be that the trademark owner gave the buyer the right to resell the goods, and the secured creditor obtained the right to exercise this right in the case of the buyer's default. Of course, in this case the resale would need to conform to the terms of the agreement between the trademark owner and the buyer; thus, if the agreement limited disposition of the goods in some way, then the secured creditor would be required to comply.

105. Similarly, if a trademark owner gives a licence to a manufacturer or a distributor of goods and the manufacturer or distributor creates a security right in the goods, whether the secured creditor can resell the goods again depends on the terms of the trademark licence. In some cases, the exhaustion principle (or doctrine) may apply. In other cases, the trademark owner may have only licensed the manufacturer to make the goods for ultimate resale by the trademark owner, in which case the secured creditor could have no greater rights than those accorded to the manufacturer. The "exhaustion doctrine" (often referred to as "exhaustion of rights") is a concept in intellectual property law whereby an intellectual property rights owner will lose or "exhaust" certain rights after the first use of the asset with respect to which an intellectual property right is used. 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, may not remove or alter the trademark applied to the goods by the trademark owner.

106. In some cases, it may be possible to remove the intellectual property right from the goods. For example, it may be possible to remove a computer chip containing copyrighted software from a car. In that case if the licensor terminates the licence, the secured creditor may be able to sell the goods without reference to any intellectual property right. In other words, unless the licence agreement provides otherwise, the manufacturer or distributor and its secured creditors cannot dispose of the goods without obtaining proper clearance from the rights holder. This means that, if the intellectual property rights cannot be separated (e.g. patent from inventory of patented pumps), the secured creditor will not be able to sell the inventory absent clearance from the rights holder. If the intellectual property right may be separated (e.g. copyright from copyrighted software in inventory of cars), the secured creditor will have to separate the intellectual property right and sell the tangible asset without it (e.g. car could be equipped with other software).

107. In any case, with respect to the rights of parties under licence agreements, secured transactions law should defer to intellectual property law. This means, inter alia, that the *UNCITRAL Secured Transactions Guide* will not affect any anti-assignment agreement contained in the licence that the licensee cannot grant a sub-licence or, if the licensee may grant a sub-licence, assign its royalty claims under a sub-licence agreement.

(f) **Application of the principle of party autonomy and electronic communications to security rights in intellectual property rights**

108. The Working Group may wish to consider whether the commentary should explain the application of the principles of party autonomy and electronic communications with respect to security rights in intellectual property rights (see the section on the rights and obligations of the parties to the security agreement in A/CN.9/WG.VI/WP.33/Add.1).

**D. Creation of a security right (effectiveness as between the parties)**

**1. The general approach of the *UNCITRAL Secured Transactions Guide***

109. The *UNCITRAL Secured Transactions Guide* provides that a security right is created by agreement between the grantor and the secured creditor (see recommendation 12). To be effective, a security 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 recommendation 13). With respect to intangible assets (such as intellectual property rights), which may not be subject to possession, the agreement must be concluded in or evidenced by a writing that in itself or in conjunction with the course of conduct between the parties indicates the grantor's intent to grant a security right. Otherwise, it may even be oral (see recommendation 15). Once it is created, a security right (including a transfer by way of assignment) becomes effective only as between the parties; effectiveness as against third parties is subject to an additional requirement (see recommendations 14 and 29).

110. The assets encumbered under the security agreement may be described in a generic way, such as "all present and future assets" or "all present and future inventory" (see recommendation 14). The security right may secure any type of obligation, present or future, determined or determinable, as well as conditional and fluctuating obligations (see recommendation 16). It may cover any type of asset, including assets that, at the time the security agreement is concluded, may not yet exist or that the grantor may not yet own or have the power to encumber (see recommendation 17). With few exceptions relating mainly to the transferability of future receivables, statutory limitations to the transferability of an asset are not affected (see recommendation 18). Unless otherwise agreed by the parties to the security agreement, the security right in the encumbered asset extends to its identifiable proceeds (see recommendation 19).

111. If the encumbered asset is a receivable, an assignment of the receivable is effective as between the assignor and the assignee and as against the debtor of the receivable notwithstanding an agreement between the initial or any subsequent assignor and the debtor of the receivable or any subsequent assignee limiting in any way the assignor's right to assign its receivables (see recommendation 24).

**2. Possible asset-specific adjustments**

112. The general provisions of the *UNCITRAL Secured Transactions Guide* with respect to the creation of a security right may apply to security rights in intellectual property rights (see recommendations 13-19). However, the application of certain provisions to security rights in intellectual property rights may need to be adjusted with asset-specific recommendations. Several issues may need to be considered.

(a) **The concept of creation**

113. Under intellectual property law, an assignment (whether outright or by way of security) of and the creation of a security right in an intellectual property right are subject to a written agreement. With respect to intellectual property rights that are subject to registration in an intellectual property rights registry, the agreement may have to describe them specifically.

114. In many jurisdictions, as a matter of intellectual property law, an assignment of an intellectual property right (whether outright or by way of security) and the creation of a security right are effective against all (in other words, in rem rights have effects *erga omnes*). TRIPS requires recognition of voluntary transfers of intellectual property rights by assignment or licence though appropriate implementation of the national legislative framework (see articles 9, 21 and 28 (2)). Nothing in the *UNCITRAL Secured Transactions Guide*'s recommendations with respect to the creation of a security right appears inconsistent with TRIPS. In any case, if there is any inconsistency, TRIPS would prevail, both because of recommendation 4, subparagraph (b), and also because implementation of the *UNCITRAL Secured Transactions Guide* would take the form of national law that typically would be subject to the international obligations of the enacting State.

115. With respect to creation, this means that, if intellectual property law addresses the creation of a security right in an intellectual property right (including an assignment by way of security), it prevails. If intellectual property law does not address it, the secured transactions law applies (see recommendation 4, subparagraph (b)).

(b) **Creation and registration**

116. In some jurisdictions, registration is required for the effectiveness of an assignment of an intellectual property right, but not for the creation of a security right in an intellectual property right. In other jurisdictions, both assignments and security rights have to be registered, but registration may have only declaratory or third party effects. In yet other jurisdictions, registration of at least certain intellectual property rights is not required at all for effectiveness. For example, a copyright is acquired with the creation of, for example, a book or a song. As the moral rights of a copyright owner are not transferable, no security right may be created in them (only in the economic rights, i.e. royalties and right to use, is this possible). Under the *UNCITRAL Secured Transactions Guide*, registration is a method of achieving third-party effectiveness but does not in itself create a security right, nor is it necessary for the creation of a security right (see recommendation 33).

117. The approach described above means in this respect that, if under intellectual property law an assignment of intellectual property rights (including assignments by way of security) has to be registered in the relevant intellectual property rights registry, the *UNCITRAL Secured Transactions Guide* does not interfere with that requirement (even though the *UNCITRAL Secured Transactions Guide* equates security transfers to security rights). Whether the regime governing the specialized registry permits such registration and, if so, the mechanics (e.g. whether document registration is required rather than notice registration) and the legal consequences of registration (i.e. whether the right is created or made effective against third parties) are left to that regime.

118. For example, the degree of specificity in the description of an intellectual property right as an encumbered asset in the document to be registered in a specialized registry is a matter of intellectual property law. While a description that embraces "all intellectual property rights" may not be sufficient for these purposes under intellectual

property law, a description such as “all rights in Patent B in Country X” or “all motion pictures owned by Studio A identified by title on the attached schedule” would often be sufficient. Similarly, as intellectual property rights registries index registered documents by the intellectual property rights, not the grantor’s name or other identifier, a document that merely identified “all intellectual property rights of the grantor” would not be sufficient for registration in that registry. It would instead be necessary, under intellectual property law, to identify each intellectual property right in the registered document. Furthermore, intellectual property law may require the description of the encumbered assets in the security agreement to meet the same level of precision.

119. If intellectual property law does not require registration of an assignment of intellectual property rights, the *UNCITRAL Secured Transactions Guide* applies and, at least, an assignment by way of security of intellectual property rights has to be registered in the general security rights registry under the *UNCITRAL Secured Transactions Guide* to become effective against third parties and obtain priority.

**(c) Legal or contractual limitations to the transferability of an intellectual property right**

120. Under intellectual property law, certain intellectual property rights may not be transferable by law or contract. The *UNCITRAL Secured Transactions Guide* respects legal or contractual limitations to the transferability of intellectual property rights (see recommendation 18). As a result, security may not be obtained, for example, in the moral rights of an author. Similarly, security may not be obtained in the right to receive performance of a personal service contract with an author or inventor (if they are not transferable under intellectual property law) without consent of the party owing the performance of such services.

121. The only exceptions refer to legal limitations to the transferability of future receivables, receivables assigned in bulk and parts or undivided interests in receivables, as well as to contractual limitations to the assignment of receivables arising for the sale or licence of intellectual property rights (see recommendations 23-25).

122. With respect to agreements limiting the assignability of receivables, the *UNCITRAL Secured Transactions Guide* provides that an agreement between the creditor of a receivable and the debtor of that receivable is enforceable between them, but cannot in itself justify avoidance of the contract from which the receivable arises nor be enforced against an assignee. However, if under other law the assignor is liable to the debtor for breach of contract, the *UNCITRAL Secured Transactions Guide* does not affect that liability (see recommendation 24). This means that a licensee cannot prevent by agreement a licensor from assigning its claim to the royalties payable by the licensee to the licensor. However, this provision does not apply to an agreement between the licensor and the licensee prohibiting the licensee from granting sub-licences or from assigning its claims to royalties payable to the licensee as sub-licensor from its sub-licensees (see also paras. 90-94).

**(d) The creation of security rights in future intellectual property rights**

123. Many intellectual property laws limit transfers of various types of future intellectual property rights (e.g. rights in new media or technological uses that are unknown at the time of the creation of the security right; although the notion of “future” may also include registrable rights created but not yet registered). Statutory prohibitions may take the form of a requirement for a specific description of the intellectual property right. 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 more than the rights of the grantor. In particular, if the grantor were a licensee, the licensee cannot give anything more than the right granted to the licensee from the licensor. As a result, lenders need to conduct appropriate due diligence to determine matters such as the extent of the licensee's rights, the duration of those rights and the territories in which those rights may be exercised.

124. Other limitations on the use of future intellectual property rights as collateral for credit may be the result of the meaning of the concepts of "improvements" and "derivative works" under intellectual property law. The creditor should understand how these concepts are interpreted under intellectual property laws and how they may affect the concept of "ownership" which is essential in the creation of a security right in intellectual property rights. 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 "derivative works" (intellectual property law concept). As is the case with other statutory prohibitions, the *UNCITRAL Secured Transactions Guide* does not affect these prohibitions (see recommendation 18).

125. If there are no such prohibitions, the *UNCITRAL Secured Transactions Guide* applies and permits the creation of a security right in future assets, i.e. assets created or acquired by the grantor after the creation of a security right in them (see recommendation 17). This approach is justified by the commercial utility in allowing a security right to extend to intellectual property rights to be later created or acquired. 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 motion pictures or software to be produced.

**(e) Ownership in encumbered intellectual property rights**

126. With respect to intellectual property rights, title determines important components of asset value, including the right to deal with governmental authorities for several purposes, such as for patent prosecutions, to grant licences and to pursue infringers. It is, therefore, essential for intellectual property law purposes to determine whether the grantor or the secured creditor holds title to the intellectual property right, as this will be important to both parties in order to preserve the value of the encumbered asset.

127. As already mentioned (see paras. 66-68), the question of who has title and whether the parties may determine it for themselves is a matter of intellectual property law. The *UNCITRAL Secured Transactions Guide* defers to intellectual property law in that regard (see recommendation 4, subparagraph (b)). In any case, under the *UNCITRAL Secured Transactions Guide*, for purposes of secured transactions law the grantor remains the owner of the intellectual property right, and the secured creditor does not become owner of the intellectual property right, at least until it acquires the asset in satisfaction of the secured obligation which requires the consent of the grantor and its other creditors (see recommendations 156-157), or purchases the asset at a public sale (see recommendations 141 and 148). This approach is based on the assumption that secured creditors have a legitimate interest in the payment of the secured obligation and are generally not prepared or willing to accept the responsibilities and costs associated with title, unless they specifically decide to acquire title.

128. In addition, the *UNCITRAL Secured Transactions Guide* does not affect who has title in a chain of transferees or the application of the *nemo dat* principle. A search as to



who has title is necessary under the *UNCITRAL Secured Transactions Guide* for both tangible and intangible assets; and registration, under the *UNCITRAL Secured Transactions Guide*, does not affect title as it results only in third-party effectiveness and priority, but does not create rights, in particular if a grantor does not have such rights.

**(f) Nature of encumbered asset**

129. The Working Group may wish to consider that a security right may be created in rights of ownership of intellectual property rights (including joint ownership rights), rights arising under licence agreements, assets including intellectual property rights and claims against infringers. The commentary could explain that, based on general principles of law (e.g. the *nemo dat* principle) in all cases, the secured creditor does not obtain any rights more than the grantor has. So, for example, where the licensor grants a security right in the rights the grantor has under the licence (to use the intellectual property rights and claim payment of royalties owed by sub-licensees), the security right is limited by the terms of the licence. The commentary could also explain whether and, if so, to what extent a secured creditor with a security right in an asset that includes intellectual property rights may sell the asset without the consent of the holder of the intellectual property right. Furthermore, the commentary could explain that licence royalties are treated, for purposes of secured transactions law, as any other receivables.

**(g) Acquisition financing and licence agreements**

130. The *UNCITRAL Secured Transactions 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 suggests a unitary and non-unitary approach to such transactions (see recommendations 9 and 187-202).

131. A licence agreement may have some of the characteristics of a secured transaction, since a licence agreement involves: (i) financing of the licensee by the licensor to the extent that royalties are payable in future periodical instalments; (ii) 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 (iii) 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.

**(h) Intellectual property rights related to tangible assets**

132. As already discussed (see paras. 102-107 above), when dealing with an intellectual property right used in connection with a tangible asset, it is important to remember that two different types of asset are involved. One is the intellectual property right; another is the right in the tangible asset. These rights are separate. Intellectual property law allows a right holder the ability to control many, but not all uses of the tangible asset. For example, intellectual property law allows a right 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 the intellectual property right does not extend to the tangible asset, and a security right in a tangible asset does not extend to an intellectual property right, 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. my inventory with all associated intellectual property rights and other rights) or whether a general description would be sufficient. It would seem that a general description would be in line with the principles of the *UNCITRAL Secured Transactions 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.

133. Thus, the ability of a secured creditor to dispose of tangible assets, with respect to which intellectual property rights are used, ultimately depends on the terms of the security agreement. A grantor may give one creditor a security right in the tangible inventory and another creditor a security right in the intellectual property right. This happens often when the holder of an intellectual property right uses a manufacturer or laboratory to make items for disposition by another. In that case, in case of default, both parties may need to cooperate to dispose of the encumbered asset. Alternatively, a grantor may have obtained clearance from a rights holder, so that a grant of a security right in “inventory” allows disposition of the tangible items by the secured creditor in case of default because the requirements of intellectual property law have been satisfied. Finally, if the grantor has obtained ownership of the goods in a transaction that “exhausted” relevant intellectual property rights, a secured creditor could resell the goods at least to the extent of the exhausted rights.

## **E. Third-party effectiveness of a security right**

### **1. The general approach of the *UNCITRAL Secured Transactions Guide***

134. As already mentioned, the *UNCITRAL Secured Transactions Guide* distinguishes between creation, i.e. effectiveness between the parties (for which a simple agreement is sufficient for the creation of a security right in intangible assets) and effectiveness against third parties, which can be achieved through an additional act (see recommendation 29).

135. The main method for making a security right effective against third parties is registration of a notice with limited information in a general security rights registry (see recommendation 32). Other methods for achieving third-party effectiveness of a security right include registration in a specialized registry (see recommendation 38), transfer of possession (see recommendation 37) and control (see recommendations 49 and 50).

136. Registration of a notice does not create a security right and is not necessary for the creation of a security right (see recommendation 33). In any case, registration of a notice in the general security rights registry would not reflect the chain of title in the relevant intellectual property right. As is the case with tangible and other intangible assets, secured creditors would have to check the chain of title in the encumbered asset outside the general security rights registry to ensure that they would obtain an effective security right from an owner or other rights holder in line with the *nemo dat* rule.

## 2. Possible asset-specific adjustments

### (a) The notion of third-party effectiveness

137. Under secured transactions law, the term “third parties” refers to creditors of the grantor of the security right competing with the secured creditor as to who will receive payment first in the case of default (which is important if the grantor or other debtor cannot pay all outstanding debts) in the case the grantor defaults and cannot pay all its outstanding debts. Under intellectual property law, third parties also include transferees, licensees and infringers of intellectual property rights. The commentary may have to clarify the difference and state that secured transactions law is concerned only with competing claimants (one of whom has to be a secured creditor or a transferee in an assignment of intellectual property rights for security purposes, which is treated as a secured transaction). Effectiveness of an intellectual property right against third-party transferees or infringers only is a matter of intellectual property law.

138. With respect to security rights in intellectual property rights, the *UNCITRAL Secured Transactions Guide* in effect provides that, unless otherwise provided by intellectual property law, a security right in an intellectual property right that is registrable under intellectual property law in the relevant intellectual property rights registry (e.g. a patent or a trademark registry) may be registered either in the general security rights registry or in the relevant intellectual property rights registry (see recommendation 38). The commentary may have to clarify that the requirements and legal consequences of registration in an intellectual property rights registry are left to intellectual property law. If, under that law, a document has to be registered rather than a notice, with constitutive or declaratory rather than third-party effects, the *UNCITRAL Secured Transactions Guide* does not interfere with these results. If other law relating to intellectual property does not deal with these matters, the *UNCITRAL Secured Transactions Guide* applies (see recommendation 4, subparagraph (b)).

### (b) Third-party effectiveness of security rights in intellectual property rights registrable in an intellectual property rights registry

139. As already mentioned, some intellectual property rights are registrable (e.g. trademarks and patents). Security rights in such intellectual property rights have to be registered in the relevant registry for creation, third-party effectiveness of declaratory purposes. Where there are improvements or derivative works, they have to be registered in the relevant intellectual property rights registry when they arise. Security rights in such improvements or derivative works have also to be registered in the intellectual property rights registry but not in the general security rights registry, in which the initial registration covers future assets.

140. Where a security right in an intellectual property right is registered in the general security rights registry and another security right or a transfer is registered in the relevant intellectual property rights registry, the question arises as to which security right has priority or whether the transferee acquires the intellectual property right free of the security right. A separate question is whether a third-party searcher would need to search in both registries.

141. It would seem that the answer to these questions would depend on the way in which the priority among competing claimants is regulated. Under the *UNCITRAL Secured Transactions 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, C would take free of the security right, because it

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 *UNCITRAL Secured Transactions Guide*, C would prevail (see recommendation 77, subparagraph (a)). In either case, as registration in the patent registry gives superior rights, third-party searches could rely on a search in that registry and would not need to search in the general security rights registry.

142. If third-party searchers had 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 name or number of the patent in the patent registry. 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 rights 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 transmittal would require that either the registrant or the registry staff of the intellectual property rights registry register a notice that would be registrable in the general security rights registry. The Working Group may wish to consider work undertaken by other organizations on registration of intellectual property rights.

143. The fact that a security right about which a notice is registered in the general security rights registry is subordinate to a security right registered in the specialized intellectual property rights 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 and other secured creditors that registered only in the general security rights registry).

144. 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 discussion on conflict of laws in A/CN.9/WG.VI/WP.33/Add.1). Another question raising applicable law issues is the question of the definition of title (for example, a transfer for security purposes may be treated as a transfer in State A and as a security right in State B). Under the *UNCITRAL Secured Transactions Guide*, if intellectual property law treats a transfer for security purposes as a pure transfer, it prevails. If intellectual property law does not address the issue, the *UNCITRAL Secured Transactions Guide* applies and treats a security transfer as a security device (see recommendation 4, subparagraph (b)).

**(c) Security rights in intellectual property rights that are not registrable**

145. As already mentioned, under intellectual property law, not all types of intellectual property rights and not all rights in intellectual property rights are registrable in an intellectual property rights registry (e.g. in some States, copyrights, trade secrets or database rights,<sup>11</sup> and security rights or licences may not be registrable). Under the *UNCITRAL Secured Transactions Guide*, a security right in such an intellectual property right may become effective against third parties by registration of a notice in the general security rights registry. However, in such a case, under the *UNCITRAL Secured Transactions Guide*, registration of a notice is sufficient and the effect of registration is to make the security right effective against third parties (see recommendations 29, 32-33 and 38).

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<sup>11</sup> See Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.

## **F. The registry system**

### **1. The general approach of the *UNCITRAL Secured Transactions Guide***

146. The *UNCITRAL Secured Transactions Guide* recommends a general security rights registry (see recommendations 54-75). In general, the purpose of the registry system in the *UNCITRAL Secured Transactions Guide* is to provide a method for making a security right effective in existing or future assets, to establish an efficient 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.

147. 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 the following information:

- (a) An identification of the grantor and the secured creditor and their addresses;
- (b) A description that reasonably identifies the encumbered assets, with a generic description being sufficient;
- (c) The duration of the effectiveness of the registration; and
- (d) If the enacting State so decides, a statement of the maximum amount secured.

148. The *UNCITRAL Secured Transactions Guide* provides precise rules for identifying the grantor, whether an individual or a legal person. This is because notices are indexed and can be retrieved by searchers according to the name of the grantor or according to some other reliable identifier of the grantor (see recommendations 54, subparagraph (h), and 58-63). The *UNCITRAL Secured Transactions Guide* contains other rules to simplify operation and use of the registry.

### **2. Possible asset-specific adjustments**

#### **(a) Coordination of registries**

149. As discussed above, many States maintain registries for recording transfers of intellectual property rights. In some of those registries, even security rights may be registered. These registries exist in most States for patents and trademarks. Some States have similar registries for copyrights, but the practice is not universal. While there are notice-based intellectual property rights 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. The reason for this is the need for transparency as, in many cases, the transfer may only involve limited rights in the intellectual property rights. As such, it is essential for the instrument of transfer 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 rights registries index registrations by the specific intellectual property right, and not by the grantor's identifier. This is because the central focus is on the intellectual property right itself, which may have multiple co-inventors or co-authors and may be subject to multiple changes in ownership as transfers are made.

150. The *UNCITRAL Secured Transactions Guide* respects the different structure and effects of registration in intellectual property rights registries. To the extent that intellectual property law addresses registration, its requirements and effects, the

*UNCITRAL Secured Transactions Guide* defers to that law. If intellectual property law does not address these issues, the *UNCITRAL Secured Transactions Guide* applies (see recommendation 4, subparagraph (b)). In addition, even if it generally applies to registration matters, in order to preserve the reliability of intellectual property rights (and other specialized) registries, the *UNCITRAL Secured Transactions Guide* provides that a security right registered in the relevant intellectual property rights registry has priority over a security right registered in the general security rights registry (see recommendation 77, subparagraph (a)). For the same reason the *UNCITRAL Secured Transactions Guide* provides that a transferee of an intellectual property right acquires it in principle free of a previously created security right, unless it is registered in the intellectual property rights registry (see recommendations 78 and 79).

151. As the issue of coordination of registries may affect intellectual property law, the *UNCITRAL Secured Transactions Guide* addressed it through the general deference to intellectual property law and appropriate priority rules. The Working Group may wish to consider whether the commentary should discuss the issue further and perhaps suggest that States consider taking measures to enhance coordination between general security rights and intellectual property rights registries. One such measure, for example, might be the transmittal of a notice about a registration in an intellectual property rights registry to the general security rights registry. Of course, such a transmittal of a notice might be easier, simpler and quicker in an electronic system rather than in a paper-based system.

**(b) Registration of notices about security rights in future intellectual property rights**

152. An essential feature of the general security rights registry recommended in the *UNCITRAL Secured Transactions 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 later acquired inventory, the notice may so identify such inventory. Since priority is determined by date of registration, the lender may maintain its priority position in later-acquired inventory. This 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.

153. Existing intellectual property rights registries, however, do not readily accommodate future assets. As transfers of or security rights in intellectual property rights are indexed against each specific intellectual property right, they can only be effectively recorded after the intellectual property right is first registered in the registry. This means that a blanket recording in a specialized registry with respect to future intellectual property rights would not be effective, but instead a new recording would be required each time a new intellectual property right is acquired.

154. The Working Group may wish to consider whether the commentary should explain that, under the *UNCITRAL Secured Transactions Guide*, a secured creditor would not obtain a security right by registration, if such a right has not been created by agreement between the grantor and the secured creditor. The commentary could also explain that, if under intellectual property law future intellectual property rights are not transferable, the *UNCITRAL Secured Transactions Guide* does not interfere with that prohibition and does not make the grant of a security right in such an asset possible. However, if the creation of a security right in future intellectual property rights is not prohibited under other law, a security right in such an asset could be created and made effective against third parties under the *UNCITRAL Secured Transactions Guide*.

(c) **Dual registration or search**

155. Where a specific intellectual property right and a security right in it are both registrable, the question arises whether registration in both registries is necessary. By deferring to intellectual property law with respect to the details of registration in an intellectual property rights registry and by giving priority, as a matter of secured transactions law, to rights registered in such a registry, the *UNCITRAL Secured Transactions Guide* makes dual registration or search unnecessary. Secured creditors and other parties would always need to register and search in the intellectual property rights registry to ensure third-party effectiveness and priority over other parties that might register in the relevant intellectual property rights registry. This would not mean that registration in the general security rights registry would be useless. In any case, a security right registered in such a registry would be effective against third parties and have priority over the rights of creditors of the grantor, such as other secured creditors that register only in the general security rights registry, judgement creditors and the administrator in the insolvency of the grantor.

156. Registration only in the general security rights registry would seem to be necessary and useful for secured transactions purposes: (i) where the encumbered asset is a type of intellectual property right with respect to which no registration is required under intellectual property law (e.g. copyrights or trade secrets); (ii) where a right in an intellectual property right is not registrable (e.g. a security right or a licence); and (iii) where there are other secured creditors that register only in the general security rights registry. The Working Group may wish to examine whether this approach could create any inconsistency with intellectual property law.

(d) **Time of effectiveness of registration**

157. Under patent and trademark law in many jurisdictions, priority 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 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 after some time from registration.

158. In view of the priority given by the *UNCITRAL Secured Transactions 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 as the *UNCITRAL Secured Transactions Guide* does not interfere with the time of effectiveness of registration in a specialized registry. 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.

(e) **Registration of security rights in trademarks**

159. The Working Group may wish to note the following registration system recommended by the International Trademark Association (“INTA”) on 21 March 2007<sup>12</sup> and may wish to consider whether it provides an appropriate basis for discussion

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<sup>12</sup> See [http://www.inta.org/index.php?option=com\\_content&task=view&id=1517&Itemid](http://www.inta.org/index.php?option=com_content&task=view&id=1517&Itemid).

of the issue of registration of security right in trademarks or in other types of intellectual property rights as well.

160. INTA endorsed uniformity and best practise in registration mechanisms and methods regarding trademark security rights, 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, as well as poses an untoward risk that a trademark owner may forfeit or otherwise endanger its trademark related rights; many countries have no or insufficient recording mechanisms for the registration of trademark security rights; 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.

161. The main features of such best practices are the following:

(a) Security rights should be registrable against registered trademarks, and ideally also against marks covered by pending applications;

(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, which are subject to a security right, and should not confer upon the secured creditor a right to use the marks;

(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 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;

(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 procedure, enforcement of a security right through foreclosure, after a judgement, administrative decision or other triggering event, should not be an unduly burdensome process;



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(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.

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**A/CN.9/WG.VI/WP.33/Add.1 (Original: English)**

**Note by the Secretariat on security rights in intellectual property rights,  
submitted to the Working Group on Security Interests  
at its thirteenth session**

ADDENDUM

CONTENTS

	<i>Paragraphs</i>
G. Priority of a security right . . . . .	1-25
1. The general approach of the <i>UNCITRAL Secured Transactions Guide</i> . . . . .	1-2
2. Possible asset-specific adjustments . . . . .	3-25
H. Rights and obligations of the parties to a security agreement . . . . .	26-30
1. The general approach of the <i>UNCITRAL Secured Transactions Guide</i> . . . . .	26-27
2. Possible asset-specific adjustments . . . . .	28-30
I. Rights and obligations of third-party obligors . . . . .	31-32
1. The general approach of the <i>UNCITRAL Secured Transactions Guide</i> . . . . .	31
2. Possible asset-specific adjustments . . . . .	32
J. Enforcement of a security right . . . . .	33-44
1. The general approach of the <i>UNCITRAL Secured Transactions Guide</i> . . . . .	33-34
2. Possible asset-specific adjustments . . . . .	35-44
K. Acquisition financing . . . . .	45-50
1. The general approach of the <i>UNCITRAL Secured Transactions Guide</i> . . . . .	45
2. Possible asset-specific adjustments . . . . .	46-50
L. Law applicable to a security right . . . . .	51-57
1. The general approach of the <i>UNCITRAL Secured Transactions Guide</i> . . . . .	51-52
2. Possible asset-specific adjustments . . . . .	53-57
M. The impact of insolvency on a security right . . . . .	58-72
1. The general approach of the <i>UNCITRAL Secured Transactions Guide</i> . . . . .	58-60
2. Possible asset-specific adjustments . . . . .	61-72
V. Conclusions . . . . .	73-76

## **G. Priority of a security right**

### **1. The general approach of the *UNCITRAL Secured Transactions Guide***

1. Under the *UNCITRAL Secured Transactions Guide*, the priority between security rights in the same assets granted by the same grantor is based on the time of registration (i.e. before creation) or the time a security right was made effective against third parties (i.e. after creation; see recommendation 76).

2. However, a security right that was made effective against third parties by registration in a specialized registry (that provides for registration of security rights) is superior to a security right that was made effective against third parties by registration of a notice in the general security rights registry (see recommendation 77, subparagraph (a)). Similarly, with limited exceptions, transferees of encumbered assets take the assets subject to any security right that was effective against third parties at the time of the transfer (see recommendations 78-82).

### **2. Possible asset-specific adjustments**

3. The Working Group may wish to consider whether the commentary should explain in detail the application of the relevant recommendations of the *UNCITRAL Secured Transactions Guide* to security rights in intellectual property rights, along the lines described in the following paragraphs.

#### **(a) Identification of competing claimants**

4. For a priority conflict to be subject to the *UNCITRAL Secured Transactions Guide*, it has to involve at least one secured creditor (or assignee in an assignment by way of security, which is treated as a secured transaction) that obtained a security right under the law recommended in the *UNCITRAL Secured Transactions Guide*. A transferee of an asset following enforcement of a security right upon default is an ordinary transferee taking the asset from the grantor through the secured creditor, who simply exercises the rights of the grantor under authority given by the grantor (see recommendation 79). A transferee acquiring an intellectual property right from the grantor after the creation of a security right by the grantor acquires it subject to the security right and thus to the rights of the transferee who acquired the intellectual property right from the secured creditor following enforcement because this second transferee cannot have more rights than the transferor. Where the conflict is between transferees or exclusive licensees, the matter is left to intellectual property law and the *UNCITRAL Secured Transactions Guide* does not apply.

5. If the conflict is between security rights in the same intellectual property rights granted by the same grantor under the law recommended in the *UNCITRAL Secured Transactions Guide*, the first right registered or made effective against third parties, whichever occurs first, has priority (see recommendation 76; for other priority conflicts dealt with in the *UNCITRAL Secured Transactions Guide*, see the following paragraphs), unless otherwise displaced by laws relating to intellectual property rights (see recommendation 4, subparagraph (b)).

#### **(b) Relevance of knowledge of prior transfers or security rights**

6. Under the *UNCITRAL Secured Transactions Guide*, knowledge of the existence of a security right on the part of a competing claimant is irrelevant for determining priority (see recommendation 93). As mentioned, 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 *UNCITRAL Secured Transactions Guide* does not affect the application of that rule (see recommendation 4, subparagraph (b)).

**(c) Priority of a right registered in an intellectual property rights registry**

7. As already mentioned, the *UNCITRAL Secured Transactions Guide* does not apply to conflicts between transferees, unless one of the transferees took a right through an assignment of intellectual property rights by way of security under secured transactions law and there is no priority rule of intellectual property law that applies to that conflict (see recommendation 4, subparagraph (b)). The *UNCITRAL Secured Transactions Guide* does apply to priority conflicts: (i) between a secured creditor that registered a notice of its security right in the general security rights registry and a secured creditor that registered its security right in the relevant intellectual property rights registry; (ii) between two secured creditors that registered their security rights in the relevant intellectual property rights registry; (iii) between a transferee or licensee and a secured creditor; and (iv) between two secured creditors that registered their security rights in the general security rights registry.

8. The general rule is that registration in a specialized registry (including an intellectual property rights registry) provides a security with higher priority status than a security right registered in the general security rights registry (see recommendations 77 and 78). This rule is also appropriate with respect to security rights in intellectual property rights.

9. More specifically, if the conflict is between two secured creditors, one of whom registers a notice in the general security rights registry and the other registers its security right in the relevant intellectual property rights registry, the *UNCITRAL Secured Transactions Guide* applies and gives priority to the secured creditor that registered in the relevant intellectual property rights registry (see recommendation 77, subparagraph (a)). If the conflict is between security rights registered in the relevant intellectual property rights registry, as required by intellectual property law, the first right registered has priority and the *UNCITRAL Secured Transactions Guide* confirms that result (see recommendation 77, subparagraph (b)). If the priority conflict is between a transferee of intellectual property rights and a secured creditor that at the time of the transfer had registered in the relevant intellectual property rights registry, the secured creditor prevails (i.e. the transferee takes subject to the security right). However, if the secured creditor had not registered its security right in the relevant intellectual property rights registry, the transferee (who is a transferee and what are the requirements for a transfer is a matter of intellectual property law) takes the encumbered intellectual property rights free of the security right (see recommendations 78 and 79).

**(d) Priority of a right that is not registrable in an intellectual property rights registry**

10. If a priority conflict is between a security right registered or otherwise made effective against third parties under the law recommended in the *UNCITRAL Secured Transactions Guide* and a security right in an intellectual property right with respect to which there is no intellectual property rights registry, priority for security rights is determined by the order of registration in the general security rights registry or third-party effectiveness (see recommendation 77). If there is a contrary intellectual property law priority rule, it prevails (see recommendation 4, subparagraph (b)). A subsequent transferee or licensee would, in principle, take the asset subject to the security right (see recommendation 79). If the asset 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 *UNCITRAL Secured Transactions Guide* does not affect).

**(e) Rights of transferees of encumbered intellectual property rights**

11. The *UNCITRAL Secured Transactions Guide* addresses sufficiently the situation where the security right is created and made effective against third parties and thereafter title to the intellectual property right is transferred. The basic rule would be that the transferee takes the intellectual property right subject to the security right (see recommendation 79). The secured creditor in effect takes the asset with a right to sell it free of the rights of the transferee if the grantor defaults and the secured creditor enforces its security right. So, the transferee acquiring the intellectual property right from the secured creditor is in effect a prior transferee who took the asset from the grantor through the secured creditor compared with the transferee who took the asset directly from the grantor after the security right became effective against third parties.

12. There are two exceptions to this rule. The first exception arises where the secured creditor authorizes the disposition or license free of the security right (see recommendation 80). The second exception relates to a non-exclusive licence in the ordinary course of the licensor's business (see recommendation 81, subparagraph (c)).

**(f) Rights of licensees in general**

13. Intellectual property rights are routinely licensed. The retained rights of a licensor, such as the ownership right or the right to receive royalties, and the rights of a licensee can both be used as an encumbered asset for credit. In each case, it is necessary to consider the relevant rules where the competing claimants are the lenders of the licensor and the licensee, or the licensor and the lenders of the licensee.

14. Where the holder of intellectual property rights creates and makes effective against third parties a security right and then grants a licence, in principle, the licensee takes 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. Similarly, the licensee would need to know that, so long as it continued performance of the licence agreement, its licence would not be terminated. This is matter of the licence agreement and the applicable law.

15. If the licensee also creates a security right, that security right would be subordinate 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 than the licensee has (based on the *nemo dat* principle). So, if the lender to the licensor enforced its security right, it could dispose of the intellectual property rights 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. 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 apply to 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.

**(g) Rights of ordinary-course-of-business licensees**

16. One question of particular importance is whether a non-exclusive licensee “in the ordinary course of business” of the licensor should be affected by any security rights created by the licensor, if it had no knowledge that the licence violated the security right (see recommendation 81, subparagraph (c)).

17. An owner of a motion picture (a producer, for example) may grant a security right in an ownership right. The owner may then enter into an exclusive licence agreement with a distributor of the film. The distributor too may grant a security right in its rights as a licensee. The distributor may then enter into non-exclusive licence agreement with exhibitors. Alternatively, the owner may enter into non exclusive licence agreements with distributors or directly with exhibitors or end-users. Under intellectual property law, a sub-licence depends for its existence on its licence. If the licence is terminated, any sub-licence derived from the licence also terminates, unless authorized by the original licensor either directly or in the original licence agreement. This happens because infringement does not depend on knowledge. A lack of knowledge can reduce infringement damages, but not liability.

18. Under recommendation 81, subparagraph (c), a non-exclusive ordinary-course-of-business licensee would not be affected by a security right created by the licensor, provided that the licensee does not have knowledge that the licence authorized by the licensor violates the rights of a secured creditor (i.e. an agreement between the licensor and its creditor). This does not mean that the licensee is no longer bound by the terms of the licence, including a provision that prohibits the licensee from entering into non-exclusive sub-licences. 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 fees to the person that acquired the licensor’s interest 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.

19. In the example given above, an exhibitor holds a non-exclusive sub-licence granted by a distributor that holds an exclusive licence granted from a producer. If the distributor’s secured creditor enforces its security right, the exhibitor as a non-exclusive licensee would continue to enjoy its rights under the licence (assuming it performs its obligations). If the producer’s (owner’s or licensor’s) secured creditor enforces its security right, however, the distributor holding a subsequent-in-time exclusive licence would lose its rights. The rights of the exhibitor, as a non-exclusive sub-licensee, would also fall because, under recommendation 82 and general law, a sub-licensee cannot have more rights than its licensee.

20. This approach seeks to balance the ability of the secured creditor to have recourse to the encumbered assets and the ability of an ordinary-course-of business licensee of the assets to retain the licensee’s rights without interference from the secured creditor of the licensor.

21. For example, it indicates that a prudent secured creditor should “police” its own borrower against the borrower entering into non-exclusive licences. However, it does not require the secured creditor to “police” its borrower’s licensees against entering into non-exclusive sub-licences because that would place too great a burden on the secured creditor. At the same time, it protects the reasonable expectations of non-exclusive licensees (generally non-negotiated transactions) that their rights are not subject to

termination as a consequence of the licensor's default. The *UNCITRAL Secured Transactions Guide* provides a statutory rule that implements what the secured creditor and the licensor undoubtedly expect (the secured creditor will routinely authorize the licensor to enter into ordinary-course-of-business transactions). That, after all, is the business the licensor runs. However, even that expectation interest is outweighed by the burden that would be imposed on the original licensor's secured creditor if it had to "police" the sub-licensing activities of all exclusive licensee's. Finally, the rules adopt a policy that it is not asking too much for an exclusive licensee (who is more likely to be negotiating its deal) either to make a deal with the licensor's secured creditor to protect the exclusive licensee or to take its licence subject to the security right granted by the licensor.

22. 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, if the borrower grants a non-exclusive licence, it 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 such a sub-licence by the licensee is an event of default that would entitle the licensor to terminate the licence. Nothing in the *UNCITRAL Secured Transactions 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 its licensees) is in the business of granting non-exclusive licences and the secured creditor expects the borrower to use the fees paid under those licences to pay the secured obligation.

23. The exception in recommendation 81, subparagraph (c), will apply only if: (i) the secured creditor does not authorize its borrower to grant a licence (in this case recommendation 80, subparagraph (b), will apply); and (ii) the secured creditor 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); and (iii) the licensor grants a non-exclusive licence to the licensee, in no case an unauthorized licensee would take the encumbered intellectual property right free of the security right of the licensor's secured creditor (but the contractual arrangement between the secured creditor and the licensor, which neither authorizes the owner-licensor nor prohibits the owner/licensor from granting a licence, does not produce third-party effects).

24. 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 between the licensor and its secured creditor 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 typically intellectual property law priority rules, a secured creditor takes subject to these authorized licences. However, in some cases the secured creditor reserves the right to approve licences, in effect becoming a right holder in intellectual property law terms. In such a case, if the owner in breach of this provision grants a licence (or a sub-licence), then the licence is unauthorized and infringing.

25. The Working Group may wish to consider appropriate clarifications of the text of recommendation 81, subparagraph (c), as it applies to intellectual property rights and explanatory commentary to ensure that it is not inconsistent with intellectual property

law (and in particular does not permit infringing licensees to take free of their licensor's security right). In any case, it should be noted that, to the extent this provision might be inconsistent with intellectual property law, it would simply not apply under recommendation 4, subparagraph (b).

## **H. Rights and obligations of the parties to a security agreement**

### **1. The general approach of the *UNCITRAL Secured Transactions Guide***

26. With few exceptions, the *UNCITRAL Secured Transactions 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). At the same time, in order to enhance efficiency and reduce transaction costs, the *UNCITRAL Secured Transactions Guide* includes a few mandatory and non-mandatory rules.

27. Generally, the *UNCITRAL Secured Transactions Guide* makes reference to the agreement of the parties, as well as to any usages they have agreed to or practices they have established between them. In addition, the party in possession of the encumbered assets must take reasonable steps to preserve the asset and its value, and the secured creditor must return the encumbered asset if the security right has been extinguished by full payment or otherwise and all commitments to extend credit have been terminated (see recommendations 111 and 112). Moreover, unless otherwise, the secured creditor may be reimbursed for reasonable expenses incurred for the preservation of the encumbered assets, make reasonable use of the assets and inspect them if they are in the possession of the grantor (see recommendation 113).

### **2. Possible asset-specific adjustments**

#### **(a) Application of the principle of party autonomy**

28. The Working Group may wish to confirm that the principle of party autonomy applies equally to security rights in intellectual property rights and discuss any special limitations that might be necessary.

#### **(b) Obligation of the secured creditor to pursue infringers or renew registrations**

29. The Working Group may also wish to consider whether the obligation of the secured creditor to preserve the encumbered asset and its value should be extended to intellectual property rights. In this connection, one question that the Working Group may wish to discuss is whether the secured creditor should have the right or be obliged to take any action necessary to protect the intellectual property right or renew a registration. The Working Group may wish to consider that the question of who may pursue infringers or renew registrations is a matter of intellectual property law and that the parties may reach an agreement in that regard only if permitted by intellectual property law.

#### **(c) Right of the secured creditor to pursue infringers or renew registrations**

30. In addition, the Working Group may wish to consider whether, as a matter of secured transactions law, the secured creditor should have a right (not an obligation) to pursue infringers and renew registrations, if the holder of these rights fails to exercise them in a timely fashion. This approach may be justified by the legitimate interest of the secured creditor in preserving the encumbered intellectual property right and its



value. The matter may be left to a default rule applicable in the absence of a contrary agreement of the parties or be left to the security agreement.

## **I. Rights and obligations of third-party obligors**

### **1. The general approach of the *UNCITRAL Secured Transactions Guide***

31. The *UNCITRAL Secured Transactions Guide* discusses the rights and obligations of debtors other than the debtor granting a security right in an asset to secure the payment or other performance of an obligation. Such third-party debtors (obligors is the term used in the *UNCITRAL Secured Transactions Guide* to distinguish from the debtor-grantor) include the debtor of an assigned receivable, the person obligated under a negotiable instrument, the guarantor/issuer, confirmer, or nominated person under an independent undertaking, the depositary bank where the encumbered asset is the right to payment of funds credited to a bank account and the issuer of a negotiable document.

### **2. Possible asset-specific adjustments**

32. Where the encumbered asset is the right to claim royalties under a licence agreement, the third-party obligor's rights and obligations would be the same as the rights and obligations of the debtor of a receivable. Where the encumbered assets are the rights of a licensee under a licence agreement, the licensor is not a third-party obligor in the sense of the *UNCITRAL Secured Transactions Guide*. The rights and obligations of the licensor are a matter of intellectual property law and, in any case, law other than secured transactions law. The Working Group may wish to consider whether appropriate explanations should be included in the commentary.

## **J. Enforcement of a security right**

### **1. The general approach of the *UNCITRAL Secured Transactions Guide***

33. Under the *UNCITRAL Secured Transactions Guide*, after default the secured creditor is entitled (see recommendation 141):

- (a) To obtain possession of a tangible encumbered asset;
- (b) To sell or otherwise dispose of, lease or license an encumbered asset;
- (c) To propose to the grantor that the secured creditor accept an encumbered asset in total or partial satisfaction of the secured obligation;
- (d) To collect on or otherwise enforce a security right in an encumbered asset that is a receivable, negotiable instrument, right to payment of funds credited to a bank account or right to right to receive the proceeds under an independent undertaking;
- (e) To enforce rights under a negotiable document;
- (f) To enforce its security right in an attachment to immovable property; and
- (g) To exercise any other right provided in the security agreement (except to the extent inconsistent with the provisions of this law) or any other law.

34. In exercising its rights, the secured creditor has to act in good faith and in a commercially reasonable manner (see recommendation 131). In particular with respect to extrajudicial enforcement, the secured creditor must abide by this standard of conduct

and exercise its remedies subject to certain notifications and additional safeguards (see recommendations 147-151).

## **2. Possible asset-specific adjustments**

### **(a) Deferral to intellectual property law**

35. In general, the exercise of remedies under secured transactions law would need to be consistent with the relevant intellectual property law. Also, the exercise of remedies under other law (such as the cancellation of a transfer or licence agreement) should not be affected. In addition, what is commercially reasonable where the encumbered asset is an intellectual property right may depend on intellectual property law and practice. The Working Group may wish to consider whether recommendation 4, subparagraph (b), may be sufficient to bring about this result, accompanied by appropriate commentary.

### **(b) Taking “possession” of an encumbered intellectual property right**

36. The right of the secured creditor to take possession of the encumbered asset is not relevant if the encumbered asset is an intellectual property right (see recommendations 146 and 147). However, the secured creditor should be entitled to take possession of any documents necessary for the enforcement of its security right. The secured creditor should also be entitled to take possession of any tangible assets in which the intellectual property right is included, subject to rights of other parties with respect to the tangible assets.

### **(c) Disposition of an encumbered intellectual property right**

37. The secured creditor should have the right upon the grantor’s default to dispose of or grant a licence with respect to the encumbered intellectual property 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 assign or license the encumbered intellectual property right. However, if the grantor, before granting the security right, granted an exclusive licence which has priority over the security right, upon default, the secured creditor will not have the right to grant another licence as the grantor did not have that right and the secured creditor cannot have more rights than the grantor.

38. If the grantor is a licensee, upon the grantor’s default the secured creditor should have the right to transfer the licence (if the licence is transferable) or grant a licence (if, under the terms of the licence agreement, the grantor-licensee had the right to grant sub-licences) consistent with the terms of the licence given by the owner to the licensee.

### **(d) Proposal by the grantor to acquire an encumbered intellectual property right**

39. The secured creditor should have the right to propose to the grantor to acquire the grantor’s rights in satisfaction of the secured obligation. If the grantor is the owner, the secured creditor could become the owner (provided that the grantor and its creditors do not object; see recommendations 156-159). Once a secured creditor becomes an owner, its rights and obligations are regulated by the relevant intellectual property law. As already mentioned (see para. 11 above), the transferee, who acquired from the grantor through the secured creditor upon default by the grantor, could prevail over a transferee who took the encumbered intellectual property right directly from the grantor after a security right has been granted in it (as the latter secured creditor cannot have more rights than the grantor).

**(e) Collection of royalties**

40. Where the encumbered asset is the right to receive payment of royalties under a licence, the secured creditor should be entitled to collect the royalties (see recommendation 168). In all these situations, the rights of the licensor under intellectual property law will be respected, as the *UNCITRAL Secured Transactions Guide* defers to intellectual property law (see recommendation 4, subparagraph (b)).

**(f) Enforcement of security rights in tangible assets related to intellectual property rights**

41. Where the encumbered assets consist of tangible assets, with respect to which intellectual property rights are used, the secured creditor should be able to dispose of them without the consent of the owner-licensor if the relevant intellectual property right has been exhausted, or if there is an authorization from the intellectual property rights holder for the secured creditor to dispose of the assets in the case of default. Of course, disposition can only occur to the extent of the exhausted rights or the authorization. Otherwise, the secured creditor would need to obtain the consent of the owner-licensor in line with the licence agreement and the relevant intellectual property law.

**(g) Rights acquired through disposition**

42. Rights in intellectual property rights acquired through judicial disposition would be regulated by the relevant law applicable to the enforcement of court judgements. In the case of an extra-judicial disposition in line with the provisions of the secured transactions law, a transferee or licensee would take the intellectual property right 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).

43. One question that would need to be addressed is whether the transferee or licensee would obtain the intellectual property right as it existed at the time the security right became effective against third parties or with any subsequent enhancements (e.g. an improvement to a patent). Generally, intellectual property laws treat such improvements as separate rights that need to be separately granted. As such, this may be a matter left to the security agreement.

**(h) Enforcement of a security right in a licensee's rights**

44. All those issues would need to be addressed also for situations where the encumbered asset is not an intellectual property right but the rights of a licensee arising from a licence to use intellectual property. In such a situation, the rights of the secured creditor may be constrained, as, where the encumbered asset is merely a licence, the secured creditor only succeeds to the licensee's rights. A mere licensee cannot enforce the intellectual property right against another mere licensee or secured creditor with a lower-ranking security right. Only the licensor (or appropriate right-holder) can do that (in some jurisdictions, exclusive licensees may join the licensor as a party to the proceedings). Thus, a secured creditor enforcing its security right against a licensee may have limited rights against other parties. Another issue is whether a transferee of the intellectual property rights has a right of access to information such as a source code of software held by the secured creditor for the case of default of the licensee of software.

## K. Acquisition financing

### 1. The general approach of the *UNCITRAL Secured Transactions Guide*

45. The *UNCITRAL Secured Transactions Guide* discusses acquisition financing with respect to tangible assets. It provides for a unitary approach to acquisition financing, in the context of which all rights securing the payment of the purchase price for tangible assets fall under a unitary notion of a security right with the result that, with the exception of certain special provisions for acquisition security rights, the provisions applicable to security rights apply to acquisition security rights (see recommendations 178-186). As an alternative, the *UNCITRAL Secured Transactions Guide* provides for a non-unitary approach to acquisition financing, in the context of which the terminology of various types of rights securing the purchase price of tangible assets is maintained, while certain special provisions are introduced to ensure that retention-of-title and financial lease rights are treated as functional equivalents of acquisition security rights (see recommendations 187-202). The main provision is a priority provision giving priority to an acquisition secured creditor, a retention-of-title seller or financial lessor as of the time of the delivery of the goods to the grantor as long as the acquisition financier registered a notice in the security rights registry (see recommendations 180 and 199). This special priority extends to proceeds of equipment but not to proceeds of inventory in the form of cash proceeds (see recommendations 185 and 192). In the context of both the unitary and the non unitary approach, there is an alternative rule, under which no distinction is made between equipment and inventory but no special priority is recognized in proceeds.

### 2. Possible asset-specific adjustments

46. The provisions of the *UNCITRAL Secured Transactions Guide* with respect to acquisition financing apply only to tangible assets. The Working Group may wish to consider whether there should be an acquisition security right with respect to intellectual property rights, which could have the special priority provided in recommendation 180 (and 192 for the non-unitary approach).

47. The first question may be whether intellectual property rights used in connection with a tangible asset should be subject to an acquisition security right with special priority with the consent of the intellectual property rights holder and appropriate description of the encumbered asset in the security agreement. At least where the tangible asset may not be effectively disposed of without reference to the intellectual property right (e.g. patented pumps or copyrighted books), it seems that such an acquisition security right should be possible. Otherwise, the acquisition security right in the tangible asset would be of little value.

48. The next question is whether an acquisition security right should be introduced for intellectual property rights themselves so as to ensure that a licensor could obtain priority over a secured creditor of the licensee with a security right in the intellectual property right or the royalties owed to the licensee from sub-licensees.

49. Under the *UNCITRAL Secured Transactions Guide*, a security right takes its priority from the time of registration or third-party effectiveness. If a potential licensee grants a security right in all existing and future intellectual property rights and then enters into an agreement with a licensor, the licensor cannot gain priority over the licensee's pre-existing secured lender. The view is expressed that it seems strange that a supplier of used equipment can do so, but the licensor of the latest patent to make new replacement equipment cannot.

50. However, unlike retention-of-title sales that were developed in practice in response to practical needs, no such practice has developed with respect to licences of intellectual property. In addition, licensors may be protected in different ways. For example, a licensor may include in the licence agreement that the licensee will not create a security right in its rights under the licence. If the licensee grants a security right in violation of the agreement, the licensor can always terminate the licence agreement. Furthermore, a licensor may include in the licence agreement that, if the licensee grants a security right in its rights under the licence agreement, the licensee will ensure that the secured creditor will conclude a subordination agreement in favour of the licensor. Nothing in the *UNCITRAL Secured Transactions Guide* affects such arrangements. The licensor could also make “lock-box arrangements” (part of the royalties owed to the licensee from sub-licensees would be paid in a separate account in the name of the licensor) or even obtain a security right in the royalties owed to the licensee to secure payment of the royalties owed to the licensor. However, such arrangements would be subject to the normal priority rules.

## **L. Law applicable to a security right**

### **1. The general approach of the *UNCITRAL Secured Transactions Guide***

51. Under the *UNCITRAL Secured Transactions Guide*, the law applicable to the creation, third-party effectiveness, priority and enforcement of a security right in intangible assets is the law of the State in which the grantor is located (see recommendation 208). The grantor is located in the State in which it has its place of business; in the case of places of business in more than one State, reference is made to the State in which the grantor has its central administration; and in the absence of a place of business, reference is made to the State in which the grantor has its habitual residence (see recommendation 219).

52. The mutual rights and obligations of the grantor and the secured creditor with respect to the security right are governed by the law chosen by them and, in the absence of a choice of law, by the law governing the security agreement (see recommendation 216).

### **2. Possible asset-specific adjustments**

#### **(a) Law applicable to proprietary matters**

53. Intellectual property law conventions adopt the principle of territoriality. As a result, the law applicable to property law issues concerning intellectual property rights (title transfers, secured transactions and licence agreements) is the law of the place where the intellectual property right is protected (*lex protectionis*). Typically, a transferee or a licensee will ensure that it obtained an effective transfer or licence in the States in which the intellectual property right is protected. Similarly, a secured creditor will inquire from the owner, transferee or licensee in which States an intellectual property right is protected and follow the rules of those States to obtain a security right, make it effective against third parties or enforce it.

54. In addition, under the principle of minimum rights, all States parties to those conventions accord a basic level of protection to intellectual property rights holders and their successors. Finally, under the principle of national treatment, each State has to treat nationals of another State no less favourably than it treats its own nationals. This creates a system in which nationals of any State know that in any other State they will be accorded at least certain minimum rights, along with any greater rights that are

accorded to domestic parties. The benefits of this structure, including ease of administration and fairness in application, have been proven by experience.

55. Other possible approaches are based on the principle of “material reciprocity” or “country of origin”, in which the rights of a person in the home or “origin” State determines the extent of a person’s rights in another State.

56. A variation of the approach based on the *lex protectionis* and approach of the *UNCITRAL Secured Transactions Guide* could be to provide that, in principle, the law applicable to the creation, third-party effectiveness and priority of a security right in an intellectual property right would be the law of the grantor’s location. However, if a competing claimant obtained a superior right under the *lex protectionis*, the *lex protectionis* would apply. Another possible variation may be to limit the application of the *lex protectionis* to security rights in intellectual property rights that can be created by registration in the relevant intellectual property rights registry.

**(b) Law applicable to contractual matters**

57. 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). The commentary might usefully explain the application of the principle of party autonomy as to the law applicable to the mutual rights and obligations of the grantor and the secured creditor where the encumbered asset is an intellectual property right.

**M. The impact of insolvency on a security right**

**1. The general approach of the *UNCITRAL Secured Transactions Guide***

58. The *UNCITRAL Secured Transactions Guide* addresses in Chapter XII the impact of insolvency on a security right granted by the insolvent debtor in a way that is consistent with the *UNCITRAL Insolvency Guide*. At the same time, Chapter XII includes additional insolvency recommendations to address specific secured transactions issues. It should be noted that Chapter XII is the product of the joint work of the Working Group and Working Group V (Insolvency Law).

59. Under Chapter XII, the effectiveness of a security right is preserved subject to any avoidance actions and stays (see recommendations (35), (39) and (46) of the *UNCITRAL Legislative Guide on Insolvency Law*, hereinafter referred to as the “*UNCITRAL Insolvency Guide*”). The third-party effectiveness and priority of a security right is also preserved subject to any preferential claims (see recommendations 238 and 239). Security rights securing post-commencement finance do not take priority over pre-commencement security rights, but the insolvency court may authorize the post-commencement creation of security rights with priority over pre-commencement security rights in certain situations (see recommendations (66) and (67) of the *UNCITRAL Insolvency Guide*). Secured creditors may be entitled to participate in insolvency proceedings if certain conditions are met (e.g. the reorganization plan affects their security rights; see recommendation (126) of the *UNCITRAL Insolvency Guide*). Similarly, secured creditors may have a right to vote on a reorganization plan, which affects their rights, and a plan may be binding on secured creditors even without their approval if certain conditions are met (see recommendations (126), (151) and (152) of the *UNCITRAL Insolvency Guide*).

60. With respect to the treatment of contracts under which both the debtor and its counterparty have not fully performed their respective obligations, Chapter XII generally provides that the insolvency representative may decide to continue the performance of a contract if continuation of the contract is beneficial to the estate or reject the contract (see recommendations (72) and (73)). With respect to automatic termination or acceleration clauses (also called “ipso facto” clauses), Chapter XII provides that, upon the application for commencement, commencement or appointment of an insolvency representative, such clauses are unenforceable against the insolvency representative and the debtor (see recommendation (70) of the UNCITRAL Insolvency Guide).

## 2. Possible asset-specific adjustments

61. It would seem that the following principles would be consistent with Chapter XII: (i) the insolvency representative does not have more rights than the insolvent debtor, whether that debtor is the owner, the licensor or licensee of intellectual property; (ii) what are the specific rights of the insolvent licensor or licensee under a licence is a matter of intellectual property law, but those rights might be affected by insolvency law; and (iii) the rights of their secured creditors are subject to secured transactions and intellectual property law, but may be affected by insolvency law. Under recommendation 4, subparagraph (b), in the case of inconsistencies between secured transactions and intellectual property law, intellectual property law prevails. The relationship between intellectual property law and insolvency law is, of course, not addressed in the *UNCITRAL Secured Transactions Guide*.

62. When the encumbered asset is the licensor’s right with respect to licensed intellectual property or a licensee’s right with respect to such property, analysis of the effect of insolvency on the security right can be complicated because the insolvent debtor may or may not be the grantor of the security right. For example, in the case of an encumbered asset consisting of the licensor’s rights, the effect of insolvency may differ depending on whether it is the licensor (who is also the grantor) or the licensee that has become insolvent. Similarly, in the case of an encumbered asset consisting of the licensee’s rights, the effect of insolvency on the security right may differ depending on whether it is the licensee (who is also the grantor) or the licensor that has become insolvent.

63. In each case, when it is the grantor that is the insolvent debtor, the starting point for the analysis is Chapter XII. In light of the nature of transactions in which intellectual property rights are encumbered assets, the Working Group may wish to consider whether the recommendations in Chapter XII should be augmented by additional commentary or illustrations relating to intellectual property transactions. In view of the fact that Chapter XII contains some additional recommendations that address specific secured transactions issues, the Working Group may wish to consider whether the recommendations in Chapter XII should be augmented, in a manner consistent with the principles of both Guides, to address specific issues related to security rights in intellectual property rights.

64. If the Working Group decides that additional recommendations or commentary would be necessary or useful to address these issues, as this effort will touch upon insolvency law issues addressed in the UNCITRAL Insolvency Guide, the Working Group will have to raise these issues with the Commission so that the Commission can make a decision as to whether the work involves issues of secured transactions, intellectual property and insolvency law and would thus require coordination between

the Working Group and Working Group V (Insolvency Law) and, if so, decide on the terms of reference of such coordination.

**(a) The treatment of security rights granted by a licensee in the case of the insolvency of the licensor**

65. As already mentioned (see para. 60 above), under Chapter XII, the insolvency representative may decide to continue the licence agreement, performing it, or rejecting it. To the extent the decision of the insolvency representative is beneficial to the estate, secured creditors with a security right in the licensor's rights will share in the benefits, while secured creditors of the licensee may be negatively affected. Outside insolvency, these secured creditors know that, if the licensee does not perform its obligations under the licence agreement, the licence agreement could be terminated, but they can address this risk, at least to some extent, by monitoring the performance of the licensee's obligations. In the case of the licensor's insolvency though, the right of the licensee's secured creditors could evaporate without the secured creditor's fault. This is a risk that any secured creditor will have to take into account in its decision whether to extend credit and at what cost.

66. The question arises though what happens to a licensee (and its secured creditors), who borrowed and invested considerable sums in marketing or further developing the intellectual property rights (granting a security right in the intellectual property rights), or to a licensee (and its secured creditors) that is down in the chain of licences or a licensee (and its secured creditors), who borrowed and developed the intellectual property rights further (cross-licensing arrangements) and licensed it back to the licensor. To protect themselves (and preserve their ability to raise credit on their rights as licensees), licensees often negotiate for: (i) long licence terms; (ii) "non-termination" rights, i.e., a waiver by the licensor of a contractual right to terminate the license for a default (to the extent allowed by relevant law), meaning that the licensor can only recover damages but the licensee can retain the rights; and (iii) a "protective security right". Under a "protective security right" a licensee takes a security right in the intellectual property right granted under the licence in order to secure its right to recoup any advance royalty payments and expenses, as well as potential damages in case of termination (these "protective security rights" are typical in particular in the movie business). The Working Group may wish to consider whether, in such a case, Chapter XII would apply to the rights of a licensee as if it were a secured creditor.

67. A way in which some insolvency laws deal with this issue is by allowing the licensee to elect to continue using the intellectual property under the licence even if the insolvency representative tries to terminate. The licensee must comply with all licence terms. However, the licensor's estate is relieved from ongoing obligations, such as providing improvements. This has the effect of balancing the interests of the licensor to escape a burdensome contract and the interest of the licensee to protect its investment in the licence. The question arises as to whether this approach would be consistent with Chapter XII.

68. The application of the principles of Chapter XII to security rights in intellectual property rights may need to be discussed, in particular in the case of cross-licensing arrangements and in cases where the insolvent debtor is a licensor high up in the chain of licences and its insolvency will affect licensees and their secured creditors in several tiers.

69. Another example of an issue that may be usefully discussed is the following. As already mentioned, under Chapter XII, the insolvency representative may terminate an



agreement only if it is not fully performed both by the insolvent debtor and its counterparty (see recommendation (70) of the UNCITRAL Insolvency Guide). The question arises in this regard whether this means, for example, that, if the licensor writes a novel for a publisher, has performed all writing services, and is only collecting royalties, the licence of the copyright in the novel to the publisher is not terminable in case of the novelist's insolvency.

**(b) The treatment of security rights granted by the licensor in the case of the insolvency of the licensee**

70. If continuation of the licence is advantageous for the estate given all the circumstances of the case, the insolvency representative will likely wish to continue exploiting the intellectual property. From the licensor's point of view (and from the point of view of the licensor's secured creditors), there is often a strong desire to recover the intellectual property right in the belief that an insolvent licensee will not be able to devote the same resources to marketing the intellectual property right as a solvent company. There is also a concern that royalty payments might not be made as regularly as if the licensee were solvent. The following issues may need to be discussed.

71. First, it is common to include a clause in a license agreement that it automatically terminates upon insolvency of either party. These automatic termination or acceleration clauses are not enforceable in Chapter XII (see recommendation (70) of the UNCITRAL Insolvency Guide). Second, in many cases, at the time of the licensee's insolvency there will be unpaid, past-due royalties. Under chapter XII, where the insolvent debtor is in breach, the insolvency representative can continue the performance of the contract, provided that the breach is cured, the non-breaching counter-party is returned to the economic position it was before the breach and the estate can perform under the continued contract (see recommendation (79) of the UNCITRAL Insolvency Guide). The application of the principles of Chapter XII in these cases may be usefully explained with examples in an augmented commentary to Chapter XII.

72. Third, if the insolvency representative elects to continue to use the intellectual property, the rights holder wants to ensure that: (i) licence terms are honoured; and (ii) royalties are paid. As already mentioned, Chapter XII sufficiently addresses these issues (see recommendations (70) to (82) of the UNCITRAL Insolvency Guide). However, if the licensee has granted before the commencement of insolvency an effective security right in its right under the licence agreement and the insolvency representative elects to continue the licence agreement, the question arises as to whom the estate should pay future royalties, to the licensor in preference to the secured creditor or to the secured creditor since it has a security right, whereas the licensor does not. The latter result would negatively affect the rights of licensors and their ability to raise credit offering their rights as collateral, since, in effect, they would lose both the intellectual property right and the royalties.

## V. Conclusions

73. The Working Group may wish to confirm that, while the *UNCITRAL Secured Transactions Guide* works well with respect to some issues arising in the context of security rights in intellectual property rights, it requires some adjustments with respect to other issues.

74. These adjustments may take the form of commentary as to the specific application of principles of the *UNCITRAL Secured Transactions Guide* to security rights in

intellectual property rights. For example, commentary may include some additional definitions and explain how other definitions of terms would apply to security rights in intellectual property rights (see A/CN.9/WG.VI/WP.33, paras. 42-60). Similarly, commentary may be sufficient to explain the application of the principle of party autonomy in the case of a security agreement relating to an intellectual property right (see A/CN.9/WG.VI/WP.33, para. 108, as well as paras. 28-30 above) or to clarify some fundamental policies with respect to security rights in intellectual property rights (see A/CN.9/WG.VI/WP.33, paras. 62-75). Furthermore, commentary may be sufficient to explain how the principles of the *UNCITRAL Secured Transactions Guide* with respect to statutory and contractual limitations to the transferability of assets would apply in the case of security rights in intellectual property rights (see A/CN.9/WG.VI/WP.33, paras. 82-108).

75. The adjustments may also take the form of additional recommendations that would apply specifically to security rights in intellectual property rights. For example, third-party effectiveness and priority issues may need to be addressed with asset-specific recommendations (see A/CN.9/WG.VI/WP.33, paras. 13-145, as well as paras. 16-25 above). Furthermore, enforcement issues in particular with respect to security rights in rights under a licence agreement may need to be addressed with asset-specific recommendations (see paras. 35-44 above). Another example of an issue that may need to be addressed with asset-specific recommendations is the issue of the law applicable to security rights in intellectual property rights (see paras. 53-57 above).

76. The Working Group may wish to consider requesting the Secretariat to prepare commentary and recommendations in the form of an annex to the *UNCITRAL Secured Transactions Guide* so as to address the above-mentioned issues.

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## VI. POSSIBLE FUTURE WORK

### A. Note by the Secretariat on possible future work in the area of electronic commerce: Legal issues arising out of the implementation and operation of single windows in international trade

(A/CN.9/655) [Original: English]

#### CONTENTS

	<i>Paragraphs</i>
I. Introduction . . . . .	1-7
II. The use of single windows in international trade: policy considerations and legal issues . . . . .	8-34
A. Concept, types, benefits and operation of single windows . . . . .	9-23
1. The single window concept . . . . .	9-12
2. Types of single window . . . . .	13-16
3. Benefits of single windows . . . . .	17-23
B. Legal issues arising out of the implementation and operation of single windows . . . . .	24-34
1. Establishment of a single window . . . . .	25
2. Identification, authentication, authorization . . . . .	26-28
3. Data protection. . . . .	29-30
4. Liability issues. . . . .	31-32
5. Electronic documents. . . . .	33-34
III. Proposed nature of future work . . . . .	35-41

### I. Introduction

1. In 2004, having completed its work on the Convention on the Use of Electronic Communications in International Contracts, Working Group IV (Electronic Commerce) of the United Nations Commission on International Trade Law (UNCITRAL) 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. 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.<sup>1</sup>

3. In 2006, UNCITRAL considered a note prepared by the Secretariat pursuant to that request (A/CN.9/604). The note identified the following areas as possible components of a comprehensive reference document: (a) authentication and cross-border recognition of electronic signatures; (b) liability and standards of conduct for information-services providers; (c) electronic invoicing and legal issues related to supply chains in electronic commerce; (d) transfer of rights in tangible goods and other rights through electronic communications; (e) unfair competition and deceptive trade practices in electronic commerce; and (f) privacy and data protection in electronic commerce. The note also identified other issues that, although in a more summary fashion, could be included in such a document: (a) protection of intellectual property rights; (b) unsolicited electronic communications (spam); and (c) cybercrime.

4. At that session, there was support for the view that the task of legislators and policymakers, in particular in developing countries, might be greatly facilitated if the Commission were to formulate a comprehensive reference document dealing with the topics identified by the Secretariat. Such a document, it was also said, might also assist the Commission to identify areas in which it might itself undertake future harmonization work. However, there were also concerns that the range of issues identified was too wide and that the scope of the comprehensive reference document might need to be reduced. The Commission eventually agreed to ask its 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, for review at its fortieth session, in 2007.<sup>2</sup>

5. The sample chapter that the Secretariat prepared pursuant to that request (A/CN.9/630 and Add.1-5) was submitted to the Commission at its fortieth session. The Commission commended the Secretariat for the preparation of the sample chapter and requested the Secretariat to publish it as a stand-alone publication. While the Commission was not in favour of requesting the Secretariat to undertake a similar work in other areas with a view to preparing a comprehensive reference document, the Commission agreed to request the Secretariat to continue to follow closely legal developments in the relevant areas, with a view to making appropriate suggestions in due course.<sup>3</sup>

6. The Secretariat has continued to follow technological developments and new business models in the area of electronic commerce that may impact international trade. One area that the Secretariat has examined closely concerns legal issues arising out of the use of single windows in international trade. The Secretariat has been invited by other international organizations and bodies interested in the implementation of single windows in international trade, in particular the United Nations Centre for Trade Facilitation and Electronic Business (UN/CEFACT) and the World Customs Organization (WCO), to consider possible topics of cooperation with those organizations in that area.

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<sup>1</sup> *Official Records of the General Assembly, Sixtieth Session, Supplement No. 17 (A/60/17)*, para. 214.

<sup>2</sup> *Ibid.*, *Sixty-first Session, Supplement No. 17 (A/61/17)*, para. 216.

<sup>3</sup> *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17 (A/62/17)*, para. 195.

7. This note sets out policy considerations and legal issues in the implementation and operation of single windows (paras. 8 to 34) and submits proposals for possible future work in cooperation with other international organizations (paras. 35 to 41).

## **II. The use of single windows in international trade: policy considerations and legal issues**

8. The following paragraphs describe the concept, types and benefits of single windows. They reproduce, to a large extent, the background information contained in UN/CEFACT Recommendation No. 33, approved in September 2004.<sup>4</sup>

### **A. Concept, types and benefits of single windows**

#### **1. The single window concept**

9. In most countries, companies engaged in international trade have regularly to prepare and submit large volumes of information and documents to governmental authorities to comply with import, export and transit-related regulatory requirements. These documents allow the government to enforce controls to ensure that imported and exported goods satisfy conditions laid down by trade control policies (e.g. health, safety, and other regulatory requirements) and international agreements, and that their custom duties have been paid. These documents also allow collecting, compiling and publishing trade statistics reflecting the economic well-being of various industrial sectors.

10. This information and documentation often has to be submitted through several different agencies, each with its own (manual or automated) system and paper forms. As noted in UN/CEFACT Recommendation No. 33, these extensive requirements, together with the associated compliance costs “constitute a burden both to governments and to the business community and can also be a major barrier to the development of international trade.”<sup>5</sup>

11. One approach to addressing this problem is the establishment of a “single window”<sup>6</sup> whereby trade-related information and/or documents need only be submitted once at a single entry point.

12. This can enhance the availability and handling of information, expedite and simplify information flows between trade and government and can result in a greater harmonization and sharing of the relevant data across governmental systems, bringing meaningful gains to all parties involved in cross-border trade. The use of such a facility

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<sup>4</sup> 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 [http://www.unece.org/cefact/recommendations/rec33/rec33\\_trd352e.pdf](http://www.unece.org/cefact/recommendations/rec33/rec33_trd352e.pdf).

<sup>5</sup> *Ibid.*, p. 3, No. 1.

<sup>6</sup> UN/CEFACT Recommendation No. 33 defines “single window” as follows: “single window is defined as a facility that allows parties involved in trade and transport to lodge standardized information and documents with a single entry point to fulfil all important, export, and transit-related regulatory requirements. If information is electronic, then individual data elements should only be submitted once.” (*Ibid.*, p. 3, No. 2).

can result in improved efficiency and effectiveness of official controls and can reduce costs for both governments and traders due to better use of resources.<sup>7</sup>

## 2. Types of single window

13. The single window is generally managed centrally by a lead agency, enabling appropriate governmental authorities and agencies to receive or have access to the information relevant for their purposes.<sup>8</sup> The role of the agency operating a single window will vary from country to country depending on legal, political and organizational issues. In some cases, the single window may provide facilities for payment of relevant duties, taxes and fees.<sup>9</sup> However, the purpose of the lead agency in a single window is not to serve as an intermediary body between trade partners and public authorities.

14. Single windows follow mainly three models. The most basic type of single window is a national single window where a single authority receives information from traders and other parties involved in international trade, either on paper or electronically, and disseminates this information to all relevant governmental authorities.<sup>10</sup> A more advanced type of single window facility is a single automated system for the collection and dissemination of information that integrates the electronic collection, use, dissemination, and storage of data related to international trade.<sup>11</sup> Lastly, single windows may involve setting up automated information transaction system through which traders can submit electronic trade declarations to the various authorities for processing and approval in a single application. In this approach, approvals are transmitted electronically from governmental authorities to the trader's computer.<sup>12</sup>

15. While single window facilities can be operated on the national level (i.e. for use with the governmental bodies of a single country), single window facilities can also cooperate on an international level. In such case, information submitted to a national single window can be forwarded to other national single window facilities thereby further reducing administrative costs.<sup>13</sup>

16. In some countries, single windows are financed by the State,<sup>14</sup> whereas in other models they are financed by the private sector or with a help of a private-public

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<sup>7</sup> Ibid., p. 3, No. 1.

<sup>8</sup> Ibid., p. 3, No. 2.

<sup>9</sup> Ibid., p. 3, No. 2.

<sup>10</sup> In the Swedish single window, for example, customs authorities perform selected tasks on behalf of some authorities, including the Tax Administration (import taxes), statistics authorities (trade statistics), the Swedish Board of Agriculture and the National Board of Trade (import licensing) (Ibid., p. 7, No. 3).

<sup>11</sup> The United States, for example, has established a program that allows traders to submit standard data only once and the system processes and distributes the data to the agencies that have an interest in the transaction. (Ibid., p. 8, No. 3).

<sup>12</sup> Such a system is in use in Singapore and Mauritius. Moreover, in the Singaporean system, fees, taxes and duties are computed automatically and deducted from the traders' bank accounts. (Ibid., p. 8, No. 3).

<sup>13</sup> An example of an international single window is the ASEAN single window for international trade (see Agreement to Establish and Implement the ASEAN single window (Kuala Lumpur, 9 December 2005), <http://www.aseansec.org/18005.htm>).

<sup>14</sup> Such as in Finland, Sweden and United States (UN/CEFACT, *Case Studies on Implementing a single window* April 2006, [http://www.unece.org/cefact/single\\_window/draft\\_april06.pdf](http://www.unece.org/cefact/single_window/draft_april06.pdf), (hereafter "Case studies") p. 3.

partnership.<sup>15</sup> The use of single window facilities can be compulsory<sup>16</sup> or voluntary,<sup>17</sup> and their services may be provided free of charge<sup>18</sup> or require payment.<sup>19</sup>

### 3. Benefits of single windows

17. Governments and trade have set an extensive range of agency-specific and country-specific regulatory and operational requirements for international trade without much coordination either internally or amongst each other. As a result, trade partners are often confronted with duplicative and redundant reporting requirements, forms, systems, data sets, data models, and messages. Governments and trade have had to develop and maintain different systems to meet these costly requirements. The burden placed on government agencies and trade partners has increased in recent years as a result of the requirements for faster information delivery, often in advance of shipping, for security and other purposes.

18. Single windows can simplify and facilitate to a considerable extent the process of providing and sharing the necessary information to fulfil trade-related regulatory requirements for both trader and authorities. The use of such a system can result in improved efficiency and effectiveness of official controls and can reduce costs for both governments and traders due to better use of resources.

19. Indeed, a single window can lead to a better combination of existing governmental systems and processes, while at the same time promoting a more open and facilitative approach to the way in which governments operate and communicate with business. For example, as traders will submit all the required information and documents through a single entity, more effective systems can be established for a quicker and more accurate validation and distribution of this information to all relevant government agencies. This will also result in better coordination and cooperation between the governmental authorities involved in trade-related activities.

20. Risk management techniques for control and enforcement purposes can also be enhanced through a single window facility that collects all data in a systematic way, resulting in more secure and efficient trade procedures. Furthermore, the implementation of a payment system within a single window facilitates payment to governmental authorities and agencies for required duties and any other charges.

21. A single window that provides up-to-date information regarding tariff rates and other legal and procedural requirements may reduce the risk of errors and increase compliance by trade partners. In addition, the collection and coordination of the required information and trade documentation through a single window will reduce the use of both human and financial resources, enabling governments to redeploy resources previously used for administrative tasks to areas of greater concern and importance.

22. The main benefit for the trading community is that a single window can provide the trader with a single point for the one-time submission of all required information

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<sup>15</sup> Such as, in the first case, Guatemala and Germany, and in the second case China, Ghana, Japan, Malaysia, Mauritius, Senegal and Singapore (Case studies, p. 3).

<sup>16</sup> Such as in Finland, Ghana, Guatemala, Mauritius, Senegal (ibid.).

<sup>17</sup> Such as in China, Germany, Japan, Malaysia, Sweden and the United States) (ibid.).

<sup>18</sup> Such as in Finland, Sweden and the United States (ibid.).

<sup>19</sup> Such as in China, Ghana, Guatemala, Germany, Japan, Malaysia, Mauritius, Senegal and Singapore (ibid.).

and documentation to all governmental agencies involved in export, import or transit procedures. The rationalization and streamlining potential offered by single windows become particularly significant in view of the expanding requirements for data standardization in international supply chains. Indeed, the ability to handle data efficiently and swiftly has become a key element in international competitiveness, especially in international supply chains. As the single window enables governments to process submitted information, documents and fees both faster and more accurately, trader partners should benefit from faster clearance and release times, enabling them to speed up the supply chain.

23. If the single window functions as a focal point for the access to updated information on current trade rules, regulations and compliance requirements, it will lower the administrative costs of trade transactions and encourage greater trader compliance. In addition, the improved transparency and increased predictability can further reduce the potential for corrupt behaviour from both the public and private sector.

## **B. Legal issues arising out of the implementation and operation of single windows**

24. The Legal Group and the International Trade Procedures Working Group (ITPWG-TBG15) of UN/CEFACT have identified a number of legal issues that may arise in the context of single window implementation and operation. These legal issues will be examined in the forthcoming UN/CEFACT Recommendation 35 on Legal Framework for International Trade single window. The following paragraphs point out the main areas of legal issues that have been identified by the UN/CEFACT Legal Group.<sup>20</sup> The extent to which these issues arise depends largely on the structure of any given single window, and the nature and scope of the functions it performs. Generally, the complexity increases in direct relation to the functionality of a single window.

### **1. Establishment of a single window**

25. As indicated earlier, single window facilities can be established in a number of different ways, not only from a technological viewpoint, but also from an organizational viewpoint. The way in which a single window is structured plays an important role with respect to possible legal issues that may arise. For each of these different organizational forms, the authority and mandate of the single window needs to be established clearly in national law. Furthermore, when multiple organizations take part in the implementation and operation of the single window, they must agree on their respective roles and responsibilities. Finally, it is necessary to establish “end-user agreements” with the users of the single window facility (such as freight forwarders, agents, traders, banks). When national single window facilities cooperate on an international level, bilateral or multilateral agreements often need to be established to govern the operations

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<sup>20</sup> See Bart W. Schermer, “Legal Issues of single window Facilities for International Trade”, paper delivered at the Congress “Modern Law for Global Commerce” (Vienna, 9-12 July 2007) to celebrate the 40th session of UNCITRAL (available at <http://www.uncitral.org/pdf/english/congress/Schermer.pdf>). The author is a member of the UN/CEFACT Legal Group.



of each single window and that take into account a variety of legal issues that may arise to ensure “legal interoperability” between these single window facilities.

## **2. Identification, authentication, authorization**

26. Given the fact that processing data is the primary role of a single window facility, issues of identification, authentication, and authorization will be of great importance. The process of identification, authentication, and authorization applies to different actors in the single window arena. They include, among others: the single window facilities themselves, the users of the single window facilities, the organizations that are part of the single window environment, and their respective employees. When single window facilities from different jurisdictions wish to exchange data, it is necessary to have common, mutually recognized mechanisms for identification, authentication and authorization for transactions being processed through each single window involved.

27. The lack of common standards for cross-border recognition of electronic signatures and other authentication methods is considered to be a significant impediment to cross-border commercial transactions. Two main problems exist in the given context. On the one hand, technological measures and systems for electronic signatures, in particular digital signatures, are currently much too diverse to enable uniform international standards. On the other hand, fears about fraud and manipulation in electronic communications have led some jurisdictions to establish rather stringent regulatory requirements, which in turn may have discouraged the use of electronic signatures, in particular digital signatures.

28. Wide accession to the recently adopted United Nations Convention on the Use of Electronic Communications in International Contracts,<sup>21</sup> which provides in its article 9 for the functional equivalence between electronic signatures and traditional types of signature, may go a long way towards facilitating cross-border use of electronic signatures. Nevertheless, use of electronic documents and electronic signatures for official government purposes is an area in which many jurisdictions are inclined to retain national standards. Conflicting technology-specific national authentication systems may however hinder or bar recognition of electronic signatures and authentication methods used in foreign single windows, thus inhibiting rather than promoting the use of single windows in international trade.

## **3. Data protection**

29. Data protection is a very sensitive area in the context of a single window, and it has essentially two dimensions. On the one hand, a single window can be regarded as a custodian of information provided by trade partners and, as such, responsible for its safe-keeping. This would entail an obligation by the single window to establish adequate procedures for protecting the information it receives against access by unauthorized persons, both within the single window structure, as well as outside it. On the other hand, a single window or participating agencies may themselves be recipients of the information provided by trade partners, and may be required to comply with domestic or regional regulations systems on data protection. Such regulations are typically concerned with consent to data collection, adequate relation of the information to the purpose for which it is collected, time limitation of storage, adequate level of protection

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<sup>21</sup> For the text of the Convention, see the Annex to General Assembly resolution 60/21, of 23 November 2005.

in third countries to which transmission takes place, information and correction claims for users, and enhanced protection for sensitive data.

30. Without proper mechanisms for the protection of data, single window facilities present major risks. To this end, adequate security and access protocols need to be established through the identification, authentication, and authorization mechanisms mentioned above. The issue of data protection is closely related to that of privacy (i.e., personal data protection). When personal data is processed it must be determined whether this is done in compliance with all relevant privacy and personal data protection laws. In the context of international single windows that share data between different countries, this provision is even more relevant. However, the right to privacy is interpreted differently in various parts of the world, and as such data protection law differs throughout the world. The highest level of international consensus is reflected in the *OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data*. However, these guidelines are not binding. When single windows cooperate on an international level, it is of importance to examine and consider how differing national (or regional) data protection regimes might be harmonized or at least accommodated in bilateral or multilateral agreements between countries participating in international single window operations.

#### **4. Liability issues**

31. An additional set of legal issues relates to the possible liability of single windows for failures that occur during transmission of messages (delivery delay or loss of information), or for malfunctioning of data storage systems (loss of stored data or unauthorized access by third parties). Loss of data or the use of inaccurate, incomplete, or incorrect data due to a service failure or malfunctioning of the databases maintained by the single window may cause damage to trade partners or agencies using the services of the single window. The greater the functionality of a single window, the bigger is the exposure to potential liability. A single window that is limited to serving as a repository of information provided by trade partners for the use and benefit of agencies entitled to retrieve that information will normally be exposed only to the same kind of liability that is usually borne by any other entity that undertakes to store data provided by other parties. Where, however, the single window either certifies the accuracy of the information compiled, or undertakes itself to transmit the information to other parties, the single window may be exposed to a substantially greater level of liability.

32. Therefore, the establishment of a single window facility requires careful consideration of its potential liability exposure. To some extent, liability exposure can be controlled through contractual mechanisms, such as general conditions of contract. However, the extent to which single window operators may disclaim liability for loss or damage caused by service failure, or may limit their liability in those cases, is likely to vary from country to country. Lack of knowledge of foreign levels of liability, conflicting standards of care for single window operators and different levels of liability may be an obstacle for the interoperability of domestic single window systems.

#### **5. Electronic documents**

33. The functional equivalence of electronic documents to paper documents and the acceptance of their evidentiary value in court are of great importance for the future development of single window facilities. As such, UNCITRAL's Model Law on Electronic Commerce (1996) and the United Nations Convention on the Use of

Electronic Communications in International Contracts (2005) are highly relevant to the implementation and operation of single window facilities. While UN/CEFACT's Recommendation 33 and its forthcoming Recommendation 35 can be applied to the non-automated single window environments, those countries that seek to move towards e-trade or "paperless trade" are encouraged to consider adoption of these UNCITRAL texts for creating both their domestic and internationally-oriented legal infrastructure for commercial applications of information and communications technology.

34. It was then pointed out that the UNCITRAL Model Law on Electronic Commerce,<sup>22</sup> the UNCITRAL Model Law on Electronic Signatures,<sup>23</sup> as well as the Convention on the Use of Electronic Communications in International Contracts provided a good basis for States to facilitate electronic commerce, but only addressed a limited number of issues.

### III. Proposed nature of future work

35. UNCITRAL has been invited to participate in a joint project with the World Customs Organization (WCO) aimed at formulating a comprehensive guidance document to which legislators, government policymakers, single window implementers, and other stakeholders involved in international transactions could refer for advice on the legal aspects of creating and managing a single window environment.

36. The WCO promotes and administers the harmonization of customs laws and procedures within its membership.<sup>24</sup> Consistent with its mandate to enhance the efficiency and effectiveness of customs administrations by harmonizing and simplifying customs procedures, WCO has been working to enable greater use of information and communications technology with a view to facilitating international trade. With the growth in areas such as international cargo, information technology and electronic commerce, the practices and systems already adopted pursuant to the Kyoto Convention<sup>25</sup> were seen as having created a conflict with modern trade practices. The revised Kyoto Convention,<sup>26</sup> provided a new structure through which modern trade practices, including electronic commerce can operate and be regulated<sup>27</sup> as it takes into account and adopts flexible methods and systems to allow for the changing nature of international trade. Further, the WCO Council adopted a declaration on electronic

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<sup>22</sup> For the text of the Model Law, see *Official Records of the General Assembly, Fifty-first Session, Supplement No. 17 (A/51/17)*, annex I. The Model Law and its accompanying Guide to Enactment have been published as a United Nations publication (Sales No. E.99.V.4).

<sup>23</sup> For the text of the Model Law, see *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17 (A/56/17)*, annex II. The Model Law and its accompanying Guide to Enactment have been published as a United Nations publication (Sales No. E.02.V.8).

<sup>24</sup> <http://www.wcoomd.org/ie/En/AboutUs/aboutus.html>.

<sup>25</sup> The International Convention on the Simplification and Harmonization of Customs Procedures ("Kyoto Convention") which entered into force on 25 September 1974, was the principal instrument through which the WCO operated and through which members regulated and implemented customs policies.

<sup>26</sup> The International Convention on the Simplification and Harmonization of Customs Procedures ("Kyoto Convention") as revised in June 1999 was adopted by the WCO Council as the updated "blueprint" for modern and efficient Customs procedures in the modern era:  
<http://www.wcoomd.org/ie/En/AboutUs/aboutus.html>: "The Kyoto Convention: Customs contributing to the development of international trade."

<sup>27</sup> The revised Kyoto Convention entered into force on 3 February 2006.

commerce known as the “Baku Declaration”, in 2001 to recognize the potential social and economic impact of electronic commerce on nations, in particular that of developing nations. The Declaration invited Members of the WCO to take certain steps in response to the declaration and also requested the WCO to develop a coherent strategic WCO policy and action plan on electronic commerce.<sup>28</sup>

37. Furthermore, the WCO has done significant work in developing a data model (WCO Data Model) for standardizing data messages exchanged between governments and between business entities and public authorities. The WCO Data Model will establish a standard, international, harmonized data set that will meet governments’ requirements for international cross-border trade and is geared exclusively to the requirements of an automated environment. Information and documentation are key elements in the control of international cross-border trade. In today’s interconnected electronic environment these controls will increasingly include information exchange prior to the arrival of the goods in order to provide the necessary level of security as well as acceptable release times. The Data Model is expected to provide Contracting Parties to the revised Kyoto Convention with a global customs standard to implement provisions dealing with reduced data requirements and electronic submission of declarations and supporting documents.

38. In a letter addressed to the Secretary of UNCITRAL on 27 March 2008, the Secretary-General of the WCO, Mr. Michel Danet, explained the proposed joint project as follows:

“Amongst the major challenges faced by parties involved in the international movement of goods are those of data management and data flows related not only to the traditional work of customs administrations, but also to an emerging role in trade facilitation that takes into account private sector international business needs. I believe that the implementation of a single window facility that would allow those parties involved in trade and transport to lodge standardized information and documents with a single entry point in order to fulfil all import, export, and transit related regulatory requirements would help address these challenges. I also believe that because of its unique situation, Customs administrations should take a lead role in designing and implementing such a facility. However, while this will go a long way to enhance trade facilitation, it is only part of the task to be accomplished in a modernized approach to harmonizing the legal infrastructure of the international supply chain.

“I recognise that, of the 171 Members of the World Customs Organization, many are at various stages of sophistication as it concerns development of the single window. Additionally, traders and other players in the international supply chain are also at various stages of development. Many of the WCO Members are not capable of implementing the single window environment without various forms of capacity-building assistance. One form of such assistance is the provision of international guidelines concerning the wide range of legal issues surrounding the single window environment and integrated border management when viewed from an international cross-border trade perspective. And while it is believed that this guidance will benefit all of our 171 Members, it will also have a particularly important value for those Members most in need of assistance to fully and robustly

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<sup>28</sup> [http://www.wcoomd.org/ie/En/Topics\\_Issues/topics\\_issues.html](http://www.wcoomd.org/ie/En/Topics_Issues/topics_issues.html): “WCO Strategy Paper: Customs and E- Commerce”, p. 2.

integrate with international supply chain networks. Such assistance will enhance their opportunities for growth and development.

“It is for this reason that I am writing you – I would like to propose a joint WCO UNCITRAL Working Group that could produce a high-level and comprehensive international reference document to which legislators, government policymakers, single window implementers, and other stakeholders involved in international transactions and the global supply chain could refer for advice on the legal aspects of creating and managing a single window environment. We believe that the important work of UNCITRAL will intersect with the work of this Working Group. For example, the international single window involves not only public international law but also private international law issues since the benefits of the international single window environment are intended not only for governments but also for those who participate in international trade. On the international trade side, we view your new UN Electronic Communications Convention as making an important contribution to the broader international legal infrastructure for electronic commerce that will help provide an enabling and harmonized environment for all participants in the international single window, particularly as more and more countries move towards the use of ICT methods in both the public and private sectors.

“I believe that UNCITRAL is the appropriate partner in this work in view of its mandate of formulating modern, fair, and harmonized rules on commercial transactions including: conventions, model laws and rules which are acceptable worldwide; legal and legislative guides and recommendations of great practical value; and updated information on case law and enactments of uniform commercial law. It is this type of practical expertise that would contribute greatly to the success of the project I am proposing. We see this as particularly important since a duality of legal regimes in the public and private sides of the single window could potentially increase the legal complexity and reduce the benefits of the single window to all participants in international trade transactions.”

39. As regards the methodology for the joint project, WCO has proposed the establishment of a joint working group to be composed of legal experts from WCO Member Customs Administrations, the UNCITRAL secretariat as well as experts from UNCITRAL Member States with legal expertise in one or more of the following areas: customs administration, information and communications technology (ICT/global electronic commerce), or the single window for international transactions. The cooperation between UNCITRAL and WCO in this area may be extended to involve other organizations, such as UNCEFACT, UNCTAD, the World Bank and the World Trade Organization (WTO).

40. The Commission may wish to consider that it would be worthwhile to study the legal aspects involved in implementing a cross-border single window facility with a view to formulating a comprehensive international reference document to which legislators, government policymakers, single window operators, and other stakeholders could refer for advice on legal aspects of creating and managing a single window designed to handle cross-border transactions. The Commission’s involvement in such a project would have several benefits, including better coordination of work between the Commission and WCO, being able to influence the content of a trade-facilitation text that may contain significant legislative aspects, and promoting the use of UNCITRAL standards in the countries using the future reference document.

41. Initially, the Commission may wish to request the secretariat, with the involvement of experts, to participate in the work of the WCO and to report to the Commission on the progress of work. This would allow the Commission to decide whether and at what stage it would be advisable for it to convene a session of Working Group IV (Electronic Commerce) in order to review the progress of work done in cooperation with WCO and formulate its views and recommendations. Since it is difficult to predict whether holding a Working Group session would be advisable already in the Spring of 2009 or after the Commission session in 2009, the Commission may wish to authorize holding a Working Group session already in the Spring of 2009, should this be warranted by the progress of work.

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**B. Note by the Secretariat on possible future work in the area  
of commercial fraud: Indicators of Commercial Fraud  
(A/CN.9/659 and Add. 1-2) [Original: English]**

**CONTENTS**

I.	Introduction .....	
II.	Comments received from Governments and international organizations .....	
	A. States .....	
	1. Latvia .....	
	2. Lebanon .....	
	3. Turkey .....	
	B. International organizations .....	
	1. European Investment Bank .....	

## **I. Introduction**

1. At its fortieth session (Vienna, 25 June to 12 July 2007, resumed 10 to 14 December 2007) the Commission commended the Secretariat, the experts and the other interested organizations that had collaborated on the preparation of the indicators of commercial fraud (A/CN.9/624, A/CN.9/624/Add.1 and A/CN.9/624/2) for their work on the difficult task of identifying the issues and in drafting materials that could be of great educational and preventive benefit. At that session, the Commission requested the Secretariat to circulate the materials on indicators of commercial fraud prior to the forty-first session of the Commission for comment.<sup>1</sup>

2. By a note verbale dated 8 August 2007 and a letter dated 20 September 2007, the draft text of the indicators of commercial fraud was transmitted to States and to intergovernmental and international non-governmental organizations that are invited to attend the meetings of the Commission and its working groups as observers.

3. The present document reproduces comments received by the Secretariat on the draft indicators of commercial fraud. Comments received by the Secretariat after the issuance of the present document will be published as addenda thereto in the order in which they are received.

4. Following its consideration of the comments of Governments and international organizations as set out below and in addenda to this document, the Commission may wish to consider how to proceed with respect to the indicators of commercial fraud. Given the technical nature of the comments received, the Secretariat could, for example, be requested to make such changes as are advisable following the consideration of the

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<sup>1</sup> *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17 (A/62/17)*, paragraph 200.

materials by the Commission, and to publish the materials as a Secretariat informational note for educational purposes and fraud prevention. The materials could be incorporated by the Secretariat as a component of its broader technical assistance work, which could include dissemination and explanation to Governments and international organizations intended to enhance the educational and preventive advantages of the materials. Further, Governments and international organizations could be encouraged in turn to publicize the materials and make use of them in whatever manner is appropriate, including tailoring them to meet the needs of particular audiences or industries.

## II. Comments received from Governments and international organizations

### A. States

#### 1. Latvia

[Original: English]  
[12 February 2008]

5. At the beginning of the draft “Indicators of Commercial Fraud” it could be useful to include explanations of terms used in the document, i.e., due diligence, loss of value, etc.
6. Latvia suggests to include also recommendations to State institutions.
7. There are several general recommendations, which do not refer to a concrete indicator. In order to avoid repeating the recommendations under each indicator such recommendations should be described separately from the indicators.
8. Some indicators are overlapping, that is why it could be useful to combine them:
  - “Undue Secrecy”, “Overly Complex or Overly Simplistic Transactions” and “Questionable or Unknown Source of Repayment” because the element of secrecy and source of repayment are already included in the indicator “Overly Complex or Overly Simplistic Transactions”.
  - “Inconsistencies in the Transaction” and “Irrational or Illogical Aspects or Explanations” because the inconsistency in the transaction is already included in the indicator “Irrational or Illogical Aspects or Explanations”.
  - “Fraud By or Involving Employees” and “Corrupted Incentives”.
9. It would be helpful to list all the indicators in two parts:
  - “Schemes of Fraud in particular spheres” (i.e., “Pyramid and Multi-Level Marketing Schemes”, “Fraud Based on Abuse of Personal Affinity or Relationships”, “Frauds Involving Goods and Services”, “Securities Fraud and Market Abuse”, “Misuse of Insolvency Proceedings”).
  - “Elements of Fraud” where other indicators could be included. This part could be split in subparagraphs, for example, indicators respecting corruption (“Corrupted Incentives”, “Fraud By or Involving Employees” etc.).
10. It is advisable to specify under each indicator who are possible victims of fraud, i.e., individuals, legal entities, State institutions.



## 2. Lebanon

[Original: Arabic]  
[7 January 2008]

11. We are concerned to make it clear that the Indicators of Commercial Fraud are practical indicators that make it possible to give those working in the public and private sectors an idea of the methods commercial fraudsters may use, with the aim of averting that risk. The indicators are based on general principles, laws and practical experience and are not incompatible with the provisions of Lebanese law but, on the contrary, provide examples that enable it to be applied in various fields.

## 3. Turkey

[Original: English]  
[15 February 2008]

12. It is observed in the draft that commercial fraud practices targeted at rendering trade policy measures as ineffective are not comprehensively reflected upon and clearly defined. A note prepared in this regard by the Turkish Undersecretariat for Foreign Trade is enclosed herewith (see below, paras. 14 to 26).

13. Furthermore, the Turkish Government wishes to suggest the inclusion of “abuse of a right under the guise of legal entity” in the draft as a separate indicator of commercial fraud.

### **Commercial Fraud Practices Targeted At Rendering Trade Policy Measures Ineffective**

#### **Introduction**

14. The note on Commercial Fraud<sup>2</sup> submitted by United Nations Commission on International Trade Law covers a wide range of indicators of commercial fraud, gives examples of these fraudulent practices and demonstrates the possible ways to escape from becoming victims of such kinds of practices.

15. In international trade, preventing commercial fraud is of vital importance, inter alia, for sustaining the effectiveness of trade policy measures. Trade policy measures such as anti-dumping, countervailing and safeguard measures and mechanisms like price undertakings have been applied to trade in goods within the context of GATT under the auspices of WTO. The main interested parties of these measures are domestic industry in the host country, the exporter country or the company whose export is causing injury in the domestic industry, and the Government, which conducts relevant trade policy measure investigations and takes measures. In this framework, the structure of trade policy measures are not directly linked with commercial fraud practices since causing injury on domestic industry, because of imported goods, is not a violation of law. Causing injury on domestic industry is one of the components that requires an appropriate measure. Even if this injury stems from dumped or subsidized imports, which can be a cause for an unfair competitive environment, it is not the subject of commercial fraud. However, after introducing a trade policy measure into force, some

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<sup>2</sup> A/CN.9/624, 10 May 2007.

fraudulent practices to render these measures ineffective fall within the scope of commercial fraud.

16. Trade policy measures are applied to the origins of specifically described goods and these measures can bring about some price controls as well. Therefore, the accuracy of origin,<sup>3</sup> description<sup>4</sup> and the value<sup>5</sup> of the goods imported, are essential in effective implementation of trade policy measures. In this context, some fraudulent practices tainting the accuracy of the above-mentioned patterns (origin, description and value of the goods) of the trade may result in circumvention of trade policy measures.

17. In the note on Commercial Fraud submitted by United Nations Commission on International Trade Law, a classification of commercial fraud based on the victims attracts the attention. In fraudulent practices targeting at circumvention of trade policy measures the victims are the domestic industry affected by injurious imports and the governments losing their revenue.<sup>6</sup> The parties that profit, on the other hand, are the importer and the exporter of the goods normally subject to trade policy measures.

18. The aim of the party who resorts to fraudulent practices is to avoid paying the trade policy measure or to avoid being subject to any other non-payable measures. In general, the importer or exporter of the goods subject to the measure resort to such practices. The importer and/or exporter try to change the origin, Harmonized System (HS) Code or the value of the goods so that customs authorities of the importing countries could not treat these goods as a subject to a measure.

#### **The Elements of Fraudulent Practices Targeting at Trade Policy Measures**

19. In the note on Commercial Fraud submitted by the United Nations Commission on International Trade Law, key elements to the identification of commercial fraud have been cited. It is possible to evaluate these elements by considering trade policy measures.<sup>7</sup>

(1) There is an element of deceit or of providing inaccurate, incomplete or misleading information: In this case, inaccurate, incomplete or misleading information are declared to customs authorities. For example, suppose that Country X imposed a measure to some specific goods originating in Country Y. But, the goods are declared as originating in Country Z to not being subject to the measure.

(2) There is a serious economic dimension and scale to the fraud: This element is an important aspect of fraudulent practices aiming at circumvention. Because, as a result of subsequent rounds of trade negotiations (now under the WTO umbrella) there has been a severe reduction in tariffs. This development has

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<sup>3</sup> In some cases, declaration of exporter companies are important as well, since some measures like company specific quotas and individual anti-dumping duties, vary within the same country among different companies.

<sup>4</sup> Mainly linked with the Harmonized System (HS) Code of the goods.

<sup>5</sup> The value declared to the customs authorities and supported by commercial invoice.

<sup>6</sup> Although the aim of the duties put into force as a result of a trade policy measure is not to provide the governments with more revenue, it is a loss to the government which could not collect the duties because of fraudulent practices.

<sup>7</sup> Normally these elements are cited by considering all forms of commercial fraud. Therefore, some of them do not meet the elements of a commercial fraud aiming at circumventing trade policy measures.

increased the importance of trade policy measures to protect domestic industry against imported goods. Therefore, as the tariffs have gradually been reduced, trade policy measures applied by countries have widened in range and increased in numbers. This widespread character of the measures has created a huge profit margin for fraudsters.

(3) The fraud uses or misuses and compromises or distorts commercial systems and their legitimate instruments, potentially creating an international impact: The fraud on trade policy measures threatens the very centre of multilateral trading system. In particular, anti-dumping and countervailing duties aim at preventing unfair competition stemming from dumped or subsidized imports. By circumventing these measures via fraudulent practices, unfair practices in international trade can not be prevented.

(4) There is a resultant loss of value: As it is mentioned above, domestic industry and the government in the importing country lose a significant amount of value. The government is deprived of relevant revenue; and domestic industry, which met the cost<sup>8</sup> of application for a trade policy measure investigation, has not been able to utilize the result of the measure.

### **Forms of Fraud and the Ways of Dealing with it**

20. Circumvention of trade policy measures does not always stem from a fraudulent practice. There is economic circumvention<sup>9</sup> in which the practice of circumvention does not fall into the scope of criminal law. In this regard, the difference is similar to that between tax avoidance and tax evasion. While economic circumvention is not an illegal act, fraudulent circumvention is. The investigating authorities for trade policy measures are responsible for economic circumvention; the customs enforcement authorities, on the other hand, stand as relevant agents to prevent these illegal practices.

21. People may resort to these illegal practices through different ways. In the note on Commercial Fraud these ways are cited as to alert international trade community to not being a victim of fraudulent commercial practices. In this regard, since the governments are the victims of commercial fraud on trade policy measure, they have to take necessary measures against these illegal acts.

22. Fraudulent practices on documents are the most common way to circumvent a trade policy measure. The commercial invoices, certificates of origin, bills of lading, export declarations and documents of payment may be changed or reissued. Therefore, inaccurate documents may be declared to the customs authorities. Inaccurate documents are easy to issue but to discover inaccuracies is not as easy as to issue them. In such a case, the customs authorities have to cross-check suspicious documents with other supplementary documents. Asking for the accuracy of the documents of the party who purportedly issues them may be another way to deal with the problem. For example, suppose an electronic product originating in country A, which is subject to a measure is declared as originating in Country B. The customs officer knows that Country B does

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<sup>8</sup> This cost is an opportunity cost. There is not a requirement to pay a fee for an application for an investigation.

<sup>9</sup> This kind of circumvention practice occurs mostly when the parts or components of a product, which is originally subject to the measure, have been imported to an importing country directly or through third countries.

not have a production capacity to produce this electronic product. In this situation, the customs authority should question the accuracy and the authenticity of the documents.

23. The other common commercial fraud practice is to change the origin of the goods just on documents. In most of the countries, the chambers of commerce and industry are authorized to issue certificates of origin. Because of the huge profit margin mentioned above, issuing false certificates of origin has become a common fraudulent practice affecting the international trade. To give the specific example, since the World Trade Organization was established in 1995, more than 500 anti-dumping duties have been imposed on the products originating in the People's Republic of China. After imposition of these anti-dumping duties, the imports for the same products originating in the neighbouring countries of PRC have been increased. Unfortunately, it has been determined as the result of anti-circumvention investigations that some part of this increase was caused by the inaccurate issuance of certificates of origin by neighbouring countries. To deal with this problem, governments should more strictly focus on these chambers. Suspending the authority to issue the certificate of origin of chambers, which is involved in these fraudulent practices, and taking measure against relevant officers accordingly is one of the first solutions to come to mind. However, when issuing a certificate of origin, cross checking with capacity and production reports belonging to that company may be another way.

24. As far as the description of the goods is concerned, the customs authorities should strictly focus on products similar to the goods subject to trade policy measure. The goods subject to the measure may be declared with a different name. The physical appearances of the goods may be similar as well. For chemicals and textile products whose identification requires laboratory research, such fraudulent practices may be applied. Laboratory tests are essential to find out such an abuse.

### Conclusion

25. In circumvention practices, it is not always easy to draw the distinguishing line between illegal fraudulent acts and economic practices aiming at circumventing the measures, much like tax avoidance. Anti-circumvention investigation, which still seeks its legal base within the multilateral trade negotiations, provides the widest tools to deal with fraudulent commercial practices targeting at rendering trade policy measures ineffective. The investigating departments, which conduct anti-dumping, anti-subsidy and other trade policy investigations, are the main bodies to prevent such unfair practices.<sup>10</sup>

26. The cooperation and dialogue between countries to prevent commercial fraud is of vital importance. United Nations Commission on International Trade Law plays a crucial role to organize such cooperation between countries and it may set up a wider platform than WTO does. In attempting to summarize its views on this matter as its field of work coincides, the Republic of Turkey Prime Ministry of Undersecretariat for Foreign Trade stands ready to further cooperate on this matter with United Nations Commission on International Trade Law.

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<sup>10</sup> In Turkey, the Prime Ministry of Undersecretariat for Foreign Trade, Directorate General of Imports is the investigating department.

## **B. International Organizations**

### **1. European Investment Bank (Office of the President)**

[Original: English]  
[22 November 2007]

27. The United Nations Commissions are to be commended on their extensive work which further seeks to raise awareness of fraudulent schemes. In particular, I have noted with pleasure that the indicators correspond closely to the indicators (or “red flags”) of fraud and corruption that have been identified by the EIB’s Fraud Investigation Unit and their colleagues in the investigation/ integrity functions of the Multilateral Development Banks (MDBs), in the course of their investigative work.

28. I am also pleased to inform you that the UNCITRAL document will be a useful addition to the materials available to EIB. In particular, I wish to inform you that the Fraud Investigation Unit of the Inspectorate General will integrate elements of this document in its training so that staff members can better identify and report suspicions of fraud and corruption, as part of the process of rolling out EIB’s Anti-Fraud Policy. In addition, the UNCITRAL document will also be a useful tool that the Office of the Chief Compliance Officer could employ in raising awareness among EIB’s borrowers, promoters, contractors, suppliers and consultants of such issues and take into account in its Integrity check-list.

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**A/CN.9/659/Add.1 (Original: English)**

**Possible future work in the area of commercial fraud:  
Indicators of Commercial Fraud**

ADDENDUM

CONTENTS

II.	Compilation of comments.....	
A.	States .....	
4.	Mali .....	

## II. Compilation of comments

### A. States

#### 4. Mali

[Original: French]  
[10 March 2008]

1. The document deals satisfactorily with commercial fraud and the related topics (corruption and bribery, money-laundering, transparency and best practices). All important fraud indicators are listed, described and illustrated, with advice offered regarding what may be done to avoid or counteract the effects of the behaviour identified.

2. However, the illustrations supporting the examples given do not provide adequate information for the reader, especially the uninitiated reader. The cross-reference system adopted for dealing with the related indicators does not make for rapid understanding of the problem. Furthermore, the approach to fraud used is based more on the situation in developed countries.

3. The indicators of commercial fraud in the A/CN.9/624 series of documents, and also indicators 10, 12, 13, 16, 20 and 21, concern practices that are frequently encountered, or are likely to be encountered, in developing countries. Practical training in recognizing these indicators and taking preventive action would be useful.

4. Mali, aware of the threat to its development posed by commercial fraud, has been fighting hard against this scourge for some time. Accordingly, it considers the UNCITRAL anti-fraud project to be very opportune.

5. Given the importance of the document, Mali strongly supports its adoption and implementation.

## A/CN.9/659/Add.2 (Original: English)

Possible future work in the area of commercial fraud:  
Indicators of Commercial Fraud

## ADDENDUM

## CONTENTS

II. Compilation of comments.....	
A. States .....	
5. Peru .....	
6. Venezuela (Bolivarian Republic of).....	

**II. Compilation of comments****A. States****5. Peru**

[Original: Spanish]  
[7 March 2008]

**Senior Public Prosecutor – North Lima Judicial District**

1. There is a clear need for this project in the face of current crime trends. Social change has brought about new forms of crime or an increase in existing forms. In the modern information society, the new types of crime have become more sophisticated with increasing use of advances in technology. Commercial fraud is being refined by means of these new technological aids.

2. The materials relating to the indicators prepared by UNCITRAL are appropriate to their purpose of commercial fraud prevention. The presentation of each indicator in three parts is ideal, the first giving an explanation defining the term; the second setting out instances and examples, which provide useful clarification for understanding the various circumstances in which the commercial fraud indicator in question can arise; and the third offering advice on how to prevent that type of commercial fraud from being committed.

3. Our suggestion relates to Indicator 1 (Irregular documents), which, because of developments in technology, needs to take account of the growth of electronic commerce where transactions are completed online and the documents containing the related contracts are on a digital platform. Notaries specializing in digital media thus need to carry out checks before decisions are made online if the complexity of an operation so warrants. Also, when contracts are accepted electronically, digital signatures should be used but checks must be made by international companies to guarantee authenticity of the signatures. To conclude, documents do not exist on paper

alone but can also be in digital format; the Commission should therefore expand this topic with regard to case examples and advice.

#### **Fourth District Prosecutor's Office, Puno – Puno Judicial District**

4. The illicit commercial activities that are taking place at the global level are a matter of concern to the United Nations as a supranational body, which is addressing this issue through UNCITRAL.

5. As previously noted, commercial activities are also a component of organized crime. They now affect countries throughout the world, with particular impact on their criminal justice systems. Specifically, they involve transnational business operations, which are using more sophisticated tools, such as modern means of communication and international trade networks.

6. These new crime types infringe individual and collective rights and are increasingly affecting State interests as a result of globalization, the free market in commercial transactions and Internet commerce, enabling certain individuals, by operating jointly, to obtain profits illicitly on a large scale, thereby augmenting their wealth. The groups carrying out such unlawful operations can be categorized as follows in criminal law:

1. Crime syndicates, which commit non-conventional offences on an international level;
2. Criminal organizations, which usually operate within a specific country;
3. Gangs, in which individuals participate in the commission of unlawful acts, on a smaller scale, and are better known and tend to operate in the area of a specific town.

7. We personally believe that illicit commercial activities primarily involve the following specific areas:

- (a) Arms trafficking;
- (b) Customs trafficking;
- (c) Labour trafficking;
- (d) Laundering of money or assets;
- (e) Corruption of public officials;
- (f) Influence peddling;
- (g) Falsification of documents.

8. A factor common to these crime types is the use of international trade to obtain illicit profits, which rise in proportion to the corruption of legal practices and engagement in illegal dealings. There is thus a correlation between increased unlawful gains and levels of corruption in business relations.

9. In connection with combating this new form of organized crime, some legal systems already criminalize the substantive offences while others still do not. This is therefore a matter of concern to the United Nations and specifically to UNCITRAL.

10. The project is a good initiative but the institutions responsible for the detection and prevention of these types of crime need to be strengthened, specifically authorities such as the prosecution service and the police. Also, the internal organization of



debates, discussions, round tables and other activities should be promoted in order to provide guidance for persons entrusted with investigations.

11. It is suggested that, with a view to enhancing lay readers' understanding of the project, a glossary could be included at the end.

#### **Second District Prosecutor's Office, Arequipa – Arequipa Judicial District**

12. This project analyses the detrimental economic impact of fraudulent practices on world trade, a development which our country has sadly not escaped. While the market is now intrinsically international and we are witnessing increased flows of information, capital, technology and trade, with interconnected economies, trading blocs and market liberalization and integration, this new economic and commercial situation calls for the implementation of new codes of conduct and the presence of effective institutions, notwithstanding their commitment to modernity and the structural changes being made to confront the challenges of the modern world, which include smuggling and revenue fraud, among other fraudulent commercial practices.

13. It is extremely important for this project to be widely disseminated in the public and private sectors as an informative document, thus alerting those involved in commercial transactions to the indicators of possible commercial fraud, which would not only help to prevent them from becoming victims but would also raise awareness of the occurrence of such offences.

14. It should be pointed out with regard to whistleblower policies, which are understood as one of the best practices in the prevention of commercial fraud, that it is essential that such policies are adequately regulated with the possibility of obtaining information which will identify the whistleblower, since anonymity for whistleblowers could allow unscrupulous individuals acting with unlawful intent to cause time and money to be wasted on futile investigations or distract the authorities so that a commercial fraud passes undetected, with serious harm to the national or international economy.

15. Concerning Indicator 1 (Irregular documents), the types of document involved should be classified as (a) genuine; (b) fictitious: documents not used in legitimate commerce; (c) forged: documents purporting to be genuine and used in legitimate commerce; and (d) counterfeits: documents used in legitimate commerce.

16. Also, institutions representing the corporate sectors and public sector institutions could through joint action:

- Establish a databank (for products liable to be the object of fraudulent transactions) containing prices, qualities, origins, producers, patterns and trends, which can be consulted in order to check information useful in preventing and controlling customs fraud;
- Set up technical assistance programmes to help business associations establish and/or improve systems for controlling their commercial operations;
- Design information systems to identify trade flows connected with laundering of drug-trafficking proceeds.

#### **Third District Prosecutor's Office, Arequipa**

17. In the definition of commercial fraud, reference is made to its "serious economic dimension" as one of its characteristics. This gives rise to a misleading interpretation

since it relates to the scale of the commercial fraud but not to the actual existence of fraud. Identifying commercial fraud in terms of its serious economic dimension focuses solely on large-scale losses involving considerable sums, whereas cases entailing minor sums nevertheless also constitute fraud.

18. The project would appear to be concerned with examining fraudulent practices that have a major economic impact. Strictly speaking, however, commercial fraud can occur whether the economic impact is major or minor. In any case, the title of the study (Indicators of Commercial Fraud) seems inconsistent with its purpose if it deals only with commercial fraud having a major impact.

19. It should be borne in mind in connection with whistleblower policies, which are understood as one of the best practices in the prevention of commercial fraud, that it is essential that such policies are regulated so that it is possible to obtain information which will identify the whistleblower, since anonymity for whistleblowers could enable unscrupulous individuals to make fictitious or fraudulent reports for unlawful purposes, causing time and money to be wasted on futile investigations, or to distract the authorities so that a commercial fraud passes undetected, with serious harm to the national or international economy.

20. Also, through joint action on the part of institutions representing the corporate sectors and public sector institutions, technical assistance programmes should be set up to help business associations establish and improve systems for controlling their commercial operations and information systems should be designed to identify trade flows connected with laundering of drug-trafficking proceeds.

21. It is very important that this project be disseminated in the public and private sectors, thus alerting those involved in the commercial sphere to the indicators of possible commercial fraud and thereby preventing them from becoming victims of such offences.

#### **Fifth District Prosecutor's Office, Arequipa**

22. Commercial fraud is best combated through prevention, which, as affirmed by UNCITRAL, should be achieved through education and training. We therefore believe that there is a need for the private sector (banks) to be made aware so that, whenever there are indications of potential commercial fraud, the prosecution service is notified so that it may conduct appropriate investigations, given that commercial fraud represents a serious threat which may be on the rise. A confidential telephone service should accordingly be set up at the prosecution service so that reports of potential offences of this type can be formally dealt with in order to prevent commercial fraud from occurring.

23. Mechanisms should be put in place so that, following the conduct of external audits, the appropriate body can be informed of cases of possible commercial fraud in order that it may undertake the necessary investigations.

#### **Sixth District Prosecutor's Office, Arequipa**

24. In the light of the document sent to this office and the information on indicators of procedural fraud provided by the State Prosecutor's Office, it may be stated that, with revision of the contents and introductory section, this could be a useful project in the prevention of international offences of this type, which also directly and indirectly affect our country, especially in the current globalization process.

25. As can also be seen from the UNCITRAL Commercial Fraud Project, some offences are connected with an organized corruption system operating at the international level and involving international criminal organizations that take advantage of a series of operations in order to commit offences of this type to the detriment of national economies, including our own. Such crimes are currently taking place but a lack of widely disseminated information on them makes combating them impossible. I therefore feel that this project, with the indicators set out in it, is a necessary document for detecting and preventing commercial fraud.

#### **Seventh District Prosecutor's Office, Arequipa**

26. Commercial fraud is the breach of legislative or regulatory provisions which the authorities are responsible for enforcing. It is committed for the purpose of:

- Evading or attempting to evade payment of customs duties, levies or charges on goods;
- Circumventing or attempting to circumvent prohibitions or restrictions applied to goods;
- Illegitimately obtaining or attempting to obtain grants, rebates or other refunds;
- Acquiring or attempting to acquire any illicit commercial advantage in contravention of the principles and practices of lawful commercial competition.

27. Commercial customs fraud includes all types of commercial fraud in breach of customs laws or regulations.

28. Commercial fraud is perpetrated primarily for financial gain and is committed where potential profits are greatest (for example, when high import customs duties are levied). However, commercial fraud is not confined to evasion of payment of customs duties but can also involve circumvention of prohibitions or restrictions on, for example, the transport of animals, military equipment, toxic products, etc.

29. As stated, one of the main motives for commercial fraud is financial gain. Personal rivalry and negligence are contributory factors.

30. There are various negative effects of fraud, which justify the fight against it. These are:

- Loss of State revenue;
- Adverse consequences for industry;
- Market disruption;
- Unfair competition;
- Social repercussions; and
- Risks for the consumer.

#### *Main methods of fraud*

31. Smuggling: a practice involving the import or export of goods in breach of laws and regulations or prohibitions in order specifically to evade or attempt to evade levies or charges through non completion of customs declarations or to avoid controls.

32. False description of goods: a technique used for the purpose of qualifying for reduced or nil duty rates or circumventing prohibitions or restrictions.
33. Overvaluation or undervaluation: the fraudulent misstatement of the value of imported or exported goods.
34. False origin: a scheme employed in order to take unwarranted advantage of preferential regimes applying to certain products and tariff quotas.
35. Abuse of inward or outward processing or temporary admission regimes: a technique used for the purpose of taking unwarranted advantage of exemptions or rebates provided for under such regimes; examples:
- No re-export or re-import of goods;
  - Substitution of goods.
36. Abuse of import or export licence regulations: a practice whose aim is the avoidance of controls relating to the granting of licences, for example:
- Prohibitions or restrictions on imports or exports.
37. Abuse of transit rules: a practice involving diversion to domestic consumption. The following methods are used:
- False customs declarations;
  - Fictitious transit of goods;
  - Substitution of goods.
38. False statement of quality or quantity in order to take advantage of duty rates; examples:
- Declaration of a smaller quantity;
  - Transport of goods hazardous to health;
  - Mislabelling of goods (as to origin or composition).
39. Abuse of special arrangements.
40. Counterfeit or pirated goods:
- Counterfeiting: unauthorized use of a registered trademark on a product or on its packaging in breach of the rights of the trademark owner;
  - Piracy: unauthorized reproduction of an article in breach of copyright.
41. The black market: the practice whereby transactions are not entered in a company's records in order to conceal illicit activities such as smuggling or undervaluation.
42. Registration of fictitious companies in order to benefit from unwarranted tax deductions.
43. Fraudulent bankruptcy: organized liquidation of companies which operate for short periods, running up tax or customs debts, and are then liquidated to avoid payment.

*The main types of fraud*

44. There are various types of commercial customs fraud, such as the misrepresentation of goods or of their end use in order to qualify for reduced or nil duty rates or to circumvent the fact that goods are prohibited or subject to restrictions. For such purposes, false descriptions are made on invoices or falsified permits are presented. We will deal here primarily with commercial fraud connected with false origin and false valuation of goods.

*False origin*

45. We will first examine the motives for false declaration of the origin of goods and then consider the methods of origin fraud.

46. Motives: There are special commercial agreements with other countries allowing goods to be freely traded. Importers try to ensure that duty rates are low or virtually nil for goods imported from developing countries by:

- Circumventing restrictions on exchanges between certain countries, for example trade embargoes (weapons);
- Circumventing quotas or import licence regulations on goods, such as textiles, agricultural products or toys, imported from certain countries;
- Circumventing anti-dumping duties levied on goods from certain countries.

47. How origin fraud is committed:

- The country of origin may be misstated on customs documentation (customs declarations);
- Counterfeit documents may be presented as proof of an advantageous place of origin; example: documentary evidence has to be provided of composition, processing and manufacture since these particulars are used to claim that goods are produced by a certain exporting country in order to benefit from preferential treatment.

*False valuation*

48. This takes the form of either overvaluation or undervaluation.

49. Undervaluation: The main aim of undervaluation of goods is to evade payment of duties through fraudulent misstatement of values declared to customs or through undeclared or undervalued payments made to or for account of the vendor.

50. The following are some examples:

- No statement of costs of transport to the place of direct delivery of the goods;
- Non-declaration of inputs (moulds, dies, etc.) used in the manufacture of the goods;
- Non-declaration of royalty payments or duties;
- No indication of deductions for goods returned to the exporter;
- Non-declaration of sales commission transferred in the name of the vendor;
- Non-declaration of payments connected with export quotas;
- False valuation of discounts granted;

- Misrepresentation of the relationship between importing and exporting companies (a subsidiary cannot be an independent company).
51. Overvaluation: While overvaluing goods for customs reasons may seem illogical, national customs services are increasingly affected by this type of fraud.
52. Motives:
- Overvaluation is used to circumvent anti-dumping duties levied on certain imports. The goods can then be sold at prices lower than those indicated in the declaration documents. As the resale value entails lower profits, the company makes higher gains in terms of direct taxation;
  - Overvaluation can be used to circumvent foreign-exchange controls;
  - Overvaluation can be used in the laundering of illicitly obtained money, which can then be invested abroad;
  - Finally, overvaluation can affect a country's domestic market through the mass import of poor-quality products and goods of unknown origin.

*Fraudulent documents*

53. Double invoicing: This technique involves an illicit agreement between the exporter or broker and the importer. Two versions of the invoice are prepared: one stating a lower value for customs use and another showing the real price, which is sent directly to the importer. It is a common undervaluation practice. Sometimes there are two other sets of invoices in addition to those sent to the importer: one for the customs office of the exporting country and the other for the customs office of the importing country. In this case, if the customs agent works for the same company operating in both countries, there has to be complicity.
54. Fraudulent or incomplete invoices: This practice occurs when particulars relating to the customs value are misstated or not stated at all; examples:
- Reductions for defective goods;
  - Non-declaration of inputs supplied to the vendor (for instance, if fabrics are sent abroad to be made into garments but the invoice subsequently mentions only the labour costs);
  - Non-declaration of royalty payments or duties relating to the use of a trademark;
  - Non-declaration of insurance costs.
55. Other fraudulent documents:
- International consignment notes (showing lower transport costs);
  - Air waybills and bills of lading;
  - Certificates of origin;
  - Documents bearing false seals;
  - Documents containing false descriptions of goods or of their end use in order to take advantage of lower duty rates or exemptions from duty or to circumvent prohibitions or restrictions.

**Eighth District Prosecutor's Office, Arequipa**

56. Suggestions regarding additional indicators:

- Fraud involving collusion between the fraudster and an employee of the defrauded enterprise (private company, State agency, etc.);
- Duration of procedures (business dealings, etc.): If a procedure is expected in advance to take a certain amount of time (for instance, six months), the swift conclusion of the operation may be an indicator of fraud; conversely, if an operation ought to be finalized quickly, a delay in its completion could be an indicator of fraud;
- In tendering processes: unscheduled changes to the timetable, little advertising of the bid, lack of precise information concerning the tendering conditions and referral to a specific individual with whom a personal interview has to be held in order to obtain full information;
- Irrational changes to the course of procedures: If a commercial, judicial or administrative procedure has to be carried out according to certain steps, any alteration to that process for irrational reasons, such as the inclusion of an extra step or a reduction in the number of steps, may be an indicator of fraud;
- Unexpected changes in staff responsible for commercial operations once the process has begun, especially when those excluded enjoy a good reputation. For example, a large company wishes to supply the State (Ministry of Health) with a certain product. Its bidder bribes the Minister in order to win the offer, whereupon the Minister, knowing the moral standing of the person in charge of the selection process, unjustifiably replaces that person with someone in his confidence. The replacement agrees to select the fraudster's company as the new supplier although the terms offered by it are not the most advantageous to the State. This example could also apply to any private company.

57. In the definition of commercial fraud, reference is made to its "serious economic dimension" as one of its characteristics. This would appear to be at variance with the facts and gives rise to a misleading interpretation since it relates to the scale of the fraud but not to the actual existence of fraud. Identifying commercial fraud in terms of its serious economic dimension focuses solely on large-scale losses involving considerable sums, whereas cases entailing minor losses nevertheless also constitute fraud even though they involve small sums. The project appears to be concerned with examining fraudulent practices that have a major economic impact. However, in the strict sense, the occurrence of commercial fraud is unrelated to the extent of its impact. In any case, the title of the study, *Indicators of Commercial Fraud*, seems inconsistent with its purpose if it deals only with commercial fraud having a major impact.

**Tenth District Prosecutor's Office, Arequipa***Comments*

58. While the globalization of relationships, in particular in the area of commerce, is becoming increasingly important worldwide since it brings benefits that are primarily economic for countries trading with each other, it has also given rise to the emergence of or an increase in criminal offences at the international level, such as

commercial fraud, money-laundering or trafficking in persons, thus undermining intercountry relations and engendering mistrust.

59. Commercial fraud, as defined by the United Nations, is similar to the offence of obtaining by deceit, false pretences or fraudulent misrepresentation, committed against legal persons, as established by our criminal code, and is thus a property crime.

60. Because of the treaties being concluded by it, one of which (the free trade agreement) is still under discussion, our country must also begin to take account of the possible fraud or deception of which it could be the victim or instigator. In the latter case, we might lose trustworthiness in international dealings and be barred from agreements or treaties. As victims of fraud, businesses or the State could sustain countless economic losses, with detrimental repercussions for workers, since fraud can lead to bankruptcy or closure of companies and hence to unemployment.

61. The United Nations accordingly attaches importance to the issue of fraud and to alerting States to the need to take precautions and prevent unlawful acts of this kind, which are now being committed.

#### *Suggestions*

62. Given the incidence and international nature of these offences, we believe that they should be so classified in the criminal code as separate from other types of property crime since, because of their legal definition, other offences such as breach of trust are implicit in their scope.

63. Also, prosecuting authorities should be instructed in these matters so that they can identify such offences promptly and thus become more familiar with this crime type, its forms and connections, and with the evidence to be obtained during investigations.

#### **6. Venezuela (Bolivarian Republic of)**

[Original: Spanish]  
[14 February 2008]

64. The Bolivarian Republic of Venezuela has no objections concerning the draft Indicators of Commercial Fraud prepared by UNCITRAL and wishes to state that they do not contravene current Venezuelan law.

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## VII. 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](http://www.uncitral.org).

A/CN.9/SER.C/ABSTRACTS may be obtained from the UNCITRAL secretariat at the following address:

UNCITRAL secretariat  
P.O. Box 500  
Vienna International Centre  
A-1400 Vienna  
Austria

Telephone (+43-1) 26060-4060 or 4061  
Telex: 135612 uno a  
Telefax: (+43-1) 26060-5813  
E-mail: [uncitral@uncitral.org](mailto:uncitral@uncitral.org)

They may also be accessed through the UNCITRAL homepage on the Internet at [www.uncitral.org](http://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.



## VIII. TECHNICAL ASSISTANCE TO LAW REFORM

### Note by the Secretariat on technical cooperation and assistance

(A/CN.9/652) [Original: English]

#### CONTENTS

	<i>Paragraphs</i>
I. Introduction . . . . .	1-4
II. Technical cooperation and assistance activities . . . . .	5-21
A. Activities addressing multiple topics . . . . .	7-9
B. Sale of goods . . . . .	10-11
C. Dispute resolution . . . . .	12-14
D. Procurement . . . . .	15
E. Security interests . . . . .	16
F. Transport . . . . .	17
G. Insolvency . . . . .	18
H. Electronic commerce . . . . .	19-20
I. Assistance with legislative drafting . . . . .	21
III. Coordination activities . . . . .	22-27
IV. Dissemination of information . . . . .	28
A. Case Law on UNCITRAL Texts (CLOUT) . . . . .	29-34
B. Website . . . . .	35-38
C. Library . . . . .	39-42
D. Publications . . . . .	43-44
E. Press Releases . . . . .	45
F. General enquiries . . . . .	46
G. Information lectures in Vienna . . . . .	47
V. Resources and funding . . . . .	48-55
A. UNCITRAL Trust Fund for symposia . . . . .	48-52
B. UNCITRAL Trust Fund to grant travel assistance to developing countries that are members of UNCITRAL . . . . .	53-55

## 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)<sup>1</sup> and the United Nations Convention on the Limitation Period in the International Sale of Goods;<sup>2</sup>

(b) In the area of dispute resolution, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards<sup>3</sup> (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,<sup>4</sup> the UNCITRAL Conciliation Rules,<sup>5</sup> the UNCITRAL Model Law on International Commercial Arbitration and revised articles,<sup>6</sup> the UNCITRAL Notes on Organizing Arbitral Proceedings,<sup>7</sup> and the UNCITRAL Model Law on International Commercial Conciliation;<sup>8</sup>

(c) In the area of government contracting, the UNCITRAL Model Law on Procurement of Goods, Construction and Services,<sup>9</sup> the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects<sup>10</sup> and the UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects;<sup>11</sup>

(d) In the area of banking and payments, the United Nations Convention on International Bills of Exchange and International Promissory Notes,<sup>12</sup> the UNCITRAL

<sup>1</sup> 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.

<sup>2</sup> *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.

<sup>3</sup> United Nations, *Treaty Series*, vol. 330, No. 4739.

<sup>4</sup> *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.

<sup>5</sup> *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.

<sup>6</sup> *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.

<sup>7</sup> *UNCITRAL Yearbook 1996*, part three, chap. II.

<sup>8</sup> *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17 (A/57/17)*, annex I; *UNCITRAL Yearbook 2002*, part three.

<sup>9</sup> *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 (A/49/17)*, annex I; *UNCITRAL Yearbook 1994*, part three, chap. I.

<sup>10</sup> United Nations publication, Sales No. E.01.V.4, A/CN.9/SER.B/4.

<sup>11</sup> *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 17 (A/57/17)*, annex I.

<sup>12</sup> *UNCITRAL Yearbook 1988*, part three, chap. I; General Assembly resolution 43/165, annex.

Model Law on International Credit Transfers,<sup>13</sup> and the United Nations Convention on Independent Guarantees and Standby Letters of Credit;<sup>14</sup>

(e) In the area of security interests, the United Nations Convention on the Assignment of Receivables in International Trade<sup>15</sup> and the UNCITRAL Legislative Guide on Secured Transactions;<sup>16</sup>

(f) In the area of insolvency, the UNCITRAL Model Law on Cross-Border Insolvency<sup>17</sup> and the UNCITRAL Legislative Guide on Insolvency Law;<sup>18</sup>

(g) In the area of transport, the United Nations Convention on the Carriage of Goods by Sea (Hamburg Rules),<sup>19</sup> and the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade;<sup>20</sup> and

(h) In the area of electronic commerce, the UNCITRAL Model Law on Electronic Commerce,<sup>21</sup> the UNCITRAL Model Law on Electronic Signatures<sup>22</sup> and the United Nations Convention on the Use of Electronic Communications in International Contracts (ECC).<sup>23</sup>

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),<sup>24</sup> and are particularly useful for developing countries and economies in transition lacking expertise 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. In its resolution 61/32 of 18 December 2006, 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

<sup>13</sup> *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 17 (A/47/17)*, annex I.

<sup>14</sup> 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.

<sup>15</sup> *UNCITRAL Yearbook 2002*, part three; General Assembly resolution 56/81, annex.

<sup>16</sup> *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17 (A/62/17 Part II)*, para. 99.

<sup>17</sup> *UNCITRAL Yearbook 1992*, part three, chap. I.

<sup>18</sup> *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 17 (A/59/17)*, para. 55.

<sup>19</sup> 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.

<sup>20</sup> A/CONF.152/13, annex.

<sup>21</sup> *Official Records of the General Assembly, Fifty-first Session, Supplement No. 17 (A/51/17)*, annex I.

<sup>22</sup> *Ibid.*, *Fifty-sixth Session, Supplement No. 17 (A/56/17)*, annex II.

<sup>23</sup> New York, November 2005, General Assembly resolution A/RES/60/21, annex.

<sup>24</sup> *Official Records of the General Assembly, Forty-second Session, Supplement No. 17 (A/42/17)*, para. 335.

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 those conventions.

4. 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 fortieth session in 2007 (A/CN.9/627 of 18 April 2007), and reports on the development of resources to assist technical cooperation and assistance activities.

## II. Technical cooperation and assistance activities

5. Technical cooperation and assistance activities undertaken by the UNCITRAL Secretariat promote the adoption of UNCITRAL legislative texts, including conventions, model laws and legislative guides and include providing advice to States considering signature, ratification or accession to UNCITRAL conventions, as well as to States that are in the process of revising their trade law and considering 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 international 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 modern legislation based on UNCITRAL texts by judiciaries and legal practitioners.

6. Activities included below that are denoted with an asterisk were funded by the UNCITRAL Trust fund for Symposia.

### A. Activities addressing multiple topics

7. A number of technical cooperation and assistance activities undertaken since the last report covered several of the topic areas noted in paragraph 1 above. These have included, at the regional level, a regional capacity-building workshop on treaty law and practice and the domestic implementation of treaty obligations to foster the rule of law in the Balkans, organized by the Ministry of Foreign Affairs of Slovenia in conjunction with the United Nations Treaty Section (Ljubljana, Slovenia 28-30 May 2007).<sup>\*</sup> Participants from nine countries (Slovenia, Croatia, Serbia, the former Yugoslav Republic of Macedonia, Montenegro, Bosnia Herzegovina, Albania, Bulgaria and Romania) attended. The UNCITRAL secretariat participated to promote the texts on arbitration, electronic commerce and the CISG, as well as to provide examples of treaty implementation through the adoption of model laws and through uniform judicial interpretation. As a result of this workshop, Montenegro signed the ECC on 27 September 2007.

8. At the country level, the Secretariat participated in the following technical cooperation and assistance activities:

(a) \*At the request of the Government of El Salvador, following its becoming a member of the Commission, briefings for relevant government officials on the methods of work of UNCITRAL and its texts and a seminar on the CISG on the occasion of its entry into force in El Salvador (San Salvador, 11-13 June 2007):

(b) \*A seminar on CISG and ECC provided, at the request of the Government of the Philippines, for government and legislative officials to promote ratification of the ECC following its signature by the Philippines, as well as accession to the CISG (Manila, 20-23 October 2007);

(c) At the request of the Government of the Republic of Korea, the Korea International Trade Law Association, the Korea International Cooperation Agency and several universities, a seminar on the draft Korean legislation on security interests in tangible assets and securities, and several general briefings on the work of UNCITRAL including insolvency, arbitration, the ECC, CLOUT and technical assistance activities (Seoul, 20-26 November 2007). The Republic of Korea signed the ECC on 15 January 2008;

(d) At the request of the Government of Honduras, a congress to discuss UNCITRAL work and texts, including procurement, arbitration and electronic commerce (Tegucigalpa, 29-30 November 2007). Following this activity, Honduras became a signatory to the ECC on 16 January 2008; and

(e) \*A seminar on the modernization of trade law in Madagascar organized by the International Trade Centre (ITC) (UNCTAD/WTO) in cooperation with the Ministry of Justice of Madagascar and the French Cooperation Agency (Antananarivo, 6-12 December 2007). The Secretariat participated to disseminate information on improving the ability of Madagascar to participate in UNCITRAL meetings as a member of UNCITRAL and to assist in assessing the current status of international trade law in Madagascar and developing a priority list for legislative reform. Topics covered included international sale of goods, electronic commerce, maritime transport, and security interests.

9. To provide a briefing on UNCITRAL's current legislative and technical cooperation and assistance activities, the Secretariat organized, in conjunction with the United Nations Institute for Training and Research (UNITAR), a two-day seminar for Permanent Missions accredited to the United Nations Office at Vienna (Vienna, 10-11 January 2008). Thirty-seven representatives from 31 Permanent Missions attended. Briefings on various working group topics are regularly being offered in Vienna.

## **B. Sale of goods**

10. The Secretariat has been particularly active in promoting adoption and uniform interpretation of the CISG, at the regional level, as well as through contact with Permanent Missions to the United Nations in Vienna, Geneva and New York and directly with relevant officials in selected States. Activities included:

(a) \*Participation at the Colloquium "Harmonization of Contract Law" organized by the International Institute for the Unification of Private Law (Unidroit) in cooperation with the Organization for the Harmonization of Business Law

in Africa (OHADA) and the Law Faculty of the Ouagadougou University, Burkina Faso (Ouagadougou, 15-17 November 2007); and

(b) Participation at the International Seminar on the Interpretation and Application of the Convention on Contracts for the International Sale of Goods (CISG) with emphasis on litigation and arbitration in China, organized by the Wuhan University Institute of International Law, The Pace University School of Law Institute of International Commercial Law, and the China Society of Private International Law (Wuhan, China, 13-14 October 2007).

11. 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 entered into force for El Salvador (1 December 2007).

### C. Dispute resolution

12. 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) Participation at two conferences «Arbitrage en Afrique: Réalité et perspectives», organized by the Centre de Conciliation et d'Arbitrage de Tunis (CCAT) and ITC (UNCTAD/WTO) and «L'arbitrage dans le monde arabe: une perspective internationale» organized by CCAT, ICC and the Union Tunisienne de l'Industrie, du Commerce et de l'Artisanat (UTICA) (Tunis, 15-18 May 2007); and

(b) Participation at the EC-financed Project "Promotion of International Commercial Arbitration and Other Alternative Dispute Resolution (ADR) Techniques in the MEDA Region" organized by the International Conference and Dispute Resolution Institution Forum (Rome, 27-29 September 2007).

13. The Secretariat collaborated with a number of arbitral institutions and organizations, participating at:

(a) A conference on the enforcement of arbitral awards, dealing with procedural aspects of enforcing an arbitral award in different jurisdictions, organized by the German Institution of Arbitration (Dresden, Germany, 19 April 2007);

(b) A seminar on revision of the UNCITRAL Rules organized by the Swedish Arbitration Association (Stockholm, 30-31 May 2007);

(c) The Conference "International Commercial Arbitration in Russia" to commemorate the 75th anniversary of the Chamber of Commerce and Industry of the Russian Federation (Moscow, 24-27 October 2007);

(d) A conference "The Role of State Courts in Arbitration", organized by the Cairo Regional Center for International Commercial Arbitration (CRCICA) (Sharm el Sheikh, Egypt, 18-22 November 2007);

(e) A conference "Revision and Modernization of UNCITRAL Arbitration Rules", organized by the Istanbul Chamber of Commerce (ICOC) and ASCAME (Istanbul, 29 November-1 December 2007);



(f) A practice building seminar organized by the Swiss Arbitration Association with the support of UNCITRAL, to exchange experiences, questions and ideas on the latest developments in arbitration practice (Marienbad, Czech Republic, 18-20 January 2008); and

(g) An international arbitration conference organized by the Qatar International Center of Arbitration (Doha, 20-22 January 2008).

14. The Secretariat participated at two conferences to celebrate the 50th anniversary of the New York Convention: (a) “New York Convention: 50 years” (New York, United States of America, 1 February 2008), presented by the Arbitration Committee of the International Bar Association in cooperation with the United Nations; and (b) “Celebrating the 50th anniversary of the New York Convention” (Vienna, 14 March 2008), presented by the International Arbitral Centre of the Austrian Federal Economic Chamber (VIAC) in cooperation with UNCITRAL.

## D. Procurement

15. 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 of 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.<sup>25</sup> The Secretariat participated in the following activities:

(a) An International Symposium “Developing Trends in Public Procurement and Auditing” organized by the European Space Agency, to review selected practices in the field of public procurement and auditing at large, to share lessons learned and outline a number of recent trends (Noordwijk, Netherlands, 13-16 May 2007);

(b) A workshop on the WTO agreement on government procurement; the work of UNCITRAL on government procurement – its purpose, objectives, and complementarity with the WTO Agreement on Government Procurement (GPA) and current trends regarding the use of information technology in procurement; and an update on developments in UNCITRAL (Geneva, 9-11 July 2007);

(c) A workshop on the alignment of Montenegro’s procurement legislation and the relevant requirements of the United Nations Convention against Corruption (UNCAC) (Podgorica, 11-13 October 2007); and

(d) The WTO Regional Workshop on Government Procurement for Central and Eastern Europe and Central Asian Countries (Vienna, 27-29 November, 2007) to discuss synergies and complementarities of UNCITRAL’s work with that of the WTO, as well as use of electronic tools in procurement processes.

## E. Security interests

16. The Secretariat participated in a number of activities to promote adoption of the United Nations Convention on the Assignment of Receivables in International Trade

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<sup>25</sup> See documents A/CN.9/575, paras. 52 and 67, and A/CN.9/615, para. 14.

(Receivables Convention) and disseminate information on the then draft UNCITRAL Legislative Guide on Secured Transactions, including:

(a) A meeting of the Section on Insolvency Restructuring and Creditor Rights of the International Bar Association to discuss the work of UNCITRAL on the draft Legislative Guide on Secured Transactions (Zürich, 12-15 May 2007);

(b) A conference “Recent Developments on the Draft UNCITRAL Guide on Secured Transactions”, organized by the Istanbul Chamber of Commerce (ICOC) (Istanbul, 8-9 November 2007);

(c) A seminar on Rome I and II (law applicable to contractual and non-contractual obligations), to discuss the coordination between Rome I and the United Nations Convention on the Assignment of Receivables in International Trade with respect to the law applicable to the assignment of receivables, organized by the Portuguese Presidency of the EU in cooperation with the preceding German and subsequent Slovenian Presidencies and the European Law Academy (Lisbon, 12-13 November 2007); and

(d) A conference on “Globalizing Secured Transactions Law”, (San Diego, United States of America, 13-14 March 2008 – participation by videoconference) organized by the International Law Section of the American Bar Association.

## **F. Transport**

17. The Secretariat participated in several activities to promote its work on the draft Convention on the Carriage of Goods [wholly or partly] [by sea], including a seminar organized by the Spanish delegation to Working Group III (Transport Law) for the African Region, (Barcelona, Spain, 9-11 October 2007) and a symposium “Transport Law for the 21st century: the New UNCITRAL Convention” (Austin, United States of America, 28 March 2008). The symposium was organized to raise awareness of the new convention among practitioners and policymakers in the United States of America with a view to promoting early ratification by the United States Government.

## **G. Insolvency**

18. The Secretariat has promoted the use and adoption of insolvency texts, particularly the Model Law on Cross-Border Insolvency, through country specific activities aimed at assisting with the drafting of implementing legislation. For example, at the invitation of the Greek Ministry of Justice, the Secretariat participated in a meeting of the Greek Bankruptcy Committee to assist with adoption of the UNCITRAL Model Law on Cross-border Insolvency, including the drafting of implementing legislation (Athens, 6-9 February 2008).

## **H. Electronic commerce**

19. The Secretariat has been actively promoting adoption of the United Nations Convention on the Use of Electronic Communications in International Contracts (ECC) and since the last report, the ECC has been signed by Colombia, Honduras, Iran (Islamic Republic of), Montenegro, Panama, Philippines, Republic of Korea, Russian Federation

and Saudi Arabia. The Convention closed for signature on 16 January 2008, with 18 signatories.

20. \*The Secretariat also provided lectures on electronic commerce for the 2007 Summer Program of Xiamen Academy of International Law (Xiamen, China, 21-27 July 2007);

### **I. Assistance with legislative drafting**

21. In addition to advising on implementation of texts as noted above, the Secretariat provided assistance with legislative drafting to Slovenia in respect of mediation law.

## **III. Coordination activities**

22. In accordance with its mandate,<sup>26</sup> 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.

23. The Secretariat participated in the following meetings of the International Institute for the Unification of Private Law (Unidroit):

(a) The Governing Council of Unidroit (Rome, 16-18 April 2007);

(b) The first session of the Unidroit Committee of governmental experts for the preparation of a draft model law on leasing (Johannesburg, South Africa, 5-9 May 2007);

(c) The Unidroit coordination meeting on Security Interests in Securities (Rome, 21-24 May 2007); and

(d) The second session of the Working Group on the Unidroit Principles of International Commercial Contracts (Rome, 4-8 June 2007).

24. The Secretariat also participated, at the invitation of The Hague Conference on private international law, in discussions on the possibility of preparing a feasibility study on the preparation of a legislative text on choice of law in international contracts (The Hague, 1 April 2008). This topic has previously been the subject of coordination discussions among the secretariats of the Hague Conference, UNCITRAL and Unidroit.

25. With respect to procurement, the Secretariat participated at:

(a) A WTO-UNCITRAL meeting on coordination in the area of procurement, as mandated by Working Group I (Procurement Law) (A/CN.9/575, para. 67) to seek expert assistance on revision of the Model Law on Procurement of Goods, Construction and Services (A/CN.9/615, para 14) (Geneva, Switzerland, 3-4 April 2007);

(b) The International Bar Association (IBA) Rule of Law Symposium (Singapore, 13-18 October 2007) to make a presentation on UNCITRAL's procurement work in the context of trends in public procurement 2007. This was combined with a visit to Singaporean Government agencies to see the operation of electronic reverse auction and government e-procurement systems; and

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<sup>26</sup> General Assembly resolution 2205 (XXI), sect. II, para. 8.

(c) The Colloquium «Le contrôle des marchés publics: perspectives européennes et internationales», organized in cooperation with the Université Paris 1, George Washington University, CNRS, Cabinet August & Debouzy, Paris, Cabinet Arnold & Porter LLP, Cabinet Achilles, Oxford. (Paris, 22–23 October 2007).

26. UNCITRAL has also provided input to procurement rules and projects being developed by other international organizations, including the OECD's Checklist for Enhancing Integrity in Public Procurement; the EBRD's Procurement Policies and Rules; and the World Bank's proposal for a Country Procurement Strategy Pilot Project.

27. Other coordination activities have included participation and, in some cases, presentations on the work of UNCITRAL at the following events:

(a) A conference on "IPR protection and transforming R&D outputs into intangible assets in economies in transition" and the "2nd annual meeting of the UNECE Team of Specialists on Intellectual Property" (Geneva, Switzerland, 24-28 July 2007);

(b) The Seminar "Justice and Commercial Affairs", European Institute of Public Administration (Athens, 11-15 November 2007);

(c) The XII International Congress and XX anniversary celebration of the Instituto Iberoamericano de Derecho Marítimo (IIDM) (Seville, Spain, 13-16 November 2007) to make a presentation of the rules on carrier liability in the new UNCITRAL draft Convention on the Carriage of Goods [wholly or partly] [by sea];

(d) An expert group meeting organized by UNODC on identity-related crime and a conference on the evolving challenge of identity-related crime, addressing fraud and the criminal misuse and falsification of identity organized by the International Scientific and Professional Advisory Council of the United Nations (ISPAC) (Courmayeur, Italy, 29 November-2 December 2008). The Secretariat provided expert advice on identity fraud and presented UNCITRAL's work on the draft indicators of commercial fraud;

(e) An expert group meeting on intellectual property organized by INTA (International Trademark Association), IFTA (Independent Film and Television Alliance), AIPLA (American International Property Law Association) and MARQUES (London, 5 December 2007);

(f) The World Legal Forum in The Hague (The Hague, 10-12 December 2007);

(g) A meeting with the International Chamber of Commerce (ICC) on the assessment of legislative enactments of the New York Convention (joint IBA/UNCITRAL project with additional input from the ICC) (Paris, 18 January 2008);

(h) Meetings with the Italian Ministry of Foreign Trade to discuss the contribution of uniform commercial law in developing international trade and to promote the UNCITRAL technical assistance programme (Rome, 1 February 2008);

(i) A moot court competition on the CISG upon invitation by the Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ); delivering presentations on UNCITRAL work and texts to the 15 Universities taking part in the event; and meetings to discuss future activities of the GTZ-supported project Open Regional Fund for South East Europe (Belgrade, 7-10 March 2008);

(j) A presentation to the «20 ème Journée de droit international privé Le nouveau règlement européen «Rome I» relatif à la loi applicable aux obligations

contractuelles», upon invitation of Institut suisse de droit comparé (Lausanne, Switzerland, 14 March 2008); and

(k) Lectures for the annual International Trade Law Post-Graduate Course on the “Issues of Harmonization of Laws Governing International Trade from the Perspective of UNCITRAL: the past and current work” upon invitation of the International Training Centre of the ILO and the University Institute of European Studies (Turin, Italy, 24-25 April 2007 and 26-27 March 2008).

#### **IV. Dissemination of information**

28. 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)**

29. 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.

30. 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, 72 issues of CLOUT had been prepared for publication, dealing with 761 cases, relating mainly to the United Nations Convention on Contracts for the International Sale of Goods (CISG) and the UNCITRAL Model Law on International Commercial Arbitration and, since January 2008, the UNCITRAL Model Law on Cross-Border Insolvency.

31. The revised Digest of Case Law on the CISG was endorsed by the CLOUT National Correspondents at their meeting on 5 July 2007. After the addition of an index listing the case law reported in the Digest, the Digest is currently being prepared for publication both in hard copy and electronically.

32. The search engine to facilitate retrieval of published case law on the UNCITRAL website was launched in the fourth quarter of 2007 and is now fully operational.

33. In February 2008 the first issue of a CLOUT Bulletin was published. The Bulletin, which should become a quarterly publication, is aimed at strengthening the links between the Secretariat, its National Correspondents, its institutional partners and the international legal community. The Bulletin will provide information on the latest CLOUT developments and offer a brief summary of recent UNCITRAL technical assistance activities.

34. A CLOUT information brochure is currently being published 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.

## **B. Website**

35. The website, available in the six official languages of the United Nations, provides access to all UNCITRAL full-text documentation by linking to the United Nations Official Documents System (ODS). The website also features other information relating to the work of UNCITRAL, such as press releases, treaty status information, latest events and news. The website is maintained and developed at no additional cost to the Secretariat.

36. During 2007, the UNCITRAL website registered over one million visitors from various parts of the world. About 50 per cent of visitors are from North America, 15 per cent from Western and Eastern Europe, 10 per cent from Asia, and the remaining 25 per cent from South America, Australia, Africa, and the Middle East. About half of the traffic is directed to pages in English, one quarter to pages in French and Spanish, and the remaining quarter to pages in Arabic, Chinese and Russian.

37. In 2007, the Content Management System hosting the website was upgraded to introduce new tools and an enhanced interface. The new version allows web pages in other languages to be managed more efficiently and offers easy-linking to ODS.

38. The content of the website is updated and expanded on an ongoing basis. In particular, UNCITRAL official documents relating to early Commission sessions are being uploaded in the ODS and made available on the website under a project on digitization of UNCITRAL archives conducted jointly with the Dag Hammarskjöld Library in New York. In 2007, nearly four hundred documents in all official languages (A/CN.9/370-A/CN.9/418) covering the 26th-29th Commission sessions were made available on the UNCITRAL website.

## **C. Library**

39. The UNCITRAL Law Library was established in 1979 in Vienna. Since its establishment, the Library has been providing services not only to UNCITRAL delegates and to the staff of the Secretariat, but also to the staff of permanent missions and the staff of other Vienna-based international organizations. It has also provided research assistance to scholars and students from many countries.

40. The collection of the UNCITRAL Law Library focuses mainly on international trade law and currently consists of over 10,000 monographs; 150 active journal titles; legal and general reference material, including non-UNCITRAL United Nations documents, and documents of other international organizations; and electronic resources (restricted to in-house use only). Lately, particular attention has been given to expanding the holdings in all of the six United Nations official languages.

41. 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 and is located at the address <http://libunov-cat.unog.ch>.

42. For each session of the Commission a bibliography of writings related to the work of UNCITRAL is prepared, including references to books, articles, and dissertations in a variety of languages, classified according to subject (see document A/CN.9/650). Individual records of the Bibliography are entered into the OPAC and the UNCITRAL Library maintains a full-text collection of all materials cited in the Bibliography. The Bibliography is periodically updated and updates relating to the period between the dates of the annual publication can be found in the bibliography section of the website.

#### **D. Publications**

43. UNCITRAL traditionally has two series of publications, in addition to official documents, which include the texts of all instruments developed by the Commission and the UNCITRAL Yearbook. A new book providing basic facts about UNCITRAL, "The UNCITRAL Guide", was published in July 2007. A collection of UNCITRAL legal texts on CD-ROM is currently being prepared and should be published by the end of 2008. Two booklets were published in the first quarter of 2008: a booklet on the 1985 UNCITRAL Model Law on International Commercial Arbitration with amendments as adopted in 2006, and a booklet reproducing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) in the six United Nations official languages.

44. 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 will be discussed, and in the context of national law reform efforts.

#### **E. Press releases**

45. To improve the availability of up-to-date information on the status and development of UNCITRAL texts, efforts have been made to ensure that press releases are issued when treaty actions are taken or information is received on the adoption of a model law. Those press releases are provided to interested parties by email and are posted on the UNCITRAL website, as well as on the website of the United Nations Information Service (UNIS) in Vienna.

#### **F. General enquiries**

46. 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**

47. 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 from Austria, Germany, Ukraine and the United States of America.

## **V. Resources and funding**

### **A. UNCITRAL Trust Fund for symposia**

48. In the period under review, contributions were received from Mexico and Singapore, to whom the Commission may wish to express its appreciation.

49. The ability of the Secretariat to implement the technical cooperation and assistance component of the UNCITRAL work programme is contingent upon the availability of extrabudgetary funding, since the costs of technical cooperation and assistance activities are not covered by the regular budget.

50. The UNCITRAL Trust Fund for symposia supports technical cooperation and assistance activities for the members of the legal community in developing countries; participation of UNCITRAL staff, as speakers, at conferences where UNCITRAL texts are presented for examination and possible adoption; and fact-finding missions for law reform assessments in order to review existing domestic legislation and assess country needs for law reform in the commercial field.

51. 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 technical cooperation and assistance activities in the short term. Some funds remain available despite the projected expenditure for 2007 as some activities did not take place and efforts have been made to organize the requested technical cooperation and assistance activities at the lowest possible cost and with funding available from other organizations where 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.

52. The Commission may once again wish to appeal to all States, relevant United Nations Agencies and bodies, international organizations and other interested entities to make contributions to the Trust Fund, if possible in the form of multi-year contributions, so as to facilitate planning and to enable the Secretariat to meet the increasing demands from developing countries and States with economies in transition.

### **B. UNCITRAL Trust Fund to grant travel assistance to developing countries that are members of UNCITRAL**

53. 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. A contribution by Austria has been announced.



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54. 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.

55. 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.

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## **IX. STATUS AND PROMOTION OF UNCITRAL LEGAL TEXTS**

### **Status of conventions and model laws (A/CN.9/651) [Original: English]**

Not reproduced. The updated list may be obtained from the UNCITRAL secretariat or found on the Internet at [www.uncitral.org](http://www.uncitral.org).

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## X. COORDINATION AND COOPERATION

### Note by the Secretariat on current activities of international organizations related to the harmonization and unification of international trade law

(A/CN.9/657 and Add.1-2) [Original: English]

#### CONTENTS

	<i>Paragraphs</i>
I. Introduction . . . . .	1-4
II. General coordination in the United Nations . . . . .	5-8
III. Harmonization and unification of international trade law . . . . .	9-55
A. International investment contracts . . . . .	9-11
B. International commercial contracts . . . . .	12-13
C. International carriage of goods . . . . .	14-28
1. Transport by sea . . . . .	17-18
2. Transport by land . . . . .	19-21
3. Inland waterway transport . . . . .	22
4. Transport by air . . . . .	23
5. Intermodal or multimodal transport . . . . .	24-28
D. Commercial arbitration and conciliation . . . . .	29-41
E. Insolvency . . . . .	42-55

### I. Introduction

1. In resolution 34/142 of 17 December 1979, the General Assembly requested the Secretary-General to place before the United Nations Commission on International Trade Law a report on the legal activities of international organizations in the field of international trade law, together with recommendations as to the steps to be taken by the Commission to fulfil its mandate of coordinating the activities of other organizations in the field.

2. In resolution 36/32 of 13 November 1981, the General Assembly endorsed various suggestions by the Commission to implement further its coordinating role in the field of international trade law.<sup>1</sup> Those suggestions included presenting, in addition to a general report of activities of international organizations, reports on specific areas of

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<sup>1</sup> *Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 17 (A/36/17)*, paras. 93-101.

activity focusing on work already under way and areas where unification work was not under way but could appropriately be undertaken.<sup>2</sup>

3. This general report, prepared in response to resolution 34/142, is the fourth in a series which the Secretariat proposes to update and revise on an annual basis for the information of the Commission. The first paper (A/CN.9/584, May 2005) and related papers on electronic commerce (A/CN.9/579) and insolvency (A/CN.9/580/Add.1) were prepared for the thirty-eighth session of the Commission. The second paper (A/CN.9/598, April 2006) and related papers on procurement (A/CN.9/598/Add.1) and security interests (A/CN.9/598/Add.2) were prepared for the thirty-ninth session of the Commission. The third paper (A/CN.9/628 and A/CN.9/828/Add.1, May 2007) focused on activities of international organizations primarily undertaken since preparation of the second paper. This fourth paper in the series is again based upon publicly available material and consultations sought with the listed organizations. The present paper and A/CN.9/657/Add.1 focuses on the activities of international organizations primarily undertaken since preparation of the third paper, while A/CN.9/657/Add.2 relates solely to current activities of international organizations related to the harmonization and unification of public procurement law. This paper does not repeat information contained in the previous papers unless necessary to facilitate understanding of a particular issue.

4. The work of the following organizations is described in this report:

(a) United Nations bodies and specialized agencies

ITU	International Telecommunications Union
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNECE	United Nations Economic Commission for Europe
UNESCWA	United Nations Economic and Social Commission for Western Asia
UNICRI	United Nations Interregional Crime and Justice Research Institute
UNODC	United Nations Office on Drugs and Crime
WIPO	World Intellectual Property Organization

(b) Other intergovernmental organizations

AfDB	African Development Bank
ADB	Asian Development Bank
APEC	Asia Pacific Economic Cooperation Commonwealth Secretariat
Arab League	League of Arab States
COMESA	Common Market for Eastern and Southern Africa
EBRD	European Bank for Reconstruction and Development
EC	European Commission

<sup>2</sup> Ibid., para. 100.

Hague Conference	Hague Conference on Private International Law
IFC	International Finance Corporation
OAS	Organization of American States
OTIF	Intergovernmental Organization for International Carriage by Rail
OECD	Organization for Economic Cooperation and Development
Unidroit	International Institute for the Unification of Private Law
World Bank	International Bank for Reconstruction and Development
WCO	World Customs Organization
WTO	World Trade Organization
(c) International non-governmental organizations	
ALI	American Law Institute
CTO	Commonwealth Telecommunications Organization
IATA	International Air Transport Association
IBA	International Bar Association
ICC	International Chamber of Commerce
III	International Insolvency Institute
INSOL	International Association of Restructuring, Insolvency and Bankruptcy Professionals

## II. General coordination in the United Nations

5. In general, the United Nations has in recent years taken greater steps aimed at improved and more effective coordination among its various bodies and in conjunction with other intergovernmental organizations. One example of such efforts, the Policy Committee Working Group (WG) on Public Administration, Local Governance, Financial Transparency and Accountability in a Peace-Building Context, established by the Secretary-General in 2006, is working towards the creation of policy options for the engagement of the United Nations, in the context of peacebuilding efforts, in supporting public administration institution- and capacity-building, local governance, financial transparency and accountability. Membership of the WG included not only various internal UN bodies, including the Office of Legal Affairs, but also other agencies active in the various elements of peacebuilding, such as the OECD, the IMF, the World Bank, various Regional Development Banks (including the ADB, the AfDB, and the EBRD), as well as UN Regional Commissions (including UNECE and ESCWA).

6. In this case, as in other contexts, the Secretariat actively participated in the WG. The responses and recommendations of all participants in the WG were compiled and will be used in the creation of concrete policy recommendations that are provided to the Secretary-General with respect to the establishment of a UN system-wide guidance or

policy on peacebuilding in the areas of public administration, local governance and financial management.

7. In addition, pursuant to general Assembly Resolution 61/39, the Secretary-General submitted an interim report to the General Assembly on 15 August 2007 (A/62/261) containing preliminary information regarding the inventory of current activities of the organs, offices, departments, funds and programmes within the United Nations system devoted to the promotion of the rule of law at the national and international levels that is to be submitted to the General Assembly at its sixty-third session in 2008.

8. Section III of that interim report contains a preliminary list of current rule of law activities which includes, under the Office of Legal Affairs, a number of activities undertaken by the UNCITRAL Secretariat with respect to promotion of treaties and other international instruments and international standards, activities relating, among other things, to capacity-building and dissemination of information, provision of technical assistance in the preparation of national legal instruments to implement international law and facilitation of dispute resolution. A Joint Rule of Law Workplan is being prepared to provide an overview of the extent and nature of the United Nation's global rule of law activities and to assist in coordination and coherence efforts, in particular to identify gaps, areas of overlap or duplication and areas of synergy and complementarity in United Nations rule of law assistance. The UNCITRAL Secretariat has contributed to the development of the workplan.

### III. Harmonization and unification of international trade law

#### A. International investment contracts

##### IFC<sup>3</sup> and UN<sup>4</sup>

9. In March of 2008, a study<sup>5</sup> entitled "Stabilization Clauses and Human Rights" that had been prepared for the International Finance Corporation and the United Nations Representative to the Secretary-General on Business and Human Rights was released. The study was intended to raise awareness of the relationship between the protection of investor rights and the host State's human rights obligations. In particular, it examined whether stabilization clauses, a widely used risk-management device in investment contracts, and similar risk allocation provisions in state contracts with foreign investors could affect a host state's ability to adopt and implement human rights laws and regulations in areas such as labour, non-discrimination and protection of health and the environment. Stabilization clauses are clauses in private contracts between investors and host states that address changes in law in the host state during the life of an investment project, for example, a "freezing clause", which freezes the law of the host state during that period.

10. The study made a number of findings, including the general conclusions that the various types of stabilization clauses currently in use may be drafted so as to insulate investors from having to implement new environmental and social laws, or to provide investors with an opportunity to be compensated for compliance with such laws. The

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<sup>3</sup> [www.ifc.org](http://www.ifc.org).

<sup>4</sup> [www.un.org](http://www.un.org).

<sup>5</sup> <http://www.ifc.org/enviropublications>.



sample of investment contracts obtained for the study, which were gathered principally from private international law firms, indicated that such an influence was more likely to be the case in contracts from countries outside the OECD than in OECD country contracts. Further, the study makes a number of recommendations, including: that appropriately high standards should be benchmarked at the outset of a project; that good practice from a human rights perspective in the use of stabilization clauses should be identified; that there should be further analysis of how the host state's capacity and the skills of the negotiators have an impact on the design of stabilization clauses; and that the transparency of investment contracts should be improved.

11. The next steps taken with regard to the study include broad dissemination of the study and consultations on it with various stakeholders. The Secretariat will continue to track this issue with a view to keeping the Commission informed.

## **B. International commercial contracts**

### **Hague Conference<sup>6</sup>**

12. At its meeting on 1-3 April 2008, the Council on General Affairs and Policy of the Hague Conference invited the Permanent Bureau to continue its exploration of the development of an instrument concerning choice of law in international business-to-business contracts with a view to promoting party autonomy. Building on preparatory work already completed in this area, the Permanent Bureau was asked to explore, in cooperation with the relevant international organizations and interested experts, the feasibility of drafting a non-binding instrument, including the specific form that such an instrument might take, and, if possible, to report and make a recommendation to the Council regarding future action in 2009.

### **Unidroit<sup>7</sup>**

13. Pursuant to the recommendation of the Governing Council of Unidroit, the Principles of International Commercial Contracts (PICC), first published in 1994, are included as an ongoing project in the work programme of the Institute. Subsequent to the adoption of the second enlarged edition of the PICC in 2004, in 2005 the Governing Council set up a new Working Group with the task of preparing a third edition of the PICC including new chapters on unwinding of failed contracts, plurality of obligors and of obligees, and termination of long-term contracts for just cause. The Working Group, composed of eminent experts representing the major legal systems and/or regions of the world as well as observers from international organizations and arbitration centres, including the UNCITRAL secretariat, held its first session in Rome from 29 May to 1 June 2006, and its second session in Rome from 4 to 8 June 2007. On the basis of a preliminary study prepared by the Unidroit Secretariat, and in-depth discussion by the Group, rapporteurs for each of the five topics suggested for inclusion in the new edition of the Principles (unwinding of failed contracts; illegality; plurality of obligors and of obligees; conditions; and termination of long-term contracts for just cause) were requested to prepare preliminary draft rules together with explanatory notes on their respective topics for discussion at the Group's next session in May 2008.

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<sup>6</sup> [www.hcch.net](http://www.hcch.net).

<sup>7</sup> [www.unidroit.org](http://www.unidroit.org).

## C. International carriage of goods

### General

14. The UNCITRAL draft convention on contracts for the international carriage of goods wholly or partly by sea, which aims at providing for a harmonized legal framework that accommodates modern container transport is, of course, before the Commission for its consideration at the current session. Although the draft convention is not a true multimodal convention, it has been characterized as a “maritime plus” convention in light of its application to door-to-door contracts of carriage, and thus could include inland transport ancillary to the international maritime leg.

15. A number of different organizations have as a mandate the pursuit of various objectives relating to the unimodal transport of goods, including a legislative mandate, while others are considering or actively pursuing intermodal or multimodal transport instruments or arrangements. In light of the “maritime plus” nature of the draft convention, the Commission may wish to take note of the summary of the current work and activities of those organizations, which appears below. In its efforts to assist States in the negotiation of the text of the draft convention, the Secretariat has closely monitored the activities of such other organizations, with a view to ensuring the integrity of the draft convention and its inter-operability with other international initiatives.

16. The Commission may also wish to note that the draft convention provides the legal basis for electronic bills of lading, called “electronic transport records” in the text of the instrument. As such, the Commission may wish to note the evolution of the paperless transport environment with respect to other electronic initiatives as outlined in the paragraphs below. Again, the Secretariat has carefully monitored such developments and, in some cases, has participated in discussions relating to those initiatives.

### 1. Transport by sea

#### UNCTAD<sup>8</sup>

17. UNCTAD continued its participation at sessions of the UNCITRAL Working Group III (Transport Law), providing technical information on the issues under consideration and highlighting implications for developing countries, with respect to the development of a new international convention to govern contracts for the international carriage of goods wholly or partly by sea.

18. UNCTAD released in February 2008 its Review of Maritime Transport 2007, which provides a detailed account of main developments affecting world seaborne trade, freight markets and rates, ports, surface transport, logistics services as well as world fleet-related issues, including ownership, control, age, tonnage and productivity. Several key developments set out in the 2007 edition are worthy of note in light of the Commission’s work on the draft convention on contracts for the international carriage of goods wholly or partly by sea: in 2006, world seaborne trade in loaded goods increased by 4.3 per cent, to reach 7.4 billion tons; at the beginning of 2007, the world fleet expanded by 8.6 per cent, reaching 1.04 billion deadweight tons. Further, containerships represented the youngest fleet with an average of 9.1 years of age,

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<sup>8</sup> [www.unctad.org](http://www.unctad.org).

and in 2006, world container port throughput increased by 13.4 per cent to reach 440 million twenty-foot equivalent units (TEUs).

## 2. Transport by land

### UNECE<sup>9</sup>

19. At the 99th session of the UNECE Working Party on Road Transport (SC.1) in October 2005, an editorial committee, comprising both Unidroit and UNCITRAL, was established to finalize the drafting of the text of an additional Protocol to the Convention on the Contract for the International Carriage of Goods by Road<sup>10</sup> (Geneva, 19 May, 1956) (CMR) with a view to facilitating the possible use of electronic consignment notes. At its 102nd session in May 2008, the 53 current Contracting Parties to the CMR were invited to sign the Additional Protocol to the CMR as adopted by the Inland Transport Committee in February 2008. Following a signing ceremony on 27 May 2008, the Protocol was open for signature from 27 to 30 May 2008 in Geneva, and thereafter, at UN Headquarters in New York until 30 June 2009. Twelve countries have reportedly declared their intention to sign the Protocol, which will enter into force ninety days after five States have deposited their instruments of ratification or accession.

20. The Protocol will allow for the first time the use of electronic consignment notes in international road transport by setting out the legal framework and standard for using electronic means of recording and storing consignment notes data. The reduction in paperwork is anticipated to save time and reduce errors in the transport of goods by road, dealing with problems such as the arrival of the goods at destination in advance of the arrival of the documentation. Further, the Protocol is intended to allow for road transport to join the ranks of other modes of transport in which electronic transport records are already operational, or their use is anticipated.

### OTIF<sup>11</sup>

21. Following the entry into force on 1 July 2006 of The Uniform Rules concerning the Contract for International Carriage of Goods by Rail, Appendix to the Convention concerning International Carriage by Rail (CIM-COTIF),<sup>12</sup> as amended by the Protocol of Modification of 1999 (the Vilnius Protocol), Member States continue to ratify and accede to the Protocol.

## 3. Inland waterway transport

### UNECE<sup>13</sup>

22. The Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway (CMNI Convention), adopted at a Diplomatic Conference organized jointly by CCNR, Danube Commission and UNECE (Budapest, 25 September-3 October 2000), entered into force on 1 April 2005. It currently has 12 Contracting Parties, an increase of 50 per cent above the number reported to the Commission in last year's current

<sup>9</sup> [www.unece.org](http://www.unece.org).

<sup>10</sup> Entry into force: 2 July 1961, United Nations, *Treaty Series*, vol. 399, p. 189. Source: <http://www.untreaty.org>.

<sup>11</sup> [www.otif.org](http://www.otif.org).

<sup>12</sup> Budapest, 22 June, 2001. Entered into force 1 April 2005.

<sup>13</sup> [www.unece.org](http://www.unece.org).

activities paper. The CMNI Convention governs the contractual liability of parties to the contract for the carriage of goods by inland waterway and provides for the limitation of the carrier's liability.

#### **4. Transport by air**

##### **IATA<sup>14</sup>**

23. IATA has created an industry-wide "e-freight" programme aimed at reducing the use of paper documents in the air freight supply chain by moving to a simpler, paper-free, electronic environment. The project began in 2005 as an industry action group including six top global cargo carriers, the WCO and Freight Forward International, and is aligned with the WCO's and United Nations' global e-customs initiatives. In November 2007, the e-freight programme was implemented on key trade routes linking six countries, and by the end of 2008, it is hoped that the programme will be implemented in eight additional locations, with full industry implementation expected by the end of 2010, where feasible. It is expected that up to 38 paper documents per shipment, costing an estimated US \$30, will be eliminated, representing greatly improved savings and efficiency.

#### **5. Intermodal or multimodal transport**

##### **UNCTAD<sup>15</sup>**

24. In light of the consideration by the Commission of the UNCITRAL draft convention on contracts for the international carriage of goods wholly or partly by sea, of interest in the most recent UNCTAD transport newsletter,<sup>16</sup> is an UNCTAD article on "The modal split of international goods transport", based on the mode of transport by which the goods arrived at the country's border, seaport or airport. According to the report, based on data not including intra-European Union trade, in 2006, seaborne trade accounted for 89.6 per cent of global trade in terms of volume (tons) and 70.1 per cent in terms of value. In the same year, airborne cargo had only a share of 0.27 per cent of trade volume and 14.1 per cent of trade value, while inland transport and other modes (including pipelines) accounted for 10.2 per cent of trade volume and 15.8 per cent of trade value.

25. The UNCTAD report goes on to note that since 2000, the shares of the different modes of transport have remained fairly stable in terms of volume, while they have fluctuated more dramatically in terms of value. Airborne transport amounted to an average of \$56,624 US per ton in 2000, while in 2006, the average value increased to \$63,184 US per ton. In the case of seaborne transport, the average value per ton was \$625 US in 2000, rising to \$943 per ton in 2006. Finally, the average value per ton of overland and other modes of transport was \$1,482 US in 2000, increasing to \$1,878 US in 2006. Again, all figures were calculated by UNCTAD based on data excluding intra-European Union trade.

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<sup>14</sup> [www.iata.org](http://www.iata.org).

<sup>15</sup> [www.unctad.org](http://www.unctad.org).

<sup>16</sup> UNCTAD Transport Newsletter, No. 38, Fourth quarter 2007/First quarter 2008, soon to be available on [www.unctad.org](http://www.unctad.org).

**UNECE<sup>17</sup> and EC<sup>18</sup>**

26. At its forty-ninth session (Geneva, 17-18 March 2008), the UNECE Working Party on Intermodal Transport and Logistics was informed that the EC had adopted in October 2007 a Freight Logistics Action Plan as part of a larger freight transport package that included other issues, such as freight-oriented rail networks, new port policies, motorways of the sea and a European maritime space without borders.

27. The Action Plan was based on extensive consultation with stakeholders and covers four broad themes: innovation, quality, simplification and green transport. Further, within the framework, the EC reported that it is developing a road map for the implementation of e-freight that anticipates a paper-free, electronic flow of information accompanying the physical transport of goods.

**Regional multimodal initiatives – UNESCWA<sup>19</sup> and the Arab League<sup>20</sup>**

28. The Secretariat was requested in February 2008 to provide comments on a regional multimodal convention that had been drafted under the auspices of the United Nations Economic and Social Commission for Western Asia (UNESCWA). The UNESCWA draft convention, called “the Convention on International Multimodal Transport of Goods in the Arab Mashreq” had been prepared by the UNESCWA secretariat from 2006 forward, and relied heavily on portions of the text from the UNCITRAL draft convention. Although the text of the UNESCWA draft convention had been prepared with a view to approving it and opening it for signature at the 25th Ministerial session of UNESCWA in May 2008, it was ultimately decided by the UNESCWA Ministerial session in May 2008 to postpone discussion of the approval of the draft convention and its opening for signature until October 2008. It appears that the decision has been made in light of both the global UNCITRAL text and of a reportedly similar text being negotiated by the League of Arab States. The Secretariat has not received any information concerning the Arab League text, and is pursuing information in that regard.

**D. Commercial arbitration and conciliation****CTO<sup>21</sup>**

29. The Commonwealth Telecommunications Organization (CTO) ADR Centre has established partnership relationships with the Chartered Institute of Arbitrators, the Centre for Effective Dispute Resolution and the Singapore Mediation Center. The CTO ADR Centre and the Claims Room.com Ltd jointly operate an online dispute resolution platform in partnership.<sup>22</sup> Recognizing the need to build capacity within developing countries and in the industry sector itself, the CTO ADR Centre conducts training programmes.

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<sup>17</sup> [www.unece.org](http://www.unece.org).

<sup>18</sup> [ec.europa.eu](http://ec.europa.eu).

<sup>19</sup> [www.escwa.un.org](http://www.escwa.un.org).

<sup>20</sup> [www.arableagueonline.org](http://www.arableagueonline.org).

<sup>21</sup> [www.cto.int](http://www.cto.int).

<sup>22</sup> [www.ctomediation.com](http://www.ctomediation.com).

**ICC<sup>23</sup>**

30. The ICC Commission on Arbitration has constituted five task forces covering amiable composition and *ex aequo et bono*,<sup>24</sup> guidelines for ICC expertise proceedings, trusts and arbitration, and national rules of procedure for recognition and enforcement of foreign arbitral awards pursuant to the New York Convention of 1958.

31. The task force on amiable composition and *ex aequo et bono*<sup>25</sup> was mandated to identify the essential features of “*amiable composition*” and of “*ex aequo et bono*” and study the role of the arbitrators when acting as “*amiable compositeurs*” or when deciding “*ex aequo et bono*” (e.g. jurisdictional, procedural or substantive problems that may arise). The task force is currently preparing a report based on a synthesis of the survey answers. It will also begin drafting guidelines to assist arbitrators who have been empowered to decide “*ex aequo et bono*” or to act as “*amiable compositeurs*”.

32. Following the adoption by the ICC Commission on Arbitration of the revised ICC Rules for Expertise in 2003, another task force prepared a set of guidelines for ICC expertise proceedings.<sup>26</sup> The task force is now preparing explanatory notes for the use of experts covering issues including: the use of experts in ICC Arbitration; using experts under the ICC Rules for Expertise as fact-finders; and neutral experts as facilitators under the ICC ADR and Dispute Board Rules.

33. The task force on national rules of procedure for recognition and enforcement of foreign arbitral awards pursuant to the New York Convention of 1958 has been set-up in view of the 50th anniversary of the New York Convention in 2008.<sup>27</sup> The objectives of the task force are: (i) to identify the countries to be covered by the work of the task force; (ii) to determine, for each country so identified, the national rules of procedure for recognition and enforcement of foreign arbitral awards, with reference to articles III and IV of the New York Convention; (iii) to compile all such national rules of procedure for recognition and enforcement of foreign arbitral awards on a country-by-country basis; and (iv) to draft an introduction to and a summary of such compilation. It will be recalled that the Commission, at its twenty-eighth session, in 1995, had approved a project, undertaken jointly with the Arbitration Committee of the International Bar Association, aimed at monitoring the legislative implementation of the New York Convention.<sup>28</sup> At its fortieth session, in 2007, the Commission encouraged the Secretariat to seek possible cooperation with the International Chamber of Commerce in order to avoid duplication of work in that respect.<sup>29</sup> The members of that task force and the Secretariat of UNCITRAL met in January 2008, and agreed to cooperate and exchange information collected during the implementation of both projects.

<sup>23</sup> [www.iccwbo.org](http://www.iccwbo.org).

<sup>24</sup> <http://www.iccwbo.org/policy/arbitration/id6566/index.html>.

<sup>25</sup> Further information is available at <http://www.iccwbo.org/policy/arbitration/id6566/index.html>.

<sup>26</sup> Information on the task force on guidelines for ICC expertise proceedings is available at <http://www.iccwbo.org/policy/arbitration/id1785/index.html>.

<sup>27</sup> Information on the task force on national rules of procedure for recognition and enforcement of foreign arbitral awards is available at: <http://www.iccwbo.org/policy/arbitration/id2882/index.html>.

<sup>28</sup> *Official Records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17)*, paras. 401-404.

<sup>29</sup> *Ibid.*, *Sixty-second Session, Supplement No. 17 (A/62/17, Part I)*, para. 207.

**OECD**<sup>30</sup>

34. In a report adopted on 30 January 2007 by the OECD Committee on Fiscal Affairs entitled “Improving the Resolution of Tax Treaty Disputes”,<sup>31</sup> the OECD has agreed to modify the OECD Model Tax Convention, which serves as a basis for most negotiations between countries on tax matters, by including the possibility of arbitration in cross-border disputes over taxation if they remain unresolved for more than two years.

35. The decision was based on the recognition that with the growth of cross-border trade and investment and the accompanying increase in the number of people working abroad, cross-border tax disputes arising when two states assert conflicting rights to tax an individual living and working in more than one country or companies that invest outside their home country, have also increased.

36. The report addresses a number of issues relating to what is known as the “mutual agreement procedure”, or MAP, the mechanism provided by tax treaties to resolve disputes between the countries that sign these treaties. At the same time, the Committee has published a web-based manual setting forth 25 best practices to help countries to improve the existing mechanisms for resolving tax disputes.<sup>32</sup>

**UNCTAD**<sup>33</sup>

37. UNCTAD has developed and is implementing a project on “Building capacity through training in dispute settlement in International Trade, Investment and Intellectual Property”. The objective of the project is to promote the integration of developing countries and countries in transition into the multilateral trading system through capacity-building on dispute settlement in International Trade, Investment and Intellectual Property. It aims to achieve this by improving the knowledge and level of critical awareness of the legal framework governing dispute settlement in international economic and trade relations.

38. The project focuses on the dispute settlement rules and mechanisms of international organizations such as ICC, ICSID, UNCITRAL, WIPO and WTO under six headings: (1) General Dispute Settlement Topics; (2) Settlement of International Investment Disputes and ICSID; (3) Settlement of International Trade Law Disputes and WTO; (4) Settlement of International Intellectual Property Disputes and WIPO; (5) International Commercial Arbitration; and (6) Regional Approaches. The comprehensive course on dispute settlement consists of forty chapters or modules, each dealing with one specialized topic as an essential building block of international dispute settlement.<sup>34</sup> The pedagogical methodology on which the format of the modules is based

<sup>30</sup> [www.oecd.org](http://www.oecd.org).

<sup>31</sup> <http://www.oecd.org/dataoecd/17/59/38055311.pdf>.

<sup>32</sup> [http://www.oecd.org/document/26/0,2340,en\\_2649\\_37427\\_36197402\\_1\\_1\\_1\\_37427,00.html](http://www.oecd.org/document/26/0,2340,en_2649_37427_36197402_1_1_1_37427,00.html).

<sup>33</sup> [www.unctad.org](http://www.unctad.org).

<sup>34</sup> General topics: International Court of Justice; Permanent Court of Arbitration. Investment Disputes: Overview; Selecting the Appropriate Forum; Consent to Arbitration; Requirements Ratione Personae; Requirements Ratione Materiae; Applicable Law; Procedural Issues; Post-Award Remedies; Binding Force and Enforcement. Trade Disputes: Overview; Panels; Appellate Review; Implementation and Enforcement; GATT 1994; Anti-dumping Measures; Subsidies and Countervailing Measures; Safeguard Measures; Sanitary and Phytosanitary Measures; Technical Barriers to Trade; Textiles and Clothing; Government Procurement; GATS; TRIPS; Agriculture. Intellectual property: (WIPO) Arbitration and Mediation Centre; Internet Domain Name Dispute Resolution. International Arbitration: Overview; Submission

allows for self-study for beginners and includes a tool to test what has been learned. The modules also provide a quick introduction for specialists, who find guidance to further specialized sources and materials. The course was developed in English, with partial translation in Spanish, French and Portuguese.

39. Capacity-building workshops are being held to train officials, academics, legal practitioners and business from developing countries, including LDCs, and countries in transition.

40. Since it started in May 2002, the project has successfully cooperated with United Nations bodies and international organizations, such as the World Trade Organization (WTO), the World Intellectual Property Organization (WIPO), the International Chamber of Commerce (ICC), the International Centre for Settlement of Investment Disputes (ICSID) of the World Bank Group, the United Nations Commission on International Trade Law (UNCITRAL), the World Bank, and the Advisory Centre on WTO Law. There is also cooperation with national and regional institutions, especially in the organization and delivery of workshops.

#### **WIPO**<sup>35</sup>

41. WIPO has released a number of publications providing an overview of the resources and services offered by the WIPO Mediation and Arbitration Center (“the Center”) and encouraging parties to seek alternative dispute resolution mechanisms. These publications include: WIPO Services under the UNCITRAL Arbitration Rules, WIPO Arbitration and Mediation Rules, Dispute Resolution for the 21st century, Guide to WIPO Arbitration, Guide to WIPO Domain Name Dispute Resolution and the Guide to WIPO Mediation.

### **E. Insolvency**

#### **American Law Institute (ALI)**<sup>36</sup>

42. The project on Transnational Insolvency: Principles of Cooperation, a joint effort with the International Insolvency Institute (III), aims to extend and disseminate the work from ALI’s Transnational Insolvency: Principles of Cooperation Among the NAFTA Countries, published in 2003. The objective of this project is for ALI and III to encourage consideration of the Principles in jurisdictions across the world, subject to appropriate local modifications, and to obtain the endorsement of influential domestic associations, courts and other groups in those jurisdictions. The Council approved the start of the project in 2005. Thus far, no part of the work has been considered or approved by the Council, by ALI membership, or by III. The project is likely to last a few more years before completion. As no drafts have been produced to date, it is not possible to determine how these principles relate to or include elements of the Model Law on Cross-Border Insolvency or might be relevant to the current work being undertaken by UNCITRAL on cross-border cooperation agreements.

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Agreement/Clause; Arbitral Tribunal; Arbitral Proceedings; Applicable Law; Making the Award; Recognition and Enforcement of the Award; Court Measures; Electronic Arbitration; Regional mechanisms: NAFTA; MERCOSUR; ASEAN.

<sup>35</sup> <http://www.wipo.int>.

<sup>36</sup> [www.ali.org](http://www.ali.org).



**Asian Development Bank (ADB)**<sup>37</sup>

43. In 2008, the ADB published the Report of the Regional Technical Assistance RETA 5975 “Promoting Regional Cooperation in the Development of Insolvency Law Reforms”. Following an earlier technical assistance project (RETA 5795) which had developed principles and guidelines for insolvency law reform, the project invited attention to the wider goals of regional cooperation, focusing on three areas: (i) development of sound insolvency frameworks for handling cross-border insolvencies; (ii) regional cooperation, especially in formal and informal workouts and restructurings; and (iii) the intersection of laws relating to secured transactions and insolvency. The UNCITRAL Secretariat participated in several aspects of the project, discussing the Model Law on Cross-Border Insolvency and the solutions it offers for handling cross-border insolvency as well as the work being undertaken at that time with respect to development of legislative guides on insolvency and on secured transactions. The proposals for a regional treaty or non-treaty arrangement to address issues of cross-border insolvency are based upon the articles of the UNCITRAL Model Law.

**EBRD**<sup>38</sup>

44. Recognizing that a solid law is not enough for an effective insolvency system, the EBRD has endeavoured to build on its core principles for an insolvency law regime and focus on the effectiveness of insolvency system by identifying a set of principles to guide countries in setting standards for the qualifications, appointment conduct, supervision, and regulation of office holders (“Office holders” are the trustees, administrators, liquidators, insolvency representatives, or similar functionaries who make many insolvency systems work) in insolvency cases. The EBRD Insolvency Office Holder Principles were finalized in June 2007. In Autumn 2007, the EBRD devoted an issue of its publication “Law in transition” to issues related to making an insolvency system work, which included UNCITRAL’s work on cross-border and domestic insolvency law.

**International Bar Association (IBA)**<sup>39</sup>

45. Previous reports (see para. 55, A/CN.9/598) have noted the subcommittees established by the Section on Insolvency, Restructuring and Creditors Rights (“SIRC”) of the IBA, their mandates and the work they undertake. With respect to UNCITRAL work, the subcommittee on Insolvency Legislation and Legislative Reform and Harmonisation is active in monitoring and organizing the IBA’s participation in sessions of UNCITRAL’s Working Group V (Insolvency Law), while the subcommittee on Enforcement of Creditors’ Rights organizes the IBA’s participation in sessions of UNCITRAL’s Working Group VI (Secured Interests). The subcommittee on Reorganizations and Workouts is currently undertaking a study of cash management in the reorganization process, the results of which will be published. SIRC is also preparing the insolvency chapter of the forthcoming report of the *IBA’s Task Force on Extraterritorial Jurisdiction*.

46. Through its various publications, the SIRC makes available information and articles on recent developments in insolvency, including cross-border insolvency, that

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<sup>37</sup> www.adb.org.

<sup>38</sup> www.ebrd.com.

<sup>39</sup> www.ibanet.org.

are of particular relevance to the adoption and implementation of UNCITRAL's Model Law on Cross-Border Insolvency and its current work on cross-border agreements. Topics discussed at SIRC conferences are often of key relevance to work completed by UNCITRAL (e.g., cross-border insolvency) or being undertaken or considered by UNCITRAL (e.g., recent discussion of cash pooling in enterprise groups and intellectual property and insolvency).

#### **INSOL<sup>40</sup>**

47. As foreshadowed in the previous report, in 2007 INSOL published:

(a) A publication on treatment of secured claims in insolvency and pre-insolvency proceedings in 12 countries;

(b) The third and fourth in a series of technical papers, entitled respectively "Formalities for the transfer of insolvent businesses: the obligatory transfer of employees in South Africa and the United Kingdom" and "Inter-Company Debts and Set-Off".

48. Publications being prepared for completion in 2008 address the following topics: claims presentation and resolution in insolvency proceedings; and in the technical papers series: strategic considerations for creditors facing a debtor in chapter 15 under the United States Bankruptcy Code, modelling financial distress in changing economic environments, distressed debt trading and a comparative study of voidable dispositions. INSOL is also considering launching a new series of case studies of cross-border collapses. A number of these publications provide comparative studies of issues directly relevant to both the UNCITRAL Legislative Guide on Insolvency Law and the UNCITRAL Legislative Guide on Secured Transactions. The work on chapter 15 of the United States Bankruptcy Code and the studies of cross-border collapses contribute directly to the discussion of the implementation of the UNCITRAL Model Law on Cross-Border Insolvency.

49. Through its various publications, INSOL contributes to making information and articles on recent developments in insolvency and insolvency law, including cross-border insolvency, widely available. These are of particular relevance, for example, to furthering the discussion of the adoption and implementation of the UNCITRAL Model Law on Cross-Border Insolvency and UNCITRAL's current work on cross-border cooperation agreements.

#### **OECD<sup>41</sup>**

50. The next Forum on Asian Insolvency Reform (FAIR), organized by OECD in conjunction with governments and other organizations, is scheduled to be held in November 2008 to discuss the corporate perspective on recent insolvency reforms in Asia (venue to be determined). The UNCITRAL Secretariat participated in a number of the previous FAIR.

51. As noted in the previous report, the inaugural conference of the Hawkamah Institute for Corporate Governance in the Middle East and North Africa (MENA), co-hosted by the OECD, adopted the so-called Dubai Declaration, which includes

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<sup>40</sup> [www.insol.org](http://www.insol.org).

<sup>41</sup> [www.oecd.org](http://www.oecd.org).

agreement that MENA countries should act to establish effective insolvency systems and provide a framework for efficient reallocation of resources to productive uses. A preparatory meeting took place on 21 May 2008 in Cairo, Egypt, following which Hawkamah and the World Bank launched the preparation of a Survey of insolvency systems in the region, with the support of INSOL International and the OECD. The Secretariat anticipates that the UNCITRAL Legislative Guide on Insolvency Law will provide a reference for insolvency law reform in the region.

#### **World Bank<sup>42</sup>**

52. In 2007 and 2008, the World Bank continued to provide requesting countries in the developing world with diagnostic analysis of their insolvency systems. The vehicle for this analysis is the joint World Bank-IMF ROSC (Report on the Observance of Standards and Codes) programme which is part of the broader Bank-Fund Financial Sector Assessment Program which is, itself, part of the International Financial Architecture initiative. In 2007 and 2008, the World Bank conducted the Insolvency and Creditor Rights (ICR) ROSC in countries in Latin America, Europe, Asia and Africa. Each ROSC resulted in legislative, regulatory and institutional recommendations for the recipient country. These included, inter alia, reference to the UNCITRAL Legislative Guide on Insolvency, which forms part of the methodology for assessments carried out under the ROSC.

53. In May 2008, the World Bank hosted, along with UNCITRAL and the EBRD, in Washington, D.C., a joint conference on secured transactions and insolvency. The conference examined the areas of contention at the intersection of secured transactions and insolvency reform. The conference included participants from the World Bank, IMF, IFC, UNCITRAL, EBRD, OAS, IADB, ADB, OECD and Insol International.

#### **International Insolvency Institute (III)<sup>43</sup>**

54. The III has a number of committees working on topics potentially of direct relevance to the work of UNCITRAL, particularly in the area of cross-border communications in insolvency cases, the ALI Principles of Cooperation in International Cases, intellectual property, and cross-border insolvency financing. The Secretariat has no information on the relationship or relevance of the work of those committees to the work of UNCITRAL.

#### **Unidroit<sup>44</sup>**

55. The Secretariat has provided comments to Unidroit on the draft convention on substantive rules regarding intermediated securities on the insolvency provisions of that draft convention, drawing attention to the manner in which they interact with the UNCITRAL Legislative Guide on Insolvency Law and the potential need for explanatory notes to clarify the application of several draft articles.

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<sup>42</sup> [www.worldbank.org](http://www.worldbank.org).

<sup>43</sup> [www.iiiglobal.org](http://www.iiiglobal.org).

<sup>44</sup> [www.unidroit.org](http://www.unidroit.org).

## A/CN.9/657/Add.1 (Original: English)

**Current activities of international organizations related to the  
harmonization and unification of international trade law**

## ADDENDUM

## CONTENTS

	<i>Paragraphs</i>
F. Security Interests .....	1-14
G. Electronic commerce and new technologies .....	15-53

**F. Security Interests****General**

1. Coordination meetings were held in September 2007 in Rome and in May 2008 in New York among the secretariats of the Hague Conference on Private International Law, the International Institute for the Unification of Private Law (Unidroit) and UNCITRAL. The main topic discussed at these meetings was the interrelationship among the texts on security interests prepared by the Hague Conference, Unidroit and UNCITRAL, and ways in which States could adopt these texts to establish a modern comprehensive and consistent legislative regime on secured transactions.

2. Further to those meetings, the three organizations have recognized that policymakers in States may have difficulty determining how their various instruments with respect to security interests fit together, which ones would best serve the policy goals of the State and whether implementing one instrument precludes the implementation of another. Thus, the three organizations are preparing a paper aimed at assisting policymakers by summarizing the scope and application of those instruments, showing how they work together, noting which of them would serve the policy goals of the State and providing a comparative understanding of the coverage and basic themes of each instrument. The paper will be prepared in a manner that is easily understood by non-experts in secured transactions, and it will be made available to States to assist them in considering the implementation of the instruments.

**Unidroit<sup>1</sup>****(a) Draft convention on substantive rules regarding intermediated securities**

3. Coordination continued to ensure consistency between the draft convention on substantive rules regarding intermediated securities and the UNCITRAL Legislative Guide on Secured Transactions. In order to avoid any overlap and conflict, the Commission decided that all securities should be excluded from the scope of the Guide (see A/62/17 (Part I), paras. 147 and 160). The Commission also decided that future work should be undertaken on certain types of securities not covered by the draft Convention and the Guide. The Commission also decided that payment rights arising from or under financial contracts governed by netting agreements, as well as from or

<sup>1</sup> www.unidroit.org.

under foreign exchange transactions, should also be excluded from the scope of the Guide, and that future work on financial contracts should be considered at a future session (ibid. paras. 147 and 161).

**(b) Preliminary draft model law on leasing**

4. The Unidroit Committee of governmental experts preparing a preliminary draft Model Law on leasing, at its meetings in Johannesburg, South Africa in May 2007 and in Muscat, Oman in April 2008, approved the joint proposal of the secretariats of Unidroit and UNCITRAL to exclude from the preliminary draft model law “a leasing agreement that creates a security right or an acquisition security right, as defined in the UNCITRAL Legislative Guide on Secured Transactions” (see article 3, paragraph 1 of the preliminary draft model law). At its meeting in April 2008 in Rome, the Governing Council of Unidroit approved the preliminary draft model law, subject to some minor translation adjustments, and authorized the Unidroit secretariat to transmit the draft model law to Governments for finalization and adoption at a joint session of the Unidroit General Assembly, meeting in extraordinary session, and the Unidroit Committee of Governmental Experts, to be held in Rome later in 2008.

**(c) Protocols to the Convention on International Interests in Mobile Equipment (Cape Town Convention)**

5. Both the Convention and the Protocol thereto on Matters specific to Aircraft Equipment, opened for signature in Cape Town on 16 November 2001, continue to attract new Contracting States. For an up-to-date picture of the situation in this regard, the reader is directed to the Unidroit website ([www.unidroit.org](http://www.unidroit.org)).

6. The Protocol to the Convention on Matters specific to Railway Rolling Stock, opened for signature in Luxembourg on 23 February 2007, currently has four signatory States. The Preparatory Commission established at the diplomatic Conference in Luxembourg to act as Provisional Supervisory Authority of the International Registry for railway rolling stock pending entry into force of the Protocol, at its second session, held in Rome from 8 to 10 April 2008, appointed CHAMP, a company based in Luxembourg, as Registrar of the future International Registry for railway rolling stock.

*Preliminary draft Protocol to the Convention on Matters specific to Space Assets*

7. Following the intersessional work accomplished by two joint Government/industry meetings called by Unidroit and the Space Working Group to consider the work accomplished by the Secretariat in pursuance of the assignments handed out by the Unidroit Committee of governmental experts at its second session, held in Rome from 26 to 28 October 2004, the Unidroit General Assembly at its 61st session, held in Rome on 29 November 2007, endorsed the Secretariat’s proposal for the establishment of a Steering Committee, open to the Governments and the representatives of the international commercial space and financial communities that had participated in the aforementioned Government/industry meetings, to build consensus around the provisional conclusions reached at the second of those meetings, notably a narrowing of the sphere of application of the preliminary draft Protocol so as to concentrate essentially on the satellite, in its entirety. The Steering Committee held its launch meeting in Berlin from 7 to 9 May 2008. On that occasion it agreed on the steps necessary to permit an early resumption of the intergovernmental consultation process and finalization of the proposed Protocol.

*Possible future Protocol to the Convention on Matters specific to Agricultural, Construction and Mining Equipment*

8. At its 87th session, the Unidroit Governing Council authorized the Secretariat to continue its research into the possible preparation of an additional Protocol on Matters specific to Agricultural, Construction and Mining Equipment.

**European Commission<sup>2</sup>**

**(a) Rome I regulation**

9. The European Commission adopted a regulation on the law applicable to contractual obligations (Rome I). Article 14 deals with the law applicable to the relationship between an assignor and an assignee under a voluntary assignment or contractual subrogation of a claim and the relationship between the assignee and the debtor in a way that is consistent with the United Nations Convention on the Assignment of Receivables in International Trade (“the United Nations Assignment Convention”). The European Commission was asked to study the matter of the law applicable to third-party effects of assignments, a matter also addressed in the United Nations Assignment Convention. The UNCITRAL secretariat will continue its dialogue with the European Commission with a view to avoiding conflicts between the Convention and any future European Commission instrument on the matter.

**(b) The UNCITRAL Legislative Guide on Secured Transactions**

10. The European Commission submitted to the Commission comments on the draft Legislative Guide on Secured Transactions (A/CN.9/633). In order to address the comments, the Commission, at its fortieth session, decided to: (a) exclude all securities payment rights arising from or under financial contracts and foreign exchange transactions; (b) undertake work on security interests in intellectual property; (c) offer an expanded non-unitary approach to acquisition financing; (d) review its conflict-of-laws provisions (see A/62/17 (Part I) paras. 158-162). With regard to the last topic, at its resumed fortieth session, the Commission confirmed the approach followed in the United Nations Assignment Convention with regard to the law applicable to third-party effects of assignments, but agreed to explain further in the commentary the alternative approach based on the law governing the assigned receivable (see A/62/17 (Part II) paras. 82-92).

**WIPO<sup>3</sup>**

11. Coordination with WIPO experts continued with respect to the preparation of the working paper discussed by Working Group VI at its thirteenth session held in New York in May 2008 (A/CN.9/WG.VI/WP.33 and Add.1, see A/CN.9/649 for the outcome of those discussions).

**The Hague Conference<sup>4</sup>**

12. The work of the Hague Conference on security interests in the past year was focused on post-Convention activities in respect of the 2006 Hague Convention on the Law Applicable to Certain Rights in Respect of Securities (Hague Securities

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<sup>2</sup> ec.europa.eu.

<sup>3</sup> www.wipo.int.

<sup>4</sup> www.hcch.net.

Convention). In particular, the Permanent Bureau continued its efforts to disseminate and provide assistance with respect to the Securities Convention. An interesting development in that regard was reported to be the signature of this Convention by Mauritius, a rapidly growing financial centre for the Pacific region, which had been undergoing a major revision and modernization of its financial legislation. Furthermore, the Hague Conference pursued its continuing efforts to promote the 1985 Trusts Convention, which includes the creation of trusts for security purposes. This Convention entered into force for Switzerland on 1 July 2007 and was acceded to on 1 June 2007 by Monaco, where the Convention shall enter into force on 1 November 2008.

13. In addition, the Permanent Bureau of the Hague Conference was also involved in the preparation of an annex to the UNCITRAL Legislative Guide on Security Transactions on security rights relating to intellectual property rights (see A/CN.9/649).

#### OAS<sup>5</sup>

14. The Organization of American States adopted a Model Inter-American Law on Secured Transactions in February 2002 at its sixth Inter-American Specialized Conference on Private International Law (CIDIP-VI). During preparations for CIDIP-VII, Member States have undertaken potential instruments for secured transactions registries needed to complement the Model Law. These instruments include the following: (1) Uniform Inter-American Registration Forms, including Amendment Form, Continuation Form, Cancellation Form, and Enforcement Form; (2) Model Rules for Secured Transactions Registries, including guidelines for both filing process and registry operation; and (3) Model Rules for Electronic Registries, including electronic signatures, certification, and multinational registry interconnectivity. In 2008, the OAS General Assembly urged Member States to present working documents on all three instruments. As a result, the delegations of the United States, Canada and Mexico formed an informal committee to prepare preliminary drafts of each. Once presented, the formal working group, also reconvened by the General Assembly in 2008 with governmental and independent experts, will complete the preparatory work, prior to convening a final diplomatic conference.

## G. Electronic commerce and new technologies

### General

15. The UNCITRAL Model Law on Electronic Commerce,<sup>6</sup> the UNCITRAL Model Law on Electronic Signatures,<sup>7</sup> as well as the Convention on the Use of Electronic Communications in International Contracts,<sup>8</sup> provide a good basis for States to facilitate electronic commerce, but only address a limited number of issues. More steps are required to enhance confidence and trust in electronic commerce. They include: appropriate rules on consumer and privacy protection, cross-border recognition of electronic signatures and authentication methods, measures to combat computer crime and cybercrime, network security and critical infrastructure for electronic commerce

<sup>5</sup> www.oas.org.

<sup>6</sup> For the text of the Model Law, see *Official Records of the General Assembly, Fifty-first Session, Supplement No. 17 (A/51/17)*, annex I.

<sup>7</sup> For the text of the Model Law, see *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17 (A/56/17)*, annex II.

<sup>8</sup> For the text of the Convention, see the Annex to General Assembly resolution 60/21, of 23 November 2005.

and protection of intellectual property rights in connection with electronic commerce, among various other aspects.

16. A number of organizations are currently working on various aspects related to the matters referred to above. To a large extent, this work is of a technical nature or is essentially aimed at capacity-building. Some initiatives, however, have taken the form of policy or legislative guidance, and the Commission may wish to take note of them. Those more directly relevant for the Commission's work on electronic commerce are summarized below.

#### **ITU<sup>9</sup>**

17. The International Telecommunications Union (ITU) is currently working on a Toolkit for Cybercrime Legislation.<sup>10</sup> The document ITU-D Study Group Q22/1 had already identified measures aimed at deterring cybercrime as integral components of a national cybersecurity/CIIP strategy. ITU advocates, in particular, the adoption of appropriate legislation to combat the misuse of information and communication technology (ICT) for criminal or other purposes and to prevent activities intended to affect the integrity of national critical infrastructures. As threats can originate anywhere around the globe, the challenges are inherently international in scope and it is desirable to promote harmonization towards international best practices in combating cybercrime.

18. The Toolkit for Cybercrime Legislation aims to provide countries with reference material that can assist in the establishment of a legislative framework to deter cybercrime. Development of the toolkit is by a multidisciplinary international group of experts and a first draft was anticipated in the first quarter of 2008.

19. Cybercrime is not an area directly related to the field of work of UNCITRAL. Nevertheless, to the extent that cybercrime negatively affects international trade, it becomes a matter of concern from the Commission's perspective. Use of modern information and communication technologies has provided new means for criminal, fraudulent or indecent activities, such as embezzlement of funds, slander, and industrial espionage, violation of trade secrets or dissemination of child pornography. At the same time, new types of criminal conduct have emerged, such as identity theft, dissemination of computer viruses, or intentional breakdown of computer and information services. Besides their criminal character, all these activities may significantly affect international trade by causing physical loss or moral damage to individuals and business entities and by undermining business and consumer confidence in electronic commerce.

20. The Commission may wish to take note of the work being done by ITU, which does not directly affect the area of work of UNCITRAL, but which is, by establishing an effective legal framework for preventing and prosecuting computer crime and cybercrime, an essential component of domestic and international strategies to promote electronic commerce.

#### **APEC<sup>11</sup>**

21. The Asia-Pacific Economic Cooperation (APEC) has also been active in the area of cybercrime and security.<sup>12</sup> The APEC Cyber-Security Strategy, for instance, includes

<sup>9</sup> [www.itu.int](http://www.itu.int).

<sup>10</sup> <http://www.itu.int/ITU-D/cyb/cybersecurity/projects/cyberlaw.html>.

<sup>11</sup> [www.apec.org](http://www.apec.org).

<sup>12</sup> [http://www.apec.org/apec/apec\\_groups/som\\_committee\\_on\\_economic/working\\_groups/telecommunications\\_and\\_information.htm](http://www.apec.org/apec/apec_groups/som_committee_on_economic/working_groups/telecommunications_and_information.htm).



a package of measures to protect business and consumers from cybercrime, and to strengthen consumer trust in the use of e-commerce. One notable initiative is the development of key public infrastructure guidelines to facilitate cross-jurisdictional e-commerce.

22. A number of countries in the APEC region are currently implementing and enacting cyber-security laws, consistent with the General Assembly resolution 55/63, of 4 December 2000, and the Convention on Cybercrime adopted by the Council of Europe (Budapest, 23 November 2001)<sup>13</sup> and its Protocol.<sup>14</sup> Against that background, the APEC Telecommunications and Information Working Group (TEL) has launched a Cyber-crime Legislation Initiative and Enforcement Capacity Building Project which is aimed at supporting domestic institutions of APEC member countries to implement new laws.

23. APEC has developed guidelines for establishing and operating so-called Computer Emergency Response Teams (CERTs) as early warning defence systems against cyber attacks. APEC is providing training to domestic officials of APEC countries in connection with the implementation of CERTs. The protection of small and medium-sized enterprises is a priority under the APEC Cyber Security Strategy. Practical tools for protecting small businesses from attacks and spreading viruses have been developed, including advice on how to use the internet securely, safety issues relating to wireless technologies and safe e-mail exchanges.

24. It is expected that work on reducing the criminal misuse of information will continue to be a priority for TEL and will focus on the importance of sharing information; developing procedures and mutual assistance laws, and other measures to protect business and citizens.

25. The Commission may wish to take note of the work being done by APEC, which, like similar work being done by ITU, does not directly affect the area of work of UNCITRAL, but which is, by establishing an effective legal framework for preventing and prosecuting computer crime and cybercrime, an essential component of domestic and international strategies to promote electronic commerce.

#### OECD<sup>15</sup>

26. The Organization on Economic Cooperation and Development (OECD) is currently working on various aspects of the use of information and communication technologies that are relevant for the electronic commerce from the perspective of UNCITRAL. The main aspects of this work are summarized below.<sup>16</sup>

#### *Electronic Authentication*

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<sup>13</sup> The CyberCrime Convention, ETS 185, entered into force on 1 July 2004. It is intended to develop a common criminal policy aimed at the protection of society against cybercrime, inter alia, by adopting appropriate criminal legislation and fostering international cooperation. Source: Council of Europe Treaty Office, <http://conventions.coe.int/>.

<sup>14</sup> The Additional Protocol to the Convention on Cybercrime Concerning the Criminalization of Acts of a Racist and Xenophobic Nature supplements, as between the Parties to the Protocol, the provisions of the Convention on Cybercrime as regards the criminalization of acts of a racist and xenophobic nature committed through computer systems (ETS 189). It was opened for signature in Strasbourg on 28 January 2003. Source: Council of Europe Treaty Office, <http://conventions.coe.int>.

<sup>15</sup> [www.oecd.org](http://www.oecd.org).

<sup>16</sup> [http://www.oecd.org/findDocument/0,3354,en\\_2649\\_37441\\_1\\_119820\\_1\\_1\\_37441,00.html](http://www.oecd.org/findDocument/0,3354,en_2649_37441_1_119820_1_1_37441,00.html).

27. On 12 June 2007, the OECD Council adopted its Recommendation on Electronic Authentication and Guidance for Electronic authentication. The Recommendation encourages efforts by OECD member States to establish compatible, technology-neutral approaches for effective domestic and cross-border electronic authentication of persons and entities. The full text of the Recommendation is available on the OECD website.

28. The OECD has also developed a guidance document on electronic authentication to assist Member countries and non-Member economies in establishing or amending their approaches to electronic authentication with a view to facilitating cross-border authentication. The Guidance sets out the context and importance of electronic authentication for electronic commerce, electronic government and many other social interactions. It provides a number of foundation and operational principles that constitute a common denominator for cross-jurisdictional interoperability.

29. Both the Recommendation and the Guidance conclude a work-stream initiated in response to the "Declaration on Authentication for Electronic Commerce" adopted by Ministers at the Ottawa Ministerial Conference held on 7-9 October 1998 and serve as a bridge to future OECD work on identity management.

30. This line of work by OECD is directly relevant to the Commission's work on electronic commerce. Article 12 of the UNCITRAL Model Law on Electronic Signatures, for example, encourages States to promote cross-border recognition of electronic signatures. Paragraph 1 of that article reflects the basic principle that the determination of whether and to what extent a certificate or an electronic signature is capable of being legally effective should not depend on the place where the certificate or the electronic signature was issued but on its technical reliability. Paragraph 2 of that article provides the general criterion for the cross-border recognition of certificates without which suppliers of certification services might face the unreasonable burden of having to obtain licenses in multiple jurisdictions. The threshold for technical equivalence of foreign certificates is based on testing their reliability against the reliability requirements established by the enacting State pursuant to the Model Law, regardless of the nature of the certification scheme obtaining in the jurisdiction from which the certificate or signature originates.

31. Article 12, paragraphs 2 and 3, of the Model Law on Electronic Signatures deal exclusively with the cross-border reliability test to be applied when assessing the reliability of a foreign certificate or electronic signature. However, in the preparation of the Model Law, it was borne in mind that enacting States might wish to obviate the need for a reliability test in respect of specific signatures or certificates, when the enacting State was satisfied that the law of the jurisdiction from which the signature or the certificate originated provided an adequate standard of reliability. As to the legal techniques through which advance recognition of the reliability of certificates and signatures complying with the law of a foreign country might be made by an enacting State (e.g. a unilateral declaration or a treaty), the Model Law contains no specific suggestion.

32. The lack of common standards for cross-border recognition of electronic signatures and other authentication methods is considered to be a significant impediment to cross-border commercial transactions. Two main problems exist in the given context. On the one hand, technological measures and systems for electronic signatures, in particular digital signatures, are currently much too diverse to enable uniform international standards. On the other hand, fears about fraud and manipulation in electronic communications have led some jurisdictions to establish rather stringent

regulatory requirements, which in turn may have discouraged the use of electronic signatures, in particular digital signatures.

33. Wide accession of the recently adopted United Nations Convention on the Use of Electronic Communications in International Contracts, which provides in its article 9 for the functional equivalence between electronic signatures and traditional types of signature, may go a long way towards facilitating cross-border use of electronic signatures. Nevertheless, notarization of electronic documents and electronic signatures in government or other official records are areas in which governments may be inclined to retain national standards capable of hindering or barring recognition of foreign electronic signatures.

34. Although the OECD recommendations and guidance are not primarily concerned with legal matters, they make reference to the principles of legal recognition of electronic signatures and technology neutrality, which are two of the basic principles of the UNCITRAL Model Law on Electronic Signatures:

“The use of electronic signatures for producing legal effect equivalent to handwritten signatures raises several issues which are addressed by the UNCITRAL 2001 Model Law on Electronic Signatures. OECD Member countries support the use of electronic signatures as equivalent to handwritten signatures and advocate technology neutrality in their use.”<sup>17</sup>

35. The essential element of the OECD recommendations and guidance will be reflected in the final version of the publication on authentication and cross-border recognition of electronic signatures, which the Secretariat plans to issue later this year, following the Commission’s request at its fortieth session.<sup>18</sup> The Commission may wish to take note of the work being done by OECD in this area in light of its previous affirmation that technology neutrality, cross-border recognition and technical interoperability are three essential components of a favourable policy framework to facilitate the use of electronic signatures and authentication methods in international trade.

#### *Consumer Dispute Resolution and Redress*

36. Another area related to electronic commerce in which OECD has been working concerns consumer protection. On 12 July 2007, OECD adopted a Recommendation on Consumer Dispute Resolution and Redress aimed at providing governments with a framework to help consumers resolve disputes and settle claims with business.<sup>19</sup> Again, the full text of the recommendation is available on the OECD’s website.

37. The annex to the recommendation covers disputes in both domestic and cross-border transactions. The recommendation was developed to deal with issues arising from the rapid growth in electronic commerce, but it will also benefit consumers making traditional types of purchases. The Chairman of the OECD Committee on Consumer Policy (CCP), which prepared the recommendation, explains its rationale as follows:

“E-commerce has allowed consumers access to an expanding range of goods and services. Recent studies [however] have shown that consumers may be reluctant to take full advantage of shopping on-line because of concerns about dispute

<sup>17</sup> <http://www.oecd.org/dataoecd/32/45/38921342.pdf>.

<sup>18</sup> *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17 (A/62/17)*, para. 195.

<sup>19</sup> <http://www.oecd.org/dataoecd/43/50/38960101.pdf>.

resolution if they are unsatisfied with their purchase. The Recommendation provides a practical approach to address these concerns in a systematic and comprehensive way.”<sup>20</sup>

38. The recommendation aims at addressing the current practical and legal obstacles to pursuing remedies in consumer cases, whether locally or cross-border contexts. The annex to the recommendation focuses on five priority areas for attention: identifying basic elements needed for effective domestic resolution and redress frameworks; improving resolution of cross-border disputes; enhancing the scope and effectiveness of private sector initiatives to resolve disputes; developing information for monitoring developments and trends in consumer complaints; and improving consumer and business education and awareness on ways to avoid and handle disputes.

39. The domestic framework described in the annex to the recommendation calls on governments to provide consumers with mechanisms allowing them to act individually, such as alternative dispute resolution services and simplified procedures for small claims courts, or collectively, such as actions initiated by a consumer in his name and representing other consumers. It also covers actions initiated by consumer organizations representing consumers, actions initiated by consumer protection enforcement authorities acting as representative parties for consumers. Consumer protection enforcement authorities may obtain or facilitate redress on behalf of consumers, allowing them to seek court orders in civil and criminal proceedings and to act as a representative party in lawsuits seeking redress. In the context of cross-border disputes, the recommendation calls on Member countries to improve awareness of, and access to, dispute resolution and redress mechanisms and to enhance the effectiveness of remedies.

40. UNCITRAL has consistently refrained from dealing with matters related to consumer protection. Article 2, subparagraph 1 (a) of the Convention on the Use of Electronic Communications in International Contracts, for example, clearly excludes consumer transactions from its scope. Most electronic commerce nowadays is done between business entities. However, the share of consumer transactions is increasing and in some industries is the prevailing market. Lack of appropriate rules, guidelines or voluntary codes of conduct for consumer protection in an electronic environment, or even the perception of insufficient legal protection, undermine confidence in electronic commerce and constitute an obstacle to its development. Conflicting standards across borders may also affect the offer of goods and services, as business entities operating under a less developed or excessively tolerant framework may enjoy an unfair competitive advantage, as compared to companies required to comply with more stringent requirements. In some cases, operations under a more lenient legal framework may be favoured by business entities interested in shielding themselves from liability that may arise under more stringent regimes. The interest of attracting investment by these companies may need to be weighed against the risk that the host country might be perceived as a safe harbour for unfair business practices, which may damage the reputation of an entire business sector.

41. The work being done by the OECD in this area is also relevant for UNCITRAL from the point of view of its past and ongoing work in the area of commercial dispute resolution. Online dispute resolution in a business context is indeed one of the items which the Commission requested Working Group I (International arbitration and

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<sup>20</sup> [http://www.oecd.org/document/53/0,3343,en\\_2649\\_34267\\_38960053\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/53/0,3343,en_2649_34267_38960053_1_1_1_1,00.html).

conciliation) to place on its agenda but and consider, at least in an initial phase, in the context of the revision of the UNCITRAL Arbitration Rules.<sup>21</sup>

*Cross-border Co-operation in the Enforcement of Laws Protecting Privacy*

42. Privacy protection has been on the agenda of OECD for a long time and has led the organization to formulate well-known instruments. The latest instrument is the OECD Recommendation on Cross-border Co-operation in the Enforcement of Laws Protecting Privacy, which was adopted by the OECD Council on 12 June 2007.<sup>22</sup> The full text of the recommendation is available on the website of the OECD.

43. The recommendation was developed by the OECD Committee for Information, Computer and Communications Policy (ICCP), through its Working Party on Information Security and Privacy (WPISP). The recommendation is grounded in the OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data (1980).<sup>23</sup> It was adopted to provide a new framework for cooperation in the enforcement of privacy laws. The recommendation was motivated by recognition that changes in the character and volume of cross-border data flows have elevated privacy risks for individuals and highlighted the need for better cooperation among the authorities charged with providing them protection.

44. The framework contained in the annex to the recommendation, and which is embodied therein by reference, reflects a commitment by OECD governments to improve their domestic frameworks for privacy law enforcement to better enable their authorities to cooperate with foreign authorities, as well as to provide mutual assistance to one another in the enforcement of privacy laws. The OECD has developed two model forms to facilitate privacy law enforcement cooperation. The first is a form to assist in the creation of a list of contact points in each country to coordinate requests for assistance. The second is a form for use by an authority in requesting assistance to help ensure that key items of information are included in the request.

45. Lack of confidence in the privacy and security of online transactions and information networks is seen as an element possibly preventing economies from gaining all of the benefits of electronic commerce. On the other hand, regulatory systems restricting the flow of information can have adverse implications for global business and economies. New issues and restrictions on data protection arise from international security concerns, which have led to legislative actions directed at data retention. With a growing stock of international rules these do not only become more heterogeneous but also make it more difficult for companies to comply. As these standards consider conflicting interests the delineation of the field of application of these instruments as well as which of the interests protected will prevail in a specific case is gaining growing importance.

46. Concerns over privacy protection may affect domestic and international electronic commerce in many ways. Conflicting standards across borders may also affect the offer of goods and services, as business entities operating under a less developed or excessively tolerant framework may enjoy an unfair competitive advantage, as

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<sup>21</sup> *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17 (A/61/17)*, para. 187.

<sup>22</sup> <http://www.oecd.org/dataoecd/43/28/38770483.pdf>.

<sup>23</sup> See OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data, applicable on 23 September 1980, [http://www.oecd.org/document/18/0,2340,en\\_2649\\_34255\\_1815186\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/18/0,2340,en_2649_34255_1815186_1_1_1_1,00.html). See further the OECD "Privacy Policy Generator" ([http://www.oecd.org/document/39/0,2340,en\\_2649\\_34255\\_28863271\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/39/0,2340,en_2649_34255_28863271_1_1_1_1,00.html)).

compared to companies required to comply with more stringent requirements. In some cases, operations under a more lenient legal framework may be favoured by business entities interested in shielding themselves from liability that may arise under more stringent regimes. The resulting lack of confidence in the protection of personal or privileged information in foreign jurisdictions may adversely affect international trade.

*Cross-Border Co-operation in the Enforcement of Laws against Spam*

47. New technical means of communication, such as e-mail messaging, have also exacerbated the problems posed by unsolicited commercials. Unreasonable amounts of unsolicited communications have led most large organizations to use filters to block communications from unknown originators, so as to avoid having their servers burdened by unwanted data. That, in turn, has created other problems, such as unintentional loss of commercially relevant information caught by and left unnoticed in quarantine mailboxes in connection with server filters.

48. A number of countries have adopted legal instruments to combat spam. The first problem confronting anti-spam legislation is a definition of and delineation between legitimate commercial messaging and undesired spamming. Enforcement of legal anti-spam measures has proven problematic, due to the number of enforcement agencies and the variety of their powers, limitations on gathering information and sharing information as well as producing the necessary evidence, and limited enforceability across borders due to lack of national jurisdiction over cross-border spam and of appropriate measures for cross-border enforcement at the operational level.

49. On 13 April 2006, the OECD Council adopted a Recommendation on Cross-Border Co-operation in the Enforcement of Laws against Spam. The OECD Council recognized, *inter alia*, that spam “undermines consumer confidence,” and can facilitate “the spread of viruses, serve as the vehicle for traditional fraud and deception as well as for other Internet-related threats such as phishing, and that its effects can negatively impact the growth of the digital economy, thus resulting in important economic and social costs.” The OECD Council further recognized that spam poses unique challenges for law enforcement in it is a “uniquely international problem that can only be efficiently addressed through international co-operation.”

50. Against that background the OECD Council recommended that its member countries should work to develop mechanisms for more efficient cooperation among their spam enforcement authorities. Such mechanisms should include, where appropriate, a domestic framework that included: (a) appropriate laws dealing with spam; (b) steps to ensure that spam enforcement authorities have the necessary powers to obtain evidence sufficient to investigate and take action in a timely manner against violations of anti-spam laws that are committed from their territory or cause effects in their territory; (c) improved ability of spam enforcement authorities to take appropriate action against senders of spam and individuals or companies that profit from the sending of spam; (d) periodical review of domestic framework and take steps to ensure their continued effectiveness for cross-border cooperation in fighting spam; (e) ways to improve redress for financial injury caused by spam.

51. As regards international cooperation, the OECD council recommended: (a) providing spam enforcement authorities with mechanisms to share relevant information with foreign authorities; (b) enabling spam enforcement authorities to provide investigative assistance to foreign authorities, in particular with regard to obtaining information from persons; obtaining documents or records; or locating or identifying persons or things; and (c) designating a contact point for cross-border cooperation.

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52. The OECD council further recommended that member countries should encourage participation by private sector and non-member economies in international enforcement cooperation efforts; efforts to reduce the incidence of inaccurate information about holders of domain names; and efforts to make the Internet more secure.

53. The Commission may wish to take note of the work being done by OECD in the area of cross-border cooperation in the enforcement of laws against spam. The Secretariat will continue to follow these issues, in particular the relationship between the goal of preventing unsolicited commercial communications and the reasonable commercial use of advertisements and other forms of general business communications in well established business practices.

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## A/CN.9/657/Add.2 (Original: English)

**Current activities of international organizations related to the  
harmonization and unification of public procurement law**

## ADDENDUM

## CONTENTS

	<i>Paragraphs</i>
I. Introduction . . . . .	1-5
II. Summary of work of international organizations relating to public procurement. . . . .	6-46
A. Policymaking and legislative work in general and electronic procurement . . . . .	6-27
1. Background and relevance to the work of the Working Group . . . . .	6-7
2. World Trade Organization . . . . .	8
3. Multilateral development banks (MDBs) . . . . .	9-12
4. Africa . . . . .	13-17
5. Asia . . . . .	18-22
6. Europe . . . . .	23-27
B. Transparency and anti-corruption in procurement. . . . .	28-46
1. Background . . . . .	28-30
2. Relevance to the work of the Working Group . . . . .	31
3. United Nations Office on Drugs and Crime . . . . .	32-39
4. Organization for Economic Cooperation and Development . . . . .	40-44
5. United Nations Development Programme . . . . .	45
6. MDBs . . . . .	46

**I. Introduction**

1. This note sets out a non-exhaustive summary of policy-related and rule-formulating work in public procurement undertaken or planned to be undertaken by international organizations that may have implications on the work of UNCITRAL Working Group I (Procurement) (the “Working Group”). It updates the information provided to the Commission in A/CN.9/598/Add.1 at its thirty-ninth session (the “2006 Secretariat Note”), and sets out information by topic and region where there have been further developments since that note was issued. It also refers to complementary work of the Working Group and the UNCITRAL Secretariat where relevant.



2. The Working Group has requested the Secretariat to coordinate and cooperate with relevant international and regional organizations,<sup>1</sup> and to seek expert assistance as regards guidance to be given for the revisions to the 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services (the “Model Law”) (A/49/17 and Corr.1, annex I) currently under preparation and review.<sup>2</sup> On the basis of the information provided in the present note, the Commission may wish to consider further appropriate cooperation and coordination strategies between the Working Group (through the Secretariat) and other relevant international and regional organizations regarding the revision of the Model Law and of the Guide to Enactment that accompanies it.

3. The Commission may also wish to guide the Working Group as to the issues that it should consider in addition to those on its agenda in connection with the current project, or separately in due course.

4. The policy activities in the areas of public procurement of the following organizations described in this paper are derived from the participation of the UNCITRAL Secretariat in the activities concerned, from publicly available materials and from information received by the UNCITRAL secretariat from these organizations in response to its inquiries:

APEC	Asia Pacific Economic Cooperation
COMESA	Common Market for Eastern and Southern Africa
EC	European Commission
MDBs	Multilateral Development Banks, including:
ADB	Asian Development Bank
AfDB	African Development Bank
EBRD	European Bank for Reconstruction and Development
IADB	Inter-American Development Bank
World Bank	
OECD	Organization for Economic Cooperation and Development
UNDP	United Nations Development Programme
UNICRI	United Nations Interregional Crime and Justice Research Institute
UNODC	United Nations Office on Drugs and Crime
WTO	World Trade Organization

5. The paper complements a note by the Secretariat on current activities of international organizations related to the harmonization and unification of international trade law, contained in A/CN.9/657, submitted to the forty-first session of the Commission.

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<sup>1</sup> A/CN.9/575, para. 67 and A/CN.9/615, para. 85.

<sup>2</sup> A/CN.9/615, para. 14.

## **II. Summary of work of international organizations relating to public procurement**

### **A. Policymaking and legislative work in general and electronic procurement**

#### **1. Background and relevance to the work of the Working Group**

6. Public procurement is regulated through a hierarchy of international, regional and national instruments, some or all of which may apply in individual enacting States. At the international level, the United Nations Convention against Corruption (A/Res/58/4) includes mandatory provisions addressing public procurement. At the regional level, the OECD Convention on Combating Bribery in International Business Transactions (1997) may apply to international procurement in States parties to that Convention. Enacting States parties may also be members of regional trade organizations or other international or regional groupings,<sup>3</sup> which have regulatory texts or agreements that address public procurement, both expressly and through the prohibition of discrimination against foreign suppliers within the grouping or organization. The Working Group has therefore recognized that the Model Law should be consistent, to the extent possible, with the requirements of these other texts and agreements, so that it can be enacted by all States that are parties to them. The Working Group has also taken account of the UNCITRAL mandates both to coordinate and cooperate with relevant institutions and to promote the harmonization of procurement legislation and practice.

7. The majority of the above organizations are regularly represented at the Working Group's sessions, and provide information to the Working Group at its sessions on their activities in policy-making and legislative work in general and electronic procurement. In addition, the UNCITRAL secretariat is actively engaged in the work of the MDBs, the OECD, the UNDP and the UNODC set out in this note, and is in regular communication with the other organizations. The UNCITRAL Secretariat has also cooperated with the WTO secretariat on various issues related to legislative and technical assistance work.

#### **2. World Trade Organization**

8. The WTO activities in public procurement continue to focus on the renegotiation of the plurilateral Government Procurement Agreement (the "GPA"), as advised in the 2005 and 2006 Secretariat Notes.<sup>4</sup> In December 2006, provisional agreement was reached by the negotiators on the text of a revised GPA. The agreement of the negotiators is provisional as it is subject, first, to a final agreement on the text itself; and, secondly, to a mutually satisfactory outcome to the negotiations on coverage. Final negotiations are ongoing.

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<sup>3</sup> Such as the Asia-Pacific Economic Cooperation (APEC), the European Union (Procurement Directives 2004/17/EC and 2004/18/EC), the draft Free Trade Area of the Americas Agreement (FTAAA), the North American Free Trade Agreement (NAFTA), the Organization of American States (OAS) and the World Trade Organization (WTO) Agreement on Government Procurement (GPA).

<sup>4</sup> A/CN.9/584, para. 55, and A/CN.9/598/Add.1, paras. 5-9.

### 3. Multilateral development banks (MDBs)

9. In the 2006 Secretariat Note, the Commission's attention was drawn to the activities of a joint working group on Harmonization of Electronic Government Procurement (e-GP) (the "Joint Working Group"),<sup>5</sup> set up at the beginning of 2003 by the ADB, the IADB, and the World Bank, and subsequently joined by the AfDB, EBRD and Nordic Development Fund.<sup>6</sup>

10. Since the issue of the 2006 Note, the Joint Working Group has conducted and published an in-depth survey of electronic government procurement (sponsored by the ADB, the IADB, and the World Bank).<sup>7</sup> The survey addressed electronic government procurement systems from a total of 15 countries, identifying strategic approaches to the adoption of electronic government procurement and the functions of systems implementing the programmes concerned, the issues and costs and benefits arising in the transition to electronic government procurement, the successes achieved, and lessons learned. The survey concluded, among other things, that some aspects of electronic government procurement were relatively advanced (such as electronic publication systems, the use of government procurement websites and the legislative framework), but that these aspects were not always sufficiently supported. Thus the survey considered that practical aspects of the programmes, such as systems integration and functionality, management control, monitoring procurement process information, and internal audit would play a significant role in promoting good procurement practice.

11. The preparation of requirements for electronic procurement under MDB financed projects is ongoing. These requirements will support the E-Tendering Requirements published in October 2005 and the E-reverse Auction Guidelines published in December 2005,<sup>8</sup> and will supplement and not replace existing requirements in procurement processes for MDB funded activities. The requirements will be documented, including through interactive standard bidding documents, guidance notes on electronic tendering, electronic reverse auctions, and electronic purchasing, and papers on the specification and codification of electronic government procurement.

12. For a further aspect of the Joint Working Group's activities, see paragraph 46 below.

### 4. Africa

#### *African Development Bank*

13. In the period under review, the AfDB has continued the publication of country procurement assessment reports and the provision of support to subregional organizations, such as COMESA and WAEMU in various legislative initiatives on harmonization and modernization of public procurement systems at national, subregional and regional levels (see paras. 14 to 17 below).

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<sup>5</sup> A/CN.9/598/Add.1, para. 10, and see also "Current activities of international organizations related to the harmonization and unification of international trade law" that was before the Commission at its thirty-eighth session (the "2005 Secretariat Note"), A/CN.9/584, paragraph 50.

<sup>6</sup> The UNCITRAL Secretariat participates in meetings of the Joint Working Group as an observer.

<sup>7</sup> The survey is available at <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=1064452>.

<sup>8</sup> Discussed in A/CN.9/598/Add.1, paras. 14-20.

*Common Market for Eastern and Southern Africa*

14. In the 2006 Secretariat Note, the Commission's attention was drawn to the work of COMESA on the Enhancing Procurement Reforms and Capacity Project (EPRCP) under the Public Procurement Reform Project (PPRP).<sup>9</sup>

15. In 2007, COMESA commenced a project to consolidate the reforms under the EPRCP and PPRP in COMESA States, with the support of the AfDB. The aims of the project are to ensure full awareness of the principles and workings of the national and regional public procurement systems, the publication of national procurement laws and regulations that are consistent with the COMESA procurement directive passed under the PPRP, and the issue of procurement training materials and case studies. A further aspect of this project involves assessing the levels of implementation of these reforms in selected COMESA member States, and assessing capacity-building needs.

*West African Economic and Monetary Union*

16. Following the adoption of the WAEMU Public Procurement Directives in December 2005,<sup>10</sup> with the support of the AfDB and the African Capacity Building Foundation (ACBF), the WAEMU commenced a Regional Public Procurement Reform project in 2007. The objective of the project is to modernize and harmonize public procurement systems in the Union's member States through effective implementation of its regulations on public procurement. The project will develop and promote a framework for public procurement, and build institutional and human capacity in the Commission and the member States of the Union.

17. The project is expected to result in the incorporation of two WAEMU directives on public procurement into national laws of the eight member countries of the Union,<sup>11</sup> the preparation of regional standards in bidding documents, and the creation of a regional public procurement monitoring capacity. Under a related project, a regional electronic government procurement portal will be established for the publication of procurement information including notices, contract award results and other procurement-related information.

## 5. Asia

*Asia Pacific Economic Cooperation*

18. During the period under review, the APEC Government Procurement Expert Group (GPEG)<sup>12</sup> has completed its consideration of the member economies' voluntary reviews and reports to GPEG on the APEC non-binding Principles on Government Procurement (the "Principles"),<sup>13</sup> and continues its work on revising the Principles, in

<sup>9</sup> Developed by the COMESA secretariat pursuant to the decision taken at the seventeenth meeting of the COMESA Council of Ministers (Kampala, 4-5 June 2004).

<sup>10</sup> See A/CN.9/598/Add.1, para. 27.

<sup>11</sup> Benin, Burkina Faso, Côte d'Ivoire, Guinea-Bissau, Mali, Niger, Senegal and Togo.

<sup>12</sup> The Group was established in 1995 as a sub-forum of the APEC Committee on Trade and Investment.

<sup>13</sup> Available at [http://www.apecsec.org.sg/apec/apec\\_groups/committees/committee\\_on\\_trade/government\\_procurement.html](http://www.apecsec.org.sg/apec/apec_groups/committees/committee_on_trade/government_procurement.html).

particular to incorporate the APEC Transparency Standards on Government Procurement (the “Transparency Standards”) as reported in the 2006 Secretariat Note.<sup>14</sup>

19. The GPEG has also identified the areas of the Principles that are relevant to anti-corruption in procurement, and has completed and published Model Measures for Government Procurement (in the context of regional and other free trade agreements, and building on the Principles and Transparency Standards).<sup>15</sup>

20. In support of its work regarding the Principles and the Transparency Standards, GPEG is continuing to develop capacity-building projects, including progressing small and medium-sized enterprise initiatives in consultation with the SME Working Group,<sup>16</sup> encouraging the development of electronic government procurement systems through a framework for electronic procurement Guidelines.

21. The content of the Principles and the Transparency Standards, and any published revisions, will continue to be brought to the attention of the Working Group as and when they are relevant to its work.

#### *Asian Development Bank*

22. In February 2007, the ADB published revised Procurement Guidelines, which require international competitive bidding unless that procurement method would not be the most economic and efficient method of procurement, or where other methods are deemed more appropriate.<sup>17</sup>

## **6. Europe**

#### *European Commission*

23. During the period under review, the EC issued a new Remedies Directive,<sup>18</sup> based on extensive consultations with procuring entities and the private sector, which seeks to strengthen legal review procedures in the area of public procurement. The Directive also seeks to combat illegal direct awards of public contracts, which the EC considers to be the most serious infringement of EU procurement law. The Directives enable national courts to render public contracts ineffective if they have been illegally awarded without transparency and prior competitive tendering, or, in appropriate circumstances and by reference to the national interest, to impose alternative penalties that are effective, proportionate and dissuasive. Member States have until 20 December 2009 to implement the new Directive into national law. The question of remedies will be taken up by the Working Group in at its fourteenth session.<sup>19</sup>

24. For contracts based on framework agreements and dynamic purchasing systems, where speed and efficiency are generally considered to be particularly relevant, the Directive provides for a specific review mechanism. For these types of contracts,

<sup>14</sup> A/CN.9/598/Add.1, para. 29.

<sup>15</sup> Annex 1 to the GPEG Model Measures, available at [http://aimp.apec.org/Documents/2007/GPEG/GPEG1/07\\_gpeg1\\_003.pdf](http://aimp.apec.org/Documents/2007/GPEG/GPEG1/07_gpeg1_003.pdf).

<sup>16</sup> See the discussion of the SME-related activities in A/CN.9/598/Add.1, paras. 29, 40 and 41.

<sup>17</sup> Available at <http://www.adb.org/Documents/Guidelines/Procurement/>.

<sup>18</sup> Directive 2007/66/EC, published on 20 December 2007, amending Directives 89/665/EEC and 92/13/EEC.

<sup>19</sup> A/CN.9/648, para. 17 and annex. The fourteenth session will be held in Vienna, from 8-12 September 2008, subject to confirmation by the Commission.

Member States may choose to replace the normal 10-day standstill obligation by a post-contractual review procedure. The Working Group will also be addressing these types of contracts at its fourteenth session.<sup>20</sup>

25. Also during the period under review, the EC published a series of feasibility studies in connection with the implementation of electronic procurement, regarding electronic catalogues, the electronic publication of procurement-related information, compliance verification in electronic procurement and the provision of electronic certificates.<sup>21</sup>

#### *EBRD*

26. In October 2007, the EBRD started work on the first comprehensive review and updating of its Procurement Policies and Rules (PP&R) since their adoption in 1992. The aim of the review is to address the evolving needs of the EBRD, its clients and suppliers, and its public stakeholders. The review is being conducted in the light of the increased activity in the east and south regions, and in municipal infrastructure and concession financing. The EBRD considers that these activities entail greater procurement risks, especially where the procuring entities do not have adequate experience in international open tendering and contract management. Further, ten of the EBRD's countries of operations have joined the European Union and have incorporated the EC procurement directives into their legislation.<sup>22</sup> Finally, the PP&R will be considered in the light of anti-corruption and integrity initiatives and other procurement objectives.

27. The EBRD envisages that the reforms to the PP&R will focus on ensuring enhanced transparency and accountability through improved monitoring and reporting on compliance, increased disclosure of procurement-related information, strengthened enforcement mechanisms to promote integrity and fight corruption, accommodating local conditions including local law, language, currency, and adapting thresholds for mandatory tendering to reflect differing local environments, modernizing procurement processes and reports through the use of electronic procurement. The results of the review have not yet been published.

## **B. Transparency and anti-corruption in procurement**

### **1. Background**

28. Multilateral instruments and initiatives have been developed in recent years to enhance international cooperation in the fight against corruption and fraud, many of them addressing the area of public procurement, which has been acknowledged to be an area of significant vulnerability in this regard.<sup>23</sup> This section of the note sets out a non-exhaustive summary of the implementation of measures to promote transparency and

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<sup>20</sup> See previous footnote.

<sup>21</sup> Further details are set out at [http://ec.europa.eu/internal\\_market/publicprocurement/e-procurement\\_en.htm](http://ec.europa.eu/internal_market/publicprocurement/e-procurement_en.htm).

<sup>22</sup> Directive 2004/EC/17 and Directive 2004/EC/18.

<sup>23</sup> As per the Organisation for Economic Co-operation and Development (OECD): “[p]ublic procurement has been identified as the government activity most vulnerable to corruption”: Integrity in Public Procurement: Good Practice from A to Z (OECD, 2007), available at [http://www.oecd.org/document/60/0,3343,en\\_2649\\_34135\\_38561148\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/60/0,3343,en_2649_34135_38561148_1_1_1_1,00.html).

integrity in public procurement, noting where that work has been carried out in conjunction with the Secretariat.

29. The UNODC, the OECD and UNDP, and the MDBs, in addition to the provision of information on relevant activities to the Working Group and Secretariat, have during the period under review sought the input of the Working Group through the Secretariat on materials and publications issued in this area of activity, and have sought the participation of the UNCITRAL Secretariat in the procurement-related aspects of the activities described below.

30. These activities have followed the entry into force of the United Nations Convention against Corruption in December 2005 (the “Convention”).<sup>24</sup> There are both legislative initiatives and the provision of functional and technical guidance on the infrastructure that is required to support those initiatives, including the promotion of integrity and transparency in procurement systems and the assessment of implementation in States in various regions.

## **2. Relevance to the work of the Working Group**

31. The Working Group has noted that the above anti-corruption activities may have implications for its work for three reasons. First, the Model Law is (through its article 3) expressly subject to international obligations of enacting States, such as those imposed by the Convention.<sup>25</sup> Secondly, the activities described may influence how the Model Law is implemented in certain enacting States,<sup>26</sup> and consistent and effective implementation is a vital aspect of UNCITRAL’s work in procurement. Thirdly, the requirements of the Convention link procurement systems with adequate internal control and risk management in public finances, requiring procurement systems to address non-legislative issues.<sup>27</sup> Such issues may include the planning and contract administration phases of procurement, and other questions of public sector governance that fall outside the remit of the Model Law.

## **3. United Nations Office on Drugs and Crime**

32. The United Nations Convention against Corruption contains an article (within its preventive measures chapter) dedicated to prevention of corruption in procurement, through the promotion of safeguards to ensure efficiency, transparency and

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<sup>24</sup> Adopted by the General Assembly on 31 October 2003, General Assembly resolution 58/4, annex. Other relevant texts include the African Union Convention on Preventing and Combating Corruption, the SADC Protocol against Corruption, the OECD Convention against Bribery of Foreign Public Officials, the Inter-American Convention against Corruption, the ADB-OECD Anti-Corruption Action Plan for Asia-Pacific, and the Council of Europe Criminal Law Convention on Corruption.

<sup>25</sup> See, also, paragraph 6 above.

<sup>26</sup> UNCITRAL’s technical assistance mandate includes preparing and promoting the use and adoption of its Model Law, among other texts, and its mandate to coordinate the work of relevant organizations and to encourage cooperation includes the avoidance of duplication of effort and the promotion of efficiency, consistency and coherence in relevant work.

<sup>27</sup> The relevant provision is article 9 (2) of the Convention: “2. Each State Party shall, in accordance with the fundamental principles of its legal system, take appropriate measures to promote transparency and accountability in the management of public finances. Such measures shall encompass, inter alia: ... (d) Effective and efficient systems of risk management and internal control ...”.

accountability in the procurement process and the effective management of public finances. The UNODC, as custodian of the Convention, has published a Legislative Guide to the Convention,<sup>28</sup> which notes that the introduction of the measures set out in the text may require amendments to, or new, legislation or regulations, depending on the existing legal framework of each State Party, and refers to the Model Law as a relevant legislative text in this regard.

33. UNICRI and UNODC are developing and maintaining a Technical Guide to support the Legislative Guide, with the contribution of procurement-related material from expert consultants and the UNCITRAL Secretariat. This material will address anti-corruption and other procurement goals and objectives (focusing on the key role of transparency), and the role of electronic procurement as a tool for achieving those sometimes conflicting goals. Publication is anticipated in the second quarter of 2008.

34. The Conference of the States Parties to the Convention (the “Conference”)<sup>29</sup> set up several Open-ended Intergovernmental Working Groups, including a Working Group on Technical Assistance, also to be served by the UNODC Secretariat. In the context of coordination regarding technical assistance, the UNODC and the UNCITRAL Secretariat<sup>30</sup> have agreed that the latter should participate in the provision of technical assistance that will be required for implementing the Convention’s provisions, initially regarding short- and medium-term activities such as legislative assistance and advisory services regarding the Convention and its implementation, but also including the development of a strategic plan for longer-term activities.

35. As a first step in this regard, the UNCITRAL Secretariat presented a note to the second session of the Conference (Nusa Dua, Indonesia, 28 January-1 February 2008) entitled “The United Nations Convention against Corruption – implementing procurement-related aspects”.<sup>31</sup> The note considered the Convention requirements regarding procurement systems, and concluded that the text of the Model Law addressed almost all the procurement-related legislative provisions of the Convention, and the Guide to Enactment that accompanies the Model Law addressed in broad terms the remainder. However, as the 2006 Secretariat Note advised, the requirements of article (1) (e) of the Convention addressing conflicts of interest, screening procedures and training are not provided for in the Model Law itself, and the Commission requested the Working Group to ensure that the Model Law, when revised, should comply with the requirements of the Convention.<sup>32</sup> The Working Group is to consider the implementation of this recommendation at its fourteenth session.<sup>33</sup>

<sup>28</sup> United Nations Publication Sales No. E.06.IV.16, ISBN-10: 92-1-133755-0, also available at [http://www.unodc.org/pdf/corruption/CoC\\_LegislativeGuide.pdf](http://www.unodc.org/pdf/corruption/CoC_LegislativeGuide.pdf).

<sup>29</sup> As reported in para. 44 of the 2006 Secretariat Note, the implementation of the Convention will operate through the Conference of the States Parties to the Convention, assisted by the UNODC Secretariat, which also ensures coordination with the secretariats of relevant regional and international organizations on the implementation of the Convention (General Assembly resolution 58/4, annex, para. 8).

<sup>30</sup> Details of the Technical Assistance Working Group and its work to date are found at <http://www.unodc.org/unodc/en/treaties/CAC/working-group3.html>.

<sup>31</sup> CAC/COSP/2008/CRP.2, transmitted under cover of A/CN.9/WG.I/XIII/INF.2 to the Working Group for information on 12 February 2008.

<sup>32</sup> A/CN.9/598/Add.1, para. 43, A/61/17, para. 192.

<sup>33</sup> See footnote 18, above.



36. The resolutions of the Conference at its second session emphasized, among other things, that States parties to the Convention should continue to adapt their legislation and regulations to implement its requirements, and that coordination and enhancing technical assistance for the implementation of the Convention should be strengthened (including as between donors, through the identification of technical assistance needs and through the work of the Technical Assistance Working Group).<sup>34</sup> The third session of the Conference (to be held in Qatar in 2009), is planned to address, inter alia, the field of preventive measures, which will include a focus on the provisions regarding public procurement, together with proposals for a review mechanism for implementation of the Convention.

37. The Technical Assistance Working Group held an “International Cooperation Workshop on Technical Assistance for the Implementation of the United Nations Convention against Corruption”, in Montevideo, Uruguay, from 30 May to 1 June 2007, and a further meeting in Vienna on 1 and 2 October 2007. The Working Group presented its reports to the Conference at its second session, which stressed the importance of preventive measures, and which were considered by the Conference in formulating the resolutions described above.<sup>35</sup> Further meetings of all of the Working Groups constituted by the Conference will be held in the latter part of 2008.<sup>36</sup>

38. In its support of the Technical Assistance Working Group, the UNODC conducted a survey regarding implementation of the procurement-related aspects of the Convention through a self-assessment checklist, and has published a report of its findings.<sup>37</sup> This report noted that 56 per cent of reporting parties indicated full compliance with the requirements of article 9 of the Convention (one advising through the enactment of procurement legislation based on the Model Law),<sup>38</sup> 40 per cent indicated partial compliance and 4 per cent provided no information. Detailed information regarding compliance on a regional basis is set out in the report. A second report, addressing the requirements for technical assistance needs identified by reporting parties for the implementation of the Convention,<sup>39</sup> noted that the parties reporting partial compliance

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<sup>34</sup> See draft “Resolutions and decisions adopted by the Conference of the States Parties to the United Nations Convention against Corruption”, available at <http://www.unodc.org/documents/treaties/UNCAC/COSP/session2/UNEDITED-COSP2Resolutions.pdf>.

<sup>35</sup> “Report of the Workshop on Development and Technical Assistance” (Montevideo, 30 May-1 June 2007), CAC/COSP/2008/6, and “Report on the meeting of the Open-ended Intergovernmental Working Group on Technical Assistance” (Vienna, 1 and 2 October 2007), CAC/COSP/2008/5, available at <http://www.unodc.org/unodc/en/treaties/CAC/CAC-COSP-session2.html>.

<sup>36</sup> Open-ended Intergovernmental Expert Working Group on Review of Implementation (Vienna, 22-24 September 2008 and 15-17 December 2008), Open-ended Intergovernmental Working Group on Asset Recovery (Vienna, 25-26 September 2008), Open-ended Intergovernmental Working Group on Technical Assistance (Vienna, 18-19 December 2008).

<sup>37</sup> “Self-assessment of the implementation of the United Nations Convention against Corruption”, CAC/COSP/2008/2, available at <http://www.unodc.org/documents/treaties/UNCAC/COSP/session2/V0788913e.pdf>, paras. 42-47 and Figure IV.

<sup>38</sup> As noted on the UNCITRAL website, approximately 20 States have notified the Commission that they have enacted procurement legislation based on or inspired by the Model Law. See [http://www.uncitral.org/uncitral/en/uncitral\\_texts/procurement\\_infrastructure/1994Model\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/1994Model_status.html).

<sup>39</sup> “Self-assessment of technical assistance needs for the implementation of the United Nations Convention against Corruption”, CAC/COSP/2008/2/Add.1, available at <http://www.unodc.org/documents/treaties/UNCAC/COSP/session2/V0789301e.pdf>.

with the requirements of article 9 identified needs including a development plan for implementation, legal advice, legislative drafting, model legislation and a site visit by an anti-corruption expert.<sup>40</sup> These reports will form the basis for the ongoing technical assistance work of the UNODC, assisted by the UNCITRAL Secretariat, in the short to medium term.

39. A 7th Global Forum on Reinventing Government, on the theme of “Building Trust in Government” (Vienna, 26-29 June 2007), was organized by the UNODC in cooperation with the Government of Austria. The UNODC and UNCITRAL Secretariats, and representatives of UNDP, the OECD, Transparency International<sup>41</sup> and the World Bank participated in a session on “Public Procurement, Money Laundering and Asset Recovery: Rethinking and Repairing Government Vulnerability”.<sup>42</sup> The session discussed the preventive mechanisms to address corruption in public procurement and their interaction with other objectives of procurement systems. The conference also aimed to promote better international and regional cooperation, and to facilitate the exchange of information on good practice and experiences. It concluded with the issue of the “Vienna Declaration on Building Trust in Government”.<sup>43</sup>

#### 4. Organization for Economic Cooperation and Development

40. During the period under review, the OECD has continued its efforts at both international and regional levels on public procurement reform from the perspective of public governance, development aid and the prevention of bribery of foreign public officials. The work involved has included a series of outreach measures, such as the issue of publications after consultation and collaboration with governments and procurement specialists (including the UNCITRAL Secretariat), country monitoring and reporting, and workshops, and regional conferences and other forums aimed at introducing the recommendations and guidance set out in those publications and at exchanging information on good practice.

41. The OECD Working Group on Bribery in International Business Transactions published in 2007 its “Bribery in Public Procurement: Methods, Actors and Counter-Measures”, which considered bribery in the context of the growing complexity of bribery schemes in public procurement, and provided mechanisms to identify and prevent corruption in public procurement through effective prevention and sanctions. This OECD Working Group also recognized at the second session of the Conference that the OECD Convention on Combating Bribery in International Business Transactions and the Convention (against Corruption) are complementary in many aspects. The OECD Working Group and UNODC are consequently cooperating as regards the implementation of the Convention, through, for example, contributions by the OECD to the Conference of State Parties, and the provision of input into the

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<sup>40</sup> Ibid., paras. 26-31 and Figure 4.

<sup>41</sup> Transparency International (TI) is actively engaged in public procurement as an aspect of anti-corruption efforts. One focus of TI’s procurement-related work is areas considered as particularly vulnerable to corruption, such as defence procurement, construction projects and aid delivery, and publishes guidelines and other information at [http://www.transparency.org/global\\_priorities/public\\_contracting/projects\\_public\\_contracting](http://www.transparency.org/global_priorities/public_contracting/projects_public_contracting).

<sup>42</sup> This session formed part of a workshop entitled “Reinvention with Integrity: Using the United Nations Convention against Corruption”.

<sup>43</sup> The text is available at <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan026677.pdf>.

development of the Legislative Guide and the Technical Guide to support the Convention described in paragraphs 35 and 36 above.

42. The OECD's Public Governance and Territorial Development Directorate also published a document in 2007 entitled "Integrity in public procurement: Good practice from A to Z", compiled following a Symposium and Forum held in November 2006 entitled "Mapping out Good Practices for Integrity and Corruption Resistance in Procurement".<sup>44</sup> Significant findings included that while the bidding process had been improved through many recent initiatives in projects such as roads, defence and dams, other vulnerable but less visible areas had been overlooked, including needs assessment, procurement planning and contract administration. Further, the report considered exceptions to competitive procedures, such as emergency contracting and defence procurement. The report cited examples of good practice not only in OECD countries, but also in Brazil, Chile, Dubai, India, Pakistan, Romania, Slovenia and South Africa.

43. Also following the conclusions of the Symposium and Forum referred to above, the OECD has issued a "Draft Checklist for Enhancing Integrity in Public Procurement", again after consultation with interested parties including the UNODC and UNCITRAL Secretariats. The Checklist, when finalized, is intended to be a practical instrument aimed at providing standards for policymakers in reforming public procurement systems to reinforce integrity and public trust in how public funds are managed, addressing functional guidance and subject to the relevant legislative framework (with reference to the Convention and Model Law).

44. During the period under review, the OECD has held regular regional conferences and workshops on best practice and enhancing integrity in public procurement. Recent venues have included central Europe, Latin America and the Middle East and North Africa. The UNODC and UNCITRAL Secretariats participated in the most recent such event, organized by the General Treasury of the Kingdom of Morocco in collaboration with the OECD.<sup>45</sup> Held in Rabat, Morocco, on 3-4 April 2008, it included a Regional Conference on Enhancing Integrity in Public Procurement, and a Workshop on Sharing Good Practices for Enhancing Integrity in Public Procurement, and discussion of the conclusions of a Joint Learning Study (JLS) on Integrity in Public Procurement in Morocco. The JLS is intended to operate as the OECD's pilot study on public procurement in the region, and so the conference and workshop explored lessons learned from the adaptation of the OECD methodology in the JLS, and future uses for OECD instruments, such as the Draft Checklist for Enhancing Integrity in Public Procurement.

## 5. United Nations Development Programme

45. The UNDP Democratic Governance Group conducts regional anti-corruption projects and UNDP has worked with UNODC since the Convention came into force in

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<sup>44</sup> The UNCITRAL Secretariat participated in both the Symposium and the Forum, and provided input in the resulting publication.

<sup>45</sup> The event was also part of the OECD's Good Governance for Development in Arab Countries Initiative, and other international organizations attending included the African Development Bank, the European Commission, the Organisation of the Islamic Conference (OIC), the World Bank and the World Trade Organization (WTO), together with representatives of 12 regional and 6 OECD governments.

regional projects regarding its implementation.<sup>46</sup> In the period under review,<sup>47</sup> the Europe and Commonwealth of Independent States region of UNDP set up an Anti-Corruption Practitioners Network, based at its Bratislava Regional Centre.<sup>48</sup> Its main current objective is the implementation of an anti-corruption regional project focusing on national capacity assessment and development in the region, and the UNCITRAL Secretariat will provide input on the procurement aspects of the project.

## 6. MDBs

46. The Joint Working Group continues to promote the use of electronic procurement as a useful tool against corruption, and has issued a study entitled “Corruption and Technology in Public Procurement”, identifying the key risk areas in the procurement process and the use of electronic systems to assist in meeting the risks identified.<sup>49</sup> The MDBs are using this study in the development of the documents and tools referred to in paragraph 11 above.

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<sup>46</sup> UNCITRAL participated in one such project, reviewing draft procurement legislation and presenting findings at a workshop, in 2007.

<sup>47</sup> Following the UNDP Regional Forum on Anti-Corruption Institutions (Vienna 12-14 December 2005). See the Report of the Regional Forum on Anti-corruption Institutions, Vienna International Centre, <http://europeandcis.undp.org/files/uploads/Lotta/AC%20Forum%20Report.pdf>.

<sup>48</sup> Details are found at <http://anticorruption.undp.sk>.

<sup>49</sup> “Corruption and Technology in Public Procurement”, January 2007, by Dr. Paul R. Schapper on behalf of the World Bank, cited with permission of the World Bank.

*Part Three*

**ANNEXES**



**I. SUMMARY RECORDS OF THE MEETINGS OF THE UNITED NATIONS  
COMMISSION ON INTERNATIONAL TRADE LAW DEVOTED TO  
THE DRAFT CONVENTION ON THE CARRIAGE  
OF GOODS [WHOLLY OR PARTLY] [BY SEA]**

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**Summary record of the 865th meeting, held at Headquarters, New York,  
on Monday, 16 June 2008, at 10.30 a.m.**

[A/CN.9/SR.865 and Corr.1]

*Temporary Chairman:* Mr. Michel (Under-Secretary-General for Legal Affairs, The Legal Counsel)

*(Later) Chairman:* Mr. Illescas (Spain)

*The meeting was called to order at 10.55 a.m.*

**Opening of the session**

1. **The Temporary Chairperson** declared open the forty-first session of the United Nations Commission on International Trade Law (UNCITRAL). He said that much of the work of the United Nations system rarely made headlines, yet that quiet work was an integral part of its objectives to promote higher standards of living, social progress and economic development. The Charter of the United Nations offered a framework of values that contributed to the emergence of a fair and inclusive global economy, and the Organization established global norms and standards to further develop those values. That standard-setting work had become ever more important in an era of globalization. The work of the Commission resulted in closer international ties and greater domestic economic stability, two essential conditions for international peace and human development.

2. The main item on the agenda for the forty-first session was the consideration of the draft convention on contracts for the international carriage of goods wholly or partly by sea, which was to be submitted to the General Assembly for adoption at its sixty-third session. Few industries were by nature as international as the transportation industry or therefore in greater need of modern, predictable and uniform rules to support its transactions. The draft convention was a comprehensive instrument that would make the law better suited to the current realities of commerce and would reduce the cost of transactions.

3. Commercial fraud, also on the agenda, posed a considerable obstacle to the growth of international trade. In addition to actual financial losses suffered by victims

of fraud, fraudulent practices had a broader negative effect in that they undermined confidence in legitimate trade instruments. The Secretariat, at the Commission's request, had submitted a note setting out 23 indicators of commercial fraud, accompanied by illustrations and advice. The Commission might wish to publish those indicators for use by its secretariat in providing technical assistance, and by Governments and international organizations in their initiatives against fraud.

4. The Commission also had a role to play in the broad work of the United Nations to strengthen the rule of law. In accordance with General Assembly resolution 62/70, inviting comment on the role of the Commission in promoting the rule of law, it had taken an interest in seeing its work integrated into the Organization's broader efforts in that area. Through its work in the areas of arbitration and mediation, in particular, and its technical assistance programme, the Commission helped to build institutional capacities and mechanisms for effective enforcement. Effective commercial law played a supportive role in addressing root causes of many international problems, such as migration caused by impoverishment, inequality and internal conflicts, or inequitable access to shared resources, and constituted the foundation of regional and global economic integration. The promotion of arbitration, conciliation and mediation in the resolution of cross-border disputes was also helpful in preventing isolated disagreements from escalating into political conflicts. Modern rules on commercial law that enhanced transparency in international transactions were also useful in helping to prevent cross-border economic crimes and financing of terrorism.

5. The Commission would also consider its own methods of work at the session. The debate was timely, taking place after the increase in membership from 36 to

60 and the broadening of the spectrum of observers that might participate in its deliberations. Fine-tuning of its working methods and publication of its practices would facilitate the participation of members and observers and further strengthen its position as the leading global agency for rule formulation.

#### Election of officers

6. **Mr. Delebecque** (France), supported by **Mr. Sharma** (India), **Mr. Fujita** (Japan), **Mr. Ibrahima Khalil Diallo** (Senegal), **Mr. Elsayed** (Egypt), **Mr. Lebedev** (Russian Federation) and **Mr. Hu** (China), nominated Mr. Rafael Illescas (Spain) for the office of Chairperson of the forty-first session of the Commission.

7. *Mr. Illescas (Spain) was elected Chairperson by acclamation.*

8. *Mr. Illescas (Spain) took the Chair.*

#### Adoption of the agenda (A/CN.9/644)

9. **Mr. Delebecque** (France) said that the agenda item entitled "Working methods of UNCITRAL" was of major importance and sought assurances that its consideration would be given adequate time in the Commission's schedule.

10. **The Chairperson** said that, although a final programme of work had not yet been drawn up, that request would be taken into consideration.

11. *The agenda was adopted.*

#### Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea (A/CN.9/642, A/CN.9/645, A/CN.9/658 and Add.1-13)

12. **The Chairperson** drew attention to the text of the draft convention, which was contained in document A/CN.9/645. The text represented six years of work by the Working Group, which had spent a total of 180 working days on the draft within the past year.

13. As had been noted at the end of the Commission's fortieth session, the draft convention constituted no more than a proposal, notwithstanding the long and intensive discussions within Working Group III (Transport Law). The Working Groups were subsidiary bodies of the Commission, which had sovereign power to review their proposals, as was its consistent practice. Its method of review would be consensus-based, like the work of the Working Group itself, which had produced a text that

reflected the prevalent views of its members.

14. He expressed appreciation for the input of non-governmental observers and hoped that they would continue to allow the Commission to benefit from their valuable experience. However, in the interest of completing the Commission's work at the current session, their views would not be taken into account in the finalization of the draft.

15. The draft instrument had much to recommend it and was already serving as a benchmark for regional instruments. However, the existence of such regional agreements might complicate the universal implementation of the draft convention, once approved, and that was a further factor that should encourage the Commission to conclude its work during the current session.

16. Turning to the text of the draft convention, he proposed that draft article 1, which set out definitions of important terms used therein, should not be discussed in a void but rather should be referred to, as appropriate, in the course of reviewing the subsequent articles. He invited members of the Commission to make general comments before undertaking an article-by-article analysis.

17. **Mr. Elsayed** (Egypt) said that his delegation, which was currently chairing the League of Arab States, had made a careful study of the draft convention. It had found some overlapping in the definitions, some aspects that had not been addressed, and some articles that needed to be corrected. A leading concern should be to ensure a balance between the parties involved in maritime transport and to provide clearly for the responsibility and accountability of carriers.

18. **Mr. Ibrahima Khalil Diallo** (Senegal) said that Senegal along with other African countries had actively participated in the work of the Working Group and was happy to see many of its positions reflected in the draft. While it was not satisfied with some of its parts, it was prepared to set aside its reservations in the interest of consensus.

19. **Mr. Blake-Lawson** (United Kingdom) said that the United Kingdom's comments on the draft (A/CN.9/658/Add.13) might not have been seen, owing to their tardy submission, and he invited delegations to read them. His delegation generally supported the draft text, which would contribute to the greater harmonization of international law, but in the interests of strengthening legal certainty it had put forward proposals concerning the definition of "contract of carriage" and chapters 9 and 11.



20. **Mr. Baghaei Hamameh** (Islamic Republic of Iran) said that his delegation was generally supportive of the draft convention. In keeping with its core mandate, the Commission should regulate the rules governing international carriage of goods by sea with a view to facilitating international trade and to ensuring a balance between the interests of the carriers, shippers and third parties concerned. While the draft convention, upon its adoption, would help to settle potential disputes between them, it should not supersede general principles of international law in such areas as maritime safety and protection of the marine environment. Draft article 18, paragraph 5 (a), which did not duly take into account the work done by the International Maritime Organization, could well undermine the safety of shipping, particularly when compared with the more effective legal regime of presumed fault. Moreover, the Commission should exercise caution in determining carriers' liability, which, in view of its possible effects on commercial shipping activities and the conditions of the insurance market, should be increased as little as possible. The necessary revisions should be made to the draft instrument before its adoption, so as to increase the chances of its being ratified by a large number of States, particularly developing countries.

21. **Mr. Tsantzas** (Greece) expressed broad support for the draft convention, pointing out that lack of uniformity in international trade law impaired legal and commercial certainty and could therefore militate against international trade.

22. **Ms. Carlson** (United States of America) said that her delegation strongly supported the current text of the draft convention, which had been agreed upon by Working Group III (Transport Law) as a result of painstaking compromises negotiated over a period of six years. While certain amendments to the present text were inevitable, it was important to bear in mind that the wording represented a delicate balance of interests: a change to any part of the text might have wider implications for the text as a whole, even threatening the widespread ratification of the draft convention itself. The current text should therefore be approved in substantially the same form as that approved by the Working Group.

23. **Mr. Sharma** (India) recalled that the current text of the draft convention was the result of hard-won efforts to achieve consensus on a number of issues over a six-year period. Consequently, while small corrections to clarify parts of the text could prove helpful, great care must be taken not to undermine the consensus that had already been achieved. Indeed, all the possible scenarios

with respect to the more contentious issues, such as the limitation of liability, had already been discussed in detail, and the definitive positions had been set down in the current text. The draft convention should therefore be adopted substantially in its current form.

24. **The Chairperson** said he took it that the Commission wished to consider the draft convention article by article, together with the related definitions in each case.

25. *It was so decided.*

*Draft article 2 (Interpretation of this Convention)*

26. *Draft article 2 was approved in substance and referred to the drafting group.*

*Draft article 3 (Form requirements) and the definition of "electronic communication"*

27. **Mr. Fujita** (Japan) suggested that references to draft article 24, paragraph 4, draft article 69, paragraph 2, and draft article 77, paragraph 4, should be included in the text of draft article 3.

28. **Mr. Sturley** (United States of America), supported by **Mr. Fernández** (Spain) and **Mr. Zunarelli** (Italy), expressed support for the proposal of the delegation of Japan.

29. **The Chairperson** said he took it that references to draft article 24, paragraph 4, draft article 69, paragraph 2, and draft article 77, paragraph 4, should be included in the text of draft article 3.

30. *It was so decided.*

31. **Mr. Oyarzábal** (Observer for Argentina) asked whether the definition of "electronic communication" in draft article 1, paragraph 17, should include the requirement that it identified the originator, in line with corresponding definitions in the UNCITRAL Model Law on Electronic Signatures and the UNCITRAL Model Law on Electronic Commerce.

32. **Mr. Sekolec** (Secretary of the Commission) pointed out that a clear distinction was drawn in UNCITRAL instruments on electronic commerce between the definition of "data message", analogous to "electronic communication" in the draft convention, and the definition of "electronic signature". The experts of Working Group III (Transport Law) and Working Group IV (Electronic Commerce) had agreed in their consultations that attributing authorship of a communication to a person was a function of the

signature rather than of the communication itself. Consequently, reference to the originator of the communication had deliberately been omitted in the present definition of “electronic communication”, since identifying the originator was a function of the signature.

33. *Draft article 3 and draft article 1, paragraph 17, were approved in substance and referred to the drafting group.*

*Draft article 4 (Applicability of defences and limits of liability)*

34. *Draft article 4 was approved in substance and referred to the drafting group.*

*Draft article 5 (General scope of application) and the definitions of “contract of carriage”, “carrier” and “shipper”*

35. **Ms. Czerwenka** (Germany) expressed her delegation’s serious concerns about the broad scope of the draft convention and, in particular, the establishment of special rules applying to multimodal transport contracts that provided for carriage by sea, which would lead to a fragmentation of the laws on multimodal transport contracts. To avoid that outcome, her delegation wished to see the draft convention applied solely to maritime transport contracts. In that connection, she also noted that her delegation would raise substantive concerns with respect to draft article 27 at the appropriate juncture.

36. **Mr. Blake-Lawson** (United Kingdom) said that his delegation shared many of the concerns expressed by the delegation of Germany and had particular concerns related to the definition of “contract of carriage”, as set out in draft article 1, paragraph 1. Under the current definition, it was essential to the application of the draft convention that the contract, either expressly or by implication, should provide for the goods to be carried by sea. However, many contracts, for good commercial reasons, allowed the means of transport to be left entirely or partially open. Thus, if a contract was not “mode specific”, it might appear that the draft convention would not apply, unless a requirement for carriage by sea could be implied.

37. Proposals had been made at various stages to add some words to the definition to indicate that a contract permitting carriage by sea would be deemed a contract of carriage for the purposes of the draft convention in cases where the goods were in fact carried by sea. Nevertheless, those proposals had so far been rejected. His delegation

was of the view that even without such words the draft convention would apply to goods carried wholly or partly by sea, where the contract permitted such carriage. However, the draft convention was not clear on that point.

38. The present unsatisfactory situation led to the distinct possibility that, once the draft convention was adopted, it would have a partial and uncertain field of application. That likelihood was increased by the requirement in draft article 5 that, according to the contract of carriage, the place of receipt, the port of loading, the place of delivery or the port of discharge must be located in a contracting State. It followed that, if neither the place of receipt nor the place of delivery was in a contracting State, and no port of loading or port of discharge was specified in the contract, the draft convention might not apply, even though the actual ports of loading and discharge were in fact in contracting States.

39. Prior to the approval of the draft convention by the Commission, the definition of “contract of carriage” and the terms of draft article 5 should therefore be clearly amended to bring within the scope of the draft convention all carriage by sea where the actual port of loading or the actual port of discharge was in a contracting State. Such an amendment should also entitle a court to have due regard not only to the contract of carriage, but also to how the goods were in fact carried.

40. **Mr. Elsayed** (Egypt) said that that draft article 5 should not begin with the phrase “Subject to article 6”.

41. **Ms. Downing** (Australia) said that the alternate text proposed by her delegation in its written comments (A/CN.9/658, para. 18) would clarify the scope of application and address some of the concerns expressed by the representatives of the United Kingdom and Germany.

42. **Mr. Sturley** (United States of America) said that it was important to recall the significant efforts made by the Working Group over many weeks in formulating the draft convention, which the Commission would have only nine days to review in its entirety. The German proposal to eliminate the “maritime plus” aspect of the draft convention would undo five of the six years of the Working Group’s work. Not only had it been agreed upon at an early stage that the draft convention would be a “maritime plus” convention, but also the “maritime plus” approach was best suited to the manner in which the business community operated. It would be unwise for the Commission to impose another type of legal regime on the business community’s operations or to reopen such a fundamental question without strong justification.

43. The United Kingdom's proposal had been carefully considered and ultimately rejected in the Working Group, which had assumed that most courts would understand that an implied modification of the contract would result if the contract permitted the carriage of goods by sea and the goods were in fact carried by sea. Whether the Working Group's assumption was correct would be determined once the courts began reviewing relevant cases. His delegation would prefer that draft article 1, paragraph 1, should remain unchanged.

44. **Mr. Mayer** (Switzerland) expressed his delegation's support for the statement made by the representative of the United States.

45. **Mr. Fujita** (Japan) also endorsed the statement made by the representative of the United States. Although his delegation shared the United Kingdom's concern to some extent, the matter had already been debated at length at the Working Group's fifteenth session, and the discussion was covered in its report (A/CN.9/576, para. 33). If there was an option under the contract of carriage to choose a port of loading or discharge within a contracting State, the convention would apply. The prevailing view in the Working Group was that an explicit provision for that practice was unnecessary and potentially misleading.

46. The issue of modality in the contract of carriage, raised by the German delegation, was dealt with in articles 27 and 84 and could be resolved during the discussion of those articles.

47. **Mr. Zunarelli** (Italy) said that his delegation agreed with the views expressed by the representative of the United States and supported by the representatives of Switzerland and Japan. The Working Group had held its discussions on the assumption that the "maritime plus" approach had been adopted; therefore, it should not be changed.

48. **Mr. Romero-Naser** (Honduras) said that the authorities in several States members of the Commission had taken note of the specific advances made and that the Commission should not undo those advances. His delegation encouraged all Commission members to support the statement made by the United States.

49. **Mr. Delebecque** (France), echoing the sentiments expressed by the delegations of the United States, Italy and Japan, said that his delegation did not wish to reopen the discussion of the definition of "contract of carriage", which had been debated at length and was perfectly acceptable in its present form. The formulation "shall provide for carriage by sea" was flexible enough to cover

many transport operations and it broadly defined the scope of application. Technical questions that the Commission did not consider to be essential should be addressed by the courts.

50. **Mr. Ndzibe** (Gabon) said that his delegation was hesitant about the German delegation's proposal to restrict the draft convention's scope of application. In its current form, the scope of application was much broader and covered pre- and post-delivery. His delegation supported the position expressed by the delegations of the United States and France.

51. **Mr. Elsayed** (Egypt) said with reference to the definitions in draft article 1, paragraphs 5 and 8, that he understood the term "carrier" to mean the person who pledged to carry the goods from one place to another in return for a fee, as one of the two parties to the contract and the term "shipper" to mean the person who delivered the goods to the carrier, transported the goods from one place to another and concluded the contract of carriage.

52. **The Chairperson** said he took it that the majority of the Commission members wished draft article 5 and the definitions of "contract of carriage", "carrier" and "shipper" set out in draft article 1, paragraphs 1, 5 and 8, to remain unchanged.

53. *Draft article 5 and draft article 1, paragraphs 1, 5 and 8, were approved in substance and referred to the drafting group.*

*The meeting rose at 1 p.m.*

**Summary record of the 866th meeting, Held at Headquarters, New York,  
on Monday, 16 June 2008, at 3 p.m.**

[A/CN.9/SR.866 and Corr.1]

*Chairperson:* Mr. Illescas (Spain)

*The meeting was called to order at 3.15 p.m.*

**Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea** (*continued*) (A/CN.9/642, A/CN.9/645 and A/CN.9/658 and Add.1-13)

*Draft article 6 (Specific exclusions) and definitions of “liner transportation” and “non-liner transportation”*

1. **The Chairperson** noted that the definitions of “liner transportation” and “non-liner transportation” contained in draft article 1, paragraphs 3 and 4, were relevant to the content of draft article 6. He took it that the Commission wished to retain the current wording of the draft article and the related definitions.

2. *Draft article 6 and draft article 1, paragraphs 3 and 4, were approved in substance and referred to the drafting group.*

*Draft article 7 (Application to certain parties) and definitions of “holder” and “consignee”*

3. **The Chairperson** noted that the definitions of “holder” and “consignee” in article 1, paragraphs 10 and 11, were related to the content of draft article 7. He took it that the Commission wished to retain the current wording of the definitions as well as the draft article.

4. *Draft article 7 and draft article 1, paragraphs 10 and 11, were approved in substance and referred to the drafting group.*

*Draft article 82 (Special rules for volume contracts) and the definition of “volume contract”*

5. **The Chairperson** suggested that the Commission should proceed to discuss draft article 82 out of numerical order, in order to complete consideration of the provisions relating to the scope of application of the draft convention. He noted that the definition of “volume contract” contained in article 1, paragraph 2, was related to the content of draft article 82.

6. **Ms. Downing** (Australia) said that her delegation had consistently opposed the wording of draft article 82 and the policy behind it, both in debate and in writing

(A/CN.9/658, paras. 11-15 and 66-67, and A/CN.9/WG.III/WP.88, annex). The draft convention was intended to harmonize the law on the carriage of goods by sea; that aim would be undermined by draft article 82, since even its proponents anticipated that the volume contract provisions would apply to as much as 70 per cent of the container trade.

7. Moreover, the ultimate test of the convention would be whether it struck a fair balance between the commercial parties, and draft article 82 failed that test. There were good public policy reasons for Governments and international law in general to provide protection for the weaker party. All other international conventions dealing with the transport of goods offered such protection, for example, by providing for mandatory but capped liability. Draft article 82, however, allowed for an unprecedented amount of freedom of contract, bringing with it the possibility of abuse of the weaker bargaining party, generally, though not always, the shipper. Her delegation was dissatisfied with the text in its current form and continued to advocate the drafting changes proposed in its written comments (A/CN.9/658, paras. 14 and 67).

8. **Mr. Elsayed** (Egypt) said that his delegation supported the statement by the representative of Australia.

9. **Ms. Talbot** (Observer for New Zealand) expressed her delegation’s agreement with the statement of Australia and drew attention to her country’s written comments on the definition of “volume contract” (A/CN.9/658/Add.2, paras. 4-6).

10. **Mr. Schelin** (Observer for Sweden) said that his delegation supported the provision as it stood, believing that it provided adequate protection for the shipper. To link the issue of freedom of contract to a specified number of containers or shipments would result in a lack of flexibility.

11. **Mr. Oyarzábal** (Observer for Argentina) said that his delegation supported the Australian position that draft article 82 as currently worded was unacceptable, because it provided inadequate protection for shippers in small

countries. Although under draft article 92 no reservation to the convention was permitted, one solution to the impasse, if positions were inflexible, might be to allow States to formulate a reservation specifically to draft article 82.

12. **Ms. Chatman** (Canada) said that her delegation supported the Australian position and had been consistently concerned about draft article 82 and an overly broad definition of “volume contract”.

13. **Ms. Czerwenka** (Germany) said that, although her delegation was not totally opposed to allowing freedom of contract in certain circumstances, it was concerned, as it had stated in its written comments (A/CN.9/658/Add.11, para. 21), that the definition of “volume contract” in draft article 1, paragraph 2, was too vague to enable a judge to decide whether draft article 82 applied in a given case.

14. **Mr. Sturley** (United States of America) said that, although the United States had many shippers, his delegation was interested in striking a good balance between shipper and carrier interests. It believed that the current draft met the concerns expressed. In Working Group III (Transport Law), more than 30 delegations,<sup>1</sup> including some that had originally opposed the provision, had supported the final draft as part of a compromise package.

15. **Mr. Hu Zhengliang** (China) said that his delegation had repeatedly expressed its dissatisfaction with draft article 82, in part because of the insufficient protection provided for small shippers. Moreover, the definition of “volume contract” was so broad that it could cover, for example, an arrangement for the shipment of three containers over the course of three voyages. It was practicable for the draft convention to allow derogation, but freedom of contract should be based on equality of bargaining power, which was often not the case in reality.

16. **Ms. Nesdam** (Norway) said that her delegation preferred to retain the current text of the draft article and the definition of “volume contract”.

17. **Mr. Delebecque** (France) said that, although the provision had been controversial from the start, his delegation found the compromise reached in the Working Group acceptable, even if not perfect, and advocated retaining the current wording of draft article 82.

18. **Mr. Cheong Hae-yong** (Republic of Korea) said that his Government had organized several meetings with national industries and maritime law experts on the issue of volume contracts. In the light of their opinions, his delegation advocated a more cautious approach towards volume contracts in order to protect small shippers and carriers from undue pressure from large carriers and shippers. If the draft convention allowed freedom of contract with regard to volume contracts, a large shipper could, for example, impose an absolute liability clause on a carrier with weaker bargaining power, depriving it of the protection of the liability limits under the Hague-Visby Rules. To maximize the carrier’s liability while reducing the amount of cargo constituting a volume contract would only benefit the shipper. Even if public policy in a given jurisdiction disallowed a contract unfairly detrimental to the carrier in that respect, once the convention was signed, the national courts could no longer regard such a contract as unlawful. Moreover, the volume contract provisions undermined the uniformity and predictability of commercial law aimed at by the draft convention. His delegation agreed with the representatives of Australia, Canada and China that the definition of “volume contract” should include a threshold figure.

19. **Mr. Zunarelli** (Italy) said that he associated himself with the views expressed by the representative of France; the subject had been discussed extensively and he was satisfied with the compromise reached in Vienna.

20. **Ms. Eriksson** (Observer for Finland) said that the draft article had been studied by her national authorities, who believed that the current wording had sufficient safeguards to ensure equitable treatment for both parties to a contract; she would prefer to leave it unchanged.

21. **Ms. Peer** (Austria) said that while she would prefer not to change the wording of draft article 82, she could support efforts to clarify the definition of “volume contracts” in draft article 1, paragraph 2, as proposed by the representatives of Australia and Germany.

22. **Mr. Fujita** (Japan) said that he agreed with the representatives of Finland and France; draft article 82, particularly with the recent addition of paragraphs 2 (c) and (d), gave shippers adequate protection. Any effort to clarify the definition of “volume contract” would be

<sup>1</sup> Angola, Benin, Brazil, Burkina Faso, Cameroon, Congo, Côte d’Ivoire, Democratic Republic of the Congo, Denmark, El Salvador, Equatorial Guinea, France, Gabon, Ghana, Guinea, Guinea-Bissau, Italy, Mauritania, Namibia, Niger, Nigeria, Norway,

Poland, Senegal, Slovenia, South Africa, Spain, Switzerland, Thailand, Togo, United Kingdom, United States of America and Venezuela (Bolivarian Republic of).

controversial. To set specific parameters would make the definition inflexible and it was unlikely that agreement on an amount would be reached; wording such as “substantial volume” would be even vaguer than the current text.

23. **Mr. Mayer** (Switzerland) said that he associated himself with the statements made by the representatives of, inter alia, France and the United States of America.

24. **Mr. Lebedev** (Russian Federation) said that while he was prepared to consider any proposals for a new definition of “volume contracts”, he saw little hope of a solution acceptable to all members of the Commission. Draft article 82 was important for traders, shippers and other parties, especially in the context of container shipping. It also suggested the manner in which the convention, once adopted, would be applied in the future. By including the reference to “greater or lesser rights, obligations and liabilities” in paragraph 1, the drafters had sought to ensure that if a future case involving abuses by a shipper or carrier came before the courts, the presumption would be that the purpose of the convention was to prevent arbitrary increases or decreases in liability.

25. The Commission had approved in substance draft article 2 (Interpretation of this Convention), which stressed “the need to promote uniformity in its application and the observance of good faith in international trade”. That statement was intended to provide guidance for the courts in cases embodying the concerns raised by the representative of Australia. In the absence of a clear proposal for a new definition of “volume contracts”, he would prefer to leave draft article 1, paragraph 2, and draft article 82 unchanged.

26. **Mr. Ibrahima Khalil Diallo** (Senegal) said that draft article 82 was of great interest to the States of his region. Its current wording reflected the concerns expressed by delegations and he saw no reason to return to that sensitive issue; the text was acceptable as it stood.

27. **Mr. Bigot** (Observer for Côte d’Ivoire) said that he associated himself with the views expressed by the representative of Senegal.

28. **The Chairperson** said it was clear that the proposed amendments to the draft article did not have the support of the majority of delegations.

29. *Draft article 82 and draft article 1, paragraph 2, were approved in substance and referred to the drafting group.*

*Draft article 8 (Use and effect of electronic transport records)*

30. **The Chairperson** said that the definitions contained in draft article 1, paragraphs 14 to 16 and 18 to 22 all related to chapter 3 (Electronic transport records); however, he suggested that the Commission should begin by considering draft articles 8, 9 and 10 and then discuss the definition of “electronic transport record” contained in draft article 1, paragraph 18, leaving the other definitions to be considered in connection with the draft articles in chapter 8 (Transport documents and electronic transport records).

31. *It was so decided.*

32. *Draft article 8 was approved in substance and referred to the drafting group.*

*Draft articles 9 (Procedures for use of negotiable electronic transport records) and 10 (Replacement of negotiable transport document or negotiable electronic transport record)*

33. *Draft articles 9 and 10 were approved in substance and referred to the drafting group.*

*Definition of “electronic transport document”*

34. *Draft article 1, paragraph 18, was approved in substance and referred to the drafting group.*

*Draft article 11 (Carriage and delivery of the goods)*

35. *Draft article 11 was approved in substance and referred to the drafting group.*

*Draft article 12 (Period of responsibility of the carrier)*

36. **Ms. Czerwenka** (Germany) drew attention to paragraph 7 of her delegation’s comments on the draft convention (A/CN.9/658/Add.11), which contained proposed amendments to draft article 12, paragraph 3 (a) and (b). Those subparagraphs, in their current form, gave the impression that the parties to a contract of carriage could exclude the liability of the carrier if the goods were received prior to the time of their initial loading under that contract. Her delegation believed that the carrier should be liable from the point at which the goods were received and should not be able to escape liability by redefining the period of responsibility.

37. **Mr. Tsantzos** (Greece) said that his delegation considered that the words “on the ship” should be added after “loading” and “unloading” in draft article 12,

paragraph 3 (a) and (b), respectively, in order to prevent the carrier from contracting out of the minimum period of responsibility between the time that the goods were loaded onto the ship and the time of their unloading.

38. **Mr. Morán Bovio** (Spain) pointed out that the Spanish text of draft article 12, paragraph 3, contained the words “sin perjuicio de lo dispuesto en el párrafo 2”, whereas the reference to paragraph 2 had been deleted from the other language versions.

39. He did not think that the majority of delegations were in favour of the amendments proposed by the representative of Germany; the current wording conveyed the drafters’ intent and should be left unchanged.

40. **Ms. Downing** (Australia) drew attention to her delegation’s comments on the draft convention (A/CN.9/658, paras. 20-21), in which it had expressed the concern that draft article 12, paragraph 3, might enable carriers to confine their responsibility to the tackle-to-tackle period, thereby affording shippers less protection than existing Australian law. Her delegation would prefer to delete the paragraph entirely but could accept the amendment proposed by the representative of Germany.

41. **Mr. Blake-Lawson** (United Kingdom), supporting the German proposal, said that draft article 12 in its current form did not take sufficient account of the fact that receipt and delivery, or even possession, were concepts rather than occurrences like loading and discharging. The responsibility of the sea carrier did not necessarily start with loading nor end with discharge. It was the carrier’s assumption of effective control of the goods that was crucial. What draft article 12, paragraph 3, aimed to do was to prevent contractual devices that would artificially deny that the carrier had assumed effective control of the goods.

42. The current text also did not take account of a situation where the consignee, contrary to draft article 45, chose not to take such effective control by refusing to accept delivery. His delegation believed that the German amendment better served the principle underlying paragraph 3 and also shared Germany’s concerns in respect of draft article 20.

43. **Mr. Elsayed** (Egypt) said that, as it stood, paragraph 3 was unacceptable because it was open to differing interpretations and because it took into account only the obligations of the carrier, without considering the possible responsibilities of a third party under a prior contract concluded between the two.

44. **Mr. van der Ziel** (Observer for the Netherlands) said that he found draft article 12, paragraph 3, quite acceptable. The intention was to retain in the draft convention the established Hague-Visby Rule that the carrier was liable for loss of and damage to goods during the tackle-to-tackle period. Thus, paragraph 3 (a) said that the time of receipt of goods, while negotiable, must not be subsequent to the beginning of loading — in other words, the moment when the goods had been hooked on to the tackle — and that the time of delivery could not be stipulated to be prior to the completion of unloading. He disagreed with the German delegation that the provisions of paragraph 3 were incorrect.

45. Since the draft convention applied to both multimodal and port-to-port shipment, the text referred to “initial loading” and “final unloading”, which in the case of port-to-port shipment automatically meant on and from the ship. The additional wording suggested by Greece was therefore unnecessary.

46. **Ms. Chatman** (Canada) proposed that paragraph 3 should either be deleted or replaced by the German proposal.

47. **Mr. Sturley** (United States of America) said that he largely agreed with the Netherlands. The draft convention should facilitate whatever the industry was doing and should therefore cover the whole range of possibilities, from tackle-to-tackle responsibility to port-to-port or door-to-port. The purpose of draft article 12, paragraph 3, was to ensure that abuses did not occur; and yet the very delegations most concerned about the possible abuses were the ones arguing against it. The German proposal was not a clarification but a complete reopening of discussion on one of the fundamental provisions determining the kind of convention that would be produced. His delegation believed that the Commission should defer to the Working Group, which had spent so much time to produce the acceptable compromise text that was before it.

48. **Mr. Fujita** (Japan) observed that his delegation’s reading of draft article 12, paragraph 3, was similar to that of the United States. The intention was to ensure that, while it prohibited agreement on a period of responsibility shorter than from tackle-to-tackle, the agreed period could also be broader, including port-to-port or even door-to-door. The German proposal subverted the provision and totally changed its nature.

49. **Ms. Czerwenka** (Germany) said that her delegation’s proposal was not intended to change the nature of paragraph 3, which it interpreted along the lines

of the proposed amendment, namely, as not intending to revert to the Hague-Visby tackle-to-tackle rule but rather as following the Hamburg Rules approach under the United Nations Convention on the Carriage of Goods by Sea. She herself felt that there was a major difference between the Hague-Visby Rules and draft article 12, paragraph 3, which contained a provision that would allow the carrier to exclude liability even while in physical possession of the goods. If, as the Netherlands had contended, the intention of the text was to retain the tackle-to-tackle principle, that should be handled as it had been in the Hague-Visby Rules, namely, by leaving it to national legislation to regulate freedom of contract to exclude liability outside the tackle-to-tackle period.

50. Moreover, in draft article 20, the draft convention developed a totally new concept, equating the position of the maritime performing party to that of the contract carrier and making them both liable to the same extent. That meant that, for the purposes of draft article 12, paragraph 3, if the contracting carrier could exclude responsibility for damages in port, then no one would be liable for what happened in port; whereas under the Hague-Visby Rules, at least one party remained liable.

51. If in paragraph 3 the tackle-to-tackle principle was to be replaced by the broader principle of the period of responsibility, it must be made clear that once the carrier had taken possession of goods on land or in a transport vehicle in the port area, the carrier's responsibility started and the carrier could not seek exemption via a definition of the period of responsibility.

*The meeting was suspended at 4.55 p.m. and resumed at 5.15 p.m.*

52. **Ms. Mbeng** (Cameroon) supported the gist of the German proposal and agreed that the current wording of draft article 12, paragraph 3, did not reflect its purpose. It would be unfortunate to revert to the Hague-Visby approach in defining the period of responsibility.

53. **Mr. Zunarelli** (Italy) observed that the current text was a clear improvement over Hague-Visby. He disagreed with the reading of the German and other delegations: the text did not allow the carrier to limit the period of responsibility, but, simply for the protection of the shipper, allowed the parties to agree that the time and location of receipt and delivery could differ from the time when a person other than the carrier received the goods, as long as it was after initial loading or prior to final unloading. Under no circumstances could the carrier deny liability after having already received the goods. The carrier could only declare that another person who had

received them had done so on behalf of the shipper. Under the current text, the carrier would also still be liable if it warehoused the goods.

54. **Mr. Delebecque** (France) observed that if past proposals to define delivery in material rather than legal terms — for example, as effective transfer or effective placing at disposal — had been adopted, there would now be no problems. Paragraph 3 (b) sought to protect consignees against abuses. France had protective legislation to the effect that a tackle-to-tackle clause would apply only once the goods had effectively been placed at the disposal of the consignee, but other countries might not have such legislation, and that made their concerns understandable.

55. **Mr. Sturley** (United States of America) thanked the German delegation for explaining the rationale behind its proposal, but said that his delegation read the current text very differently. The carrier's period of responsibility would be stipulated in the contract of carriage; if the carrier assumed functions outside the scope of the convention, its liability would be determined by other national rules and regimes, which often entailed an even higher degree of responsibility. Persons other than the carrier in possession of the goods were covered as appropriate under national laws. It would be unwise to try in the draft convention to impose rules on the carrier when it was acting in a capacity other than as a provider of carriage. Therefore, Germany's concerns were needless.

56. **Mr. Alba Fernández** (Spain) said that the inclusion in draft article 12, paragraph 3 (a) and (b), of a reference to the persons referred to in article 19 would obscure rather than clarify the issue, since it would distract the reader and could create problems in specific practical instances in the future. In his delegation's view, draft article 12, paragraph 3, was sufficiently clear as to the carrier's responsibility for the goods and should therefore be left as it was.

57. **Mr. Schelin** (Observer for Sweden) pointed out that draft article 12, paragraph 3, could be interpreted in two different ways. On the one hand, it could be understood to mean that the carrier's liability began when he received the goods and ended when the goods were delivered; paragraph 3 simply prevented the contract of carriage from providing a time of receipt subsequent to the beginning of the initial loading or a time of delivery prior to the completion of the final unloading. On the other hand, it could be construed as the old tackle-to-tackle principle, according to which a carrier could avoid liability by denying responsibility for the goods during



their warehousing, either before their receipt or after their delivery. Sweden subscribed to the first interpretation and considered paragraph 3 to be a mere clarification; other delegations, however, seemed to interpret the provision differently. The current wording, though ambiguous, could not be easily changed; his delegation therefore accepted draft article 12, paragraph 3, as it stood.

58. **Mr. Cheong** Hae-yong (Republic of Korea) said that his delegation, too, supported the current version of draft article 12, paragraph 3.

59. **Ms. Czerwenka** (Germany) expressed appreciation for the Swedish delegation's explanation. She disagreed with the representative of Spain that the meaning of paragraph 3 was clear; it seemed to be clear to different delegations in different ways. That was why it would be helpful to find a way of clarifying the provision, perhaps in informal consultations; first, though, she would need some instruction as to the exact meaning of paragraph 3. Her delegation could accept the Italian interpretation, as endorsed by Sweden. If that interpretation was supported by the Working Group, she was open to making the provision itself more precise or, at least, to making its meaning clear in the report of the current session. To end the discussion in dissent would be extremely unfortunate.

60. **Ms. Nesdam** (Norway) said that her delegation interpreted paragraph 3 as Sweden did.

61. **Mr. Fujita** (Japan) wondered whether a clarification to the effect that nothing in paragraph 3 prevented a contracting State from introducing mandatory regulations covering the period before loading and after discharge would address the concerns raised by Germany.

62. **The Chairperson** asked the representative of Japan whether he wished that clarification to be included in the report of the session or in the text of the draft convention.

63. **Mr. Fujita** (Japan) said that he had been referring to the report. However, if other delegations wished to include a clarification in the draft convention itself, his delegation would consider that possibility.

64. **Mr. Sturley** (United States of America) said that, if the Japanese representative meant that nothing in the draft convention prevented a contracting State from introducing mandatory regulations covering the period before the carrier's period of responsibility began, which could be at loading, and after the carrier's period of responsibility ended, which could be at discharge but for a door-to-door or port-to-port shipment would be at those

respective points, his delegation had no objection to including such a clarification in the report of the session.

65. **Mr. Fujita** (Japan) confirmed that that was what he had meant.

66. **Mr. van der Ziel** (Observer for the Netherlands) said that he was somewhat confused. Surely it was obvious that the period before loading and after unloading could be regulated by national legislation. He agreed with the representative of Germany that the text as it stood was ambiguous; every effort must be made to remove that ambiguity. The differences of opinion did not seem all that far apart to him.

67. **Mr. Morán Bovio** (Spain) endorsed the comment made by the representative of the Netherlands. It was not clear to him why they were discussing issues that fell under national law and were therefore outside the scope of the draft convention.

68. **Mr. Zunarelli** (Italy) proposed retaining the current wording of paragraph 3, minus the phrase "for the purposes of determining the carrier's period of responsibility", and placing it directly after, or even making it part of, paragraph 1. It would then be clear that paragraph 3 did not derogate from the general provision stated in paragraph 1, but simply placed limitations on the parties at the time of drawing up the contract of carriage.

69. **Mr. Alba Fernández** (Spain) proposed placing paragraph 3 directly after paragraph 1 and adding an introductory phrase along the lines of "without prejudice to paragraph 1". The minor change proposed by the representative of Italy could be the solution.

70. **Ms. Eriksson** (Observer for Finland) supported by **Mr. Sturley** (United States of America) and **Mr. Hu Zhengliang** (China), suggested that a smaller group should consider the issue in informal consultations. She hoped that a solution would be found so as to remove the current ambiguity for future generations.

71. **The Chairperson** said he took it that the Commission wished to leave the issue open and hold informal consultations.

72. *It was so decided.*

*Draft article 13 (Transport beyond the scope of the contract of carriage)*

73. **Mr. Elsayed** (Egypt) said that he failed to understand how the Commission could allow a carrier to issue a document that included transport that was not covered by the contract of carriage and in respect of which it did not assume the obligation to carry the goods.

Such a provision ran counter to the spirit of the draft convention, which aimed to secure the rights and define the obligations of the parties concluding a contract. Draft article 13 should therefore be deleted.

74. **Ms. Downing** (Australia) agreed that draft article 13 should be deleted.

75. **Mr. Delebecque** (France) said that draft article 13 was problematic because it was not clear, at least not in the French version, and because it was contrary to the general objective of the draft convention. France had already stated its reservations on the subject and was in favour of deleting the draft article.

76. **Ms. Czerwenka** (Germany) said that her delegation, too, had a number of concerns regarding draft article 13. At the Working Group's twenty-first session, the German delegation had sought clarification. The current version was slightly better, but a great deal of uncertainty remained. Referring members to Germany's written comments (A/CN.9/658/Add.11, para. 8), she said that her delegation was concerned, above all, that in the case of a negotiable transport document it was not clear from whom the holder of the document could require the delivery of the goods. Article 1, paragraph 14, defined transport document as "a document issued under a contract of carriage". Article 13, however, dealt with something else altogether, hence the uncertainty. The simplest option would be to delete the draft article, since it was not necessary for the purposes of the draft convention.

*The meeting rose at 6 p.m.*

**Summary record of the 867th meeting, held at Headquarters, New York,  
on Tuesday, 17 June 2008, at 10 a.m.**

[A/CN.9/SR.867 and Corr.1]

*Chairperson:* Mr. Illescas (Spain)

*The meeting was called to order at 10.15 a.m.*

**Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea** (*continued*) (A/CN.9/642, A/CN.9/645, A/CN.9/658 and Add.1-13)

*Draft article 13 (Transport beyond the scope of the contract of carriage) (continued)*

1. **Mr. Kim** (In Hyeon (Republic of Korea)) said that his delegation had withdrawn its objections to the current wording of draft article 13 and supported its approval.
2. **Mr. Egbadon** (Nigeria) said that draft article 13 was meaningless since the carrier's responsibility did not extend beyond the period covered by the contract of carriage. His delegation therefore agreed that the draft article should be deleted.
3. **Ms. Carlson** (United States of America) said that it was actually in the interests of shippers for draft article 13 to be retained, since the carrier could only agree to transport beyond the scope of the contract of carriage "on the request of the shipper". Consequently, there was no basis for the arguments of some delegations that the deletion of draft article 13 would be beneficial to the shipper. On the contrary, draft article 13 should be retained in its current form.
4. **Mr. van der Ziel** (Observer for the Netherlands) recalled that draft article 13 was closely related to draft article 12, paragraph 3, which determined the carrier's period of responsibility for the carriage of goods as being from the time of their unloading until the completion of their unloading under the contract of carriage. Draft article 13 provided two exceptions to the carrier's period of responsibility: in relatively infrequent cases when the shipper required a document to a particular destination not served by the carrier; and in far more frequent cases of "merchant haulage" when, for operational reasons, the consignee, instead of the carrier, wished to take responsibility for the final part of the carriage of the goods from the port of discharge to the inland destination.
5. It was therefore in the interests of the consignee for draft article 13 to be retained, since its deletion would not allow the carrier to honour a request for merchant haulage, since the carrier would become responsible for the goods in the final part of the carriage in accordance with draft article 12, paragraph 3. Moreover, draft article 43 provided that the transport document constituted conclusive evidence of all contract particulars, whereas under the Hague-Visby Rules it was conclusive evidence as to the goods only, so that the matter of who was responsible for the goods during the final part of the carriage could be dealt with contractually.
6. One possible solution was to delete draft article 13 and add a sentence to the second paragraph of article 14, stipulating that the consignee and the carrier could mutually agree on merchant haulage. However, in view of the existing objections of some delegations to the wording of draft article 14, paragraph 2, that proposal would not appear to be acceptable either.
7. **Mr. Ibrahima Khalil Diallo** (Senegal) said that his delegation was in favour of the deletion of draft article 13 in view of its problematic nature.
8. **Mr. Hu Zhengliang** (China) said that his delegation was in favour of retaining draft article 13 in its current form since there was a practical need for such provisions, particularly in cases of multimodal transport. It was clear that the interests of third parties other than the shipper would be sufficiently protected, since the draft article required a transport document or an electronic transport record to specify the transport not covered by the contract or carriage. The retention of draft article 13 would facilitate maritime trade, especially with regard to multimodal transport.
9. **Mr. Mayer** (Switzerland) said that his delegation supported the retention of draft article 13, which reflected a long-standing practice that required shippers to hold documents to prove that they had actually shipped goods to their final destinations.
10. **Mr. Elsayed** (Egypt) said that his delegation advocated the deletion of draft article 13 because its wording was not consistent with the other provisions of the draft convention: it did not specify the rights or liabilities of the contracting parties and was actually detrimental to the shipper.

11. **Mr. Imorou** (Benin) said that the French version of draft article 13 was unclear. Moreover, the draft article itself was irrelevant since it referred to transport beyond the scope of the contract of carriage.

12. **Mr. Zunarelli** (Italy) said that the current wording of draft article 13 was not in keeping with the definition of “transport document” in the draft convention, although it reflected the practical needs of international trade. It might therefore be useful to retain the current wording, followed by a clarification that the carrier would act as a forwarding agent on behalf of the shipper for the remaining part of the carriage of the goods.

13. **Mr. Tsantzos** (Greece) said that his delegation supported the retention of draft article 13 in its current form in order to clarify the period of responsibility of the carrier.

14. **Mr. Ndzibe** (Gabon) said that his delegation was in favour of the deletion of draft article 13 since it gave rise to such confusion.

15. **Mr. Bigot** (Observer for Côte d’Ivoire) said that the provisions of draft article 13 presented a number of difficulties. First, while practical reasons existed for including provisions to address transport beyond the scope of the contract of carriage, the current wording failed to indicate clearly whether or not the single transport document required was a multimodal contract. A definition of “single transport document” in the draft convention might allow delegations to better measure the scope of the draft article and to draw conclusions with respect to the carrier and the shipper requesting the transport of the goods. Second, the interests of the shipper were not necessarily protected merely because it was the shipper that requested the transport of the goods. Third, there was a lack of clarity regarding the legal relationship between the carrier issuing the single transport document and the party providing the transport but not assuming full responsibility for it. In view of those difficulties, draft article 13 should not be retained.

16. **Mr. Fujita** (Japan) said that delegations had expressed both theoretical and practical concerns about draft article 13. From a theoretical standpoint, the proposal put forward by the Italian delegation had already been discussed and discounted by Working Group III (Transport Law) because delegations had opposed the regulation of forwarding agency relationships under the draft convention. With regard to the practical aspects, the purpose of the current provisions of draft article 13 was to maintain existing commercial practices under the Hague-Visby and Hamburg Rules. It was regrettable that many delegations were still unable to interpret the

provisions in that light but encouraging to see that the delegation of the Republic of Korea had come to appreciate the need for such provisions.

17. While his delegation supported the retention of draft article 13, its deletion would not imply that the relevant commercial practices had been abolished. For that reason, his delegation would not strongly object to the deletion of the draft article. Nevertheless, such a deletion could lead to a degree of uncertainty in current commercial practices. In any event, it was vital to ensure that any deletion did not imply the abolition of current merchant haulage practices, as had been mentioned earlier by the delegation of the Netherlands.

18. **Ms. Malanda** (Observer for the Congo) agreed with the reservations expressed by the observer for Côte d’Ivoire concerning the unclear scope of the single transport document issued by the carrier. Her delegation was therefore also in favour of the deletion of draft article 13.

19. **Mr. Møllmann** (Observer for Denmark) said that his delegation saw the provisions of draft article 13 as an attempt to codify commercial practices in order to ensure that shippers obtained the transport documents that they required. While the deletion of draft article 13 would not imply the abolition of current practices, it would be preferable to retain the current text in order to have a clear rule, particularly in view of the concerns expressed by the observer for the Netherlands. References to matters of agency had specifically been removed from previous draft texts, following a policy decision by the Working Group. For that reason, the proposal of the delegation of Italy to refer to the forwarding agency would not be an acceptable compromise and it would be better to retain the current wording.

20. **Mr. Sharma** (India) agreed that draft article 13 was based on current commercial practices pursuant to the Hague-Visby and Hamburg Rules, but pointed out that a rather different approach had been adopted in the draft convention. Whereas under the Hamburg Rules the carrier acted as the agent of the shipper for the carriage of goods not covered by the original carrier, under draft article 13 the period of responsibility of the carrier was the term of reference used to clarify that the carrier was not responsible for the portion of carriage beyond the contract of carriage.

21. The specific merit of draft article 13 was that it allowed the shipper to request a single transport document when the carrier was not in a position to carry the goods or was unwilling to do so. The retention of that principle in the draft convention would not harm the

interests of any parties. His delegation was therefore in favour of retaining draft article 13 as it stood.

22. **Ms. Czerwenka** (Germany) said that one way to solve the dilemma regarding article 13 would be to state that only a non-negotiable transport document was acceptable. In her view, it was a question of proof, and restricting the scope of the article was a possible way to compromise, although her delegation favoured its deletion.

23. **Ms. Sobrinho** (Observer for Angola) said that her delegation also favoured deletion.

24. **Mr. Fujita** (Japan) said that if the article was redrafted as proposed, that would be a clear indication that the issuance of a negotiable document was totally prohibited, which would represent a complete departure from current practice. In that case, his delegation would prefer to delete the article, as the proposal of the delegation of Germany could have a drastic effect on current practice.

25. **Mr. Mayer** (Switzerland) said that he supported the view expressed by Japan, as he also failed to see the benefit of such a restriction.

26. **Mr. Kim** In Hyeon (Republic of Korea) said that his delegation favoured leaving the text of article 13 as it was drafted.

27. **The Chairperson** said that the Commission faced a question of policy with regard to article 13. At the current stage in the discussion, a slight majority of members of the Commission appeared to favour deletion of article 13, the text of which had been arrived at by consensus in the Working Group. For the first time, however, the Commission faced the situation of having a majority decision overturn a consensus reached in a Working Group. From the tone of the interventions during the debate, most delegations appeared to accept the substance of the article but found that it was poorly expressed or difficult to understand. The report of the session must be clear to ensure that deletion of the article would not lead to the prohibition of a long-standing commercial practice.

28. **Mr. Zunarelli** (Italy) said that his concern was that deletion of article 13 might imply that the current practice ran counter to the convention. In his view, there were two possible solutions. First, the article could be deleted but the Commission could put on record in its report that it had no intent to condemn the long-standing commercial practice covered by that article. Second, a small group of members could attempt to redraft the article in order to

clarify its intent, perhaps by adding a new definition of the type of contract required.

29. **Mr. Elsayed** (Egypt) said that he supported the first option, deletion of the article accompanied by a declaration regarding current practice.

30. **Mr. Schelin** (Observer for Sweden) said that in his view, deletion of the article along with a declaration of intent was a better option than attempting to redraft it.

31. **Mr. van der Ziel** (Observer for the Netherlands) said that he had difficulty with the first option proposed by Italy because it was unlikely that the report of the Commission would be read by practitioners, whereas the convention would be widely available. His concern regarding deletion of the article was that some practices would thus become legally impossible, allowing no latitude for deviation from the minimum period of responsibility of the carrier. The Commission must either improve the text or accept the legal consequences of deletion.

32. **Mr. Delebecque** (France) agreed that the language of draft article 13 was ambiguous. The text should specify that the express request of the shipper was required and should state the action positively so that the carrier has the responsibility of a type of organizer when it issues the transport document for transport beyond the contract of carriage.

33. **Ms. Carlson** (United States of America), supported by **Mr. Serrano Martinez** (Colombia), said that her delegation, too, had concerns about deleting the article and supported the proposal to attempt to redraft it.

34. **Mr. Ibrahima Khalil Diallo** (Senegal) said that his delegation advocated deletion of draft article 13.

35. **Mr. Hu Zhengliang** (China) said that, since the purpose of the debate was to improve the draft convention, a small group in informal consultations should attempt to redraft the article in order to achieve that objective.

36. **Mr. Egbadon** (Nigeria) said that in order to elevate trade practice to the level of a legal rule, liabilities and sanctions must be clearly spelled out; the current text of the draft article did not do so and should be deleted.

37. **Ms. Nesdam** (Norway) and **Ms. Talbot** (Observer for New Zealand) supported the proposal to redraft the article in an attempt to reach consensus.

38. **The Chairperson** said he took it that the Commission vested to hold informal consultations on draft article 13. If it was still unable to reach consensus, the draft article would be deleted.

39. *It was so decided.*

*The meeting was suspended at 11.35 a.m. and resumed at noon.*

*Article 14 (Specific obligations)*

40. **Mr. Ibrahima Khalil Diallo** (Senegal) said that draft article 14 had been debated at great length in the Working Group. His delegation, along with other African States, had expressed reservations with regard to the title and paragraph 2 of the draft article. The title “Specific obligations” did not reflect the content of paragraph 1, which described obligations that were traditionally performed by the carrier; therefore, the title should read “General obligations”. Paragraph 2 should be deleted because it made the consignee, who was not a party to the contract of carriage, subject to provisions to which it had not consented.

41. **Mr. Imorou** (Benin) endorsed the statement made by the representative of Senegal and suggested merging draft articles 14 and 15 under the single title “General obligations”. Neither article mentioned any specific obligations; the obligations listed in article 14 were standard.

42. **Mr. Elsayed** (Egypt) endorsed the suggestion made by the representative of Senegal, calling for deletion of draft article 14, paragraph 2. He also proposed adding marking of goods to the obligations defined in paragraph 1 and noted that loading, stowing and related obligations were the responsibility of the master of the ship.

43. **Ms. Nesdam** (Norway) said that her delegation continued to prefer retaining the current version of paragraph 2.

44. **Ms. Malanda** (Observer for the Congo) and **Mr. Egbadon** (Nigeria) joined the delegations of Senegal and Egypt in calling for the deletion of paragraph 2.

45. **Mr. Delebecque** (France) noted that paragraph 2 addressed the issue of clauses under which the carrier did not perform certain obligations, particularly loading and unloading. Paragraph 2 might settle the question that arose under the Hague-Visby Rules as to whether such clauses were valid. The British House of Lords had recognized such clauses, while elsewhere, supreme courts, particularly in France, had expressed serious reservations about them. Paragraph 2 took an innovative approach to the matter and generally recognized the validity of those clauses. Though such clauses were perfectly acceptable in so-called “tramping” operations

where ships did not operate on a fixed route or schedule, his delegation expressed the hope that, after careful consideration, the clauses would not apply to regular liner transportation.

46. **Mr. Zunarelli** (Italy) said that the title “Specific obligations”, meaning obligations that were specifically formulated, accurately represented the content of the draft article and should therefore be retained. The proposed title “General obligations” was incorrect. No reference to marking should appear in paragraph 1, as had been suggested, because marking the goods was the responsibility of the shipper, not the carrier.

47. Paragraph 2 reflected normal practice in the tramping trade, but not in the liner trade. Any contract in the liner trade that precluded the responsibility of the shipper for obligations such as loading and stowing of the goods onto the ship should be regarded with suspicion; therefore, his delegation joined the French delegation in suggesting that paragraph 2 should be restricted to the tramping trade.

48. **Ms. Mbeng** (Cameroon) agreed with the Senegalese delegation that the obligations listed in draft article 14 were traditionally assumed by the carrier and therefore should not be referred to as “specific” in the title. Her delegation also wondered why the consignee should assume responsibility for a contract to which it was not a party and joined other delegations in calling for the deletion of paragraph 2.

49. **Mr. Ngoy Kasongo** (Observer for the Democratic Republic of the Congo) said that his delegation aligned itself with the other African States calling for the deletion of paragraph 2 and echoed the suggestion made by the delegations of Senegal, Nigeria and Cameroon regarding amendment of the title. The Commission should keep the draft convention from establishing exceptions to the rule in practice as a result of overusing standard clauses.

50. **Mr. Blake-Lawson** (United Kingdom) said that his delegation supported the retention of paragraph 2, which allowed for the shipper and the carrier to reach an agreement as to who loaded the goods. When that paragraph was read in conjunction with draft article 18, paragraph 3 (i), the carrier was relieved of any liability. His delegation considered those provisions helpful and satisfactory in overcoming problems that had arisen under previous conventions with “free-in-and-out” and “free-in-and-out, stowed”(FIO(S)) clauses.

51. **Mr. Fujita** (Japan) said that his delegation fully supported the current wording of draft article 14, paragraph 1, and was grateful for the French delegation’s

statement, which clarified why draft article 14, paragraph 2, was necessary, and how it represented an improvement over the current situation. Although the French proposal to restrict the application of paragraph 2 to non-liner trade was interesting, FIO(S) clauses were also used in the liner trade, particularly for the carriage of large machinery or other special equipment. Therefore, it would be best to retain the current formulation of paragraph 2. In such a situation, draft article 83 (b) might be helpful, but the requirements under draft article 82, paragraph 2 (b), were too strict and provided inadequate protection.

52. **Mr. Møllmann** (Observer for Denmark) stressed that liner trade was not restricted to container transport. Generally, the FIO(S) clause represented a sound solution when the shipper had better knowledge of how to handle the goods than the carrier did. An example of FIO(S) application in liner trade cited by Danish industry representatives was the carriage of coffee in bags, which had specific ventilation requirements. His delegation favoured the retention of draft article 14, paragraph 2, in its current wording, with no distinction between liner and non-liner trade.

53. **Mr. Bigot** (Observer for Côte d'Ivoire) endorsed the proposal made by the Senegalese delegation to change the title of draft article 14 from "Specific obligations" to "General obligations", as the obligations mentioned were those typically assumed by the carrier and could not be considered specific. He noted that draft article 14, paragraph 2, described a possible agreement between the shipper and the carrier, under which the shipper assumed some of the obligations mentioned. If such arrangements were only common practice in the tramping trade, which the draft convention had not been designed to regulate, it followed that paragraph 2 should be deleted. It should also be stressed that the draft convention had been designed to regulate transport, not sales. Lastly, given the economic circumstances of developing countries like his own — where shippers were in the majority — and the burden that extra obligations represented, it was important to strike a fair balance between the responsibilities of shippers and carriers.

54. **Mr. Mayer** (Switzerland) said that the current title of the draft article should be retained, as it concerned specific obligations, not special obligations. With regard to paragraph 2, he agreed with the proposal to add marking to the shipper's obligations, since marking had always been one of the shipper's main tasks, as reflected in the Hague-Visby Rules and other instruments. He was strongly in favour of keeping paragraph 2 as a whole. It was not an escape clause: it reflected a long-standing practice not only

in the tramping trade, but also in the liner trade, albeit to a lesser extent. For commercial, technical or logistical reasons, shippers often undertook some of the carrier's responsibilities. Where the shipper had agreed to carry out restricted FIO(S) shipments, it would be unfair to impose responsibility on the carrier for damage that occurred during loading merely because paragraph 1 made it mandatory for such responsibility to fall to the carrier.

55. **Mr. Ndzibe** (Gabon) said that he supported deleting draft article 14, paragraph 2, because it posed a genuine danger to shippers, especially small shippers. He would also like to see the title changed as suggested by the representative of Senegal.

56. **Ms. Traoré** (Burkina Faso), supported by **Mr. Ousseimi** (Observer for the Niger) and **Ms. Sobrinho** (Observer for Angola), endorsed the statement made by Senegal.

57. **Ms. Downing** (Australia) said that her delegation endorsed the proposal to delete draft article 14, paragraph 2, for the reasons set out in its written comments (A/CN.9/658, paras. 24-25).

58. **Mr. Morán Bovio** (Spain) said that it was crucial to maintain paragraph 2 because it reflected an existing commercial practice, even in liner trade. In some cases in liner trade it was important for the shipper, rather than the carrier, to be able to handle cargo, such as coffee, cranes and yachts, which required special care. To delete paragraph 2 would be to impede the small shipper's ability to have certain goods transported.

59. **Mr. Schelin** (Observer for Sweden) said that he supported changing the title of draft article 14 because the obligations set out were of a general rather than a specific nature; he suggested replacing the current title with "Obligations in relation to the goods". However, he was in favour of retaining the contents of draft article 14 in its current version. Furthermore, paragraph 2 should not be restricted to non-liner trade. Indeed, a gray area existed between liner and non-liner transportation; such transportation was often referred to as "industry shipping", in which ships entered and left ports on a specific schedule and loaded specific types of cargo, and shippers often made use of FIO(S) clauses.

60. **Ms. Carlson** (United States of America) said that her delegation was in favour of maintaining draft article 14 as currently formulated, including the title. Paragraph 2 reflected current, useful commercial practice. As the purpose of the draft convention was to facilitate industry, it would be inappropriate to attempt to restrict a practice that had existed for decades.

61. **Mr. Sharma** (India) said that he supported the title of draft article 14 as it stood, since the general nature of the obligations of the carrier was clear from the title of the chapter containing article 14. The current formulation of paragraph 1 was adequate, with no need for reference to marking, as that was usually the responsibility of shippers, not carriers. As for paragraph 2, while the Working Group had not considered non-liner trade in its discussion of the paragraph, a shipper wishing to enter into a contract with a carrier in order to take over some of the latter's standard duties should not be prevented from doing so.

62. **Ms. Peer** (Austria) said that her delegation strongly supported retaining draft article 14, paragraph 2.

63. **Mr. Cheong** Hae-yong (Republic of Korea) said that his delegation was in favour of maintaining the current version of draft article 14.

64. **Mr. Sandoval** (Chile) said that draft article 14 should be retained as it stood. As an exporter of copper and other goods, Chile did not take issue with paragraph 2, since the carriage of goods was usually based on an agreement between the shipper and the carrier.

65. **Ms. Eriksson** (Observer for Finland) expressed support for maintaining draft article 14 as currently formulated, including paragraph 2, which reflected a commercial practice in both non-liner and liner trade.

66. **Mr. Hu** Zhengliang (China) said that his delegation strongly supported retaining draft article 14 in its entirety. The words "may agree" in paragraph 2 implied that the paragraph was in fact about a matter of freedom of contract. As such, it should not pose a problem, as the shipper was in no way obliged to enter into such a contract.

67. **Mr. Tsantzas** (Greece) reiterated that his delegation wished to see draft article 14 maintained in its entirety, but had no strong feelings regarding the title and would welcome an alternative if the majority of Commission members found it more satisfactory.

68. **Mr. Egbadon** (Nigeria) pointed out that paragraph 2, extended responsibility to the consignee, a particularly objectionable proposition since the consignee was not a party to contracts between the shipper and the carrier. If the draft convention was to be acceptable to shipping and cargo interests, that paragraph should be deleted.

69. **Mr. van der Ziel** (Observer for the Netherlands) said that the title of draft article 14 was acceptable in its current version. The word "consignee" was used in paragraph 2 merely because the clauses involved in

agreements between the shipper and the carrier were FIO(S) clauses; however, the agreements themselves were only between the shipper and the carrier. Paragraph 2 as such placed no obligation on the consignee with regard to unloading.

70. **Mr. Berlingieri** (Italy) said that he questioned the compatibility of draft article 14, paragraph 2, and draft article 12, paragraph 3. He feared that those two articles might give rise to differences in interpretation in the future, particularly within the context of a FIO(S) clause, where receipt of the goods was usually assumed to take place on board the ship, whereas under article 12, paragraph 3, receipt must be assumed to have taken place prior to loading.

71. **Mr. Lebedev** (Russian Federation) said that it was important to discuss not only the legal aspects of draft article 14, but also the economic, technical and financial implications of the carriage of goods by sea. The question was not merely one of obligations regarding loading and unloading, since other articles of the draft convention also dealt with those, but rather of financial responsibility for property, which would pose no problem if all loading and unloading operations were carried out by the carrier alone and not the shipper or consignee. Unfortunately, it was not always that simple, as loading and unloading by the carrier often incurred additional costs. Draft article 14 in its current version took account of the great variety of situations that arose in maritime transport. As argued by other speakers, it also reflected actual current practice. For all those reasons, his delegation was in favour of keeping draft article 14 as it stood.

*The meeting rose at 1.05 p.m.*



**Summary record of the 868th meeting, held at Headquarters, New York,  
on Tuesday, 17 June 2008, at 3 p.m.**

[A/CN.9/SR.868 and Corr.1]

*Chairperson:* Mr. Illescas (Spain)

*The meeting was called to order at 3.10 p.m.*

**Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea** (*continued*) (A/CN.9/642, A/CN.9/645 and A/CN.9/658 and Add.1-13)

*Draft article 14 (Specific obligations) (continued)*

1. **Mr. Oyarzábal** (Observer for Argentina) said that in an attempt to address the concerns raised by the African States in particular, his delegation proposed inserting text along the lines of “to the extent that the particular characteristics of the goods so require” in paragraph 2, so as to make it clear that the carrier or shipper could stipulate that the loading, handling, stowing or unloading of the goods was to be performed by the shipper only when the particular characteristics of the goods so required. He also proposed amending the title of draft article 14 to read “Obligations to properly and carefully receive, load, handle, stow, carry, keep, care for, unload and deliver the goods” and deleting the word “specific” in the title of draft article 15 so that it read “Obligations applicable to the voyage by sea”.

2. **Mr. Mayer** (Switzerland) said that the purpose of paragraph 2 was to limit paragraph 1; there was no intention whatsoever to place an obligation on the consignee. His delegation had made that clear during the Working Group’s discussions on draft article 45, paragraph 2, which had ultimately been deleted. All aspects of the consignee’s responsibilities would be governed by national law. In that connection, he referred the Commission to paragraphs 148 to 150 of the Working Group’s report (A/CN.9/645).

3. **Ms. Czerwenka** (Germany) said that the criticisms of the draft article’s title were warranted; the obligation to carry the goods was not a specific obligation but a key obligation of the carrier. Her delegation therefore endorsed the proposal made by the representative of Sweden at the morning meeting (A/CN.9/SR.867) to amend the title to read “Obligations in relation to the goods”.

4. She also took the point made by the Italian delegation at the morning meeting (A/CN.9/SR.867) that it was important to consider the relationship between draft article 14, paragraph 2, and draft article 12, paragraph 3, which made it impossible to do away with the obligation to load and unload the goods. However, the

relationship was not entirely clear and should, perhaps, be looked at further. Since the text already contained that specific provision on loading and unloading, her delegation could support the retention of the current version of draft article 14, paragraph 2, provided the reference to the consignee was removed. Contrary to the Swiss interpretation, her delegation believed that paragraph 2 did give the impression that an obligation could be placed on the consignee through a written agreement between the carrier and the shipper.

5. **Mr. Serrano Martínez** (Colombia) said that draft article 14, paragraph 1, clearly set out the carrier’s obligations, unlike the Hague-Visby Rules, which were vague in that regard. Paragraph 2 reflected the primacy of the will of both the carrier and the shipper, since the carrier and the shipper could agree that the shipper, the documentary shipper or the consignee would perform certain specific obligations. His delegation therefore supported the current version of both the title and the text of draft article 14.

6. **The Chairperson** said that since none of the proposals appeared to enjoy broad support, he took it that most delegations preferred to retain the current version of the text.

7. *Draft article 14 was approved in substance and referred to the drafting group.*

*Draft article 15 (Specific obligations applicable to the voyage by sea)*

8. **Mr. Elsayed** (Egypt) said that the general reference to “due diligence” in the chapeau of draft article 15 was insufficient, since due diligence was governed by many different criteria. He therefore proposed inserting after “due diligence” a reference to the prevailing standards of maritime safety.

9. **Mr. Amadou Kane Diallo** (Senegal) said that, just as other delegations had proposed having the title of draft article 14 refer to obligations concerning the cargo, the title of draft article 15 could refer to obligations concerning the ship. Such wording would reflect more accurately the content of the draft articles in question.

10. **Mr. van der Ziel** (Observer for the Netherlands) said that overall draft article 15 was acceptable to his delegation. He did wish, however, to introduce some minor drafting changes in subparagraph (c). The current

wording suggested that containers were an intrinsic part of the ship; there were many examples of parties making that argument in litigation. To remove any ambiguity, he proposed amending the beginning of the subparagraph so that it read: "Make and keep the holds, all other parts of the ship in which the goods are carried and any containers supplied by the carrier in or upon which the goods are carried ...".

11. At the twenty-first session of Working Group III (Transport Law), the Dutch and Swedish delegations had proposed changing the definition of "container" so as to include road and railroad cargo vehicles. The Working Group had decided that the appropriateness of the definition would be considered in each provision where the word "container" appeared. Draft article 15, subparagraph (c), was one provision where the appropriateness of expanding the definition had not yet been considered. He therefore proposed that the change in the definition of "container" should be taken into account when considering draft article 15.

12. **Mr. Tsantzos** (Greece) said that, in order to be broadly accepted by the international community, a new convention should safeguard a fair balance of rights and liabilities and, therefore, a fair allocation of risk between the parties to the contract of carriage. In that context, draft article 15 created an imbalance between the interests of carriers, on the one hand, and shippers, on the other.

13. Greece had already expressed its reservations about the extension of the carrier's obligation to exercise due diligence in relation to the vessel's seaworthiness to cover the entire voyage. As stated in its written comments on the draft convention (A/CN.9/658/Add.10, para. 4), owing to that and other new elements, the carrier would be exposed to greater liability under the new convention than under existing international practice (in other words, the Hague-Visby Rules), which would result in a shift in the allocation of risk between the parties. For that reason, his delegation would have preferred it if that obligation had not been included in the draft convention. He had no intention, however, of reopening the debate at the current juncture. His delegation supported the minor drafting changes proposed by the delegation of the Netherlands.

14. **Mr. Bigot** (Observer for Côte d'Ivoire) wondered if the secretariat might be able to look at the French version of the draft article, especially subparagraph (c), since the current wording was unclear.

15. **The Chairperson** said that the request had been noted.

16. **Mr. Mollmann** (Observer for Denmark), responding to the representative of the Netherlands, said that, as far as he recalled, the Working Group had agreed not to extend the definition of "container" per se but rather to look at the appropriateness of the definition article by article and add a reference to road or railroad

cargo vehicles where the context so required. Such a reference was unnecessary in the draft article in question, since it was very rare for carriers to supply road or railroad cargo vehicles to the shipper. That said, if such a practice did exist — or came to exist in the future — then road and railroad cargo vehicles should be treated in the same way as containers. His delegation was, therefore, open to the idea of extending the definition in draft article 15, subparagraph (c), in line with the Dutch proposal. The minor drafting changes proposed by the Netherlands, meanwhile, had his delegation's full support.

17. **Mr. Kim** Bong-hyun (Republic of Korea) endorsed the drafting changes proposed by the observer for the Netherlands.

18. **Mr. Berlingieri** (Italy) said that his delegation supported the first proposal of the Netherlands, namely, to refer in article 15, subparagraph (c), to "the holds, all other parts of the ship in which the goods are carried and any containers supplied by the carrier in or upon which the goods are carried". However, a reference to road or railroad cargo vehicles, however appropriate elsewhere, was not called for in draft article 15, since it would be quite unusual for the carrier to supply such vehicles.

19. **Ms. Carlson** (United States of America) said that her delegation could support the first Netherlands proposal but would appreciate clarification as to the exact wording proposed for the reference to road or railroad cargo vehicles.

20. **Mr. Sharma** (India) said that Denmark and Italy were correct in the points they had raised: the agreement in the Working Group had in fact been, not to change the definition of "container" to encompass road and railroad cargo vehicles, but to decide article by article whether to include a reference to them. Such a reference was not warranted in draft article 15, since cases where the carrier supplied road or railroad cargo vehicles were very rare.

21. With regard to the chapeau, which stated that "the carrier is bound to exercise due diligence", he would like to know whether the obligation of the carrier was to exercise due diligence or actually to do the things listed in subparagraphs (a), (b) and (c), in other words, to make and keep the ship seaworthy and so forth.

22. **Mr. Oyarzábal** (Observer for Argentina) said that the obligation imposed on the carrier to exercise due diligence indeed appeared to be an obligation of means. His delegation thought that the obligation should be one of result: the carrier should be required to ensure that the ship was seaworthy and should be held liable for the consequences if it was not maintained in a seaworthy condition.

23. **Mr. Tsantzos** (Greece) said that his delegation could support the Netherlands' proposals but was not in favour of changing the definition of "container".

24. **Mr. Mayer** (Switzerland) said that his delegation supported the Netherlands's first proposal, which would prevent claimants from asserting that containers were part of the ship. Otherwise, the current wording of the draft article should be retained, in particular the words "during the voyage". The requirement that due diligence must be observed throughout the voyage constituted an important improvement in maritime law.

25. **Mr. Fujita** (Japan) said that the first Netherlands proposal was not a change of substance but a necessary clarification to ensure that containers were not considered an intrinsic part of the ship; his delegation could support it. It could also support the substance of the second proposal, but would prefer to implement it, not by changing the definition of "container", but by adding a reference to road and railroad cargo vehicles to subparagraph (c). It was true that for a carrier to supply a road or railroad cargo vehicle was a rare occurrence, but if it did so, it should be obliged to keep it in an appropriate condition.

26. **Mr. Elsayed** (Egypt) said that his delegation agreed with the representative of the Netherlands that the wording needed to be consistent with the prevailing situation. He proposed that the words "in which the goods are carried" should be deleted the first time they appeared in subparagraph (c).

27. **The Chairperson** said he took it that the Commission approved of the proposal to change the first part of draft article 15, subparagraph (c), so that it would read: "Make and keep the holds, all other parts of the ship in which the goods are carried and any containers supplied by the carrier in or upon which the goods are carried ...". However, there did not seem to be a consensus in favour of other amendments.

28. *Draft article 15, as amended, was approved in substance.*

*Draft article 16 (Goods that may become a danger)*

29. **Mr. Elsayed** (Egypt) proposed that a proviso should be added at the end of draft article 16 to the effect that, in order to evade liability for the measure contemplated by the article, the carrier must declare that it was unaware that the goods were dangerous or might become a danger; and, if the carrier took measures damaging to the goods, it must justify those measures and explain why it could not take less drastic measures.

30. **Ms. Czerwenka** (Germany) said the concern seemed to be that draft article 16 allowed the carrier broad discretion to destroy goods since draft article 18, paragraph 3 (o) released the carrier from liability for acts "in pursuance of the powers conferred by articles 16 and 17". But if the carrier accepted goods, having been informed by the shipper pursuant to draft article 33 that they were dangerous in nature, and did not take

appropriate measures, it would seem that the carrier should be liable for later destroying the goods on the grounds that they were or appeared likely to become a danger. Her delegation could therefore support the proposal for a proviso that the carrier in order to escape liability must not have been aware of the dangerous nature of the goods. Justification of the reasonableness of the actions taken, however, could be left to the litigation stage.

31. **Mr. Mayer** (Switzerland) said that the overall system was coherent and right. Draft article 16 was part of chapter 4 on obligations of the carrier, which were essentially to keep the ship seaworthy and to take proper care of the cargo. The draft article simply made the point that the mere act of destroying cargo was not necessarily a breach of the carrier's obligations. Chapter 5, on the other hand, dealt with the liability of the carrier for loss, damage or delay and addressed the concerns just raised.

32. Draft article 16 did not apply to goods of a dangerous nature as such, which were of necessity often carried in trade, but to goods that actually became or were likely to become a danger in the course of carriage. In such cases the carrier had an obligation to take action to protect the ship, the crew and the other cargo, even if that entailed sacrificing the goods. Notwithstanding the exemption from liability allowed under draft article 18, paragraph 3 (o), the carrier was not exempt from the test of reasonableness, stipulated in draft articles 16 and 17, or the other tests set out in draft article 18, paragraphs 4 and 5. Moreover, if the shipper had duly informed the carrier pursuant to draft article 33 that the goods to be shipped were dangerous in nature, the carrier could not bring a liability action against the shipper. Thus, there were many checks on the carrier's discretion to damage or destroy cargo, and there was no need to change the text of draft articles 16 and 17.

33. **Mr. Fujita** (Japan) said that his delegation agreed that the system, taken as a whole, was adequate and did not need to be changed. In a situation where the carrier had accepted dangerous goods after being informed of their nature by the shipper, the carrier would certainly have an obligation to take appropriate safety measures, and if the carrier contributed to the circumstance necessitating the damage or destruction of the goods it would be liable under draft article 18, paragraph 4 (a), notwithstanding the exemption from liability under paragraph 3 (o) and the powers conferred by draft articles 16 and 17.

34. **Mr. Berlingieri** (Italy) said that two situations could be envisaged. If potentially dangerous goods were loaded onto a ship with the carrier's knowledge and were subsequently sacrificed at sea, and if the carrier was unable to show that the danger had increased during the voyage, the carrier would be liable under draft article 18. If, however, the situation changed so that the

theoretical danger posed by such goods became real — for example, if they exploded or caught fire — and were sacrificed in order to prevent further harm, to hold the carrier liable would be tantamount to transferring liability from the shipper to the carrier, which was unacceptable. Draft article 16 should be left unchanged.

35. **Mr. Elsayed** (Egypt) said that draft article 16 envisaged a situation in which the carrier did not realize that the goods posed a potential danger; the situation envisaged in draft article 18 was quite different. The Commission would need to decide how that difference should be reflected in the draft articles.

36. **The Chairperson** noted that there did not appear to be sufficient support for the proposed amendments.

37. *Draft article 16 was approved in substance and referred to the drafting group.*

*Draft article 17 (Sacrifice of the goods during the voyage by sea)*

38. **Ms. Downing** (Australia), drawing attention to paragraphs 28 to 30 of her delegation's comments on the draft convention (A/CN.9/658), said that the scope of draft article 17 was broader than the treatment of the issue under the Hague-Visby Rules or the Hamburg Rules and would afford a lesser degree of protection to shippers than current international law.

39. *Draft article 17 was approved in substance and referred to the drafting group.*

*The meeting was suspended at 4.30 p.m. and resumed at 5 p.m.*

*Draft article 18 (Basis of liability)*

40. **Mr. Ibrahima Khalil Diallo** (Senegal), drawing attention to paragraphs 8 to 12 of the comments on the draft convention submitted by Angola, Benin, Burkina Faso, Cameroon, Congo, Côte d'Ivoire, Democratic Republic of the Congo, Equatorial Guinea, Gabon, Ghana, Guinea, Guinea-Bissau, Mali, Mauritania, Niger, Nigeria, Senegal and Togo (A/CN.9/658/Add.1), said that the position of those States had not changed during the lengthy discussions that had culminated in the current wording of draft article 18. Most of the States in his subregion were governed by the Hamburg Rules, which were worded differently from the draft article. The shipping industry had made tremendous technological strides over time and the exceptions listed in paragraph 3 were no longer valid; the industry, and especially small-scale shippers, would suffer from their inclusion. Paragraph 2 of the draft article was quite sufficient to protect the carrier and paragraph 3 should be deleted.

41. **Mr. Elsayed** (Egypt) said that his delegation would prefer to begin paragraph 3 with wording along the lines of "Unless the claimant proves that the carrier is at fault

..."; however, the best solution would be to delete the entire paragraph, as the representative of Senegal had proposed.

42. **Ms. Downing** (Australia), drawing attention to paragraphs 31 to 37 of her delegation's comments on the draft convention (A/CN.9/658), said she realized that the Working Group had spent a great deal of time on the draft article and that the issue of liability was a complex one. However, like the representative of Senegal, her delegation had concerns about the list of exceptions contained in paragraph 3. The wording differed from that of the similar lists included in the Hague Rules and the Hague-Visby Rules and would need to be interpreted by the courts. In addition, the burden of proof would be more onerous for the claimant, particularly if the unseaworthiness of the ship was alleged. Proportional liability was frequently invoked as a stalling device; as noted in paragraph 37 of her delegation's comments, in a case where two or more causes, one of which was unseaworthiness, contributed to the loss or damage, the existing text provided no guidance as to who bore the onus of proof.

43. **Ms. Chatman** (Canada) said that her delegation's position, like those of the representatives of Australia and Senegal, remained unchanged. Canada's shipping industry had been consulted extensively and was of the view that draft article 18 would make the burden of proof excessively onerous for shippers. Paragraph 5, in particular, should be amended in order to place the burden of proof with respect to seaworthiness on the carrier, not the shipper.

44. **Mr. Imorou** (Benin), **Mr. Ndzibe** (Gabon), **Ms. Sobrinho** (Observer for Angola), **Mr. Bigot** (Observer for Côte d'Ivoire) and **Mr. Ousseimi** (Observer for the Niger) associated themselves with the statement made by the representative of Senegal.

45. **Mr. Tsantzos** (Greece) said that, although he wished to reiterate his delegation's concern at the elimination of "nautical fault" from the list of exceptions, his delegation supported the draft article as it stood.

46. **Ms. Slettemoen** (Norway) said her delegation considered that draft article 18 was, in many ways, the core of the draft convention. The current wording was the result of years of difficult negotiations, and, although not perfect, should be left unchanged.

47. **Mr. Blake-Lawson** (United Kingdom), **Mr. Mayer** (Observer for Switzerland) and **Mr. Hron** (Czech Republic) said that draft article 18 should remain in its current form in its entirety, without deletion of paragraph 3.

48. **Ms. Czerwenka** (Germany) said she understood the concerns expressed by the delegations that wished to amend the draft article. As the representative of Senegal

had noted, the list contained in paragraph 3 was not an example of modern law. Her delegation would prefer a clearer, shorter text but was prepared to support the majority view, whatever it might prove to be.

49. It seemed to her that the concern expressed by Australia in paragraph 37 of its written comments (A/CN.9/658) was addressed in the current text of draft article 18. Paragraph 5 of the draft article made it clear that in cases such as those mentioned in paragraph 37 of Australia's comments the burden of proving due diligence lay with the carrier, although the alternative wording proposed by Australia was more elegant. Her delegation was prepared to accept that proposal, but it could also accept the paragraph as it stood.

50. **Mr. Fujita** (Japan) suggested that, for the sake of consistency, "including" should be deleted from paragraph 5 (a) (iii) and the passage should be reworded in order to reflect the amendment to draft article 15 (c) that had already been approved. His delegation would then be prepared to approve draft article 18.

51. **Mr. Cheong** Hae-yong (Republic of Korea) said that, even though his country's shipping industry was strongly in favour of restoring "nautical fault" to the list of exceptions in paragraph 3, his delegation joined those of Greece and Switzerland in calling for the draft article to be approved in its current form.

52. **Mr. Elsayed** (Egypt) said that under both written and common law, the carrier's liability was based not on the exercise of due diligence but on results. The amendment that his delegation had proposed would preserve the rights of the shipper where the carrier was at fault; if it was not accepted, the draft article should be deleted in order not to alter the balance between the contracting parties or to weaken a principle that all delegations wished to preserve.

53. **Mr. Egbadon** (Nigeria) said that he associated himself with the other African delegations. Paragraph 3, if approved in its current form, would negate all the progress achieved in the previous articles of the draft convention and particularly in chapter 4, which established the terms of the carrier's obligations. He urged delegations to consider the amendment proposed in paragraph 12 of document A/CN.9/658/Add.1.

54. **Mr. Schelin** (Observer for Sweden) said that, like the representative of Germany, he would have preferred a shorter version of paragraph 3; however, he was aware of the lengthy debate and the sensitive compromises that had culminated in the text that the Commission had before it. The representative of Japan's suggestion had merit, and his own delegation would like to propose that the brackets in paragraph 5 (a) (iii) should be removed and that "including" should be replaced by "and".

55. **Mr. Berlingieri** (Italy), endorsing the text as it stood said, by way of explanation to those delegations proposing amendments, that chapter 4 on obligations and chapter 5 on liability represented an overall compromise and should be read together. In chapter 4, in contrast to the Hague-Visby Rules, the carrier's obligations had been made continuous throughout the voyage; and in the draft convention's liability regime, two basic Hague-Visby exonerations — fault in navigation and fault in management of the ship — had been eliminated, significantly shifting the balance in favour of the shipper.

56. Regarding article 18, paragraph 3, whose deletion had been proposed, there was a misunderstanding: the list of exceptions in paragraph 3 were not exonerations but rather cases of reversal of the burden of proof. Perhaps that was a traditional approach, but it was one based on common sense and was certainly not obsolete. The purpose of the list was to reverse the burden of proof in situations where it was likely that the cause of the loss or damage was an event beyond the control of the carrier. A certain balance had been struck because the draft article allowed the shipper to prove that a different cause was at issue or that fault by the carrier had contributed to the loss or damage. The text was certainly not contrary to domestic transport law, which was generally based on fault and not on strict liability.

57. **Ms. Lost-Sieminska** (Poland), **Ms. Talbot** (Observer for New Zealand) and **Mr. Sandoval** (Chile) endorsed the current text and supported the technical correction to paragraph 5 (a) proposed by Japan and Sweden.

58. **Mr. van der Ziel** (Observer for the Netherlands) said that the compromise wording of article 18 drastically shifted the balance of interest in favour of cargo interests, and there was no need to go further than the draft already did. He therefore supported the text as it stood, with Japan's correction in the interest of consistency.

59. **Mr. Baghali Hamaneh** (Islamic Republic of Iran), expressing strong reservations to article 18, said that it should be amended to balance the interests of the carrier and the shipper. Paragraph 3 should be deleted because it provided too many grounds for exonerating the carrier. He would also prefer the deletion of paragraph 5; the carrier should be liable if the claimant proved fault. Paragraph 4, moreover, should be amended to put the shipper on a fairer footing and shield the shipper from the heavy burden of proving unseaworthiness claims whenever the carrier invoked one of the defences under paragraph 3.

60. **Ms. Carlson** (United States of America), supporting the remarks of Italy and the Netherlands, favoured retention of the current text, with the technical correction proposed by Japan. Years of negotiations by the Working Group had gone into producing the text,

which was an essential part of a package of compromises; and it would be a deplorable mistake to introduce any amendments that might result in the failure of the draft convention.

61. **Mr. Alba Fernández** (Spain), endorsing the remarks of Italy, the Netherlands and the United States, said that the current wording of article 18 should be maintained. It preserved the traditional rules of carrier and shipper liability and the traditional treatment of the burden of proof in other maritime, air and road transport treaties. Under no circumstances would Spain agree to the removal of the need to prove the simple probability of the unseaworthiness of the ship.

62. **Mr. Imorou** (Benin), agreeing with the Italian delegation that the rules should be based on common sense, disagreed that the exceptions listed in article 18, paragraph 3, were not exonerations: they were simply disguised exonerations. The African countries were mainly shipping countries, and their shippers should certainly be able to impute latent defects to the carrier.

63. **Ms. Malanga** (Observer for the Congo) said that, like other African countries, she believed that article 18 was not the balanced text it purported to be. She would in particular support the deletion of paragraph 3, which provided so many grounds for relieving the carrier of liability.

64. **Mr. Hu Zhengliang** (China), noting the importance of article 18, said that the text was the result of long discussions in the Working Group and should be retained, with Japan's technical correction. Even though China's shipping industry was not happy with the entire list in paragraph 3, his delegation favoured its retention because the exceptions enumerated would actually resolve uncertainties in practice.

65. **Ms. Eriksson** (Observer for Finland) said that although her delegation was not completely happy with the final draft of what was a very complex article and would have preferred a more streamlined text, it could accept it as it stood. However, she believed that it would be important to highlight in the Commission's report the explanation given earlier by Italy, that paragraph 3 did not list a series of exonerations but rather shifted the burden of proof.

66. **Mr. Mollman** (Observer for Denmark), observing that there should be a firm consensus before making any changes in a text arrived at after sensitive compromises in the Working Group, said that his delegation therefore endorsed as it stood. The consequential correction put forward by Japan could not be considered a change in that sense.

67. **Mr. Serrano Martínez** (Colombia) said that the basic assumption of article 18 was that the carrier had an obligation to deliver the goods in the same condition in

which they had been received, an obligation both of result and of guarantee. On the most controversial point, it was therefore important to enumerate the exemptions that relieved the carrier of liability, especially since it was difficult to distinguish under the Hague-Visby Rules whether the carrier's liability was objective or subjective and whether there was to be presumption or proof of fault. His delegation was therefore in favour of retaining draft article 18 in its entirety in its current wording.

68. **Mr. Ngoy Kasongo** (Observer for the Democratic Republic of the Congo) said that the text of article 18 could be improved and that it was the Commission's task to carry forward the work done over the years in the Working Group. All the key articles of the draft convention had been the subject of sharp debate but a proper balance of interests had not yet been struck. If the current text was retained, the fundamental notion of the liability of the carrier became relative. He fully agreed that the concept of the burden of proof should be based on common sense. The list of exemptions in paragraph 3 were a boon for insurers but detrimental to the economies of the African States, and should be deleted.

69. **Mr. Sharma** (India) observed that the issue of liability had been very central to the Working Group's deliberations from the start. While noting that the list of exonerations in the Hague-Visby Rules had been eliminated from the subsequent Hamburg Rules, the Working Group had determined that the list had worked well in its time and indeed had been adopted in most national legislations. It had with difficulty arrived at a compromise text, which India believed should be retained, except for the technical correction to paragraph 5 (a).

*The meeting rose at 6.05 p.m.*

**Summary record of the 869th meeting, held at Headquarters, New York,  
on Wednesday, 18 June 2008, at 10 a.m.**

[A/CN.9/SR.869 and Corr.1]

*Chairperson:* Mr. Illescas (Spain)

*The meeting was called to order at 10.10 a.m.*

**Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea** (*continued*) (A/CN.9/642, A/CN.9/645 and A/CN.9/658 and Add.1-13)

*Draft article 18 (Basis of liability) (continued)*

1. **Ms. Traoré** (Observer for Burkina Faso) said that, since draft article 18 was of central importance in the draft instrument, its wording should reflect the expressed concern to strike a balance between the various interests involved. Because of the lack of such a balance in that draft article, her delegation along with other African States had proposed in A/CN.9/658/Add.1 that paragraph 3 should be deleted and that the draft article should be restructured accordingly.

2. **Mr. Bigot** (Observer for Côte d'Ivoire), responding to the statement made by the delegation of Italy at the previous meeting, said that there was, in fact, an imbalance in the burden of proof requirements for shippers as opposed to carriers. Carriers were offered alternative possibilities of relief from liability, thereby benefiting from more advantageous treatment than shippers.

3. **Mr. Lebedev** (Russian Federation) said that, since the draft instrument was intended to regulate questions of obligation and liability in international trade, draft article 18 went to the heart of the matter. It was the result of a compromise and reproduced the provisions of article IV, paragraph 2, of the Hague-Visby Rules in that it listed events or circumstances that could serve to relieve the carrier of liability, as opposed to the Hamburg Rules, which did not set out such a list. However, he questioned the omission from that list of nautical fault, contained in the Hague-Visby Rules, since even in the modern age such accidents could occur. A compromise wording should be included in the draft convention to the effect that the carrier would be exonerated from liability in cases of fault in the navigation or in the management of the ship. The relative lack of success of the Hamburg Rules had been due to their omission of such a provision. It was important to give thought to the future of the draft convention and ensure that it would lend itself to broad application.

4. **Mr. Elsayed** (Egypt) reminded the Commission that the views he expressed were those of all the members

of the League of Arab States and stressed the key role of maritime transport companies, which rendered valuable services to developed and developing countries alike. He recalled the provisions of draft article 2 relating to the observance of good faith and draft article 4 relating to the applicability of the proposed instrument in judicial and arbitral proceedings and said that time constraints should not prevent the Commission from attending to the practical matter of achieving a balanced text, particularly since its members were called upon to act as legislators. Everyone had the right to defend their own interests, while justice demanded that all interests should be taken into account. Since draft article 18, paragraph 2, would be nullified in cases where a carrier could not prove the absence of fault, he proposed that the following should be inserted at the beginning of that paragraph: "Unless the claimant proves that the damage was caused by a fault of the carrier or one of its representatives ...". He agreed with the proposal that paragraph 3 should be deleted. Paragraphs 1, 2 and 3 of the draft article seemed to have been framed in isolation from one another and failed to strike a balance between the interests of all the parties concerned.

5. **Ms. Mbeng** (Cameroon) said that if the draft convention was to achieve broad acceptability, there had to be a balance between the interests of shippers and carriers. Serious consideration should accordingly be given to the alternative wording of the draft article proposed in A/CN.9/658/Add.1, which entailed the deletion of draft paragraph 3. Moreover, it might well be difficult for a claimant to prove the unseaworthiness of a ship, as required by draft paragraph 5.

6. **Mr. Oyarzabal** (Observer for Argentina) said that paragraph 2 required a negative proof, which it would be hard to provide. He would have preferred a more positive formulation. The case of fire on the ship, provided for by paragraph 3 (f) should definitely be exempt from liability since it was one of the events that could not be foreseen by the carrier.

7. **The Chairperson** reminded the Commission that the text proposed by the Working Group was the result of a compromise achieved at the end of long and difficult debate and that it had the support of a broad majority.

8. **Ms. Sobrinho** (Observer for Angola) recalled that it had been decided, in the absence of a consensus, to hold informal consultations to reconsider draft article 12, and

wondered whether a similar approach might be taken to draft article 18. In its current wording, it would lead to higher prices for goods in developing countries and thus run counter to the global efforts called for by the General Assembly in support of the Millennium Development Goals, in particular that of poverty reduction. She referred notably to paragraph 68 of the 2005 World Summit Outcome, set forth in General Assembly resolution 60/1, on meeting the special needs of Africa. If draft article 18 were approved in its current wording, her delegation would exercise its right of reservation.

9. **The Chairperson** said that he had called for informal consultations on draft article 12 because he had been unable to identify a prevailing opinion. That was not the case in regard to draft article 18: according to his calculations, there was a two-to-one majority in favour of the proposed wording.

10. **Mr. Amadou Kane Diallo** (Senegal) stressed that it was important for the Commission to take into account the views of the African States and the members of the Arab League with respect to draft article 18 in order for an acceptable consensus decision to be reached. According to his calculations, there was not an overwhelming majority in favour of the current wording. In fact, at least 15 delegations had called for the deletion of the draft article.

11. **Mr. Egbadon** (Nigeria) said that equity and fairness should not be sacrificed to the need for a timely decision on draft article 18, which was a central part of the draft convention as a whole. The Commission should therefore ensure that the necessary efforts were made to address draft article 18 in a manner that was satisfactory to all. Otherwise the Commission might give the misleading impression that the views of the entire African continent, the Arab League and some major European countries were not considered to be important. In order to build a consensus, he proposed that informal consultations should be held to review draft article 18.

12. **Ms. Czerwenka** (Germany) agreed that it was important to draw up a draft convention that was acceptable to all delegations. For that reason, those delegations that had expressed concerns about draft article 18 should have an opportunity to try to find a consensus solution in informal consultations. She therefore supported the proposal just made by the delegation of Nigeria.

13. **Mr. Delebecque** (France) pointed out that while informal consultations might prove useful, it would be difficult to discuss draft article 18 in isolation, since it was part of a compromise with widespread implications for other provisions, including limits of liability, reservations and the wording of draft article 27.

14. **Mr. Ibrahima Khalil Diallo** (Senegal) said that his delegation did not agree with the views just expressed by

the delegation of France. Informal consultations on draft article 18 could be limited to that particular issue. Draft article 62 on limits of liability, for example, was an entirely separate matter and would not be called into question.

15. **Mr. Ngoy Kasongo** (Observer for the Democratic Republic of the Congo) agreed that it would be extremely dangerous to reopen the compromise package already agreed upon in Vienna. Informal consultations could focus on the specific proposal made by a group of African States in paragraph 12 of their joint comments (A/CN.9/658/Add.1).

16. **Mr. Tsantzos** (Greece) said that his delegation was in favour of retaining the current wording of draft article 18, which represented a fair and balanced compromise solution. Reopening the discussion of the draft article would only create further complications.

17. **Ms. Carlson** (United States of America) said that her delegation was in favour of retaining draft article 18 in its current form. Every effort had already been made to achieve an acceptable compromise solution. The proposed informal consultations would merely reopen the debate on a number of contentious issues, which could even jeopardize the outcome of the draft convention itself.

18. **Mr. Hu Zhengliang** (China) said that draft article 18 was part of a compromise package on the carrier's liability, and it would therefore not be appropriate to consider it in isolation. If informal consultations were held, they should cover the whole compromise package concerned with the carrier's responsibility, especially the limits of liability of the carrier.

19. **Mr. Imorou** (Benin) pointed out that the maritime industry had evolved considerably since the Hague Rules of 1924. It seemed odd to base arguments for the present draft convention on such a model. Africa was not one State but many independent States whose concerns must be respected and taken into account. If the Commission failed to adopt that approach, the convention might never be ratified.

20. **The Chairperson** recalled that the total number of delegations opposed to the retention of draft article 18 was still in the minority.

21. **Mr. Mouloupo** (Observer for the Congo) said that the Commission should allow concerned delegations to review the provisions of draft article 18 informally in a spirit of compromise and in an effort to achieve a consensus on a fair and balanced basis. The maritime industry had indeed changed significantly since 1924, but draft article 18 took no account of those developments. As a result, the current text would adversely affect the shipper, leading to higher insurance premiums that would



increase the price of the goods. Those costs would ultimately be passed on to the final consumer. The draft text was therefore out of step with the national campaigns of African countries to combat poverty and to achieve the Millennium Development Goals.

22. **Ms. Downing** (Australia) stressed that the Commission had a mandate to produce harmonized international trade law. To that end, her delegation supported the proposal to hold informal consultations on draft article 18 in order to reach a compromise solution.

23. **Mr. Kim Bong-hyun** (Republic of Korea) said that, while his delegation was not completely satisfied with the wording of draft article 18, it was willing to support its retention in a spirit of compromise. His delegation was opposed to holding informal consultations on draft article 18 since it did not wish to reopen the debate on that issue.

24. **Mr. Schelin** (Observer for Sweden) said that his delegation supported the text of draft article 18 as a compromise solution. While the wording of the draft article was not entirely satisfactory, progress had been made compared with the Hague-Visby Rules: the nautical fault exception had been eliminated; half of the fire exception had been eliminated; and it had become clear that paragraph 3 of draft article 18 did not represent exonerations but rebuttable presumptions of the absence of fault. However, since draft article 18 was part of a delicate series of compromises, informal consultations, if conducted, should not be limited to a review of the draft article in isolation.

25. **Mr. Sharma** (India) said that his delegation favoured the retention of draft article 18 in its entirety. However, if informal consultations were to be held, they should address draft article 18 exclusively, without the added complications associated with limits of liability.

26. **The Chairperson** said that, notwithstanding the strength of the arguments put forward, notably by the African States and Egypt, the fact remained that the majority of the members of the Commission wished to retain draft article 18 in its entirety. He took it that the Commission accepted the amendment proposed by Japan and Sweden to eliminate the brackets in paragraph 5 (a) (iii) and to replace “including” by “and” in order to align the provision with article 15, subparagraph (c), as amended.

27. *Draft article 18 was approved in substance, with the amendment proposed by Japan and Sweden, and referred to the drafting group.*

*The meeting was suspended at 11.30 a.m. and resumed at noon.*

*Draft article 19 (Liability of the carrier for other persons)*

28. *Draft article 19 was approved in substance and referred to the drafting group.*

*Draft article 20 (Liability of maritime performing parties) and definitions of “performing party” and “maritime performing party”*

29. **Ms. Czerwenka** (Germany) drew attention to the comments of her Government regarding draft article 20 (A/CN.9/658/Add.11, para. 9). Her delegation also had concerns about the definition of “maritime performing party” contained in draft article 1, paragraph 7. The first problem that arose was how to interpret the term “port”. From her reading of the definition in draft article 1, paragraph 7, an inland carrier became a maritime performing party once it entered the port, but further clarification of that definition would be helpful. It was also not clear who was responsible for proving where damage had occurred. A provision was needed which gave States with concerns regarding “maritime plus” contracts the flexibility to opt out.

30. **The Chairperson** said that the word “only” in the last sentence of the definition should meet the concerns expressed by the representative of Germany.

31. **Mr. Fujita** (Japan) explained that a road carrier that started and ended its journey outside the port area was never a maritime performing party. A land carrier would be a maritime performing party only if it operated exclusively within the port area: for example, a trucker who transported goods between terminals within the port. However, the ambiguity in the definition could perhaps be clarified.

32. **Mr. Sturley** (United States of America) said that countries which had ratified the Hamburg Rules had been living with the ambiguity in the definition of the port area for some time. As it was difficult to define the boundaries of a port in the abstract, the Hamburg Rules allowed local port authorities to define the boundaries, and it would be best for the draft convention to leave that issue to be decided country by country. His delegation supported the current text of draft article 20 and the related definitions.

33. **Mr. Elsayed** (Egypt) said that draft article 20, paragraph 2, related to draft article 13, which his delegation had preferred to delete. It was impossible to conceive of a maritime performing party as being exempt from liability.

34. *Draft article 20 and draft article 1, paragraphs 6 and 7, were approved in substance and referred to the drafting group.*

*Draft article 21 (Joint and several liability)*

35. *Draft article 21 was approved in substance and referred to the drafting group.*

*Draft article 22 (Delay)*

36. **Ms. Czerwenka** (Germany) said that Working Group III (Transport Law) had debated at length whether agreement must be explicit or could be implied. Since, as drafted, the article contained no explicit reference to an express agreement, she inferred that either an express or an implied agreement was acceptable.

37. **Mr. Mayer** (Switzerland) said that his delegation interpreted the draft article in the same way.

38. **Ms. Downing** (Australia) said that, since the draft article would change the law in Australia dramatically and amount to a reduction of rights of cargo interests, her delegation had always favoured its deletion.

39. **Ms. Nesdam** (Norway) said that her delegation had also favoured deletion of the draft article but would accept the compromise text on the understanding that carriers could not contract out of their general obligation in respect of delay and that the provision applied without express agreement.

40. **Ms. Peer** (Austria) said that her delegation supported the inclusion of the article as it was drafted, with the interpretation expressed by the representatives of Germany and Switzerland.

41. *Draft article 22 was approved in substance and referred to the drafting group.*

*Draft article 23 (Calculation of compensation)*

42. **Mr. Elsayed** (Egypt) said that his delegation would like to insert a provision between paragraphs 2 and 3 to the effect that, if there were no goods of the same kind and quality at the place of delivery, a competent court would determine the amount of compensation.

43. **Mr. Morán Bovio** (Spain) said that, in his view, the convention would not be the best place to resolve that question, as arbitration tribunals in most countries established compensation. In most cases, the question would be resolved under domestic law, an area which the convention was not intended to address.

44. *Draft article 23 was approved in substance and referred to the drafting group.*

*Draft article 24 (Notice in case of loss, damage or delay)*

45. *Draft article 24 was approved in substance and referred to the drafting group.*

46. *Draft article 25 was approved in substance and referred to the drafting group.*

*Draft article 26 (Deck cargo on ships) and definitions of “goods”, “ship” and “container”*

47. **Mr. van der Ziel** (Observer for the Netherlands) said that draft article 26, which extended the normal liability rules to deck cargo, was an essential element of the balance of risk as expressed in the convention. In restricting the freedom of the carrier to carry goods on deck, the article represented an improvement upon the situation under the Hague Rules, which did not cover deck cargo and had therefore allowed carriers to exonerate themselves of liability in most cases. Draft article 26 shifted the balance in favour of the interests of the shipper.

48. **Mr. Ibrahima Khalil Diallo** (Senegal) noted that, although progress had been made on the issue of balance between shipper and carrier interests since the Hague Rules, the shipper's contractual situation under draft article 26 and that under the Hamburg Rules were essentially the same. If anything, the trend in that respect favoured the interests of the carrier: the Hamburg Rules allowed for notice of damage to be given to the carrier within 15 consecutive days after the date of delivery, whereas the draft convention in draft article 24, paragraph 1, limited the notification period to seven days.

49. **Mr. Hu Zhengliang** (China) said that his delegation had no objections to the substance of the text but thought that the reference to the “customs usages and practices of the trade” should be standardized in word order wherever it appeared in the draft convention.

50. **Mr. Morán Bovio** (Spain) said that, in the interest of legal common sense, differences in historical context must be taken into account when comparing the provisions of legal instruments such as the 1978 Hamburg Rules, the current draft convention and other earlier legal documents. It was obvious that in 1978 a message had taken longer to send than in the current era of electronic communications, hence the longer period of time granted for notification of damage under the Hamburg Rules.

51. **Mr. Ibrahima Khalil Diallo** (Senegal) said that it was untenable for some delegations to defend a series of outdated and unjustifiable provisions of the Hague Rules, which were nearly a century old, when it was expedient, while dismissing inconvenient comparisons to the Hamburg Rules as invalid because they were three decades old. Rather than pursuing such contentious debates, the focus should remain on making progress that favoured both carrier and shipper interests.

52. **The Chairperson** noted that the definitions of “goods”, “ship” and “container” contained in draft article 1, paragraphs 24, 25 and 26, were related to draft article 26.

53. **Mr. van der Ziel** (Observer for the Netherlands) asked whether the term “container” in the definition of “goods” should be supplemented by “road and rail cargo vehicle”, as per the proposal made by his delegation in its comments (A/CN.9/658/Add.9, para. 9).

54. **Mr. Mollmann** (Observer for Denmark) and **Mr. Sharma** (India) agreed that adding a reference to “road and rail cargo vehicles” was appropriate in draft article 1, paragraph 24.

55. **Mr. Schelin** (Observer for Sweden) said that including a reference to “road and rail cargo vehicles” in the definition of “goods” would cause some confusion. The definition of “goods” already covered “articles of every kind whatsoever”, making an explicit mention of road and rail cargo vehicles unnecessary. Moreover, draft article 61, paragraph 2, referred to containers and road or railroad cargo vehicles as things that goods were carried in or on.

56. **The Chairperson** said that, given the divergent views on the proposed amendment, he took it that the Commission wished to retain the current wording of the definition of “goods”. The drafting group would be asked to ensure consistency in references to “customs, usages and practices of the trade”.

57. *Draft article 26 and draft article 1, paragraphs 24, 25 and 26 were approved in substance and referred to the drafting group.*

*The meeting rose at 1 p.m.*

**Summary record of the 870th meeting, held at Headquarters, New York,  
on Wednesday, 18 June 2008, at 3 p.m.**

[A/CN.9/SR.870 and Corr.1]

*Chairperson:* Mr. Illescas (Spain)

*The meeting was called to order at 3.15 p.m.*

**Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea** (*continued*) (A/CN.9/642, A/CN.9/645 and A/CN.9/658 and Add.1-13)

*Draft article 27 (Carriage preceding or subsequent to sea carriage)*

1. **Ms. Downing** (Australia), referring to her Government's written comments (A/CN.9/658, paras. 41-42), said that, as currently worded, draft article 27 imposed on shippers the nearly impossible burden of proving where damage or loss had occurred before its provisions could have any practical effect. Furthermore, unless a reference to national law was inserted, her own Government and others would have difficulty regulating inland carriers under draft article 27.

2. **Ms. Halde** (Canada) said that her delegation had long argued for the inclusion of a reference to national law to ensure that the maritime limitations established by draft article 27 would not have any impact on the land portion of a transport and to ensure that national limitations on inland carriers were preserved. An acceptable alternative would be to allow States parties to formulate a reservation to the convention to that effect. While aware that the concept of the maritime performing party could cover the land transportation issue, Canadian industry had expressed major concerns over the potential ambiguity and resultant misapplication of the draft convention to inland carriers.

3. **Mr. Hu Zhengliang** (China), supporting the Australian position, observed that the situation in China was similar, because China was not a party to the Convention on the Contract for the International Carriage of Goods by Road (CMR) or the Convention concerning International Carriage by Rail (COTIF). His delegation had consistently advocated the inclusion of a reference to national law in draft article 27.

4. **Ms. Eriksson** (Observer for Finland) said that, while her Government favoured having the draft convention cover door-to-door transport, it was concerned about the rules for multimodal transport in draft article 27 and agreed that it should include a reference to national law.

5. Another major problem had to do with non-localized damages. The maritime rules would apply

to the land transport leg if the shipper could not prove that the damage had occurred during transport by a mode other than by sea, which was extremely difficult to do, especially in the case of containers. Global harmonized rules for shipping were necessary, but the different worldwide trade and transport patterns must be recognized. In Europe, land transport conventions were applied with significantly higher limitation amounts than were currently stipulated in the draft convention. Unfortunately the special rule on limits of liability for non-localized damage had been eliminated from the draft, so that there was a clear link between draft article 27 and draft article 61; the low limits set in the latter compounded the problem in the case of non-localized damage. To address the different multimodal transport situations worldwide and attract as many signatories as possible to the convention, an arrangement was needed to regulate the multimodal liability aspects in a way that was fair to both shipper and carrier. That could be done via a reservation clause.

6. **Mr. Elsayed** (Egypt) proposed that, since draft articles 27 and 12 both dealt with the period of responsibility of the carrier, draft article 27 should be deleted and the text combined with that of draft article 12.

7. **Mr. Sharma** (India), concurring with Australia on the need to include a reference to national law, observed that the Asian countries were not parties to regional conventions like CMR. A reference to national law would also serve to clear up any ambiguity about the applicability of the limits of liability in the draft Convention. The understanding in Working Group III (Transport Law) had been that the Convention would apply where there was no applicable international instrument but would yield to another applicable international instrument.

8. **Mr. Schelin** (Observer for Sweden) said that his delegation shared Finland's concerns and believed the Commission should seek to approve a text acceptable to the large majority of States, which meant a compromise text. A number of States required a reservation to draft article 27, and the limitation amounts would also be an important issue. Compromise could be achieved and Sweden was willing to join the discussion.

9. **Ms. Czerwenka** (Germany), referring to her Government's written comments (A/CN.9/638/Add.11, paras. 3-5 and 11-12), said that her delegation supported the reintroduction of a reference to national law. In any

case, draft article 27 was no longer very important in the scheme of the draft convention, because the Working Group had deleted the provision on the limits that would apply in cases of non-localized damage, which meant that the relatively low limits of liability set in draft article 61 would apply in most cases. A compromise must be reached on draft article 27, and one solution would be to include a reservation clause regarding “maritime plus” contracts.

10. In addition, since the Working Group had concluded that draft article 27 was not a conflict of conventions provision, the statement in the chapeau that the convention did not “prevail” was misleading. Rather, there should be wording to the effect that the convention did not “apply” in the cases set out in subparagraphs (a) to (c).

11. **Mr. Sturley** (United States of America) said that draft article 27 was already part of a compromise proposed by more than thirty countries and supported by others. There was therefore no need for a new compromise. Many delegations, including his own, had refrained from insisting on the inclusion of preferred positions in the interests of general consensus on the text. It was not appropriate at the current stage to insert a reference to national law or to introduce a reservation clause.

12. He had been astonished to hear the limits of liability under the draft Convention described as low: for packaged goods they were much higher than under other carriage regimes like CMR or COTIF.

13. **Mr. Berlingieri** (Italy), concurring with the United States, said that his delegation could not support the proposals for a reference to national law in draft article 27. All certainty about the scope of the convention would disappear, because the provisions of the different national transport laws were not known the world over, and could be changed at any time by States, leaving both carriers and shippers unclear as to what rules applied to the contracts they had concluded.

14. On the question of non-localized damage, it was reasonable to adopt the rule that unless there was proof that loss or damage had occurred elsewhere, it would be deemed to have occurred on the sea leg of the transport because draft article 27 covered “maritime plus” contracts in which the maritime section was the fundamental leg that triggered the applicability of the convention in the first place.

15. **Ms. Nesdam** (Norway) said that her delegation would have preferred a reference to national law but agreed with the United States that the draft text as it stood represented a compromise. However, the possibility of coming back to draft article 27 might be left open if other parts of the compromise were altered later in connection with other provisions. As to the German suggestion to

change “prevail” to “apply”, article 30 of the Vienna Convention on the Law of Treaties used the word “prevail”, and it should be retained in the draft convention as well.

16. **Mr. Blake-Lawson** (United Kingdom), **Mr. Delebecque** (France), **Mr. Alba Fernández** (Spain), **Mr. Tsantzos** (Greece) and **Mr. Sandoval** (Chile) said that the current text of draft article 27 should be retained.

17. **Mr. Elsayed** (Egypt) said that he supported the proposal of Australia and Finland to refer to national law. The non-maritime leg of a contract should be covered by national law, and the draft convention should apply only to the maritime leg, because a shipper had no way of knowing where damage had occurred.

18. **Mr. Mayer** (Switzerland), agreeing that the text of article 27 should be retained as it stood, said that he would, however, support Germany’s proposal to find wording other than “do not prevail”, because draft article 27 was not a conflict of conventions clause but reflected a network approach and could not be compared to the Vienna Convention.

19. **Mr. van der Ziel** (Observer for the Netherlands) said that article 27 was already a compromise text, and the Commission should adhere to the compromise. As to the German proposal, he believed that the phrase “do not prevail” was the correct one. The draft convention and other international conventions must be read in the context of different liability regimes, but the draft convention in principal prevailed unless there were conflicting provisions in one of the other applicable conventions.

20. **Mr. Shautsou** (Belarus) said that his delegation favoured retaining the agreed compromise text of draft article 27. The phrase “do not prevail” was the correct wording because it allowed individual provisions of the draft convention to apply where there was no conflict. As Italy had argued, a reservation clause regarding national legislation would affect the stability of the draft convention and should not be introduced.

21. **Mr. Fujita** (Japan) said that his delegation agreed with all those who supported retaining the draft article in its current form, as it represented a compromise. He had no firm views on whether the draft article embodied a conflict of conventions or a network approach, but felt that “prevail” was the right term. The draft article as it stood enabled a court to give preference to other conventions that applied to the limited situation described in the article but did not prevent it from giving preference to the draft convention if it saw fit.

22. **Ms. Czerwenka** (Germany) said that the reason for changing “prevail” to “apply” was to make it clear that draft article 27 was not a conflict of conventions provision. Provided it was known where the damage had

occurred and provided it had occurred where another international instrument applied, the provisions of the latter instrument would apply.

23. **The Chairperson** said that there appeared not to be a majority in favour of including a right of reservation or a reference to national law. With regard to the choice of verb between “prevail” and “apply”, the drafting group could decide.

24. *Draft article 27 was approved in substance and referred to the drafting group.*

*Draft articles 28 (Delivery for carriage),  
29 (Cooperation of the shipper and the carrier in providing information and instructions),  
30 (Shipper’s obligation to provide information, instructions and documents) and 31 (Basis of the shipper’s liability to the carrier)*

25. *Draft articles 28, 29, 30 and 31 were approved in substance and referred to the drafting group.*

*Draft article 32 (Information for compilation of contract particulars) and definition of “contract particulars”*

26. **Ms. Czerwenka** (Germany) noted that, as her delegation had pointed out in its written comments (A/CN.9/658/Add.11, paras. 13-14), the shipper was subject to strict liability if the information it was obliged to provide under draft articles 32 and 33 was inaccurate. Moreover, under draft article 81 the shipper’s liability could not be limited, whereas under draft article 61 the carrier enjoyed limited liability for all breaches of its obligations. The liability regime was thus unbalanced to the detriment of the shipper. Her delegation would therefore propose deleting the verb “limits” in draft article 81, paragraph 2, in order to allow the parties to agree contractually to a limitation of the shipper’s liability.

27. **Mr. Sturley** (United States of America) recalled that the Working Group, after much discussion, had concluded that there was no practical way to limit the shipper’s liability. Although it might be appropriate in certain cases for the parties to agree contractually to different terms, that was provided for in draft article 82 on special rules for volume contracts. There was no need to change draft articles 32 and 33 or draft article 81.

28. **Ms. Peer** (Austria) said her delegation agreed that there was currently an imbalance between shipper and carrier interests, and it supported the proposed change.

29. **Ms. Downing** (Australia) said that her delegation supported the German proposal. As it had indicated in its written comments (A/CN.9/658, para. 8), Australia had some concerns about the balance of interests in the draft convention. Although it was difficult to set an appropriate

general cap on the shipper’s liability, the shipper should have the freedom to seek to limit its liability contractually, for example, to the amount of insurance it was able to obtain.

30. **Mr. Schelin** (Observer for Sweden) said that his delegation saw merit in the German proposal, which could benefit both parties because it would make it easier for the shipper to insure its liability. A shipper’s general liability insurance policy might not cover the risks described in draft articles 32 and 33, and in any case insurance companies were generally unwilling to insure unlimited liability.

31. **Mr. van der Ziel** (Observer for the Netherlands) said he assumed that Germany’s aim was to allow the shipper to negotiate a monetary limit on its liability. The issue of capping the shipper’s liability had been discussed, and the current solution was part and parcel of the compromise. His delegation would not be in favour of reopening the whole package.

32. **Mr. Kim In Hyeon** (Republic of Korea) said that his delegation associated itself with the statement by the representative of the United States and preferred to leave draft article 81 unchanged. In fact, the Working Group had not been able to find any practical way to set a limit on the shipper’s liability.

33. **Ms. Talbot** (Observer for New Zealand) said that her delegation supported the comments of Austria and Sweden.

34. **Mr. Fujita** (Japan) said that, although his delegation had not favoured a mandatory rule on shipper’s liability, it had some sympathy for the German proposal. However, the proposed change to draft article 81, paragraph 2, would affect not only the obligations under draft article 32 but also the shipper’s obligations of disclosure relating to dangerous goods under draft article 33, and perhaps no limitation of those obligations should be allowed. If the question were reopened, the Commission should be very careful about the scope of freedom of contract. Although his delegation tended to prefer to maintain the compromise solution and retain the current wording of draft article 81, it could consider a more limited amendment.

35. **Mr. Mayer** (Switzerland) expressed support for the German proposal and said that he had no recollection of draft article 81, paragraph 2, being part of a compromise.

36. **Ms. Czerwenka** (Germany), responding to the Netherlands, again argued that under draft article 81, paragraph 2, it was not currently possible for the parties to limit the shipper’s obligations and hence liability contractually. That was unfair, since draft article 61 set specific limits on the carrier’s liability for all breaches of its obligations. The issue related not only to draft article 32, but also to draft article 33. Her delegation was

simply trying to strike a better balance, but was, of course, open to compromise.

37. In that connection, she was puzzled by some delegations' reference to an earlier compromise. The Working Group had indeed approved a text, but it was the Commission's task to review it. It was a matter of finding a balanced text that was acceptable to most delegations, not of reopening issues or questioning compromises that might have been agreed by some, but not all, delegations in the Working Group.

38. **Mr. Mollmann** (Observer for Denmark) said that two different issues were being discussed. With regard to the introduction of a general limitation on the shipper's liability, the representative of the United States was correct in saying that it would be very difficult for the Commission to agree on a rule. With regard to the possibility of contracting on terms other than those set out in the Convention, his delegation agreed that the Convention was currently unbalanced; however, it was unbalanced not in favour of the carrier, as the German delegation argued, but in favour of the shipper. Indeed, draft article 81, paragraph 2, subparagraph (a), prevented the parties from contracting on terms that increased the shipper's obligations; nothing, however, prevented the parties from contracting on terms that increased the carrier's obligations. His delegation had accepted that situation in earlier discussions but was opposed to making the Convention even more unbalanced by allowing the parties to the contract to limit the shipper's obligations. The current version of the text should, therefore, be retained.

39. **Mr. Morán Bovio** (Spain) said that his delegation failed to understand why draft article 32 raised so many concerns. The only obligation it placed on the shipper was to provide, in a timely manner, the information required for the compilation of the contract particulars and the issuance of the transport documents or electronic transport records. Without such information, those documents or records could not be issued and the goods could not be transported. The current version of draft article 32 should, therefore, be retained.

40. **Mr. Sharma** (India) said that his delegation had no problem with draft article 32. With regard to draft article 81, he recalled that, during its discussions regarding the liability of the carrier, the Working Group had agreed that there was no practical way of setting specific limits on the liability of the shipper. However, the German proposal to delete the word "limits" simply allowed the parties to decide that matter contractually and would not affect the compromise. His delegation was, therefore, sympathetic to the proposal.

41. **Ms. Nesdam** (Norway) said that her delegation agreed with the Dutch delegation that simply deleting the

word "limits" was not the best solution. Any amendment should deal more specifically with the limits of liability.

42. **Mr. van der Ziel** (Observer for the Netherlands) confessed that he had understood the German proposal to relate only to the possibility of placing a monetary cap on the shipper's liability; he now realized that it also related to obligations of a non-monetary nature, which was another matter altogether. The obligations set out in draft articles 30, 32 and 33 related not only to contractual relations, but also to safety and the proper performance of the transport itself. Therefore, while the part of the proposal relating to liability might be open to compromise, the part relating to obligations was unacceptable to his delegation, for the reasons set out by the representative of Spain.

43. **Ms. Halde** (Canada) said that her delegation agreed with Germany that the shipper should be able to limit its liability through contractual arrangement.

44. **Mr. Delebecque** (France) said that his delegation had no problem with draft article 32. With regard to draft article 81, it was open to the idea of allowing the parties to limit the liability of the shipper contractually, but only in relation to certain obligations — the shipper's liability in relation to obligations relating to dangerous goods, for example, should not be limited — and only where the breach was due neither to wilful misconduct nor to gross negligence.

45. **Ms. Nesdam** (Norway) said that, like the Netherlands, her delegation supported the German proposal with regard to the shipper's liability, but not with regard to the shipper's obligations in general.

46. **Ms. Czerwenka** (Germany) explained that her delegation's intention was only to allow for contractual limitation of the shipper's monetary liability, not its substantive obligations.

47. **The Chairperson** said that since draft article 81 was not yet under consideration, the German delegation still had time to refine its proposal, taking into account the concerns raised. He took it that the Commission wished to approve draft article 32 and, in the absence of any comments, the related definition of "contract particulars" contained in draft article 1, paragraph 23.

48. *Draft article 32 and draft article 1, paragraph 23, were approved in substance and referred to the drafting group.*

*The meeting was suspended at 4.45 p.m. and resumed at 5.25 p.m.*

49. **The Chairperson** informed the Commission that, following consultations between the delegation of Germany and the secretariat, it had been decided that the current wording of draft article 27 could be retained so

that the drafting group would not need to decide between the “prevail” and “apply”.

50. **Mr. Sekolec** (Secretary of the Commission) explained that, once approved, the draft convention would be reproduced in annex to the report of the Commission on the work of its forty-first session. The Sixth Committee would consider that report at the sixty-third session of the General Assembly and would prepare a draft resolution for adoption by the Assembly, adopting the draft convention and opening it for signature. It was the Commission’s practice to request the General Assembly to open such instruments for signature without substantial renegotiation since the Assembly, as a political body, was not competent to consider it in detail. Draft instruments could also be adopted at a diplomatic conference. However, in addition to the budgetary implications that such an approach would entail, the draft convention was very long; at least three weeks would be needed if the participants were to vote separately on each article, and the result would be unpredictable. Several recent international conventions had been negotiated entirely in the Commission, and the General Assembly had demonstrated its confidence in the Commission’s technical knowledge and political wisdom by opening those instruments for signature without further negotiation; he thought it likely that that practice would be followed in the case at hand.

*Draft article 33 (Special rules on dangerous goods)*

51. *Draft article 33 was approved in substance and referred to the drafting group.*

*Draft article 34 (Assumption of shipper’s rights and obligations by the documentary shipper) and definitions of “documentary shipper”*

52. **The Chairperson** noted that the definition of “documentary shipper” contained in draft article 1, paragraph 9, was relevant to the content of draft article 34.

53. **Ms. Czerwenka** (Germany), drawing attention to her delegation’s written comments (A/CN.9/658/Add.11, para. 15), said that the draft article went too far by making the documentary shipper subject to all the obligations and liabilities imposed on the shipper and, apparently, establishing their joint and several liability. In draft article 1, paragraph 9, it was not clear in practice which party had the burden of proving that the documentary shipper had accepted to be named as “shipper”.

54. **Mr. Schelin** (Observer for Sweden) said it seemed reasonable that documentary shippers should bear some responsibility when they substituted for the shipper; that was particularly true if they were responsible for the

loading of the ship. However, he did not think that any joint liability was implied.

55. *Draft article 34 and draft article 1, paragraph 9, were approved in substance and referred to the drafting group.*

*Draft article 35 (Liability of the shipper for other persons)*

56. *Draft article 35 was approved in substance and referred to the drafting group.*

*Draft article 36 (Cessation of shipper’s liability)*

57. **Ms. Downing** (Australia), drawing attention to her delegation’s written comments (A/CN.9/658, paras. 46-47), said that draft article 36 should be deleted. It was at odds with the freedom of contract provisions elsewhere in the draft convention and established an imbalance to the detriment of the shipper, since the parties would not be free to put a time limit on when the shipper’s liability would cease.

58. **Ms. Halde** (Canada) said that her delegation agreed with the representative of Australia; the draft article appeared to create never-ending liability for the shipper, which was contrary to draft article 64 (period of time for suit); either it should be deleted, or a provision linking it to draft article 64 should be included in order to make it clear that the latter article would apply to all claims.

59. **Mr. Sandoval** (Chile) suggested that for linguistic reasons, the words “*carecerá de efecto alguno*” should be changed to “*no producirá efecto ninguno*” in the Spanish text of the draft article.

60. **Ms. Peer** (Austria) said that her delegation agreed with the proposal to delete draft article 36.

61. **Mr. Lebedev** (Russian Federation), supported by **Ms. Nesdam** (Norway), pointed out that paragraphs 107 and 108 of the report of Working Group III (Transport Law) on the work of its twenty-first session (A/CN.9/645) did not provide a rationale for the inclusion of draft article 36. The provision appeared superfluous, but he would be interested to know whether an explanation of its function appeared in an earlier report of the Working Group.

62. **Mr. Schelin** (Observer for Sweden) recalled that in the past, some members of the Working Group had argued that the draft article was needed. He had never understood the rationale and agreed that it should be deleted; it might lead to confusion in the context of draft article 81, which also covered derogation from the shipper’s liability. Moreover, if the Commission should decide that it wished to allow the parties to a contract to set a cap on the shipper’s liability, draft article 36 would be in direct contradiction to that freedom of contract.



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63. **Mr. Imorou** (Benin), **Mr. Elsayed** (Egypt), **Ms. Czerwenka** (Germany), **Mr. Sharma** (India) and **Ms. Talbot** (Observer for New Zealand) said that they associated themselves with the delegations that had called for the deletion of draft article 36.

64. **Mr. Shautsou** (Belarus) suggested that the draft article might be useful in the context of the economic implications of the shipper's liability.

65. **The Chairperson** said it appeared that the majority of the Commission's members wished to delete the draft article.

66. *Draft article 36 was deleted.*

*The meeting rose at 6 p.m.*

**Summary record of the 871st meeting, held at Headquarters, New York,  
on Thursday, 19 June 2008, at 10 a.m.**

[A/CN.9/SR.871 and Corr.1]

*Chairperson:* Mr. Illescas (Spain)

*The meeting was called to order at 10.10 a.m.*

**Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea** (*continued*) (A/CN.9/642, A/CN.9/645 and A/CN.9/658 and Add.1-13)

*Draft article 37 (Issuance of the transport document or the electronic transport record)*

1. *Draft article 37 was approved in substance and referred to the drafting group.*

*Draft article 38 (Contract particulars)*

2. **Mr. Ibrahima Khalil Diallo** (Senegal), referring to the proposed version of draft article 38 contained in the written comments by a group of African States (A/CN.9/658/Add.1, para. 15), called for the inclusion of additional information, specifically, the name of the consignee, the name of the ship, the ports of loading and unloading and the approximate date of delivery, in the list of contract particulars in draft article 38. Such information was essential for the performance of the contract.

3. **Mr. Elsayed** (Egypt) endorsed the proposal made by the representative of Senegal and stressed the need for providing details such as the place and date of issuance of the transport document, the name and address of the carrier, the value of the goods, the place of delivery of goods, a sufficient description of potentially dangerous goods and the number of originals of the document.

4. **Mr. Imorou** (Benin) said that his delegation firmly supported the proposal made by the representative of Senegal. As primarily a shipping country, Benin thought the additional information to be essential. Without knowing particulars such as the name of the ship, where the goods were loaded and the approximate date of arrival, the shipper could not take the necessary action and should therefore be provided with all relevant information.

5. **Ms. Wakarima Karigithu** (Kenya) endorsed the proposals made by the representatives of Senegal, Benin and Egypt.

6. **Ms. Malanda** (Observer for the Congo) said that her delegation also supported the addition of the particulars proposed by the representative of Senegal. She did not understand the reasons for omitting such basic

information, which had been included in previous drafts until the tenth session of the Working Group.

7. **Mr. Ndzibe** (Gabon), **Mr. Lavambano** (Observer for Angola) and **Mr. Ousseimi** (Observer for the Niger) also supported the proposal presented by the representative of Senegal and contained in the joint written comments of a group of African States (A/CN.9/658/Add.1, para. 15).

8. **Mr. van der Ziel** (Observer for the Netherlands) explained that draft article 38 included only the mandatory particulars and allowed the commercial parties to agree on which additional particulars should be included in the transport document. In many cases, particulars such as the name of the ship, the name and address of the consignee, the ports of loading and unloading and the approximate date of delivery were simply not available at the moment of issuance of the transport document. For instance, in a multimodal transport contract the name of a ship onto which goods would be loaded after carriage from an initial inland point — which could take days — might not be known in advance, and even the ports used might be left to the carrier's discretion. Similarly, the name of the consignee was not considered mandatory, because the identity of the eventual buyer was sometimes unknown at the time the transport document was issued. With regard to the date of delivery, though estimates and notices of arrival to the consignee were customary in the maritime industry, it would be going too far to require inclusion of that information in the transport document. Furthermore, the shipper was under pressure to obtain a transport document as early as possible to present to the bank in order to obtain the purchase price; therefore, early issuance of the transport document was in the interest of the shipper.

9. **Ms. Czerwenka** (Germany) thanked the representative of the Netherlands for his explanation and requested further clarification of the idea that the contract particulars listed in article 38 were mandatory. She wondered whether inaccurate or missing information would render a transport document null and void.

10. **The Chairperson** said that draft article 41 might address the concern expressed by the representative of Germany.

11. **Mr. Ngoy Kasongo** (Observer for the Democratic Republic of the Congo) supported the proposal of the

African States. Requiring more details relevant to the goods being shipped — such as the name of the vessel in which the goods were transported, or the ports in which the goods were loaded or discharged — would be a useful supplement to the basic information listed in draft article 38, rendering it more precise.

12. **Mr. Sturley** (United States of America) said that the concept underlying draft article 38 was to require information only on those aspects that were absolutely necessary. Many of the additions proposed would be counterproductive, resulting in more expensive transactions for the shipper and undermining the purpose of the draft convention. He found it ironic that delegations that had been defending the interests of shippers would favour provisions that would interfere with those interests in many cases. For the reasons explained by the representative of the Netherlands, his delegation opposed the inclusion of additional requirements in article 38.

13. In response to the questions raised by the representative of Germany, he noted that the items required under draft article 38 were indeed mandatory in a legally enforceable sense, though draft article 41, paragraph 1, preserved the legal validity of the transport document in the event of absence or inaccuracy of one or more of the contract particulars and therefore did not punish the shipper interests for a mistake made by the carrier. However, the draft convention did not purport to regulate all aspects of the contractual relationship between the carrier and the shipper; some aspects would be dealt with by national laws, and many national legal systems did indeed have provisions that governed what would happen if the carrier refused to include information in the document that the shipper had the right to demand. Under article 41, paragraph 3, the draft convention itself provided for the presumption of good order and condition of the goods at the time the carrier or a performing party received them if the contract particulars failed to state otherwise.

14. **Mr. Kim In Hyeon** (Republic of Korea) said that some of the additional particulars suggested in the African proposal were not usually fixed at the moment of issuance of the transport document. Those particulars might be included in the transport document on a voluntary basis, but they should not be covered by draft article 38. His delegation endorsed the views expressed by the representative of the Netherlands and the explanation given by the representative of the United States.

15. **Mr. Sandoval** (Chile) said that he understood that draft article 38 covered only the information that was required to issue the transport document, and his delegation supported the retention of the article as it stood, endorsing the views expressed by the representatives of the Netherlands and the United States.

Any other particulars should be provided as part of a prior agreement between the shipper and the carrier.

16. **Mr. Hu Zhengliang** (China) said that the explanation given by the representative of the Netherlands was convincing, since the draft convention was a “maritime plus” convention. When a transport document or an electronic transport record was issued, some particulars were not known to the carrier or to the shipper. He also welcomed the Chairperson’s reference to draft article 41, which confirmed that the absence of one or more particulars did not affect the legal validity of the transport document. Such a provision implied that the items listed in draft article 38 were not entirely mandatory. His delegation agreed with the African view to an extent, insofar as the consignee should, upon receipt of a transport document, be informed of the place of delivery of the goods; however, that piece of information did not need to be included in the transport document or the electronic transport record as such.

17. **Mr. Elsayed** (Egypt) said that, as legislators, the members of the Commission should include any elements that would make for greater clarity and precision. Information such as the name of the ship could prove valuable in the event of recourse to arbitration.

18. **Mr. Bigot** (Observer for Côte d’Ivoire) stressed that the omission or inaccuracy of any information that might be required by draft article 38 would not affect the validity of the transport document, as was made clear by draft article 41. The information the African States wished to see added to the list would facilitate trade. Shippers needed to know the place and at least the approximate date of delivery. There was no obvious reason why the inclusion of such information should entail higher costs.

19. **Ms. Traoré** (Observer for Burkina Faso) said that it was important to include the additional elements, especially for shippers in landlocked countries, who would need to have reliable information about ports of transit and delivery dates so as to be able to take delivery of goods at the right time and in the right place.

20. **Ms. Nesdam** (Norway), while in favour of the draft text as it stood, suggested, in a spirit of compromise, that the additional elements might be included on an explicitly non-mandatory basis.

21. **Mr. Delebecque** (France) said that the requirement to include further information in transport documents might prove counterproductive. It was not necessary to name the ship in such documents, which related essentially to the goods transported and not to the means used for that purpose. Draft article 22 already provided for the issue of time constraints, which depended on an express or implicit agreement between the parties.

22. **Mr. Fujita** (Japan) said that additional particulars, such as the name of the ship and the ports of loading and unloading, would indeed be useful for trade but could only be included if they were known. Failure to provide that information should not be an obstacle to issuance of the transport document, while inclusion of the date of delivery in the list would necessitate some qualification. In view of the detailed and complicated conditions that would have to be introduced to qualify the proposed additions, it might be better to leave the list unchanged. He agreed with the representatives of the United States and China that a failure to meet any of the requirements of the draft article would not necessarily invalidate the transport document. That would depend on national law. The draft convention did not itself spell out the possible consequences of the breach of many of its provisions.

23. **Mr. Sharma** (India) recalled that the list of particulars had been finalized after lengthy discussion. While there was some merit in the proposal by the African States, he accepted the reasoning of the representatives of the Netherlands and the United States. Technically speaking, the requirements of the draft article were not mandatory pursuant to draft article 41, but that was not relevant to the current discussion. One further piece of information that would be useful and had not been mentioned was the place and date of receipt of goods, particularly in the light of draft article 33.

24. **Mr. Berlingieri** (Italy) said that information as to the place and date of receipt did indeed need to be included, since according to draft article 5, it would not be possible in its absence to determine whether the draft convention applied.

25. **Mr. Egbadon** (Nigeria) said that draft article 38 could not be considered in isolation from draft article 41. The requested information need only be supplied if it was available and would not be mandatory.

26. **Mr. Ibrahima Khalil Diallo** (Senegal) recalled that the Hamburg Rules adopted in 1978 listed in their article 15 a number of contract requirements that had not been included in the draft convention. It was indeed important for contracts to include all essential information, including the place and date of receipt of goods. While the subject of the contract was not ships but goods, it would be useful for the ships involved in the transport of the goods to be named.

27. **Mr. van der Ziel** (Observer for the Netherlands) said that the Hamburg Rules did indeed contain a longer list of requirements for contract particulars, but the main point on which the draft convention differed was that it called for inclusion of the name and address of the carrier. In 1978, before the development of electronic communication, the transport document had been an essential means of having the necessary data. Nowadays, once the carrier had been identified, it was easy to obtain

any information required. As all the larger carriers had websites that offered goods tracking systems, it was no longer so necessary to include such data in transport documents. A further consideration was that for information to be included, it had to be available, and since much of it only became so in the course of the voyage, such a requirement might militate against the early issuance of travel documents. That was particularly true in regard to the place of delivery, as shippers did not always know where goods would finally be unloaded. In addition, the shipper could be a documentary shipper, who might prefer the name of the shipper to remain confidential. As for the place of receipt of goods, since if it were unknown there could be no transport, there was no need to mention it: it was central to any contract of carriage.

28. **Ms. Downing** (Australia) recognized the usefulness of naming the place of receipt and delivery and pointed out, in response to the representative of the Netherlands, that in cases where, for example, the place of delivery was not known, draft article 41 would apply.

29. **Mr. Mollmann** (Observer for Denmark) said that in cases like that cited by the representative of Burkina Faso, it would be left to the carrier and the shipper to agree on the information to be included in the contract; it would not be practical to make any mandatory provision to that effect. He did not agree with the representative of Australia regarding the applicability of draft article 41, which simply stated that deficiencies in respect of contract particulars would not affect the validity of the transport document. Such deficiencies might have other consequences under national law that would not be alleviated by that draft article.

30. **Ms. Talbot** (Observer for New Zealand) said that it might be useful to hold informal consultations in order to address the suggestions made by the representatives of Norway and Japan.

31. **Ms. Mbeng** (Cameroon) stressed that her country like most African countries was at the receiving end of trade and would therefore find it very useful for the contract particulars to include the name and address of the consignee. That information should be mandatory and should be included in the list of requirements in the draft article.

32. **Mr. Morán Bovio** (Spain) stressed that it was important to bear in mind that the aspects governing the implementation of the contract of carriage, as provided for in draft article 5, were not necessarily contained in the transport document. His delegation would prefer to retain the current text of draft article 38, since the inclusion of additional contract particulars could be problematic.

33. **Ms. Carlson** (United States of America) supported the proposal of the representative of New Zealand that informal consultations should be held to produce a

carefully nuanced draft that met the various concerns that had been raised.

34. **Ms. Czerwenka** (Germany) said that the transport document, as defined in draft article 1, paragraph 14 (b), evidenced or contained a contract of carriage. It followed that the key elements should be reflected in the transport document. For that reason, her delegation supported the inclusion of a longer list of contract particulars in draft article 38 and endorsed the proposal of the representative of New Zealand that informal consultations should be held.

35. **Mr. Elsayed** (Egypt) said that his delegation could also support the holding of informal consultations to amend draft article 38. He would urge the group entrusted with that task to ensure that its list of additional contract particulars included the name of the ship.

36. **Mr. Mayer** (Switzerland) said that his delegation could agree to the inclusion of a longer list of contract particulars in draft article 38, provided the necessary qualifications were also included. The parties should not be forced to agree on the ports of loading and unloading, for example, at the time of the issuance of the transport document. Reference to those ports in draft article 38 should therefore be followed by wording such as “if specified by the parties”. Similarly, draft article 38 should allow the place of receipt and delivery, if included, to be determined at a later stage by the parties concerned.

37. **Mr. Ibrahima Khalil Diallo** (Senegal) reiterated that the additional information that his delegation wished to see included in the contract particulars consisted of the name and address of the consignee, the name of the ship, the ports of loading and unloading and the approximate date of delivery.

38. **Mr. Kim** In Hyeon (Republic of Korea) recalled that draft article 38 was closely related to the evidentiary effect of the contract particulars in draft article 43. In that connection, he noted that the draft convention, unlike the Hague-Visby Rules, allowed additional contract particulars in the transport document other than those referred to in draft article 38 to trigger the evidentiary effect in draft article 43, subparagraphs (a) and (b).

39. **Mr. Sharma** (India) asked that inclusion of place of receipt should also be considered in informal consultations.

40. **Mr. Ibrahima Khalil Diallo** (Senegal) noted that a consensus should be possible since a clear majority of the delegations wished to include additions to draft article 38 and to provide such additions with the necessary qualifications. However, if a consensus could not be reached to include all of those elements, he hoped that his delegation’s original proposal could be approved as the consensus decision.

41. **The Chairperson** said he took it that the Commission wished to hold informal consultations on draft article 38 to consider not only the proposals of Senegal and Egypt but also the inclusion of the place and date of receipt and the necessary qualifications. However, if no compromise solution was reached, draft article 38 would be retained in its current form.

42. *It was so decided.*

*The meeting was suspended at 11.55 a.m. and resumed at 12.20 p.m.*

*Article 39 (Identity of the carrier)*

43. **Mr. Elsayed** (Egypt) suggested that paragraph 2 of article 39 should be redrafted in the interests of legal certainty, since it allowed too much leeway for the carrier to evade responsibility.

44. **Mr. Fujita** (Japan) said that his delegation was dissatisfied with the text of draft article 39 but, since it was a part of a compromise package, had nevertheless decided to accept it.

45. *Draft article 39 was approved in substance and referred to the drafting group.*

*Draft article 40 (Signature)*

46. **Ms. Czerwenka** (Germany), drawing attention to her delegation’s written comments (A/CN.9/658/Add.11, para. 17), noted that draft article 40, paragraph 2, stipulated that an electronic transport record must include an electronic signature of the carrier and set forth a few requirements. As her delegation interpreted that paragraph, more specific requirements for electronic signatures could be imposed by national law. On that basis, her delegation could accept paragraph 2 of draft article 40.

47. **Ms. Downing** (Australia) said that her delegation could accept draft article 40 on the basis of the interpretation provided by the representative of Germany.

48. **Mr. Fujita** (Japan) said that his delegation fully endorsed that interpretation of draft article 40 and would also welcome any further clarification of the draft article.

49. **Ms. Carlson** (United States of America) said that her delegation had the same interpretation as the representative of Germany. That article was one of the places where the language of the draft convention was not exhaustive, and matters not provided for were left for national law to determine.

50. *Draft article 40 was approved in substance and referred to the drafting group.*

*Draft article 41 (Deficiencies in contract particulars)*

51. **Mr. Imorou** (Benin) suggested that “*erreurs*” or “*omissions*” might be more appropriate than “*lacunes*” in the title of the French version of the text.

52. *Draft article 41 was approved in substance and referred to the drafting group.*

*Draft article 42 (Qualifying the information relating to the goods in the contract particulars)*

53. **Mr. van der Ziel** (Observer for the Netherlands), noting that the term “container” was used several times in draft article 42, said that the term should be expanded to include road and rail cargo vehicles as well, in order to make the language consistent with draft article 61, paragraph 2, which had been based on the so-called “container clause” of the Hague-Visby Rules. Under draft article 61, paragraph 2, each package in a container or road or railroad cargo vehicle counted as a unit for limitation purposes, provided the packages were enumerated in the contract particulars. That being the case, the carrier should be able to qualify the enumeration.

54. **Mr. Berlingieri** (Italy), noting that the term “closed container” was used in draft article 42, paragraphs 3 and 4, asked whether the adjective would also be applied to road or railroad cargo vehicles under the Netherlands’ proposal.

55. **Mr. van der Ziel** (Observer for the Netherlands) said that “closed” should also apply to road and rail cargo vehicles because in the context of the article the term meant that the contents were not visible from outside the container.

56. **Mr. Sturley** (United States of America) said that his delegation agreed with the proposal by the Netherlands.

57. **The Chairperson** said he took it that the Commission accepted the proposal to add a reference to a road or railroad cargo vehicle whenever a container was mentioned in draft article 42.

58. **Mr. Estrella-Faria** (International Trade Law Division) said that it would be possible to avoid repeating the words “road or railroad cargo” each time by adding a general definition of “vehicle” to draft article 1, which would indicate that “vehicle” meant “road or railroad cargo vehicle”. The drafting group could take up the matter when it met to harmonize all the language versions of the text.

59. **The Chairperson** said that the drafting group could consider that suggestion.

60. *Draft article 42, as amended, was approved in substance and referred to the drafting group.*

*Draft article 43 (Evidentiary effect of the contract particulars)*

61. **The Chairperson** recalled the statement by the representative of the Republic of Korea during the debate on draft article 38 that all the contract particulars in the transport document, and not just those listed in draft article 38, had evidentiary effect pursuant to draft article 43, subparagraphs (a) and (b).

62. **Mr. Elsayed** (Egypt) said that the wording of subparagraph (c) (ii) opened the door for substitution of goods and smuggling, and in fact similar cases had been heard before Egyptian and Jordanian courts. He proposed that the words “but not” before the phrase “the identifying numbers of the container seals” should be replaced by “and”.

63. **Mr. Mollmann** (Observer for Denmark) said that the draft article was one of the instances where his delegation doubted whether it was appropriate to add the term “road and railroad cargo vehicles” because of the practical implications of the article, which was aimed at actual containers. Road vehicles often displayed an identification number, or at least a licence plate, but he did not know if that practice extended to railroad cargo vehicles. Regarding the suggestion of the representative of Egypt that the identifying numbers of the container seals should also be considered as conclusive evidence, the text was the result of extensive negotiation. The current wording was based on practical considerations, in that the carrier did not have full control over the seals; additional seals might be placed by customs authorities, for example. His delegation therefore favoured retaining the text as it stood.

*The meeting rose at 1 p.m.*

**Summary record of the 872nd meeting, held at Headquarters, New York,  
on Thursday, 19 June 2008, at 3 p.m.**

[A/CN.9/SR.872 an Corr.1]

*Chairperson:* Mr. Illescas (Spain)

*The meeting was called to order at 3.10 p.m.*

**Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea** (*continued*) (A/CN.9/642, A/CN.9/645 and A/CN.9/658 and Add.1-13)

*Draft article 43 (continued)*

1. **The Chairperson** said that, in the absence of further comment, he took it that the majority of the Commission members were not in favour of the amendments proposed at the previous meeting.

2. *Draft article 43 was approved in substance and referred to the drafting group.*

*Draft article 44 ("Freight prepaid")*

3. *Draft article 44 was approved in substance and referred to the drafting group.*

4. **The Chairperson** invited the Commission to turn to the definitions contained in draft article 1, paragraphs 14 to 16, 18 to 22 and 27.

*Draft article 1, paragraph 14 (definition of "transport document")*

5. **Mr. Fujita** (Japan), drawing attention to his delegation's written comments (A/C.9/658/Add.6, para. 2), recalled that Working Group III (Transport Law), at its twenty-first session, had deleted all references to the consignor from the draft convention and had agreed that a mere receipt for the goods, which could be issued by a performing party, would not constitute a transport document for the purposes of the draft convention, since a transport document also had to evidence or contain a contract of carriage. His delegation did not think that a performing party could issue a transport document on its own initiative, rather than on behalf of the carrier, under the current definition. He therefore proposed that all references to "a performing party" should be deleted from the definition of "transport document".

6. **Mr. Elsayed** (Egypt) said that he agreed with the representative of Japan. His delegation would also like to add a new subparagraph (c) with wording along the lines of "Evidences the delivery of the goods to the consignee".

7. **Mr. Hu Zhengliang** (China) said that he supported the Japanese delegation's position. In addition, he proposed that the words "or a person acting on its behalf"

should be added after the two references to "the carrier" in order to bring the paragraph into line with draft article 40 on signature.

8. **Mr. Sharma** (India) said that he, too, supported the proposal made by the representative of Japan.

9. **Mr. van der Ziel** (Observer for the Netherlands), supported by **Mr. Sandoval** (Chile), **Mr. Romero-Nasser** (Honduras), **Mr. Berlingieri** (Italy), **Mr. Mayer** (Switzerland) and **Mr. Sturley** (United States of America), said that while he agreed with the representative of Japan, he could not support the amendment proposed by the representative of Egypt. In any case, draft article 11 clearly stipulated that the carrier must deliver the goods to the consignee. While he sympathized with the position of the Chinese delegation, he was hesitant to accept its proposal. Draft article 40 had been included because it was desirable to make it clear that a transport document could be signed by one person on behalf of another. Generally speaking, however, the concept of agency, an old transport practice that had caused many problems, had been deliberately left out of the draft convention.

10. **Mr. Ibrahima Khalil Diallo** (Senegal) said that he associated himself with the statement made by the representative of Japan. He was also sympathetic to the Chinese proposal since paragraph 14 might otherwise suggest that only the carrier could issue a transport document.

11. **The Chairperson** said he took it that the Commission wished to delete all references to "a performing party" from paragraph 14, but noted that there was insufficient support for the other proposals.

12. *Draft article 1, paragraph 14, as amended, was approved in substance and referred to the drafting group.*

*Draft article 1, paragraph 15 (definition of "negotiable transport document") and paragraph 16 (definition of "non-negotiable transport document")*

13. *Draft article 1, paragraphs 15 and 16 were approved in substance and referred to the drafting group.*

*Draft article 1, paragraph 18 (definition of "electronic transport record")*

14. **Mr. Fujita** (Japan) proposed that all references to "a performing party" should be deleted from paragraph 18

for the reasons that he had given with reference to paragraph 14.

15. *Draft article 1, paragraph 18, as amended, was approved in substance and referred to the drafting group.*

*Draft article 1, paragraph 19 (definition of “negotiable electronic transport record”), paragraph 20 (definition of “non-negotiable electronic transport record”), paragraph 21 (definition of the “issuance” of a negotiable electronic transport record), paragraph 21 (definition of the “transfer” of a negotiable electronic transport record) and paragraph 27 (definition of “freight”)*

16. *Draft article 1, paragraphs 19 to 22 and 27 were approved in substance and referred to the drafting group.*

*Draft article 45 (Obligation to accept delivery)*

17. **Mr. Blake-Lawson** (United Kingdom), drawing attention to his delegation’s written comments (A/C.9/658/Add.13, paras. 15-19), said that he had deep misgivings about the entire chapter on delivery of the goods, which, if adopted, would prejudice the United Kingdom’s adoption of the draft convention. The chapter would create more problems than it solved and could facilitate fraud. The current text was the result of long negotiation, but he thought that it was important to reconsider it.

18. Draft article 45 raised a number of questions; it was not clear what the consignee must do in order to incur the obligation to accept delivery, whether a consignee that did not initially exercise its rights under the contract of carriage but later accepted delivery of the goods would be retroactively in breach of the draft article, and whether the carrier had any remedy in the event of a breach of the obligation.

19. **Ms. Czerwenka** (Germany), drawing attention to her delegation’s written comments (A/C.9/658/Add.11, para. 18), said that she shared the concerns raised by the representative of the United Kingdom; the draft article created an obligation for the consignee without specifying the point at which that obligation arose. It would be preferable to replace “the consignee that exercises its rights” with “the consignee that requires delivery of the goods”.

20. **Mr. Kim Bong-hyun** (Republic of Korea) said that he agreed with the representatives of the United Kingdom and Germany. His delegation would welcome examples of ways in which the consignee could exercise its rights under the contract of carriage, perhaps by making a claim against the carrier or by exercising its right of inspection. He hoped that other delegations could provide additional information on that point.

21. **Ms. Downing** (Australia) said that she associated herself with the previous speakers, particularly the United Kingdom.

22. **Mr. Mayer** (Switzerland) said that he, too, shared the concerns expressed by the representative of the United Kingdom. His delegation had stated in the past that it did not think the consignee’s exercise of its rights under the contract of carriage was an appropriate criterion for determining the point as from which the consignee should be bound by that contract. Rather than the language suggested by the representative of Germany, he would prefer to introduce a reference to the consignee’s explicit or implicit consent to be the consignee.

23. **Mr. Fujita** (Japan) said that his delegation had raised the issue repeatedly in the Working Group, but its proposal to replace “the consignee that exercises its rights under the contract of carriage” by “the consignee that demands delivery” had always been rejected. However, he was prepared to accept the wording suggested by the German delegation.

24. **Mr. van der Ziel** (Observer for the Netherlands) said that he could not support the proposed change. Draft article 45 was intended to address a specific problem for the carrier: that of the consignee who was well aware that the goods were being shipped and who did not wish to accept delivery for a variety of reasons. That was a fairly common business attitude and should be legislated against. An example of the consignee exercising its rights might include, for example, inspecting the goods before demanding delivery. If the consignee then decided to reject the goods, it should not be allowed to leave the problem in the carrier’s hands. According to the United Nations Convention on Contracts for the International Sale of Goods, even a buyer wishing to reject goods must accept delivery, but could do so on behalf of the seller. The draft convention should provide that the consignee must either accept the goods as the agent of the seller or instruct the carrier what to do with them. The consignee, not the carrier, should bear the risk and take the responsibility of lodging a claim or sending the goods back. Of course, inspection was not the only action covered by the phrase “exercises its rights”; it could mean that the consignee had been actively engaged with the carrier. The point was that the consignee must allow the carrier to be discharged, and the solutions proposed by Germany and Japan did not accomplish that.

25. **Mr. Tsantzos** (Greece), supported by **Ms. Carlson** (United States of America), **Mr. Hu Zhengliang** (China), **Mr. Sandoval** (Chile), **Ms. Nesdam** (Norway) and **Mr. Mollmann** (Observer for Denmark), said that the arguments of the representative of the Netherlands were convincing that such a provision was needed. The current text of draft article 45 had been arrived at by compromise and should be retained.



26. **Mr. Imorou** (Benin), supported by **Mr. Mouloupo** (Observer for the Congo) said that his delegation did not find the arguments of the Netherlands convincing, since draft article 45 involved a contract of carriage, not a sales contract; it therefore supported the proposal of Germany.

27. **Ms. Shall-Homa** (Nigeria) said that, in the light of the extensive provisions on the obligations of the shipper to the carrier in chapter 7 and in the spirit of a fair division of risks and responsibilities between the carrier and the consignee, her delegation supported the proposal of Germany.

28. **Mr. Berlingieri** (Italy), **Ms. Halde** (Canada), **Mr. Ibrahima Khalil Diallo** (Senegal), **Ms. Wakarima Karigithu** (Kenya), **Ms. Talbot** (Observer for New Zealand), **Mr. Bigot** (Observer for Côte d'Ivoire), **Ms. Traore** (Observer for Burkina Faso) and **Mr. Luvambano** (Observer for Angola), also supported the proposal of Germany.

29. **The Chairperson** noted that there seemed to be sufficient support for the proposal to replace the words "exercises its rights" with the words "requires delivery of the goods".

30. **Ms. Carlson** (United States of America) said that the verb "demands", as proposed by Japan, would perhaps be more correct than "requires", while conveying the same idea.

31. **Ms. Czerwenka** (Germany) said that her delegation had no problem with the substitution of "demands" for "requires".

32. *Draft article 45, as amended, was approved in substance and referred to the drafting group.*

*Draft article 46 (Obligation to acknowledge receipt)*

33. *Draft article 46 was approved in substance and referred to the drafting group.*

*Draft article 47 (Delivery when no negotiable transport document on negotiable electronic transport record is issued)*

34. **Mr. Blake-Lawson** (United Kingdom), supported by **Mr. Delebecque** (France), said that his delegation was concerned that the protection provided to the carrier depended on the carrier's having followed the prescribed procedures, which might not always be available. In subparagraph (c), the carrier, if unable to locate the controlling party, was told to advise the shipper, which should then give instructions in respect of the delivery of the goods. However, in cases where the shipper had transferred all its rights to a controlling party, it could not give delivery instructions without the express authorization of the controlling party.

35. **The Chairperson** said that, in the absence of further comments, he took it that the majority of the Commission did not share those concerns.

36. *Draft article 47 was approved in substance and referred to the drafting group.*

*Draft article 48 (Delivery when a non-negotiable transport document that requires surrender is issued)*

37. *Draft article 48 was approved in substance and referred to the drafting group.*

*Draft article 49 (Delivery when a negotiable transport document or negotiable electronic transport record is issued)*

38. **Ms. Downing** (Australia), drawing attention to her delegation's written comments (A/CN.9/658, paras. 48-52), noted that the draft article was intended to address a practical problem frequently faced by carriers when the cargo owner appeared without the requisite documents or did not appear at all. However, the solution proposed had very serious flaws. The draft article as written would undermine confidence in the system of the bill of lading as a document of title and increase the risk of fraud without effectively solving the carrier's problem. The alternative procedures in subparagraph (d) for obtaining instructions for the delivery of the goods without a bill of lading would eliminate the long-standing requirement to deliver on the production of a bill of lading and would affect banks and other parties relying on that security. Yet the procedures proposed would not solve the problem, because a prudent shipper would not issue delivery instructions without authorization from the rightful owner, since a shipper that did so might be subject to lawsuit. The Australian banking sector had commented that the provision would impose additional risks on banks.

39. The statutory indemnity provided for in subparagraph (f) was also problematic. A seller providing the carrier with alternative delivery instructions would unwittingly be giving the carrier an indemnity that would make it more difficult for a CIF cargo insurer to institute a recovery action or for a cargo claimant to recover for misdelivery. Moreover, since the effect of subparagraphs (d) to (f) was that a carrier who sought alternative delivery instructions from a shipper would be relieved of liability to the holder of a bill of lading, the shipper would be giving an indemnity to a party that had no liability.

40. There were other practical solutions available to the carrier. One possibility was that carriers concerned about certain destinations could insist on prepaid freight including all destination charges, the latter to be refunded if the goods were collected. Australia had procedures that could be followed for turning abandoned goods over to police or customs.

41. **Mr. Delebecque** (France) agreed that the provisions obliging a shipper that was no longer in a position to do so to give delivery instructions and to indemnify the carrier were problematic and would seriously affect confidence in the bill of lading as security. His delegation would prefer to delete subparagraphs (d) to (h).

42. **Mr. van der Ziel** (Observer for the Netherlands) said that the trade as a whole, bankers as well as carriers, had engaged in practices that had undermined the function of the bill of lading. Whenever experts had studied the problem it had been concluded that practitioners could not solve it without the assistance of legislators. The Commission should therefore seize the opportunity to restore trade law in that area. If the system established by draft article 49 created other problems in practice, then practical solutions would have to be found for them.

43. He took strong exception to some assertions that had been made — first of all, that the new system would lead to fraud. Frankly, it was the current system that encouraged fraud: often, for instance, there were three originals of the negotiable transport document in circulation, making it easy to sell them to multiple buyers. It was simple to forge a bill of lading with the current copying techniques. The guarantee system involving delivery against letters of indemnity meant that bills of lading continued to circulate after delivery. The new system, on the contrary, eliminated existing types of fraud. If and when it was shown to facilitate new types of fraud, they could deal with it.

44. Secondly, it was asserted that the banking sector would be assuming additional risk. Yet the new system tended to remove the existing risk, and restored the very essence of the bill of lading system, namely, that the transport document itself, and not a letter of indemnity, legitimated the person entitled to delivery at the place of destination. Draft article 49 put the onus on the holder of the document, which could well be a bank to give the carrier delivery instructions when the goods arrived at destination. That meant, of course, that the bank might have to take action if it did not want its collateral to become worthless — but that could by no means be described as a risk. Additionally, the new system provided legal security in respect of bills of lading, which were currently allowed to continue in circulation after delivery, raising all kinds of legal questions about their validity, generally by voiding those still in circulation.

45. Thirdly, it had been asserted that the lines of authority were unclear. Under draft article 49, the holder of the bill obviously needed no special authorization; when the holder was in default, the carrier, who was generally in a good position to do so, was under the obligation to search for the holder, and if the carrier could not find the holder, it must ask for instructions from the

shipper, who admittedly might have to seek authorization from an absent holder. However, that was a cargo-side problem for which there were solutions, and he would be glad to see draft article 49 improved on that point.

46. He urgently appealed to the Commission, in view of the very serious structural problem in the trade, to recognize that article 49, drafted after extensive discussions and broad consultation with industry practitioners, including banks and commodity traders, solved a number of problems. The time had come for the industry to change its practices.

47. **Mr. Elsayed** (Egypt), agreeing with Australia, Germany and others that article 49 was ambiguous, favoured the holding of informal consultations with a view to redrafting the article from a legal rather than a technical standpoint. A more legal approach should have been taken in the first place.

48. **Mr. Blake-Lawson** (United Kingdom) acknowledged that the current system did encourage fraud, but familiar risks were more easily controlled. The disadvantage of the new system proposed in draft article 49 was that it complicated the current legal position and would stand in the way of a satisfactory and comprehensive reform of the law. The Commission had a chance now to develop a better system, but it could not do so in just a few more days. He therefore reverted to his original proposal to delete draft article 49 and devote more time in the future to finding the best solution for that particular problem.

49. **Mr. Berlingieri** (Italy) said that a number of national legal systems had a procedure for extinguishing a document of title, but unfortunately it took a long time, often months. Draft article 49 offered a rapid procedure, albeit one that perhaps did not offer sufficient security to all interested parties. An effort should be made in informal consultations to enhance the security aspect.

*The meeting was suspended at 4.45 p.m. and resumed at 5.15 p.m.*

50. **Ms. Nesdam** (Norway) said that draft article 49, subparagraph (d), did not offer a practical solution. It was couched in terms not of the rights and obligations of the carrier but rather of instructions to be given, and it created problems in respect of the bill of lading. The banking community in Norway found the provision worrisome. She proposed deleting subparagraph (d), and, for the same reasons, deleting the similar provision in article 48, subparagraph (b).

51. **Ms. Talbot** (Observer for New Zealand) said that her delegation supported the comments of Australia, whose banking system closely resembled that of New Zealand. Draft article 49, in attempting to solve a very real problem for carriers, seemed likely to create other problems for the banking industry.

52. **Mr. Sturley** (United States of America) said that article 49 did not offer a perfect solution to an acknowledged problem, but it was the best that the Working Group had been able to devise in six years. He doubted that the Commission would be able to improve on it in the current session, but his delegation was willing to participate in informal consultations in an attempt to do so. It believed that the Commission should seize the opportunity to make some changes, for that was better than no solution at all.

53. **Mr. Tsantzos** (Greece), supporting the Netherlands, said that his delegation favoured retention of the current text.

54. **Mr. Morán Bovio** (Spain) said that the current text of draft article 49 should be retained. It solved a good number of problems and had met with approval in both the banking and the maritime circles in his own country.

55. **Ms. Czerwenka** (Germany) said that she found the Australian and United Kingdom statements very persuasive. It was not likely that the Commission could resolve such an extremely complex matter to everyone's satisfaction, and it was not clear that draft article 49 actually improved the situation at all. A policy decision was required, not merely informal consultations. Her delegation supported France's proposal to delete paragraphs (d) to (h).

56. **Mr. Mollmann** (Observer for Denmark) said that there was a practical problem to be resolved, not just for carriers but for all involved in the trade, especially for consignees without a bill of lading to present. Draft article 49 was perhaps not the perfect solution, but it had been thought through and had by and large received a favourable response from the industry. He endorsed the remarks of the Netherlands. The draft article would resolve many problems for all parties in practice, and it would be a mistake not to seize the opportunity to improve the situation. His delegation strongly recommended the approval of draft article 49 as it stood.

57. **Mr. Kim** In Hyeon (Republic of Korea) and **Mr. Sandoval** (Chile) agreed that draft article 49 should be retained in its current wording.

58. **Mr. Delebecque** (France) said that the scenario described in subparagraph (d) was fairly common and therefore required a solution. On reflection, the solution proposed — that, in the event the holder did not claim delivery of the goods, the carrier should seek instructions from the controlling party, the shipper or the documentary shipper — seemed acceptable.

59. With regard to subparagraphs (e) to (h), however, his delegation had a fundamental problem with the idea that, in the event that the holder did not claim delivery of the goods, responsibility would be placed on the shipper. The shipper was not the guarantor of the consignee.

Furthermore, the consignee and the shipper were two completely different parties, and the responsibilities of the former could not be transferred to the latter. While his delegation supported some of the ideas expressed in the subparagraphs in question, overall they went too far, for they overturned existing practices and called into question the very way in which the contract of carriage and the relationship between sale and transport were preserved. Subparagraphs (e) to (h) at least should therefore be deleted.

60. **Mr. Hu Zhengliang** (China) reiterated his delegation's position that the arrangements set out in draft article 49 would solve some problems but create others. In particular, the arrangement contained in subparagraph (d) would be time-consuming and costly for the carrier. If, as his delegation preferred, subparagraphs (d) to (h) were deleted, any goods whose delivery was not claimed would simply be deemed to be goods remaining undelivered and draft article 50 would come into play. That said, his delegation might consider retaining the provisions in question if the wording could be improved; however, that might not be feasible so late in the day.

61. **Ms. Czerwenka** (Germany) said that her delegation agreed that subparagraph (d) was also problematic. However, her delegation's concerns related to the statement that if, after reasonable effort, the carrier was unable to locate the controlling party, the carrier should so advise the shipper; the shipper was not the holder of the document. Her delegation therefore favoured the deletion of subparagraphs (d) to (h).

62. **Ms. Halde** (Canada) said that her delegation supported the deletion of subparagraphs (d) to (h). That said, she welcomed the idea of holding informal consultations to try to improve the wording of the draft article.

63. **Mr. Sharma** (India) said that the subparagraphs in question, though somewhat complicated, addressed a very practical problem, namely, what to do in the event that the holder did not claim delivery of the goods. If the goods were simply deemed to be goods remaining undelivered, article 50 would be invoked. It was not unreasonable, in his view, for the carrier to be required to take certain steps before that happened. His delegation therefore supported the retention of subparagraphs (d) to (h).

64. **The Chairperson** said that the Commission seemed to be divided almost equally between delegations in favour of deleting all or part of the draft article and delegations in favour of retaining the draft article. Since some of the latter delegations had acknowledged that the wording could be better, he suggested that an effort should be made to improve the text in informal consultations. If a favourable outcome was not achieved,

however, the current version of the draft article should be retained, in line with the usual practice in such cases.

65. **Ms. Czerwenka** (Germany) said that the Chairperson's statement that, in the absence of a favourable outcome, the current version of the draft article should be retained was somewhat at odds with the approach he had taken thus far. In her view, every effort should always be made to find a good compromise that was acceptable to all delegations; to say that the current wording would be retained if no favourable outcome was found was not a compromise. If informal consultations failed, the Commission should be able to consider the text again so as to make a clear decision as to whether or not the current wording should be retained.

66. **The Chairperson** said that the draft convention before the Commission was the result of six years of discussions in the Working Group. As he had announced at the start of the session, the text would be modified only when that was the clear will of the majority of the Commission. Just the day before, the Commission had clearly disagreed with the Working Group in respect of draft article 36 and the draft article had been deleted. The only time when he had not applied that rule was in respect of draft article 12, where, despite a slight majority in favour of retention, he had facilitated informal consultations.

67. In the case of draft article 49, the delegations in favour of deleting all or part of the draft article were still outnumbered by the delegations in favour of retaining the draft article as it currently stood. However, since some of the delegations in favour of retention had indicated their willingness to try to improve the wording, he took it that the Commission wished to hold informal consultations on draft article 49.

68. *It was so decided.*

69. **Mr. Elsayed** (Egypt) said that his delegation agreed with the Chairperson's suggestion and, as representative of the States belonging to the Council of Arab Ministers of Transport, wished to participate in efforts to improve the wording of draft article 49.

*The meeting rose at 6.05 p.m.*

**Summary record of the 873rd meeting, held at Headquarters, New York,  
on Friday, 20 June 2008, at 10 a.m.**

[A/CN.9/SR.873 and Corr.1]

*Chairman:* Mr. Illescas (Spain)

*The meeting was called to order at 10.10 a.m.*

**Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea** (*continued*) (A/CN.9/642, A/CN.9/645 and A/CN.9/658 and Add.1 to 13)

1. **The Chairperson**, in response to queries at the previous meeting regarding the Commission's working methods, drew attention to paragraph 11 of document A/CN.9/653, "UNCITRAL rules of procedure and methods of work", elaborating on the concept of consensus in the work of the Commission. Paragraph 11 (c), described the Chairperson's role in determining the existence of consensus and allowed for a vote to be taken if a delegation formally disagreed with that assessment. Although that rarely happened in current practice, members did have the right to object.

*Draft article 50 (Goods remaining undelivered)*

2. **Mr. Mollmann** (Observer for Denmark) said that draft articles 49 and 50 were closely related. Draft article 49 aimed at making it possible to deliver goods without a transport document, while draft article 50 gave instructions to a carrier on the disposition of goods if they could not be delivered. He saw the articles as alternative possibilities that did not have to be applied in sequence. A carrier could follow the procedures outlined in draft article 50 before using the procedures in draft article 49, or could use them simultaneously.

3. **Mr. Rapatzikos** (Greece), drawing attention to his delegation's written comments (A/CN.9/658/Add.10, para. 13), said that his delegation shared the Danish interpretation of draft article 50 but thought that the text required further clarification.

4. **Mr. Imorou** (Benin), supported by **Mr. Elsayed** (Egypt), **Mr. Egbadon** (Nigeria), **Mr. Ngoy Kasongo** (Observer for the Democratic Republic of the Congo), **Ms. Traoré** (Observer for Burkina Faso), **Mr. Mouloupo** (Observer for the Congo), **Mr. Bigot** (Observer for Côte d'Ivoire) and **Mr. Luvambano** (Observer for Angola) said that in many States under national law a carrier could not destroy undelivered goods but must turn them over to the customs authorities. Destruction of goods was a serious step. Therefore paragraph 2 (b) should contain the same phrase, "pursuant to the law or regulations of the place where the goods are located at the time", that

appeared in paragraph 2 (c) regarding the sale of undelivered goods.

5. **Ms. Nesdam** (Norway) said that her delegation agreed that the carrier should be able to apply the provisions of draft article 50 without being required to apply draft article 49, but that interpretation was not clear from the text as it stood. That understanding should be reflected in the Commission's report and should be made clear in the text as well.

6. **Mr. Mayer** (Switzerland) said that he had no firm view on the position of the observer for Denmark but did not see how it could be reconciled with the text of draft article 50. The use of "only if" in the chapeau of paragraph 1 implied that the list of events covered in subparagraphs (a) to (e) was exhaustive, and subparagraph (b) implied that the carrier would first have to follow the procedures in draft article 47, 48 or 49. With regard to paragraph 2 (b), his delegation favoured retaining the current text.

7. **Mr. Ibrahima Khalil Diallo** (Senegal) said that, as the destruction of cargo was a serious matter, his delegation supported the amendment proposed by Benin. In other respects, the text of draft article 50 was sufficiently explicit.

8. **Mr. Sharma** (India) said that he shared the understanding of the representative of Switzerland as to the reading of draft article 50. The procedure in draft article 50 for dealing with goods deemed undelivered could only be commenced after the procedure in draft article 49 had been exhausted.

9. **Mr. Mollmann** (Observer for Denmark) said that the proposal of the representative of Benin was useful; his delegation shared the understanding that any destruction of cargo under paragraph 2 (b) must be in accordance with local laws and regulations. In response to the representative of Switzerland, he pointed out that draft article 50, paragraph 1, described five different situations in which goods could be deemed undeliverable, with the fifth situation being simply that the goods were otherwise undeliverable by the carrier. That the five situations were alternative rather than cumulative was clearly shown by the "or" at the end of paragraph 1 (d). Having that reading of the article reflected in the report, however, would avoid any possible misunderstandings.

10. **Mr. van der Ziel** (Observer for the Netherlands) said that at times destruction of the goods might be the

only alternative, for example, where the goods were seriously damaged or perishable, but it should be a last resort. The proposal of Benin would be a useful addition to the text. He agreed with the Danish interpretation regarding the relationship between draft articles 49 and 50; there was no need to change the text in that regard, and the request to include a clarification of those provisions in the report of the Commission should be honoured.

11. Pending the outcome of informal consultations on draft article 49, as a consequential change the term “holder” might need to be added to draft article 50, paragraph 1 (b).

12. **Mr. Alba Fernández** (Spain) said that he endorsed the Danish interpretation regarding the relationship between draft articles 49 and 50, and indeed draft articles 47 and 48 as well. The carrier, to safeguard its position, should be able to commence the procedures permitted under draft article 50 without first having to resort to the procedures under draft articles 47, 48 or 49. The current wording of draft article 50 was sufficiently clear, but confusion could perhaps be avoided by deleting paragraph 1 (b), which was not strictly necessary, since the situation was covered by paragraph 1 (a).

13. **Mr. Fujita** (Japan) said that the proposal by the representative of Benin should be carefully drafted to clarify the procedure. If there was a law or regulation concerning destruction in the place where the goods were located, the carrier should, of course, follow it; however, if the amendment could be taken to mean that the carrier always needed permission from an authority, it would place an undue restriction on its action. There might be an urgent need to destroy goods for safety reasons and no established procedure to follow.

14. **Mr. Shautsou** (Belarus) proposed that the phrase “pursuant to the law or regulations of the place where the goods are located at the time” should be placed in the chapeau of paragraph 2 so that it would apply to all the subparagraphs. Further, he proposed adding the phrase “for reasons that do not depend on the carrier” at the end of paragraph 1 (e) in view of the serious consequences when goods were deemed undeliverable.

15. **Mr. Sturley** (United States of America) said that his delegation generally supported the retention of draft article 50 in its current wording. The conditions listed in paragraphs 1 (a) to (e) were alternative, not cumulative. If drafted properly, the solution suggested by the representative of Benin might be helpful. If there were applicable rules in the port where the goods were located, the carrier should comply with them. He shared the concerns expressed by the delegation of Japan regarding undue restrictions of the right to destroy the goods in cases where the carrier was left with undeliverable goods and no guidance.

16. **Mr. Berlingieri** (Italy) said that his delegation also supported the proposal made by the representative of Benin and suggested that mention of destruction of the goods should be moved to subparagraph 2 (c). Whether the same precautions for sale of the goods should also apply to destruction of the goods was a matter of drafting.

17. **Ms. Wakarima Karigithu** (Kenya) said that her delegation endorsed the proposal made by the representative of Benin. The language of paragraph 2 (c), if applied to the destruction of goods in paragraph 2 (b), should address the problem adequately.

18. **Mr. Delebecque** (France) agreed that destruction of goods was a serious act and should be carried out pursuant to local laws. He endorsed the suggestion made by the representative of Italy to mention destruction of goods in paragraph 2 (c), or perhaps in a new paragraph 2 (d).

19. **Mr. Mayer** (Switzerland), citing article 49, subparagraph (f), which stated that the carrier might refuse to follow instructions if the person failed to provide adequate security, pointed out that the implication was that the carrier was required to follow instructions under all other circumstances. It followed that the carrier would be obliged to attempt to obtain instructions from the controlling party or the shipper before initiating the procedure described in article 50. Therefore, the reading of those two articles by the observer for Denmark was irreconcilable with the text as currently drafted.

20. **Mr. Ndzibe** (Gabon) pointed out that a ship arriving at a port of destination was required to report to customs and that, in so doing, it automatically became subject to the local laws and regulations. His delegation could support the proposal by the representative of Benin provided that paragraphs 2 (b) and (c) reflected that situation.

21. **Ms. Nesdam** (Norway) proposed the addition of the phrase “without regard to the provisions of articles 47, 48 and 49 but” after the word “article” in the first line of paragraph 3, in order to clarify the point made by the observer for Denmark.

22. **Mr. Elsayed** (Egypt) said that the actions in respect of the goods listed in paragraph 2 (b) should be subject to the condition mentioned in paragraph 2 (c), namely, that such actions must be carried out in accordance with the practices or pursuant to the law or regulations of the place where the goods were located. The entire paragraph should be redrafted to reflect that change. In that sense his delegation endorsed the proposal made by the representative of Benin.

23. **The Chairperson** took it that the Commission accepted the amendment proposed by the delegation of Benin, borrowing the language in paragraph 2 (c) for the provision on the destruction of goods. The Commission’s report would reflect the discussion on the interpretation

of draft article 50, paragraphs 1 (a) to (e) in relation to draft articles 47, 48 and 49.

24. *Draft article 50, as amended, was approved in substance and referred to the drafting group.*

*Article 51 (Retention of goods)*

25. *Draft article 51 was approved in substance and referred to the drafting group.*

*Draft article 1, paragraph 9 (definition of “documentary shipper”)*

26. *Draft article 1, paragraph 9, was approved in substance and referred to the drafting group.*

*Draft article 52 (Exercise and extent of right of control)*

27. **Mr. Imorou** (Benin) said that several aspects of article 52 were unclear. He wondered how the controlling party might modify instructions in respect of the goods, replace the consignee or obtain delivery of the goods at a port of call without changing the contract of carriage.

28. **Mr. Elsayed** (Egypt) said that the chapeau of paragraph 1 should be amended to state that the right of control might be exercised by the controlling party so long as it did not change the contract of carriage.

29. **Ms. Czerwenka** (Germany) said that her delegation supported the retention of article 52 as drafted. In certain situations, it was important for the controlling party to give instructions, despite the potential change to the contract of carriage. Furthermore, although replacing the consignee might create problems, relevant precautions were covered by other provisions of chapter 10 on rights of the controlling party.

30. **Mr. Sturley** (United States of America), **Mr. Kim In Hyeon** (Republic of Korea) and **Mr. Shautsou** (Belarus), endorsed the statement by the representative of Germany.

31. **Mr. Ngoy Kasongo** (Observer for the Democratic Republic of the Congo) said that he understood the concerns expressed by the representatives of Benin and Germany. He called for prudence in determining the specific conditions under which the controlling party might replace the consignee and noted that explicit mention of them would add to the clarity of the article.

32. **Mr. Fujita** (Japan) said that his delegation supported the retention of the current text and noted that, in certain situations, it was indeed possible to modify instructions without changing the contract of carriage. Inclusion of specific conditions in the current article might create confusion, since other provisions of the same chapter addressed those conditions.

33. **The Chairperson** took it that a majority of the Commission members favoured retention of the current text of draft article 52.

34. *Draft article 52 was approved in substance and referred to the drafting group.*

*Draft article 53 (Identity of the controlling party and transfer of the right of control)*

35. **Mr. van der Ziel** (Observer for the Netherlands) said that his delegation had proposed a consequential change to draft article 53 in its written comments (A/CN.9/658/Add.9, para. 23). The chapeau of paragraph 1 should begin with the words “Except in the cases referred to in paragraphs 2, 3 and 4”.

36. **Mr. Fujita** (Japan), **Mr. Berlingieri** (Italy) and **Mr. Sharma** (India) endorsed the correction made by the observer for the Netherlands.

37. **Mr. Hu** Zhengliang (China), supported by **Mr. Sturley** (United States of America), pointed out that the reference in paragraph 3 (c) should be to “article 1, subparagraph 10 (a) (i)”.

38. **The Chairperson** took it that the Commission approved the technical corrections suggested.

39. *Draft article 53, as amended, was approved in substance and referred to the drafting group.*

*Draft article 54 (Carrier’s execution of instructions), draft article 55 (Deemed delivery), Draft article 56 (Variations to the contract of carriage), Draft article 57 (Providing additional information instructions or documents to carrier)*

40. *Draft articles 54 to 57 were approved in substance and referred to the drafting group.*

*Draft article 58. Variation by agreement*

41. **Mr. Fujita** (Japan) asked whether, since a paragraph 2 had recently been added to draft article 53, the reference to article 53, paragraph 1 (b), in draft article 58 should be expanded to take that into account.

*The meeting was suspended at 11.40 a.m. and resumed at 12.15 p.m.*

42. **Mr. van der Ziel** (Observer for the Netherlands) said that after consultations it had been concluded that there was no need to change the reference to draft article 53 in draft article 58.

43. *Draft article 58 was approved in substance and referred to the drafting group.*

*Draft article 1, paragraph 12 (definition of “right of control”) and paragraph 13 (definition of “controlling party”)*

44. *Draft article 1, paragraphs 12 and 13, were approved in substance and referred to the drafting group.*

45. **The Chairperson** invited representatives of the informal groups set up to review draft article 12, draft

article 13 and draft article 38 to report on the outcome of their consultations.

*Draft article 12 (Period of responsibility of the carrier) (continued)*

46. **Mr. Fujita** (Japan) reported that, despite lengthy consultations, no consensus had been achieved on a possible improvement to paragraph 3 of draft article 12. He assumed, therefore, that the text would remain unchanged.

47. **Mr. Alba Fernández** (Spain) said that, in its current wording, the draft article impaired the internal consistency of the draft convention. Problems could result from a possible discrepancy between the provisions of paragraphs 1 and 3. Situations could arise in which the right of control, which coincided with the carrier's period of responsibility, commenced subsequent to the issuance of the transport document. While noting that his delegation's proposal to include in paragraph 3 the phrase "subject to the provisions of paragraph 1" had not been accepted, he again proposed that the phrase "For the purposes of determining the carrier's period of responsibility" should be deleted from the chapeau of paragraph 3.

48. **Ms. Czerwenka** (Germany) agreed that paragraph 3 presented a problem of interpretation which would be averted by the proposed deletion. The suggested addition of a reference to paragraph 1 would also be useful and had found some support in informal consultations.

49. **Ms. Carlson** (United States of America) and **Mr. Sharma** (India) said that, since no consensus had been reached on the draft article in informal consultations, the existing text should be retained.

50. **Mr. Lebedev** (Russian Federation) wished to know whether the proposed deletion in paragraph 3 had been discussed in informal consultations.

51. **Mr. Fujita** (Japan) said that the deletion had been discussed but the concern raised by the representative of Spain in respect of the commencement of the right of control, especially in cases where the transport document had been issued earlier, had not been discussed in informal consultations.

52. *Draft article 12 was approved in substance and referred to the drafting group.*

*Draft article 13 (Transport beyond the scope of the contract of carriage) (continued)*

53. **Mr. Berlingieri** (Italy), reporting on informal consultations, said that he had hoped that a clearer wording would be found for draft article 13 and that the need to delete it would thereby be averted. However, despite all the efforts made to specify the subject matter and effects of the single transport document contemplated

in the article, that had not proved possible. There seemed therefore to be no choice but to delete draft article 13.

54. **Mr. Fujita** (Japan), while concurring in the deletion, said that it had been agreed that deletion should not be taken to imply any criticism of the current practice in the trade of issuing a single transport document.

55. *Draft article 13 was deleted.*

*Draft article 38 (Contract particulars) (continued)*

56. **Mr. Fujita** (Japan) reported that every effort had been made in informal consultations to incorporate into the list of contract particulars contained in paragraph 1 the largest possible number of the additional items proposed, together with any necessary qualification so as to avoid potential problems in practice. It had not been deemed wise to include the sensitive issue of approximate date of delivery, because of its close relation to the carrier's liability for delay, covered by draft articles 22, 23 and 24. He proposed the following new paragraph 2, *bis*:

"2 *bis*. The contract particulars in the transport document or the electronic transport record referred to in article 37 shall furthermore include:

"(a) The name and address of the consignee if named by the shipper;

"(b) The name of a ship if specified in the contract of carriage;

"(c) The place of receipt and, if known to the carrier, the place of delivery;

"(d) The port of loading and the port of discharge if specified in the contract of carriage."

57. **Mr. Ibrahima Khalil Diallo** (Senegal), **Mr. Elsayed** (Egypt), **Mr. Imorou** (Benin), **Ms. Wakarima Karigithu** (Kenya), **Mr. Sharma** (India) **Mr. Ngoy Kasongo** (Observer for the Democratic Republic of the Congo) and **Mr. Mouloupo** (Observer for the Congo), expressed support for the proposal.

58. Draft article 38, as amended, was approved in substance and referred to the drafting group.

*The meeting rose at 1 p.m.*



**Summary record of the 874th meeting, held at Headquarters, New York,  
on Friday, 20 June 2008, at 3 p.m.**

[A/CN.9/SR.874 and Corr.1]

*Chairperson:* Mr. Illescas (Spain)

*The meeting was called to order at 3.20 p.m.*

**Election of officers** (*continued*)

1. **Mr. Bigot** (*Kane Diallo (Senegal)*) was elected Vice-Chairperson by acclamation.

**Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea** (*continued*) (A/CN.9/642, A/CN.9/645 and A/CN.9/658 and Add.1-13)

*Draft article 59 (When a negotiable transport document or negotiable electronic transport record is issued)*

4. **Mr. Blake-Lawson** (United Kingdom) said that his delegation had considerable concerns about chapter 11 on transfer of rights. The current draft text lacked sufficient detail to achieve either certainty or the harmonization of national law. In addition, it should not be subject to the same conditions of applicability as the remainder of the draft convention. The chapter needed to be further clarified and modified to be of benefit to future shippers, consignees and carriers. The whole chapter should therefore be removed and worked on further.

5. As an example, draft article 59 did not address when and under which circumstances a negotiable transport document might become exhausted as a document of title or when and under which circumstances the right to possession of the goods might therefore cease to attach to the document. Nor did it address the effect of transferring the document once that stage had been reached. It was also unsatisfactory that transfer rights under straight bills of lading were not covered. It would make more sense to provide that the rights to delivery of the goods were transferred by transfer of the document from the shipper to the consignee, rather than to leave the matter to national law. His delegation also had concerns in respect of draft article 60 but would reserve its comments until the discussions on draft article 59 had been completed.

6. **Ms. Downing** (Australia), drawing attention to her delegation's written comments (A/CN.9/658, para. 55) and expressing support for the concerns raised by the representative of the United Kingdom, said that her delegation's concerns in respect of draft articles 59 and 60 stemmed from the fact that they were narrower in scope than current national law and couched in vague language.

7. **The Chairperson** said that, in the absence of any other comments, he took it that the Commission wished to approve draft article 59.

8. *Draft article 59 was approved in substance and referred to the drafting group.*

*Draft article 60 (Liability of holder)*

9. **Mr. Kim** In Hyeon (Republic of Korea) wondered whether it might be appropriate to replace the phrase "exercise(s) any right" in paragraphs 1, 2 and 3 by the phrase "demand(s) delivery of the goods", by analogy with the change made to draft article 45.

10. **Mr. Mollmann** (Observer for Denmark) said that the reference to article 45 in paragraph 3 was no longer necessary and could, therefore, simply be deleted.

11. **Ms. Downing** (Australia), drawing attention to her delegation's written comments (A/CN.9/658, paras. 53-55), said that the Australian banking industry had pointed out that negotiable transport documents were often consigned to a bank without prior notice or agreement. Under draft article 60, paragraph 2, the bank, acting as the consignee, might incur liabilities for contractual commitments, costs and so on. In the banking industry's view, such an approach was inconsistent with general principles and would create problems in the area of cost-recovery.

12. **Mr. Fujita** (Japan) said that while draft article 60 would undoubtedly work well in some countries, it would create major difficulties for others, including Japan. In the worst case scenario, it could even prevent some countries from ratifying the convention. The Commission should therefore consider deleting if not the entire draft article then at least paragraph 2.

13. **Mr. Sturley** (United States of America), **Mr. Mayer** (Switzerland), **Mr. Hu Zhengliang** (China) and **Mr. Sharma** (India) expressed support for the Danish proposal to delete the reference to article 45 in paragraph 3.

14. **Mr. Mayer** (Switzerland) also expressed support for the Japanese proposal to delete paragraph 2.

15. **Mr. Blake-Lawson** (United Kingdom) said that draft article 60 in its entirety should be deleted.

16. **Mr. van der Ziel** (Observer for the Netherlands) expressed support for the Danish proposal, but said that

the rest of the draft article should be retained in its current form. Draft article 60 was of benefit to holders and banks. Under paragraph 1, a bank that took no action assumed no liability. He failed, therefore, to understand the Australian banking industry's concerns. Paragraph 2, meanwhile, simply reflected a general rule in respect of documents of title and confirmed that the rule applied to bills of lading, too.

17. **Mr. Berlingieri** (Italy) endorsed the proposals of both the Republic of Korea and Denmark. However, if, as the Republic of Korea proposed, the phrase "exercise(s) any right" was replaced by "demand(s) delivery of the goods" in paragraphs 1 and 2, paragraph 3 would no longer serve a purpose and could therefore be deleted in its entirety.

18. **Mr. Elsayed** (Egypt) expressed support for the Italian position.

19. **The Chairperson** said that if there was no objection, he would take it that the Commission wished to make the technical amendments proposed by the delegations of the Republic of Korea and Denmark.

20. **Mr. Mollmann** (Observer for Denmark) said that he would prefer to leave paragraphs 1 and 2 unchanged and simply to delete the reference to draft article 45.

21. **Mr. van der Ziel** (Netherlands), supported by **Mr. Ibrahima Khalil Diallo** (Senegal), objected to the Chairperson's statement that the amendment proposed by the representative of the Republic of Korea was of a purely technical nature. In the context of draft article 45, the consignee's exercise of its rights related solely to delivery of the goods; draft article 60, however, related not only to the consignee but to any holder and to the entire period of carriage. If the proposed amendment to paragraph 1 were made, a bank that exercised the right of control — as it might be forced to do if it held a pledge — might also have to assume any liability; the reference to draft article 57 had been included precisely in order to address that situation. In any event, he did not think that the Commission wished to dilute the meaning of paragraphs 1 and 2 by replacing "exercise(s) any right" by "demand(s) delivery of the goods".

22. He would prefer to leave paragraphs 1 and 2 in their current form; however, if the proposed changes were made, the representative of Italy was correct in stating that paragraph 3 would no longer be needed; the reference to article 57 in paragraph 1 could also be deleted.

23. **Mr. Sturley** (United States of America) said that he agreed with the observer for the Netherlands; his delegation would prefer simply to delete the reference to draft article 45 as the Danish delegation had proposed.

24. **Mr. Berlingieri** (Italy) said he had thought that there was general agreement on the representative of the Republic of Korea's proposal. He agreed that the

proposed amendments to paragraphs 1 and 2 would make paragraph 3 unnecessary; conversely, if that paragraph was retained, the proposed changes in paragraphs 1 and 2 should not be made.

25. **Mr. Sharma** (India) said that, while he supported the Danish delegation's proposal to delete the reference to draft article 45, he was not in favour of the amendments proposed by the delegation of the Republic of Korea. As the observer for the Netherlands had noted, draft articles 45 and 60 referred to different situations; in the latter case, the holder could be the controlling party, in which case its rights would not be restricted to the period of delivery.

26. **Mr. Kim In Hyeon** (Republic of Korea) said that he had not meant to make a formal proposal but had merely posed a question. After hearing the explanation given by the representative of the Netherlands, he thought that it would be sufficient to delete the reference to draft article 45 from paragraph 3.

27. **The Chairperson** said, he took it that the Commission wished to delete the reference to draft article 45 from paragraph 3.

28. *Draft article 60, as amended, was approved in substance and referred to the drafting group.*

#### *Draft article 61 (Limits of liability)*

29. **Ms. Hu Shengtao** (China) said that her Government attached great importance to the draft convention and would like to make it a workable legal instrument. However, China's shipping industry was of the view that the limits of liability established in the Hague-Visby Rules should be maintained. Her delegation had tried to demonstrate flexibility during the lengthy negotiations on draft article 61, but if the limits of liability were set higher than those in the Hamburg Rules, China would be unable to sign the draft convention.

30. **Mr. Delebecque** (France) said that his delegation fully supported the current text of the draft article, which represented an advance over the existing versions.

31. **Mr. Ibrahima Khalil Diallo** (Senegal) said that most of the African States were governed by legislation that was over a century old. They had made many concessions during the negotiations on the draft convention, yet the level of protection that it afforded shippers was still below that of the Hamburg Rules. While the text of draft article 61 was not perfect, it was part of a compromise package regarding the limitation on the carrier's liability (A/CN.9/WG.III/XXI/CRP.5) that had been negotiated during the twenty-first session of Working Group III (Transport Law), and the limits agreed at that time were reasonable. His delegation strongly supported the provision in its current form.

32. **Mr. Mbiah** (Observer for Ghana) said that, while the text of the draft convention was not set in stone, it represented a delicate balance that could not be changed without renegotiating a number of provisions of great concern to developing economies such as his own. The draft article should remain unchanged.

33. **Mr. Tsantzos** (Greece), drawing attention to his delegation's written comments (A/C.9/658/Add.10, paras. 5-8), said that during the Working Group's deliberations, his delegation had expressed the view that liability limits should not be increased from the levels established in the Hague-Visby Rules, which were adequate to handle the vast majority of claims, as a counterbalance to the shift in the allocation of risk and liability towards the carrier in the draft convention. His delegation had been willing to take a positive approach to the initial compromise proposal for the adoption of maximum limits in line with those of the Hamburg Rules, combined with the deletion of other controversial provisions, as an overall package. However, it could not support the new proposal represented by draft article 61, which provided for limits even higher than under the Hamburg Rules. Another solution should be sought.

34. **Mr. Mollmann** (Observer for Denmark), speaking on behalf of **Ms. Nesdam** (Norway), who could not be present, said that the Norwegian delegation had endorsed the compromise package agreed in the Working Group and could not support any alternative proposals.

35. **Ms. Carlson** (United States of America) said that, although her delegation was not fully satisfied with the limits of liability established in the draft article, other delegations had shown flexibility on issues of great importance to the United States as part of the compromise package. She recognized that China's adherence to the draft convention, once adopted, would be vital to its success, but her own delegation supported the draft article in its current form.

36. **Mr. Elsayed** (Egypt) said that his delegation advocated leaving the text as it stood with one slight amendment in the second sentence of paragraph 3: instead of referring to the value of the currency "at the date of judgement or award", it would be fairer to make the value date the date that suit was filed or that arbitration proceedings were brought. There could be a considerable change in the value of a currency between the bringing of a claim and the pronouncement of a judgement or award, and the earlier date was closer to the date of the damage or loss.

37. **Mr. Schelin** (Observer for Sweden) said that the most important goal was to ensure that the greatest possible number of States could find the draft convention satisfactory as a whole, so that it would be ratified by States representing a large percentage of world trade and transport in all regions. Only if its provisions represented

a fair balance between the carrier's and the shipper's interests was there hope that the convention would come to form the global standard in maritime trade. The debate had shown that a number of delegations found some of the more important draft articles unsatisfactory, including those applying to land transport and those on the carrier's limits of liability, particularly the limitation amounts. His delegation believed that it was not too late to reach a compromise on those issues. Although he was well aware that the current provisions were the result of many years of negotiation and represented a delicate balance, it was possible that only minimal changes might make a broader consensus possible. His delegation wished to go on record as being willing to work out such a compromise together with other delegations.

38. With regard specifically to draft article 61, paragraph 1, Sweden proposed replacing the phrase "the carrier's liability for breaches of its obligations" with "the carrier's liability for loss resulting from loss of or damage to the goods as well as for loss resulting from misdelivery of the goods". Loss or damage to the goods and misdelivery represented the typical situations for which the carrier was liable and narrowed somewhat the scope of the carrier's obligations covered by the limitation amounts. Liability for loss from misinformation, for example, would not be limited. Considering that the shipper had no opportunity to limit its liability for misinformation, that struck a fairer balance.

39. **Mr. Hu In Hyeon** (Republic of Korea) recalled that in the Working Group his delegation had argued that the limits provided for under the Hague-Visby Rules, which the Republic of Korea had incorporated the previous year into its maritime law, were the appropriate ones. After lengthy consultations with industry, it had decided to maintain that position. Most of the East Asian countries were satisfied with the Hague-Visby limits. Even the shippers' associations did not feel the need for liability limits higher than those under the Hamburg Rules. Recent developments in packing had made it possible to increase the number of packages in a container; by declaring the full number of packages and paying a higher freight, a shipper could receive full compensation for loss. The draft convention's elimination of nautical fault as one of the carrier's defences would increase insurance premiums for the carrier in any case; Korean carriers were unwilling to accept higher liability limits as well. His delegation therefore continued to advocate the use of the Hague-Visby limits in draft article 61.

40. **Mr. Sandoval** (Chile) said that his delegation considered the limits set out in draft article 61, which were slightly higher than those under the Hamburg Rules, to be acceptable. Indeed, it would have wished the limits to be set even higher but had accepted the compromise in the hopes that it would enable the convention to bring

about a unification of international transport law. He would urge delegations to support the current text.

41. **Mr. Berlingieri** (Italy) said that, since his delegation had participated in negotiating the limits of liability, it was committed to them.

42. **Ms. Peer** (Austria) said that her delegation supported the current limits of liability but was in favour of adopting the proposal of Sweden.

43. **Ms. Wakarima Karigithu** (Kenya) said that her delegation was strongly in favour of retaining draft article 61 in its current wording for the reasons expressed in particular by France, Ghana, Senegal and the United States of America.

*The meeting was suspended at 4.40 p.m. and resumed at 5.05 p.m.*

44. **Mr. Mollmann** (Observer for Denmark) said that as one of the sponsors of the compromise his delegation was saddened to hear that the limitation amounts were a cause of great concern to some delegations, including China and the Republic of Korea. The compromise had been agreed upon as a package, and it was important not to reopen single issues. What the delegation of Sweden had proposed as a minor adjustment was in fact a major change that would have a large impact on the draft convention.

45. **Mr. Egbadon** (Nigeria) stressed that the current text was the result of a complex compromise; the issue of limits could not be reopened without reopening all the other issues tied to the package. All regions of the globe should be taken into consideration, and many developing countries felt that the limits in draft article 61 should be retained. With regard to the Swedish proposal, his delegation was not in favour of redefining the carrier's breaches of obligation, since the current wording had also been part of the compromise.

46. **Ms. Czerwenka** (Germany) said that, despite arguments that the issue should not be reopened, it was the Commission's task to consider all aspects of the draft convention. She, too, was eager for the convention to enter into force throughout the world; it would be unfortunate if some regions were left out. Her delegation was willing to look into the question of limits and perhaps, without reopening all aspects, to help devise a package in which all concerns were reflected.

47. Her delegation also shared Sweden's concerns about the scope of the obligations of the carrier covered by the limits of liability and therefore supported the proposed change of wording. Many delegations had been concerned that a reference merely to loss and damage would be too narrow, and the current formula had therefore been devised, but the carrier's failure to supply information or indeed to provide the means of transport altogether had never been intended to be covered by the

liability limits. A reference to misdelivery as well as loss and damage would clarify what had originally been intended by "breaches of its obligations"; the Swedish proposal therefore constituted a clarification, not a change of substance.

48. **Mr. Lebedev** (Russian Federation) said draft articles 18 and 61 were undoubtedly crucial to the draft convention. Leading experts in maritime law had been working on the draft for six years and some kind of output was essential. Of course, the convention, once adopted, would be heavily scrutinized. At that point there would be three international conventions in existence governing maritime trade, and it was not clear which of the three would be most widely applied.

49. While it would be difficult to go back and reconsider the liability limitation amounts, the Commission might reconsider the use of the phrase "breaches of its obligations under this Convention", a term not found in the Hague Rules or the Hamburg Rules, instead of the traditional "loss or damage to the goods". Paragraph 189 of the report of Working Group III (Transport Law) on the work of its twenty-first session (A/CN.9/645) indicated that there had been uncertainty about whether misinformation and misdelivery were or should be included. The term "breaches of its obligations" was vague and unclear, and guidelines would be required for courts and arbitration tribunals in applying the provision. If it were possible to revert to the original notion of loss or damage to the goods, it might be easier to reach consensus on the monetary amounts of liability.

50. **Mr. Sharma** (India) said that the Working Group, after much effort, had produced a compromise text that struck a balance between those who wanted higher limits of liability and those who wanted lower limits. Consequently, although he was sympathetic to the concerns of China and the Republic of Korea, his delegation had accepted the compromise, in fact had proposed the current limits, and could not reverse its position. The Swedish proposal had merit. His delegation could not take a definitive position on it, since its hands were tied by the original agreement.

51. **Ms. Halde** (Canada) said that, not having been a party to the compromise agreement, her delegation would support Sweden's efforts to build a broader consensus. It also supported the proposed change to paragraph 1 for that reason.

52. **Mr. Fujita** (Japan) said that his delegation had not been a sponsor of the compromise package in the Working Group, since it considered the limits too high, but it had ultimately supported the compromise. He was not optimistic about the emergence of any broader consensus on a new package, but would endorse such a consensus. If that effort failed, his delegation would stand by the current text of the draft article. Also, with regard

to the Swedish proposal, the text of article 61 had been kept intentionally ambiguous. By specifically mentioning loss, damage and misdelivery, the Swedish proposal would, furthermore, affect the interpretation of article 18, making it clear that it did not cover misdelivery. That point, too, had been deliberately left ambiguous, because in some jurisdictions misdelivery was considered loss of the goods.

53. **Mr. Mouloupo** (Observer for the Congo) said that article 61 was the result of a comprehensive compromise no part of which was subject to reconsideration. He therefore supported the text as it stood.

54. **Mr. Bigot** (Observer for Côte d'Ivoire) said that article 61 represented a single package reconciling divergent opinions on a number of issues, not just the limits of liability. Although his own delegation would have liked higher limits, support for the compromise text sent a strong signal of support for the principle of universality. His delegation was committed to the current text of draft article 61.

55. **Mr. Morán Bovio** (Spain) said that his delegation found draft article 61 fully acceptable in its current form. It had been an enormous task to reach consensus, and an agreement of that sort could not be improved upon.

56. **Ms. Mbeng** (Cameroon) said that her delegation had advocated higher limits but had agreed to the current text of draft article 61 in a spirit of compromise. The Swedish proposal represented a substantial change. Her delegation considered itself bound by the firm agreement that no aspect of the compromise package regarding the limitation on the carrier's liability would be reopened.

57. **Mr. Ngoy Kasongo** (Observer for the Democratic Republic of the Congo), noting that some advances were historic and that the Commission had a chance to adopt the draft convention as a universal instrument, said that draft article 61 should be approved in its current form without reservation.

58. **Mr. Serrano Martínez** (Colombia) said that, even though his own country's law allowed higher limits of liability, his delegation supported the current text of draft article 61.

59. **Mr. Madariaga** (Honduras) said that one of the basic aims of the Commission was the harmonization of law. It had been agreed that the draft text would not be touched, and that commitment should be respected now.

60. **Mr. Luvambano** (Observer for Angola) said that the word "compromise" had an important legal definition. The text should be retained as drafted.

61. **Mr. Oyarzábal** (Observer for Argentina) said that the limits set in draft article 61 were 10 times lower than those his Government would have wanted, and it therefore could not accept any further reduction.

62. **Mr. Blake-Lawson** (United Kingdom), **Mr. Imorou** (Benin), **Ms. Lost-Sieminska** (Poland), **Mr. Ndzibe** (Gabon), **Mr. Hron** (Czech Republic), **Mr. Ousseimi** (Observer for the Niger) and **Ms. Traoré** (Observer for Burkina Faso) said that their delegations supported the compromise and wished to retain the current wording of draft article 61.

63. **Mr. Hu Zhengliang** (China) said, to clear up any misunderstanding of why his Government could not accept the limits of liability set in draft article 61, that the decision had been reached carefully, after consultation with China's cargo and shipping industries, which had unanimously maintained that, while the Hague-Visby Rules were acceptable, the limits set under the Hamburg Rules were higher than commercially necessary for the foreseeable future, and that to go above even the Hamburg Rules would harm maritime trade.

64. In the Working Group, China, as a political concession, had accepted the limits under the Hamburg Rules as the absolute maximum, but had never been given an explanation of why it was necessary to go any higher. The Commission, in going beyond what was necessary, had not been faithful to its principle of adopting rules of law that facilitated trade. The Commission's major political consideration should be to encourage the widest application of the convention to maritime trade, in terms of both trade volume and the number of contracting States. In World Trade Organization statistics, China ranked third in the world in the value of its international commodities trade and fourth in the size of its merchant fleet. As the largest developing country, China attached importance to harmonization of the law on the carriage of goods by sea, but its own fundamental national interest forced it to reject such high limits of liability.

65. **Mr. Ibrahima Khalil Diallo** (Senegal) asked China to take account of the will of the Commission. While China's needs were understandable, the rest of the world needed China, and it should try to reach an accommodation.

66. **Mr. Egbadon** (Nigeria) said that he understood the difficulty faced by China, the major trading partner of several African countries, but political considerations were also important, and he asked the Chinese delegation to reconsider before taking a final position.

67. **The Chairperson** said that it was clear that there was very broad support in the Commission for the current text of draft article 61.

68. *Draft article 61 was approved in substance and referred to the drafting group.*

*Draft article 62 (Limits of liability for loss caused by delay)*

69. **Mr. Oyarzábal** (Observer for Argentina) noted that the text set a limit of liability for economic loss due to delay equivalent to two and one-half times the freight payable on the goods delayed, but since delay might damage the goods, that limit was not reasonable.

70. **Mr. Mbiah** (Observer for Ghana) said that he recalled that in earlier versions the Commission had done away with limits based on freight payable.

71. **Mr. Sturley** (United States of America) clarified that the limit of liability based on freight payable did not relate to physical loss or damage to the goods due to delay, where the general limits in draft article 61 would apply, but only to non-physical, economic or consequential loss.

72. *Draft article 62 was approved in substance and referred to the drafting group.*

*The meeting rose at 6 p.m.*

**Summary record of the 875th meeting, held at Headquarters, New York,  
on Monday, 23 June 2008, at 10 a.m.**

[A/CN.9/SR.875 and Corr.1]

*Chairperson:* Mr. Illescas (Spain)

*The meeting was called to order at 10.15 a.m.*

**Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea** (*continued*) (A/CN.9/642, A/CN.9/645 and A/CN.9/658/Add.1-13)

*Draft article 63 (Loss of the benefit of limitation of liability)*

1. *Draft article 63 was approved in substance and referred to the drafting group.*

*Draft article 64 (Period of time for suit)*

2. *Draft article 64 was approved in substance and referred to the drafting group.*

*Draft article 65 (Extension of time for suit)*

3. **Mr. Ibrahima Khalil Diallo** (Senegal), supported by **Mr. Imorou** (Benin), **Mr. Nama** (Cameroon), **Ms. Traoré** (Observer for Burkina Faso) and **Mr. Ousseimi** (Observer for the Niger), drawing attention to the written comments on draft article 65 (A/CN.9/658/Add.1, paras. 16-18), submitted by a number of African States to express their concerns regarding the potential effects of the draft article in certain African jurisdictions, said that in order to ensure that the text was acceptable to the industry and, in particular, insurance companies, the first clause of draft article 65 reading “The period provided in article 64 shall not be subject to suspension or interruption, but” should be deleted. Draft article 65 would then read: “The person against which a claim is made may at any time during the running of the period extend that period by a declaration to the claimant. This period may be further extended by another declaration or declarations”. Thus, while the initial two-year period for suit would remain unchanged, suspension or interruption of that period would not be formally prohibited. The draft article would then be in line with other relevant international instruments, such as the Warsaw Convention.

4. **Mr. Elsayed** (Egypt) said that, since the second part of draft article 65 contradicted the first part, the second part should be deleted. Left in its current form, the draft article might have adverse effects, since the potentially indefinite extension it provided for meant that the other party could be taken by surprise at any time and could not plan its legal action properly.

5. **Mr. Morán Bovio** (Spain) said that he favoured retaining draft article 65 in its current form because it managed to preserve the delicate balance between, on the one hand, the need for legal certainty and uniformity (by setting a two-year period for suit), and, on the other hand, the need for a degree of flexibility (by allowing for the extension of that period).

6. **Mr. Sturley** (United States of America) endorsed the remarks made by the representative of Spain. If the proposal to delete the first part of the first sentence of draft article 65 was adopted, the question of suspension or interruption of the two-year period provided for in draft article 64 would be governed solely by domestic law, which varied significantly from country to country. That had been the case under the Hague-Visby Rules and had led to a lack of uniformity and predictability, particularly for shippers, and encouraged forum-shopping. His delegation had originally been in favour of a one-year period of time for suit. The decision to increase the period to two years provided much of the additional protection sought by the representative of Senegal.

7. **Mr. Mollmann** (Observer for Denmark) said that he supported the statements of the representatives of Spain and the United States. Although draft article 65, if approved, would require amendments to most States' ordinary rules on limitation of actions, including those of his own country, it would create a uniform regime at the international level. The prohibition of suspension and interruption was counter-balanced by the increase of the period of time for suit to two years from the one-year period under the Hague-Visby Rules, to which most maritime carriage was subject. His delegation had originally advocated a one-year period and thought that two years was ample time for a shipper to bring suit.

8. **Mr. Sharma** (India) recalled that the Working Group had engaged in lengthy discussions on draft article 65. In the interest of legal uniformity, he favoured retaining the text as currently drafted.

9. **Mr. Fujita** (Japan) said that he sympathized with the position of the African countries. Nevertheless, since the relevant legal regime differed from country to country, it was important to take a standardized approach to the issue of time limits. As for the concerns regarding extension by declaration expressed by the representative of Egypt, he recalled that that practice was not new, having already been sanctioned by the Hague-Visby and Hamburg Rules.

10. **Mr. Sandoval** (Chile) said that it was perfectly possible to reconcile the two imperatives of legal certainty and flexibility by allowing for agreement on an extension of time for suit. His delegation would prefer to retain the current version of draft article 65.

11. **Mr. Berlingieri** (Italy) said that his delegation was in favour of retaining the current version of draft article 65. Deleting the first part of the draft article would mean that the issue of suspension or interruption of the period of time for suit would be governed solely by domestic law, a situation that would undermine the Commission's aim of achieving uniformity.

12. **Mr. Prosser** (United Kingdom), **Mr. Kim In Hyeon** (Republic of Korea), **Mr. Schelin** (Observer for Sweden) and **Ms. Talbot** (Observer for New Zealand), endorsed the remarks made by the representatives of Spain and the United States.

13. **Mr. Elsayed** (Egypt) clarified that he was not in favour of deleting the first phrase of draft article 65. However, like some other States, Egypt took the view that a time limit for requests for extension should be established.

14. **Mr. Essigone** (Gabon) said that the two-year period for suit was in line with international maritime practice. However, in its current form, draft article 65 did not grant the claimant sufficient flexibility, and for that reason his delegation supported the proposal put forward by the representative of Senegal.

15. **Mr. Moulupo** (Observer for the Congo) said that, in order to strike a better balance between the interests of the carrier and those of the claimant and to prevent any adverse effects on insurance companies, his delegation strongly supported the proposal put forward by the representative of Senegal.

16. **Mr. Mayer** (Switzerland) said that he supported retaining the current version of draft article 65 for two reasons. First, it was vital to specify a time limit for suit so that claimants did not have to revert to the relevant provisions of their national law, which differed from jurisdiction to jurisdiction and were often very complicated. Secondly, clarity and predictability were essential to ensure that lawyers for both the plaintiff and the defendant in any given case did not waste time, and thus money, unnecessarily.

17. **Mr. Hu Zhengliang** (China) said that Chinese law permitted suspension and interruption, but not extension; however, his delegation supported the text as drafted in the interests of uniformity.

18. **Mr. Honka** (Observer for Finland) said that insurers in his country found that the two-year time limit allowed enough time for settlement; he therefore supported the current text.

19. **Mr. Gombrii** (Norway) said that his delegation supported retention of the current text because the establishment of clear rules would provide invaluable clarity and legal certainty for both parties.

20. *Draft article 65 was approved in substance and referred to the drafting group.*

*Draft article 66 (Action for indemnity)*

21. **Ms. Shall-Homa** (Nigeria) questioned why a party being held liable should be allowed to file a counter-claim after the expiration of the period of time for suit.

22. *Draft article 66 was approved in substance and referred to the drafting group.*

*Draft article 67 (Actions against the person identified as the carrier)*

23. **Mr. Imorou** (Benin) proposed the deletion of the term "bareboat charterer" from the first line of draft article 67 in keeping with draft article 6, which excluded charter parties from the scope of the convention.

24. **Mr. Moulupo** (Observer for the Congo) said that since the draft convention applied only to regular liner transport, he supported the proposal by the representative of Benin.

25. **Mr. Mayer** (Switzerland) said that draft article 67 should be retained purely in the interests of shippers and claimants. It allowed a generous amount of time for the shipper to sue another party in cases where the carrier was not identified, a situation addressed in draft article 39.

26. **Mr. Imorou** (Benin) said that, as he understood it, draft article 39 addressed the problem of identifying the carrier, whereas draft article 67 assumed that the carrier had been identified.

27. **Mr. Mbiah** (Observer for Ghana) said that it was true that draft article 39 and draft article 67 were protective of shippers because they provided the opportunity to locate the actual carrier by bringing a claim against the registered owner or the bareboat charterer; therefore, the text of draft article 67 should remain as it was.

28. *Draft article 67 was approved in substance and referred to the drafting group.*

29. **The Chairperson** said that, when considering the separate draft articles of chapter 14 (Jurisdiction), the Commission should bear in mind that draft article 76 contained an "opt-in" clause establishing that only States that made a positive declaration would be bound by the provisions of the chapter.

30. **Ms. Downing** (Australia) said that since chapter 14 contained no provision like that in draft article 77, paragraph 5, stating that any agreement contrary to that



article was void, her delegation understood draft article 76 to mean that States that chose not to opt in reserved the right to regulate matters of jurisdiction according to national law. It was a fundamental issue for her delegation that Australian cargo claimants should be able to bring claims in Australia.

31. **Mr. Oyarzábal** (Observer for Argentina) said that his delegation would have preferred not to have allowed for exclusive choice of court agreements, which had been excluded in a number of MERCOSUR multimodal transport agreements. In his national jurisdiction the determination of jurisdiction or subjection to arbitration could always be made ex post facto, in other words, after the events that had given rise to the dispute.

32. **Mr. Fujita** (Japan) said that, as he understood it, draft article 76 gave a free hand to the contracting State to regulate the question of jurisdiction and had his delegation's full support.

33. **Mr. Sturley** (United States of America) said that his delegation supported chapter 14 as a whole; it represented a carefully balanced agreement in the Working Group. He agreed with the interpretation that States that did not opt in would retain the power under domestic law to give more or less protection to claimants. The chapters on arbitration and jurisdiction were similar in many respects, but the arbitration chapter had been drafted to harmonize with the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

*Draft article 68 (Actions against the carrier) and definitions of "domicile" and "competent court"*

34. **The Chairperson** noted that the definitions of "domicile" and "competent court" contained in draft article 1, paragraphs 28 and 29 were related to draft article 68.

35. *Draft article 68 and draft article 1, paragraphs 28 and 29, were approved in substance and referred to the drafting group.*

*Draft article 69 (Choice of court agreements)*

36. **Ms. Downing** (Australia), referring to her Government's written comments (A/CN.9/658, para. 63), said that in paragraph 2 (c) the meaning of "timely and adequate notice" was unclear and was likely to lead to much litigation. Her Government did not support the principle of binding a consignee or any third party unless it consented to be bound.

37. **Mr. Elsayed** (Egypt) said that he shared the concerns expressed by the representative of Australia about binding a person by an exclusive choice of court agreement when that person had not been a party to the agreement.

38. **Ms. Carlson** (United States of America) said that she agreed with the representative of Australia that any country that did not opt into chapter 14 was allowed to regulate matters of jurisdiction according to domestic law. Draft article 69 and chapter 14 as a whole were part of a carefully crafted compromise. In agreeing to the wording of paragraph 2 (c), the Working Group had decided that what constituted timely and adequate notice should be determined by domestic law. Her delegation supported the retention of the current wording of draft article 69.

39. *Draft article 69 was approved in substance and referred to the drafting group.*

*Draft article 70 (Actions against the maritime performing party) and draft article 71 (No additional bases of jurisdiction)*

40. *Draft articles 70 and 71 were approved in substance and referred to the drafting group.*

*Draft article 72 (Arrest and provisional or protective measures)*

41. **Mr. Lebedev** (Russian Federation) said that the broad wording of draft article 72, subparagraph (a), which set out the condition that the requirements of chapter 14 must be fulfilled, left room for interpretation. He took it to mean that a court that had taken provisional or protective measures was competent to consider the merits of a case if it had jurisdiction under any of the provisions of chapter 14. He would be interested to hear whether others had a different interpretation of paragraph (a).

42. **Ms. Carlson** (United States of America) and **Mr. Elsayed** (Egypt) agreed with that interpretation.

43. *Draft article 72 was approved in substance and referred to the drafting group.*

*The meeting was suspended at 11.45 a.m. and resumed at 12.15 p.m.*

*Draft article 73 (Consolidation and removal of actions) and draft article 74 (Agreement after dispute has arisen and jurisdiction when the defendant has entered an appearance)*

44. *Draft articles 73 and 74 were approved in substance and referred to the drafting group.*

*Draft article 75 (Recognition and enforcement)*

45. **Mr. Sturley** (United States of America) pointed out that the Working Group had overlooked one of the consequential changes that had become necessary after it had decided against a partial opt-in approach to the chapter on jurisdiction. He proposed that in paragraph 2 subparagraph (b) should be deleted and the chapeau and subparagraph (a) should be combined.

46. **Mr. Sharma** (India), **Mr. Fujita** (Japan) and **Mr. Berlingieri** (Italy) endorsed the technical correction proposed by the representative of the United States.

47. *Draft article 75, as amended, was approved in substance and referred to the drafting group.*

*Draft article 76 (Application of chapter 14)*

48. **The Chairperson** took it that the Commission accepted the opt-in clause, as set out in draft article 76.

49. *Draft article 76 was approved in substance and referred to the drafting group.*

50. **The Chairperson** reminded the Commission that draft article 80 contained an opt-in clause that applied to the whole of chapter 15 on arbitration.

*Draft article 77 (Arbitration agreements)*

51. **Mr. Kim** In Hyeon (Republic of Korea) pointed out that “the person asserting a claim against the carrier” in draft article 77 was referred to elsewhere in the draft convention sometimes as the “claimant” (draft articles 18 and 50) and sometimes as the “plaintiff” (draft articles 68 and 70). The wording should be made consistent.

52. **Mr. Sturley** (United States of America), supported by **Mr. Fujita** (Japan) said that the drafting group could address the issue of consistency. He would just like to point out that the word “plaintiff” should not be used to denote “the person asserting the claim against the carrier” in chapters 14 and 15, as reference was specifically being made there to the cargo claimant, and “plaintiff” could be taken to mean any person bringing a claim, including the carrier.

53. **Ms. Czerwenka** (Germany) said that her delegation was satisfied with the draft article as currently worded.

54. *Draft article 77 was approved in substance and referred to the drafting group.*

*Draft article 78 (Arbitration agreement in non-liner transportation)*

55. *Draft article 78 was approved in substance and referred to the drafting group.*

*Draft article 79 (Application of chapter 15)*

56. **Ms. Marcovčić Kostelac** (Observer for Croatia) wondered what would happen in the event that Contracting Party opted to be bound by the provisions of chapter 15 but not of chapter 14, since the draft article bracketed the two chapters together.

57. **Mr. Sturley** (United States of America) said that in some jurisdictions the provisions in chapter 14 could be interpreted as precluding all dispute resolution clauses. The aim of chapter 15 was to interfere with the arbitration system as little as possible and ensure that, if a State had opted in to the jurisdiction chapter, parties could not evade that application of that chapter through arbitration. In the unlikely event that a State opted in to chapter 15 but not to chapter 14, the reference to chapter 14 would be meaningless and do no harm.

58. *Draft article 79 was approved in substance and referred to the drafting group.*

*Draft article 80 (Application of chapter 15)*

59. *Draft article 80 was approved in substance and referred to the drafting group.*

*Draft article 81 (General Provisions)*

60. **Ms. Czerwenka** (Germany) said that the text of her delegation’s proposed amendment to draft article 81 would be circulated soon.

61. **The Chairperson** said he took it that the Commission wished to defer consideration of draft article 81 until it had the proposed amendment before it.

62. *It was so decided.*

*Draft article 83 (Special rules for live animals and certain other goods)*

63. **Mr. Fujita** (Japan) recalled an amendment proposed by Japan in its written comments (A/CN.9/658/Add.6, para. 6) to ensure consistency between the wording of the draft article and that of draft article 63. He proposed the insertion after the words “referred to in article 19” in subparagraph (a) of the following words: “done with the intent to cause such loss or damage to the goods or the loss due to delay or”.

64. **Mr. Berlingieri** (Italy), **Mr. Sturley** (United States of America), **Mr. van der Ziel** (Observer for the Netherlands), **Mr. Morán Bovio** (Spain), **Mr. Kim** In Hyeon (Republic of Korea), **Mr. Sharma** (India) and **Mr. Madariaga** (Honduras) supported the proposal by Japan.

65. *Draft article 83, as amended, was approved in substance and referred to the drafting group.*

*The meeting rose at 1 p.m.*

**Summary record of the 876th meeting, held at Headquarters, New York,  
on Monday, 23 June 2008, at 3 p.m.**

[A/CN.9/SR.876 and Corr.1]

*Chairperson:* Mr. Illescas (Spain)

*The meeting was called to order at 3.10 p.m.*

**Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea** (*continued*) (A/CN.9/642, A/CN.9/645 and A/CN.9/658 and Add.1-13; A/CN.9/XLI/CRP.5)

*Draft article 81 (General provisions) (continued)*

1. **The Chairperson** invited the Commission to consider the proposed amendments to draft article 81 (A/CN.9/XLI/CRP.5) sponsored by the delegations of Germany, Austria, Switzerland and Australia.

2. **Ms. Czerwenka** (Germany), introducing the proposal, said that the draft convention established the basis of the shipper's liability to the carrier in draft article 31 but did not set a monetary cap on that liability. In order to achieve a fairer balance between shipper and carrier, the proposal's sponsors felt that the parties to a contract of carriage should have the option of agreeing to a cap on the shipper's liability. That was particularly true of strict liability, which was capped under many States' domestic law. Since the Working Group had been unable to agree on the amount of such a cap, the sponsors had felt that the draft convention should allow the issue to be addressed by agreement between the parties.

3. There had been some discussion as to whether the word "limits" in draft article 81 referred to a monetary cap on liability or to the modification of an obligation. For purposes of clarity, the proposal would replace the verb "limits" by "reduces" in paragraphs 2 (a) and (b). It would also add a new paragraph 2 (c), which would read:

"The contract of carriage may, however, provide for an amount of limitation of the liability of the shipper, consignee, controlling party, holder or documentary shipper for a breach of obligations, provided that the claimant does not prove that the loss resulting from the breach of obligations was attributable to a personal act or omission of the person claiming a right to limit done with the intent to cause such loss or recklessly and with knowledge that such loss would probably result."

4. The second part of that sentence, after "provided", which reflected the language of draft article 63 (Loss of the benefit of limitation of liability), had been included in order to address the concern expressed by the

representative of France, who had pointed out that even a cap that had been agreed contractually should not apply in the event of a wilful misconduct on the part of the shipper.

5. **Mr. Sturley** (United States of America) said that, while he was pleased to see that the German delegation appreciated the benefits of freedom of contract, he thought that draft article 82 (Special rules for volume contracts), which the Commission had already approved in substance, offered an appropriate means of providing for limits of liability not available under the draft convention, since it was the parties to a volume contract that were most likely to agree to a cap on the shipper's liability. Moreover, the types of limits envisaged in the proposal were even broader than the shipper would be able to obtain under draft article 82, which contained super-mandatory provisions from which derogation was not possible. The proposal was therefore unacceptable to his delegation.

6. **Ms. Halde** (Canada) and **Ms. Talbot** (Observer for New Zealand) endorsed the proposal.

7. **Mr. Fujita** (Japan) said that, generally speaking, his delegation welcomed flexibility regarding the shipper's liability and freedom of contract. However, he would like the sponsors to clarify whether, as the representative of the United States of America had suggested, the proposal's intent was to allow complete freedom of contract even with regard to the carriage of dangerous goods. A public policy issue was involved; draft article 82, paragraph 4, specifically stated that, even in the case of a volume contract, the derogations authorized in article 82, paragraph 1, did not apply to the rights and obligations provided in articles 30 and 33 or to liability arising from the breach thereof. If the intent at the proposal was to allow such derogations, it would call previous assumptions into question and would change his delegation's understanding of draft articles 30 and 33.

8. **Mr. Ibrahima Khalil Diallo** (Senegal) said that after all the unsuccessful efforts to limit the shipper's liability, it would be dangerous to allow it to be limited by contract, since the consignee's interests might not be protected. It would be preferable to leave draft article 81 in its current form and to allow the courts to determine the limits of liability in the event of a dispute.

9. **Mr. Schelin** (Observer for Sweden) said that he supported the proposal, which would benefit both parties.

In particular, the option of setting a cap on liability would allow cargo insurers to cover such liability which would benefit the carrier as well. However, in light of the public policy implications of the proposal, the super-mandatory provisions of draft article 82 should be carried over to draft article 81 by including a statement to the effect that the new paragraph did not apply to the situations covered by articles 30 and 33.

10. **Ms. Downing** (Australia), speaking as a sponsor of the proposal, stressed that strict liability was usually capped under the domestic law of States; the proposal would allow the parties to agree on the cap, which, generally speaking, would be equal to the insurance value of the goods. She did not think that that option would be exercised frequently, but it should be available.

11. **Mr. Mbiah** (Observer for Ghana) said that in the interests of clarity, he welcomed the proposed changes in paragraphs 2 (a) and (b) of the draft article. However, the proposed new paragraph was a case of “too little, too late”. During the negotiations, several delegations had said that they would like to set a limit on the shipper’s liability. Their position had not met with the approval of the majority and the current proposal, which took the approach of contractual freedom, did not address their concerns. The draft article should remain in its current form.

12. **Ms. Czerwenka** (Germany) explained that the proposed new paragraph was intended to provide the option of capping liability, even strict liability in the case of dangerous goods. If the agreement between the parties was unfair, the matter could be referred to the courts. She did not agree with the representative of Senegal’s interpretation; it seemed to her that in its current form, draft article 81, paragraph 2, did not allow for the capping of liability, even by the courts. It was true that draft article 81, paragraph 1, allowed the carrier’s liability to be increased; her delegation would not object if that fact were made more explicit.

13. Draft article 82 allowed the parties to agree on greater or lesser rights, obligations and liabilities than those imposed by the draft convention. The super-mandatory provisions contained in paragraph 4 of draft article 82 were necessary because paragraphs 1 through 3 allowed for very broad derogation from the convention, but the proposed amendments to draft article 81 were narrower in scope. They did not allow the parties to change their obligations or liabilities, but merely to set a monetary cap on liability.

14. **Mr. Mollmann** (Observer for Denmark) recalled that a similar issue had arisen in the context of draft article 32. During the negotiations, his delegation had expressed the view that the draft convention should accord equal treatment to shippers and carriers; it had been opposed to allowing for the possibility of increasing the carrier’s

obligations under draft article 81, paragraph 1. The new proposal would increase the existing inequality by making it possible for a strong shipper to limit its own liability while increasing that of the carrier.

15. In addition, the proposal was worded in very general terms, and his concerns had not been allayed by the representative of Germany’s explanation. He did not think it unrealistic to envisage a situation in which a strong shipper was able to force the carrier to accept a liability limit as low as one Special Drawing Right (SDR), allowing the shipper to escape liability entirely for all intents and purposes. As the observer for Ghana had said, during the meetings of the Working Group some delegations had tried, without success, to agree on a limit of liability for shippers. The resulting text was not his delegation’s first preference, but it stood by the compromise that had been agreed.

16. **Mr. Tsantzos** (Greece) said that he endorsed the views expressed by the representatives of Denmark and the United States of America.

17. **Mr. Bigot** (Observer for Côte d’Ivoire) said that, while his delegation would like to strike a better balance between the liability of the two parties, it was not satisfactory to do so through freedom of contract. He supported the views expressed by the representative of Senegal.

18. **Mr. Sharma** (India) said that he agreed with the proposal to replace “limits” by “reduces” in paragraphs 2 (a) and (b). As the representative of Ghana had noted, the Working Group had failed to reach agreement on a monetary cap on the shipper’s liability. The compromise package agreed in January 2008 would not, therefore, be affected by a decision to allow the parties to agree on such a cap, taking into account their circumstances and the nature of their trade. The representative of Germany’s explanation of the differences between draft articles 81 and 82 was convincing, and his delegation supported the proposal.

19. **Mr. Elsayed** (Egypt) said that in light of the explanation provided by the representative of Germany, he was prepared to support the proposal, since it would ensure a fairer balance between the parties to the contract.

20. **Mr. Kim In Hyeon** (Republic of Korea) said that his delegation thought highly of the current text of draft article 81, which sought to address recent developments in shipping, such as the widespread use of containers. Since a carrier was unable to check the contents inside a closed container, without adequate information from the shipper about the nature of the contents the carrier could not transport the goods safely. In his country, in fact, there had been a number of incidents of fire and explosion due to the failure of the shipper to disclose the nature of the cargo. That was the rationale for the obligations imposed on the shipper by draft articles 32 and 33. Safe transport

depended on not allowing the shipper to derogate from those obligations. Another noticeable development was the emergence of large shippers with the power to force carriers to accept absolute liability. It was highly likely that large shippers would try to exclude or limit some of their own obligations by contract; the words “excludes” and “limits” in paragraphs 2 (a) and (b) were intended to prevent that. As Denmark had pointed out, the carrier was already at a disadvantage in that the word “increases” had been omitted from the provisions in draft article 81, paragraph 1, concerning the scope of contractual derogation permitted to the carrier but was included in the parallel provisions in paragraph 2 in relation to the shipper. The implication was that the carrier’s obligations and liability could be increased contractually but the shipper’s could not. Although the version of draft article 81 proposed in A/CN.9/XLI/CRP.5 sounded reasonable, it in fact shifted the balance even further in favour of the shipper. His delegation preferred to retain the current text.

21. **Ms. Shall-Homa** (Nigeria) said that her delegation aligned itself with the statements of the United States of America, Denmark and Senegal and in particular those of Ghana about the Working Group’s previous efforts to find a way to cap the shipper’s liability. It supported the proposal to change the verb “limits” to “reduces”, since the amendment was in keeping with the intent of the provision. Otherwise it wished to retain the current wording of the draft article.

22. **Mr. van der Ziel** (Observer for the Netherlands) said that his delegation could support the change from “limits” to “reduces” but had serious objections to the proposed new sentence in A/CN.9/XLI/CRP.5. As the proposal was drafted, a shipper with sufficient bargaining power could impose drastic limits on its liability; if the new provision had said, for example, that the minimum cap would be equal to the value of the goods the proposal would have been more acceptable. Moreover, some of the shipper’s obligations involved a public policy issue. There were too many cases of accidents due to misinformation from the shipper about the nature of the goods; a large chemical shipper, for example, should not be allowed to contract out of liability resulting from a breach of its obligation under draft article 33.

23. **Mr. Delebecque** (France) said that his delegation could not support the proposal contained in A/CN.9/XLI/CRP.5 for the reasons stated by Japan. Provision must be made to exclude derogation with respect to the obligations under draft articles 32 and 33.

24. **Mr. Prosser** (United Kingdom) and **Mr. Berlingieri** (Italy) said that their delegations supported the retention of the current wording for the reasons stated by Denmark.

25. **Mr. Gombrii** (Norway) said that the proposal went even further than the volume contract provisions in draft

article 82, which provided for certain safeguards by excluding its application to the so-called super-mandatory provisions. A powerful shipper negotiating under draft article 81 with the amendment proposed in A/CN.9/XLI/CRP.5 would be even less constrained than under draft article 82.

26. **Ms. Sobekwa** (South Africa) said that her delegation had some sympathy with the proposal but would prefer to retain draft article 81 as it stood.

27. **Mr. Honka** (Observer for Finland) said that his delegation supported the current text for the reasons given by the Netherlands and Denmark.

28. **Mr. Hron** (Czech Republic) said that his delegation supported the views expressed by the Netherlands.

29. **Mr. Mouloupo** (Observer for the Congo) said that his delegation shared the views of Senegal and Côte d’Ivoire. A contract of carriage was usually a contract of adhesion, so that contractual freedom, which presupposed consent between the parties, would not provide a solution. Since the documents were usually drawn up by the carrier, the latter should not be allowed the opportunity to increase the obligations of the shipper. His delegation supported the current text.

30. **Mr. Bokana Olenkongo** (Observer for the Democratic Republic of the Congo) said that his delegation aligned itself with the statements of Denmark, the United States of America and Senegal and preferred to retain the current text.

31. **Mr. Serrano Martínez** (Colombia) said that, to be consistent with its previous position, his delegation supported the text of draft article 81 as it stood.

32. **Mr. M’inoti** (Kenya), **Mr. Sandoval** (Chile), **Mr. Essigone** (Gabon) and **Mr. Luvambano** (Observer for Angola) said that their delegations preferred to retain the current wording of draft article 81.

33. *Draft article 81 was approved in substance and referred to the drafting group.*

*Draft article 78 (continued)*

34. **Mr. Lebedev** (Russian Federation) said that, although the Commission had already approved the substance of draft article 78, there was a need for greater clarity in the drafting of paragraph 2. For example, subparagraph (a) referred to an arbitration agreement, whereas subparagraph (b) talked about an arbitration clause.

35. **Mr. Estrella Faria** (International Trade Law Division) said that at first glance there did seem to be a confusion in terms. The thrust of paragraph 2 was that the three conditions set out in subparagraphs (a), (b) and (c) were cumulative. If all those conditions were met, the

arbitration agreement would not be subject to the provisions of chapter 15, which made the enforceability of the arbitration agreement dependent on certain conditions that did not normally apply to arbitration agreements in general. Perhaps the solution would be to harmonize the terms used in subparagraphs (a) and (b).

36. **Mr. Lebedev** (Russian Federation) said that the cumulative nature of the conditions was not obvious from the current wording. Perhaps some additional words of explanation would be helpful.

37. **Mr. Berlingieri** (Italy) said that chapter 15 sometimes used the term “arbitration clause”, sometimes “arbitration agreement” and sometimes “arbitration clause or agreement”. In some jurisdictions “arbitration clause” referred to something agreed before any dispute had arisen and “arbitration agreement” referred to something agreed after a dispute had arisen. Inconsistency in the use of terms should be avoided to prevent difficulties in interpretation.

38. **Ms. Czerwenka** (Germany) said that, if the text was referred to the drafting group, her delegation would like to see the new wording before the adoption of the draft convention as a whole, since it was hard to judge the possible implications without seeing the new text.

39. **Mr. Gombrii** (Norway) said that the provision was not a model of clarity but he could explain the practical background. Paragraph 1 provided that the arbitration provisions did not apply to charterparties, but since the draft convention could apply to bills of lading issued under charterparties, paragraph 2 then became relevant. It was very common in such bills of lading to state that the bill of lading incorporated the terms and conditions of the charterparty, and that was the situation referred to in subparagraph (a). However, it was important for a party acquiring a bill of lading to be aware that the charterparty included an arbitration agreement, hence the requirement in subparagraph (b) of a specific reference to the arbitration clause.

40. **Mr. Sekolec** (Secretary of the Commission) said that the drafting group might consider it helpful to make the use of the terms “arbitration agreement” and “arbitration clause” consistent with other Commission texts on arbitration, such as the UNCITRAL Model Law on International Commercial Arbitration. In those texts “arbitration agreement” was a generic term indicating an agreement in any form to arbitrate, whereas “arbitration clause” referred to a paragraph in a larger document. It seemed to make sense, then, to refer to an “arbitration clause” in paragraph 2 (b).

41. **Mr. Sturley** (United States of America) suggested, to dispel the ambiguity pointed out by the Russian Federation, that one could simply make it clear in paragraph 2 that subparagraph (b), like subparagraph (a), referred to the charterparty clause. The appropriate use of

the terms “agreement” or “clause” could then be decided by the drafting group as it checked for linguistic consistency with other Commission texts.

42. **Mr. Hu** Zhengliang (China) proposed that paragraph 2 (b) could be eliminated, and the word “specific” could be added before the word “reference” in paragraph 2 (a). In addition, since a charterparty, a transport document or an electronic transport record could by definition contain only an arbitration clause, not an arbitration agreement, he believed that the proper reference would be to a clause, both in the chapeau of paragraph 2 and in subparagraph (a).

43. **Mr. Morán Bovio** (Spain) said that paragraph 2, which he interpreted as Norway did, was clear enough as drafted.

44. **Mr. Estrella Faria** (International Trade Law Division) suggested, after consultations and on the basis of remarks by the delegations of China and Norway, that article 78, paragraph 2, could be reformulated to read:

“2. Notwithstanding paragraph 1 of this article, an arbitration agreement in a transport document or electronic transport record to which this Convention applies by reason of the application of article 7 is subject to this chapter unless such an arbitration agreement:

(a) Identifies the parties to and the date of the charterparty or other contract excluded from the application of this Convention by reason of the application of article 6; and

(b) Incorporates by reference and specifically refers to the clause in the charterparty or other contract that contains the terms of the arbitration agreement.”

The drafting group could then easily make any minor adjustments to the text.

45. *Draft article 78, as amended, was approved in substance and referred to the drafting group.*

*Draft article 84 (International conventions governing the carriage of goods by other modes of transport)*

46. **Ms. Czerwenka** (Germany), supported by **Mr. Delebecque** (France), said that her delegation was in general agreement with the text but proposed deleting, in the chapeau, the phrase “in force at the time this Convention enters into force” after the phrase “international conventions”, so as not to limit the scope of article 84 only to international conventions in force at the time but to encompass also subsequent protocols to amend existing conventions and new conventions governing other modes of carriage. For example, an additional protocol to the Convention on the Contract for

the International Carriage of Goods by Road (CMR) had recently been adopted.

47. **Mr. Schelin** (Observer for Sweden) said that additional protocols to existing conventions could be considered to be covered by the current wording. However, it would be a matter of serious concern if the proposed deletion meant that draft article 84 applied to entirely new conventions replacing the existing inland carriage conventions, for that might force some contracting States to denounce the draft convention if they wished to become parties to the new conventions. The issue would have implications for draft article 92 on reservations.

48. **Mr. Berlingieri** (Italy) said that draft article 84 should not allow the draft convention to be superseded by any new conventions adopted or any protocols that significantly extended the scope of the pre-existing conventions.

*The meeting was suspended at 4.40 p.m. and resumed at 5.05 p.m.*

49. **Mr. Mollmann** (Observer for Denmark) said that his delegation did not think that draft article 84 should encompass new conventions replacing existing inland unimodal conventions, for that would undermine the application of the draft convention. A reference to subsequent amendments or protocols to existing conventions would be acceptable, but would require new wording, whereas his delegation was satisfied with the current wording.

50. **Mr. Barbuk** (Belarus) proposed that the word “convention” in subparagraphs (a) to (d) should be replaced by the words “international treaty”, reflecting the definition of treaty in the Vienna Convention on the Law of Treaties. That might address some of the concerns of the German delegation.

51. **Mr. van der Ziel** (Observer for the Netherlands), noting that draft article 84 was a conflict of conventions provision, said that it clearly defined the scope of application of the other conventions; as long as subsequent protocols did not extend the scope, no problem would arise. The German proposal, however, would give a “blank cheque” to new conventions, whereas the point of draft article 84 was to protect the scope of the draft convention against future inroads from other conventions. The German proposal was undesirable not just in theory but in practice, because it was largely unnecessary. Draft article 27 applied to possible future international instruments governing inland modes of transport and addressed Germany’s concerns adequately.

52. **Mr. Fujita** (Japan) said that his delegation sympathized with Germany’s concerns insofar as simple amendments to existing inland transport conventions were concerned, but the deletion suggested by Germany

was too broad because it opened the door to entirely new unimodal conventions as well as simple amendments. However, to address Germany’s point, the chapeau of draft article 84 could be amended by adding, after the words “enters into force”, the phrase “including any amendment thereto”. A similar phrase was used in draft article 88 (a). To be sure, that proposal would not solve the problem when an existing convention was replaced by a new convention that was in many respects a continuation of the previous convention.

53. **Ms. Carlson** (United States of America) said that her delegation opposed the Danish and Japanese proposals, since nothing would prevent a future amendment to an existing convention from completely changing the scope of that convention. She agreed with the representative of the Netherlands that it would be very dangerous to give a “blank cheque” to the drafters of amendments to existing conventions or new conventions. As he had also pointed out, future conflicts were already covered by draft article 27. The current version of draft article 84 should, therefore, be retained.

54. **Mr. Honka** (Observer for Finland) said that, as the representative of the Netherlands had pointed out, draft article 27, in its chapeau, referred to other international instruments in force “at the time of such loss, damage or event or circumstances”. Any future amendments to existing inland transport conventions would, therefore, apply under draft article 27. The purpose of draft article 84 was to safeguard against possible incursions from future conventions or future amendments to existing conventions expanding their scope; the current wording should therefore be retained.

55. **Ms. Czerwenka** (Germany) said that the inclusion of the phrase “to the extent that” in subparagraphs (a) to (d) made it clear which provisions of the international conventions in question would apply; the drafters of amendments to existing conventions or new conventions would not, therefore, be given a “blank cheque”, since future provisions that did not fall within the scope of the existing conventions would not apply.

56. In a spirit of compromise, she could support the Japanese proposal even if, as he himself had pointed out, it still did not cover instruments that were not amended, per se, but replaced by a complete new version. The 1999 revision of the Convention concerning International Transport by Rail (COTIF) — to which many members of the Commission were a party — was just one example of such an instrument.

57. **The Chairperson** suggested that, in view of the fairly even split in opinions, interested delegations should consult informally in order to try to reach an understanding.

58. *It was so decided.*

*Draft article 85 (Global limitation of liability)*

59. **Mr. Imorou** (Benin) asked why draft article 85 referred to “vessel owners” when thus far the convention had used the terms “carrier” and “shipper”.

60. **Ms. Czerwenka** (Germany), supported by **Mr. Fujita** (Japan), explained that draft article 85 aimed to resolve situations in which the carrier under the current convention was also the shipowner under either the Convention on Limitation of Liability for Maritime Claims or the Strasbourg Convention on the Limitation of Liability of Owners of Inland Navigation Vessels, both of which allowed the shipowner to limit his liability, for example in the case of a major accident. A carrier who was also the shipowner might be liable under the present convention to, say, up to \$1 million. However, if there were other claimants against whom the shipowner could invoke a limitation of liability under the Convention on Limitation of Liability for Maritime Claims, the consignee or the shipper might receive less than the full amount and the claim would not be fully met. Her delegation believed it was important for the Conventions in question to continue to apply in the way that they currently applied. The term “vessel” had been chosen because it applied to the carriage of goods both by sea and by inland waterways and, therefore, to both Conventions.

61. **Mr. Elsayed** (Egypt) said that it was normal for draft article 85 to refer to “vessel owners” if the vessel owner was the same person as the person mentioned in the contract of carriage. He wished to know nonetheless what was meant by the word “regulating” in the context of draft article 85. He was also concerned that any understanding reached with regard to draft article 84 might run counter to draft article 85.

62. **Mr. Berlingieri** (Italy) expressed support for the German and Japanese position, but cautioned that problems might arise if the term “vessel owners” was interpreted in the light of the Convention on Limitation of Liability for Maritime Claims, which defined “shipowner” as the owner, charterer, manager or operator of the ship.

63. **Mr. Hu** Zhengliang (China), supported by **Mr. Kim** In Hyeon (Republic of Korea), said that while he agreed that draft article 85 was necessary, he also agreed that the term “vessel owners” might give rise to misunderstandings and even disputes, particularly since the present convention did not define either “vessel” or “owner”. To make the draft article clearer, he proposed changing its title to “Global limitation of liability for maritime claims”, in line with the wording of the related Convention.

64. **Mr. Sharma** (India) and **Mr. Tsantzas** (Greece) expressed support for the German and Japanese position.

65. **Mr. van der Ziel** (Observer for the Netherlands) expressed support for the current version of draft article 85. Responding to the concerns raised in respect of the term “vessel owners”, he said that the word “owner” clearly referred to the Convention on Limitation of Liability for Maritime Claims and subsequent conventions, including any conventions relating to the liability of owners of inland navigation vessels; that was the most important consideration. As pointed out by the representative of Germany, the word “vessel” had been used instead of “ship” so as to cover the carriage of goods both by sea and by inland waterways; that was also relevant to draft article 27.

66. **Ms. Markovčić Kostelac** (Observer for Croatia) said that, while her delegation supported the current version of draft article 85, the inclusion of the phrase “as defined by the respective instruments” directly after the term “vessel owners” would make it absolutely clear that the draft convention referred to both the Convention on Limitation of Liability for Maritime Claims and the relevant instruments relating to inland waterways.

67. **Mr. Imorou** (Benin) said that, while he fully understood the positions of Germany and Japan, he remained concerned about possible confusion between the terms “carrier” and “vessel owners”, particularly in the absence of a definition of the latter.

68. **Mr. Gombrii** (Norway) said that the proposal by Croatia would seem to solve some of the problems raised.

69. **Ms. Czerwenka** (Germany) said that, as far as her delegation was concerned, draft article 85 was adequate as it stood. The draft article simply provided that, in the event of a conflict, nothing in the draft convention would affect the application of any international convention or national law regulating the global limitation of liability of vessel owners. It was impossible to know at the current juncture whether or not such an international convention or national law would be applicable; that would depend on the instrument in question. Hence the use of the word “regulating”, which also made it unnecessary to add the phrase “as defined by the respective instruments”.

70. Responding to the representative of China, she said that draft article 85 related not only to maritime claims, but also to inland waterway claims, so that the current title should be left unchanged.

71. **Mr. Mbiah** (Observer for Ghana) said that, though he had initially been sympathetic to the Chinese proposal, he had been convinced by the explanation of the representative of Germany that the proposed wording would be too restrictive. The current title should, therefore, be retained.

72. **The Chairperson** said that a clear majority of delegations were in favour of retaining the current version of draft article 85.



73. *Draft article 85 was approved in substance and referred to the drafting group.*

*Draft article 86 (General average)*

74. **Mr. Elsayed** (Egypt) drew attention to a discrepancy between the English term “general average” and the term used in the Arabic version of draft article 86 and said that his delegation thought that a definition of “general average” would be useful.

75. **The Chairperson** said that he noted no support for a definition, but the Secretariat would look into the matter of the Arabic wording.

76. *Draft article 86 was approved in substance and referred to the drafting group.*

*The meeting rose at 6 p.m.*

**Summary record of the 877th meeting, held at Headquarters, New York,  
on Tuesday, 24 June 2008, at 10 a.m.**

[A/CN.9/SR.877 and Corr.1]

*Chairperson:* Mr. Illescas (Spain)

*The meeting was called to order at 10.20 a.m.*

**Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea** (*continued*) (A/CN.9/642, A/CN.9/645 and A/CN.9/658 and Add.1-13; A/CN.9/XLI/CRP.3 and 6)

*Draft article 87 (Passengers and luggage)*

1. **Ms. Marcovčić Kostelac** (Observer for Croatia) noted that the Spanish version of the title of the draft article spoke of “Passengers and their luggage” (“Pasajeros y su equipaje”), in contrast with “Passengers and luggage” in the English version. She proposed the insertion of the possessive pronoun in the English version, in the interests of concordance and in line with the 1974 Athens Convention relating to the Carriage of Passengers and their Luggage by Sea.

2. **The Chairperson** said that the drafting group would address the matter.

3. *Draft article 87 was approved in substance and referred to the drafting group.*

*Draft article 88 (Damage caused by nuclear incident)*

4. **Mr. Fujita** (Japan), pointing out that the Paris Convention on Third Party Liability in the Field of Nuclear Energy had been revised in 2004, asked for the Secretariat to check the current status of all the nuclear conventions mentioned in the draft article, so as to ensure fully up-to-date references.

5. **The Chairperson** said that the Secretariat would carry out such a check and that all appropriate changes would be made.

6. *Draft article 88 was approved in substance and referred to the drafting group.*

*Draft article 89 (Depositary)*

7. *Draft article 89 was approved in substance and referred to the drafting group.*

*Draft article 90 (Signature, ratification, acceptance, approval or accession)*

8. **The Chairperson** said that the spaces between square brackets would be filled once the place and dates of signature had been agreed upon.

9. **Mr. de Boer** (Observer for the Netherlands) called attention to a letter from the Minister of Transport, Public Works and Water Management of the Netherlands, the Mayor of Rotterdam and the Executive Board of the Port of Rotterdam Authority addressed to all delegations to the forty-first session of the Commission (A/CN.9/XLI/CRP.3, annex). He said that, because of the great value attached by the Netherlands authorities to the work of the Commission and in recognition of the achievement represented by the finalization of the draft convention, which would be the culmination of six years of hard work, they would consider it a great honour to organize and host in Rotterdam an event to celebrate its adoption, including a signing ceremony, if the United Nations General Assembly approved. In keeping with the maritime nature of the draft convention, a large part of the celebration would take place on an ocean passenger steamer.

10. **Ms. Carlson** (United States of America), **Mr. Morán Bovio** (Spain), **Mr. Sharma** (India), **Mr. Mollmann** (Observer for Denmark), **Mr. Honka** (Observer for Finland), **Mr. Mbiah** (Observer for Ghana), **Ms. Talbot** (Observer for New Zealand), **Mr. Berlingieri** (Italy), **Mr. Ibrahim Khalil Diallo** (Senegal), **Mr. Gombrii** (Norway), **Mr. Elsayed** (Egypt), **Mr. Essigone** (Gabon), **Mr. Blake-Lawson** (United Kingdom), **Mr. Sandoval** (Chile), **Ms. Downing** (Australia), **Mr. Imorou** (Benin), **Ms. Halde** (Canada), **Mr. Lebedev** (Russian Federation), **Ms. Shall-Homa** (Nigeria), **Mr. Fujita** (Japan), **Mr. Luvambano** (Observer for Angola), **Ms. Traoré** (Observer for Burkina Faso), **Mr. Bokama Olenkongo** (Observer for the Democratic Republic of the Congo), **Mr. Moulolo** (Observer for the Congo), **Mr. Schelin** (Observer for Sweden), **Ms. Sobekwa** (South Africa), **Mr. M'inoti** (Kenya), **Mr. Oyarzábal** (Observer for Argentina), **Mr. Bigot** (Observer for Côte d'Ivoire) and **Ms. Marcovčić Kostelac** (Observer for Croatia) expressed deep appreciation for the leading role played by the Netherlands in the development of the draft convention and welcomed the generous offer by the authorities of that country to organize an event to celebrate its finalization and adoption. They looked forward to accepting the invitation, upon its being approved by the General Assembly.

11. **Mr. Sekolec** (Secretary of the Commission) said that Commission might wish to reflect in the text of the draft convention itself the participants' broad recognition

of Rotterdam as the most suitable place for the signing ceremony. Accordingly, the name “Rotterdam” could be inserted in draft article 90, paragraph 1, as the place at which the finalized convention would initially be open for signature. The period during which the instrument would be open to signature, first in Rotterdam and then at Headquarters, would be specified upon finalization, in late 2008 or early 2009.

12. **The Chairperson** said that it was the first time in the six years of preparing the draft convention that he had seen such a unanimous agreement to a suggestion put forward by a participant. He proposed the removal of the first set of square brackets in paragraph 1, before “at” and after “thereafter” and the insertion in the first space, in place of the dotted line and without square brackets, of the name “Rotterdam”.

13. *Draft article 90, as amended, was approved in substance and referred to the drafting group.*

#### *Draft article 91. Denunciation of other conventions*

14. *Draft article 91 was approved in substance and referred to the drafting group.*

#### *Draft article 92. Reservations*

15. **The Chairman** drew attention to the proposed amendment to draft article 92 put forward by the delegations of Austria and Germany and set out in document A/CN.9/XLI/CRP.6.

16. **Ms. Czerwenka** (Germany), introducing the proposal, recalled that, throughout the negotiations, her delegation had expressed a number of concerns regarding the regulation of multimodal transport contracts as defined in the draft convention. First, the draft failed to address various specific problems relating to carriage performed partially by land, inland waterway or air. The list of exemptions in draft article 18, paragraph 3, had been drawn up with only maritime transport in mind. For instance, it was inconsistent to relieve the carrier of liability in cases of fire on the ship in draft article 18, paragraph 1 (f) but not in cases of fire affecting other vehicles. Furthermore, draft article 82 on volume contracts in conjunction with the definition of “volume contract” did not address situations in which the contract of carriage provided for a series of shipments by road but only a single shipment by sea.

17. Second, there was no justification for applying the maritime regime set out in the draft convention in cases where the land leg was considerably longer than the maritime leg. In particular, it was difficult to understand why, when compared with the provisions of other instruments, including the Convention on the Contract for the International Carriage of Goods by Road (CMR) and the Uniform Rules concerning the Contract for

International Carriage of Goods by Rail (CIM-COTIF), the draft convention provided for significantly diminished carrier liability in such cases.

18. Third, when determining the applicability of draft article 27, the text placed an unfair burden of proof on the shipper, who would usually be unable to prove where the damage had occurred and would thus be unable to rely on draft article 27 for the purposes of compensation.

19. Fourth, the draft convention discriminated against the shipper as compared to the carrier in cases where another international convention provided for a shorter period of time for suit. If, pursuant to draft article 64, the shipper instituted a claim more than one year after the breach of obligation but before the expiry of the two-year period provided for in that article, such a claim could be dismissed if the carrier was able to prove, for example, that the damage had occurred during the land leg covered by the provisions of CMR, since, pursuant to the latter, the period of time for suit was only one year.

20. Fifth, the absence of a rule allowing the claimant to take direct action against the carrier performing carriage by road or rail was problematic. It was even more problematic to leave unresolved the issue of whether, by virtue of draft article 12, paragraph 3, the carrier could restrict the period of responsibility to the tackle-to-tackle period and thus, on the basis of draft article 20, paragraph 1, exempt itself and the maritime performing party from any liability for damages occurring on land.

21. Sixth, there was no justification for not allowing parties to a maritime plus contract to opt out of the network system provided for in draft article 27 and to agree on the application of a single liability regime.

22. Seventh, the draft convention led to a fragmentation of the laws on multimodal transport contracts because it applied only to one part of those contracts. In her view, it was unreasonable to exclude, by virtue of draft article 84, any modernization of unimodal conventions and, in addition, to prevent the adoption of an international regime regulating not only maritime plus contracts but also full-fledged multimodal transport contracts.

23. Since the Commission had already approved most of the draft text, it was no longer possible to remedy the aforementioned shortcomings. Thus, the German and Austrian delegations had proposed redrafting the reservations clause in such a way as to allow contracting States to reserve the right not to apply the convention to maritime plus contracts. States that shared her delegation’s concerns would thus be in a position to ratify the convention and introduce a new maritime regime. In the absence of a reservations clause, States with concerns about the multimodal regulations might not ratify the instrument. Furthermore, the reservations clause was discretionary, not mandatory, and did not preclude the possibility of adopting a comprehensive set of uniform

rules on genuine multimodal transport contracts at the international level.

24. **Mr. Barbuk** (Belarus) expressed support for the statement by the representative of Germany. While the draft convention dealt primarily with carriage by sea, some States were completely landlocked. The proposed new version of draft article 92 would ensure that the instrument was of interest to those States.

25. **Ms. Carlson** (United States of America) said that her delegation was strongly opposed to the proposal put forward by Austria and Germany. Indeed, should that proposal be approved, the United States would have very little interest in becoming a party to the convention. The door-to-door (or maritime plus) scope of the instrument was essential. Specifically excluding the application of the convention to contracts providing for carriage by sea and by other modes of transport in addition to sea carriage would undermine its fundamental purpose. Furthermore, acceptance of the maritime plus nature of the convention was an integral part of the compromise package agreed upon by over 30 States at the twenty-first session of Working Group III (Transport Law) (A/CN.9/WG.III/XXI/CRP.5). Her delegation could not approve the proposal put forward by Austria and Germany without violating that agreement.

26. **Mr. Mollmann** (Observer for Denmark) said that, like the representative of the United States, he was neither willing nor able to support the Austrian and German proposal. The Commission had devoted six years to developing a set of binding rules that responded to modern transport needs and established a uniform and predictable regime at the global level. The proposed amendment would drastically alter the scope of those rules by allowing contracting States to restrict their application to port-to-port contracts. National law would thus govern the land legs of any multimodal transport contracts, a situation that undermined the Commission's desire for uniformity. In addition, the proposed new wording of draft article 92 ran counter to the compromise solution reached in the Working Group.

27. **Mr. Morán Bovio** (Spain) stressed that there was a need for consistency in the Commission's decisions. The representative of Germany had enumerated a number of flaws in the draft convention, but her comments reflected only her delegation's perspective, not the perspective of the Commission as a whole. The Working Group had been mandated to draft a legislative instrument covering multimodal transport. The proposal put forward by Austria and Germany undermined that mandate and, if approved, would divest the draft convention of its door-to-door scope and run counter to the work done so far. His delegation therefore favoured retaining the current text of draft article 92.

28. **Mr. Lebedev** (Russian Federation) said that he welcomed the opportunity to revisit the issue of the scope of the draft convention and trusted that the points raised by the representative of Germany would be reflected in the record of the meeting and taken into consideration in the context of any future discussions on the question of reservations. With a view to determining the consequences of the amendment to draft article 92 proposed by Austria and Germany, he recalled that, upon ratifying the convention, States would automatically denounce the Hague-Visby and Hamburg Rules. However, if contracting States then reserved the right to exclude the application of the convention to maritime plus contracts, it appeared that situations in which goods were lost during the maritime leg of a multimodal transport contract would remain unregulated by international law. He would be grateful for further clarification in that regard.

29. **Mr. Blake-Lawson** (United Kingdom) said that the proposal of Austria and Germany would be costly in terms of uniformity; he urged delegations wishing to introduce the possibility of reservations to the convention to be willing to compromise on other draft articles. The draft convention was perhaps too detailed, but useful ambiguities in the text permitted a certain flexibility in its application. Draft article 2 on interpretation of the convention required States to be faithful to its spirit, but allowed ample scope for domestic law or judicial determination to fill in any gaps or ambiguities. Though the possibility of reservations might make it more palatable to his delegation in view of its concerns about chapters 9 and 12, but it regarded, the text as drafted as very workable. Certainly, no reservation should be permitted that would compromise the delicate balance between cargo and carrier interests reflected in the text. Delegations should have faith in the work they had done on the draft convention and stand by what had been agreed previously; he urged the retention of draft article 92.

30. **Mr. Tsantzos** (Greece) said that he did not support the proposal by Austria and Germany. Shipping was a national commercial activity that required international rules, and the best way to get results was through an international convention. A reservation clause opened the door to regulatory arrangements that would lead towards a fragmented system and away from uniformity and clarity. After six years of work, that proposal undermined the purpose of the draft convention.

31. **Ms. Halde** (Canada) said that her delegation supported the proposal, which was a final attempt at introducing needed flexibility into the text, leading to a higher number of ratifications.

32. **Mr. Schelin** (Observer for Sweden) said that he was worried that some of the major trading countries had raised concerns regarding multimodal transport and

limitation levels. Uniformity was indeed important, but it would not have much value if only a few States were able to ratify the convention. In the worst-case scenario, the convention might enter into force alongside the Hague-Visby and Hamburg Rules, resulting in three or even four systems being applied simultaneously. He urged a compromise in order to broaden the consensus.

33. **Ms. Downing** (Australia) said that she agreed with the United States delegation that door-to-door scope was important, but that aim had not been achieved. Her delegation, too, had hoped for uniformity in the system, which the current instrument did not provide. It had already shared a number of its concerns, especially regarding draft article 27 and draft article 12, paragraph 3, and thus supported the proposal by Austria and Germany.

34. **Mr. Maradiaga** (Honduras) said that the draft convention was in line with the purpose of the Commission, which was the harmonization of international trade law. Allowing reservations would undermine the work done by the Working Group; his delegation therefore did not support the proposal.

35. **Mr. Delebecque** (France) said that the proposal would allow States to set aside the convention, even for the maritime segment, if it had a multimodal component. The proposal could cover any liner transport, and in his view it went too far. There might be a need to consider a multimodal transport regime in a regional context, but the proposal as drafted contained a high risk of fragmentation of law.

36. **Mr. Ibrahima Khalil Diallo** (Senegal) said that his delegation had been sceptical about the draft convention, but found that draft article 92 in its current form was fully acceptable. It represented a compromise and ensured that the convention would be broad in scope.

*The meeting was suspended at 11.50 a.m. and resumed at 12.10 p.m.*

37. **Mr. van der Ziel** (Observer for the Netherlands) said that, in the view of his delegation, the proposal on reservations in respect of maritime plus contracts went too far. In general, modern contracts, particularly in the container trade, were multimodal; regulating port-to-port contracts no longer made sense. Some concessions had been made: for example, a distinction had been drawn between maritime performing parties and inland performing parties without providing for direct action against an inland performing party. He agreed with the observer for Sweden that it would be important to enable the major trading countries to adhere to the convention, but excluding the whole multimodal aspect through a reservation clause went too far.

38. **Mr. Fujita** (Japan) said that he was sympathetic to the need for adjustment regarding multimodal transport,

but the proposal went too far by excluding multimodal transport as a whole without any conditions. States could refuse to apply the convention regardless of whether any other regimes applied. The proposal represented extreme pre-emption of rights, which his delegation could not support. It was not opposed to some adjustment, but hoped for a more limited and reasonable approach.

39. **Mr. Berlingieri** (Italy) said that, from the outset his delegation had advocated for a modern door-to-door instrument that would be more suited to the age of container shipping. To allow the proposed reservations would undermine uniformity. His delegation was never opposed to negotiation, but after six years, it was time to come to a conclusion and adopt the current text of draft article 92.

40. **Mr. Sandoval** (Chile) said that his delegation rejected the proposal and favoured the current text of the draft article.

41. **Mr. Gombrii** (Norway) said that his delegation could not agree to the proposal for both substantive and procedural reasons, having joined the compromise in the Working Group. He agreed with the representative of Sweden that it was a problem when major trading nations felt that they could not sign the convention, but perhaps that was an indication that compromise was needed on limitation of liability. For example, the limits under draft article 61 could be maintained, but with a phase-in period, which might then allow States to ratify the Convention.

42. **Mr. Orfanos** (Observer for Cyprus) said that his delegation did not support the proposal for the reasons stated by the delegations of Greece, the United States, Spain and Denmark.

43. **Ms. Czerwenka** (Germany) argued that it was common for delegations to make provision for reservations to a convention at the end of negotiations, in order to address their concerns with some part of the instrument. Other conventions, such as the United Nations Convention on Contracts for the International Sale of Goods, allowed for rather broad reservations. The reservation clause proposed by the African States in their written comments (A/CN.9/658/Add.1, para. 24) was not framed in terms of contracts. In contrast, the Austrian and German proposal did refer to one of the two specific types of contracts, as described in draft article 1, paragraph 1, that were regulated by the convention. The proposed reservation clause would only apply to multimodal contracts; States that had ratified the convention would still be required to apply it to contracts that provided for carriage by sea only.

44. Currently, if a multimodal transport contract included a maritime leg, it might still be necessary under the applicable law to apply the Hague Rules, for instance to the maritime leg. If a State ratified the convention and denounced the Hague Rules, it would then apply the

maritime regime provided for in the convention to the maritime leg of a multimodal contract. In that regard, the current situation would not change.

45. Although it was not possible under the draft convention, it should be possible — and would indeed be advantageous — for parties to be able to apply a single, uniform liability regime to multimodal transport contracts, without having to prove where damage to the goods had occurred; the burden of proof might be difficult and costly for the shipper.

46. **Mr. Honka** (Observer for Finland) said that his delegation had framework instructions from his Government, which had welcomed the Commission's efforts to deal with multimodal aspects. However, draft article 27 in its current form was too uncompromising, because it did not provide for the possibility of applying national mandatory law. Since his delegation was not completely happy with draft article 27, which had already been approved, it would like to allow States some room for manoeuvre, which might lead to broader ratification of the convention. His delegation thought that further compromise remained possible and would be prepared to discuss the reservation clause proposed by the delegations of Austria and Germany, though its scope would have to be restricted.

47. **Ms. Shall-Homa** (Nigeria) said that her delegation had some sympathy for the Austrian and German proposal. By concentrating on agreed basic rules and allowing disagreement on certain other matters, a reservation clause provided a means of encouraging harmony among States with widely differing social, economic and political systems. However, such a clause should not call into question the integrity of the draft convention, which had been the product of significant efforts and compromises.

48. Her delegation had had serious reservations on several articles, most notably draft article 14. It had hoped that draft article 14 would be based on the principle of due diligence, both before the voyage and throughout it to the point of final delivery, in the light of the obligations placed on shipowners, as a result of the International Safety Management (ISM) code and other laws affecting shipping. It had also hoped that draft article 14 would eliminate the defence based on nautical fault, or exceptions for acts, neglect or default in navigation or management of ships, frequently invoked by carriers. Draft article 14, paragraph 2, also permitted contractual allocation of responsibility for certain functions, such as loading, handling, stowing and discharging, to the shipper and the consignee. Given the lack of sophisticated discharge and loading equipment in the African trade, it was clear that allowing carriers to contract out of responsibilities for certain functions created a complex set of liabilities in a localized manner, and would not lead to the uniformity and harmonization that the convention

sought to achieve. Nevertheless, she remained hopeful that a compromise might be reached.

49. **Mr. Serrano Martínez** (Colombia) said that the proposed reservation clause would sacrifice the scope of contractual freedom embodied in the draft convention and undermine uniformity by introducing substantial changes. Draft article 92 was the product of intense debate in the Working Group; the time had come to move forward. His delegation therefore supported the retention of article 92 in its current form.

50. **Ms. Talbot** (Observer for New Zealand) said that her delegation, along with a probable majority of delegations in attendance at the current session, had not been a party to the compromise that had been reached at the twenty-first session of the Working Group. It shared the concerns that had been voiced regarding the draft convention and had sympathy with the suggestion made by the representative of Sweden that a compromise should be reached. The prospect of three parallel legal regimes — the Hague-Visby Rules, the Hamburg Rules and the current convention — operating concurrently, to the detriment of the Commission's goal of uniformity, was also a matter of concern. Her delegation had entered the negotiation process seeking uniform rules for international transport door-to-door, and like the delegation of Australia, she considered that that goal had not been satisfactorily achieved. Although the proposed reservation clause did not resolve the problem for her delegation, she remained open to seeking a different solution to the outstanding problems.

51. **Mr. Elsayed** (Egypt) said that the door should not be opened to reservations. His delegation supported further compromise with the aim of improving upon the draft convention; that, in turn, would address the concerns raised by the delegations of Austria and Germany and at the same time make it possible to implement the convention, which had been the product of extensive efforts. The delegation of Germany had indeed raised an issue of particular relevance, given the rise in multimodal transport and its impact on maritime transport.

52. **Mr. Sharma** (India) said that the proposed reservation clause was clearly related to the scope of application of the draft convention. Early in the negotiations, the character of the draft convention — whether it should be multimodal, door-to-door or restricted to the sea voyage — had been the subject of debate. The final decision had resulted in a door-to-door, maritime plus convention that was not truly multimodal in character. The reservation clause provided for opting out of the convention as a whole with regard to multimodal contracts and therefore changed the maritime plus character of the instrument.

53. Another issue highlighted by the delegation of Germany was the applicability of the regime to the land

leg of the transport contract. The problem had been solved to a great extent, with regard to the application of international instruments, where applicable, when such instruments were available in regional forms such as CMR. Since the beginning of negotiations his delegation and several others had been pointing out that there was a gap for non-CMR countries. The proposal also addressed that issue indirectly.

54. He agreed with most delegations that, following extensive discussions, a delicate balance had already been reached on draft article 27. However, as minor problems remained, his delegation was open to further discussion of a solution, including a reservation clause, but opposed reservations to the convention as a whole.

55. **Ms. Sobekwa** (South Africa) said that her delegation could not support the proposal made by the representatives of Austria and Germany because it would severely undermine the convention or destroy its value as a means of promoting uniformity. The current text of draft article 92 should be retained.

56. **Mr. Mbiah** (Observer for Ghana) said that his delegation also associated itself with the comments of the observer for Sweden regarding the importance of producing a convention that could be implemented. The draft convention's key elements of uniformity, modernization and balance of interests had been maintained, despite the delicate compromises made, and had in fact served as the basis for those compromises. At some of the Working Group's deliberations, the choice of a uniform liability approach versus a network liability approach had been debated extensively. While a uniform approach had been favoured, the impossibility of achieving it had led to the adoption of a mixed approach, built upon a whole series of decisions taken over a long period of time.

57. Although his delegation, like others, had problems with certain draft articles, it should be borne in mind that parties to a compromise never left the negotiating table entirely satisfied, but that all involved hopefully gained something in the process. The Commission had come to accept the maritime plus regime with all its limitations, and after six years of negotiations, it was too late to seek further compromises, which would undoubtedly require another lengthy process. Draft article 92 in its current form was important; if parties were allowed to make selective use of the provisions of the convention, that would undermine the basis of the instrument and be inconsistent with its very title.

58. **Ms. Markovčić Kostelac** (Observer for Croatia) said that although it was true that reservation clauses were usually negotiated in the later stages of the finalization of a convention, the adoption of the proposal made by the delegations of Austria and Germany, at such a late stage in the process, would constitute a radical approach. Many

compromises had been made during nearly six years of negotiation. No one involved was likely to be entirely satisfied with the compromises reached, but all could agree that some of their views and approaches had been taken into account. Both the carriage and shipping industries in her country were modest ones, and for that reason, her Government was keenly interested in having international rules. Accepting the proposed amendments to draft article 92 would result in an international instrument that had been ratified by many countries but was implemented on a very limited scale, and that, in turn, would not lead to the harmonization to which the Commission aspired. However, her delegation remained open to further discussion and possible compromises, provided that they did not deviate from the main principles of the draft convention.

59. **Mr. Hu Zhengliang** (China) welcomed the proposal made by the delegation of Sweden and said that compromise was necessary in order to achieve real legal uniformity.

60. **Mr. Bigot** (Observer for Côte d'Ivoire) said that his delegation supported the retention of draft article 92 in its current form for the reasons cited by the United States delegation and others, and in the light of the compromise achieved in the Working Group. Further compromise on draft article 92 would jeopardize the delicate balance achieved on a number of provisions in the draft convention.

*The meeting rose at 1 p.m.*

**Summary record of the 878th meeting, held at Headquarters, New York,  
on Tuesday, 24 June 2008, at 3 p.m.**

[A/CN.9/SR.878 and Corr.1]

*Chairperson:* Mr. Illescas (Spain)

*The meeting was called to order at 3.10 p.m.*

**Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea** (*continued*) (A/CN.9/642, A/CN.9/645 and A/CN.9/658 and Add.1-13; A/CN.9/XLI/CRP.6)

*Draft article 92 (Reservations)(continued)*

1. **The Chairperson** invited the Commission to resume consideration of the Austrian and German delegations' proposal to replace the text of draft article 92 with two new paragraphs that would allow States to exclude application of the draft convention to contracts that provided for carriage by sea and by other modes of transport in addition to sea carriage (A/CN.9/XLI/CRP.6).

2. **Mr. von Ziegler** (Switzerland) said he realized that the purpose of the proposal was to allow as many States as possible to adhere to the draft convention, thereby replacing the proliferation of competing instruments with a single instrument that reflected the needs of the trade. However, the proposal would simply lead to another proliferation — that of reservations — which would do nothing to harmonize law. Some delegations had maintained that the freedom of contract allowed under some provisions of the draft convention would also pose an obstacle to harmonization. However, the 1980 United Nations Convention on Contracts for the International Sale of Goods, which provided for similar freedom of contract, had not had that effect. If some contracting States opted for the reservation, he could foresee major problems in determining whether the convention applied to a given contract of carriage, depending on where the forum was and whether the place of receipt and the place of delivery were in different States.

3. **Mr. Nguema Assoumou** (Gabon) said that he associated himself with the representatives of Senegal, Côte d'Ivoire and other States that had stressed the need to work towards the harmonization of national legal systems. The Commission should adopt the solution that would be acceptable to the greatest number of delegations, but his delegation could not support the proposal.

4. **Mr. M'inoti** (Kenya) said that his delegation, like many others, was satisfied with some provisions of the draft convention and had concerns about others.

However, the proposal would not solve that problem, and it would be preferable to leave draft article 92 unchanged.

5. **Mr. Beare** (Observer for the Comité Maritime International) said he was aware that the proposal raised policy issues that should be decided by Governments. However, he wished to place his organization's position on record. For the past seven years, the Comité Maritime International, which represented national maritime associations throughout the world, had taken the consistent view that in order to modernize maritime law and facilitate current commercial practice, the draft convention should cover door-to-door transport. It had taken that position during the preparation of the preliminary draft of the convention, which had subsequently been revised and considerably improved by the Working Group. The proposed amendment to draft article 92 would not promote harmonization and would lead to uncertainty, particularly regarding the mandatory scope of the convention with regard to contracts such as those currently concluded on well-known trade forms such as COMBICON and MULTIDOC.

6. **Ms. Mbeng** (Cameroon) said that some of the sponsors' views coincided with those expressed in document A/CN.9/658/Add.1, which contained the comments of a number of African States. Her delegation had initially considered that making the draft convention applicable to door-to-door operations would have serious legal consequences for many countries of her region, among other things by placing a heavier burden of proof on the claimant in most cases, and that small-scale operators, especially transport intermediaries, would be forced out of existence by the major operators. However, after hearing the speakers who had argued for the need for a global harmonized instrument, she had come to believe that the draft article should remain in its current form.

7. **Ms. Flores** (Venezuela) said that her delegation, too, would prefer to leave draft article 92 unchanged.

8. **Mr. Schelin** (Observer for Sweden) said that, at the previous meeting, he had sensed that many delegations might be willing to compromise on the issues of limits of liability and multimodal transport. He would therefore like to make a last attempt to broaden the consensus on



those matters by proposing a new draft article 92 bis (Special declarations) which would read:

“A State may according to article 93 declare that:

(a) it will apply the Convention only to maritime carriage; or

(b) it will, for a period of time not exceeding 10 years after entry into force of this Convention, substitute the amounts of limitation of liability set out in article 61, paragraph 1, by the amounts set out in article 6, paragraph 1(a), of the United Nations Convention on the Carriage of Goods by Sea concluded at Hamburg on 31 March 1978. Such a declaration must include both amounts.”

9. That proposal should be considered as a package since it covered both the issues that he had mentioned. Unlike the proposal made by the delegations of Austria and Germany, it would allow States to stipulate that the draft convention would apply only to the port-to-port (maritime) carriage portion of multimodal operations that also included land transport, an option available also under the Hague, Hague-Visby and Hamburg Rules. It might be argued that such an approach would be detrimental to uniformity, but it would trigger ratification by a number of States that had stated that they were not in favour of a multimodal convention and would thus increase the chances of arriving at uniform rules, at least for the maritime portion of the transport. If the current text remained unchanged, there was a risk that many States would refuse to ratify the draft convention. The result would be a situation in which there would be not three, as at present, but four sets of rules with no uniformity even for the maritime leg of the operation.

10. He believed that if States had the option of making a special declaration upon ratification of the instrument, many of them might not make use of it. But if that option was not available, strong shipping interests in those States might well prevent ratification. The proposal was also an attempt to reassure delegations that were in favour of setting high limits of liability since those levels would, in fact, be reached no later than 10 years after the entry into force of the draft convention. It should be borne in mind that if the convention was not ratified by the States that wanted to set lower limits, the Hague-Visby Rules, which set a limit far lower than that of the Hamburg Rules, would become the dominant system in practice.

11. His delegation's proposal also had the merit of leaving the compromise reached in the Working Group untouched since the draft convention would still cover door-to-door transport and would leave the limits established in draft article 61 unchanged, subject to a transitional period and to the option not to apply them to multimodal transport.

12. **Ms. Carlson** (United States of America) said that she was grateful for the Swedish delegation's attempt to find a compromise solution. She agreed that the Commission's goal was to achieve the broadest possible ratification of the draft convention; however, she had more faith in the draft convention than the representative of Sweden did and was convinced that the best way to achieve broad ratification was to honour the compromise reached over the course of six years of negotiations. It was somewhat disingenuous to say that the new article would not affect the compromise package agreed in the Working Group (A/CN.9/WG.III/XXI/CRP.5) since multimodal transport and the agreed limits of liability were essential elements of that package. The proposal would not promote wider ratification and would undermine uniformity by allowing States to limit the convention's applicability to maritime carriage.

13. From the procedural point of view, she did not think that the Swedish proposal should be discussed until the Commission had taken a decision on the proposal submitted by the delegations of Austria and Germany.

14. **Mr. Ibrahima Khalil Diallo** (Senegal) said he agreed with the representative of the United States of America that the compromise package would be undermined by either of the two proposals; it appeared that the great majority of delegations were in favour of leaving draft article 92 unchanged.

15. **Mr. Mbiah** (Observer for Ghana) said that he appreciated the Swedish delegation's effort to find a compromise acceptable to all. However, he could not support such a “back-door” approach, which would introduce new elements at a late stage of the negotiations and revise limits that had already been agreed. The proposal would create general uncertainty as to the state of the law on matters covered by the draft convention; as he had stated at the previous meeting, it was important not to create a situation in which States could select only the elements of the convention that suited them. Furthermore, the proposed 10-year transition period was an arbitrary one for which no justification had been presented. Lastly, the explanation provided by the representative of Sweden should have been submitted in writing, together with the proposal, as a conference room paper so that delegations could consider the consequences of the proposed new draft article.

16. **Mr. Morán Bovio** (Spain) said that his delegation would prefer not to introduce the special declarations envisaged in the Swedish proposal. Past experience had shown that many factors influenced States' ratification of an international instrument; time would show whether it would achieve broad acceptance.

17. **Mr. Berlingieri** (Italy) said that, while he appreciated the Swedish delegation's efforts, like previous speakers he rejected the proposal. Speaking on

a point of order, he said that the Commission should finish discussing draft article 92 before it discussed the proposed draft article 92 bis.

18. **The Chairperson** agreed that, in order to avoid confusion, the Commission should finish its discussion of draft article 92 and the Austrian and German proposal contained in A/CN.9/XLI/CRP.6 before discussing the Swedish proposal. He invited any delegations still wishing to speak on draft article 92 to do so.

19. **Ms. Czerwenka** (Germany), supported by **Mr. Hu Zhengliang** (China), said that the issue under discussion was extremely important. Every effort should therefore be made to ensure that those major trading partners represented at the meeting could tell their respective Governments that the convention reflected an appropriate compromise and should be ratified.

20. During the discussion of the Austrian and German proposal (A/CN.9/XLI/CRP.6), a number of delegations had expressed their willingness to work towards a compromise. That meant looking for alternatives, not rejecting a text simply on the basis of a vote count. If the Commission wished to reach a compromise, it should consider all the proposals put forward thus far.

21. In that regard, she expressed appreciation to the Swedish delegation for trying to come up with a new proposal to address the various concerns. The Swedish proposal did at least contain one element, if not all elements, of the Austrian and German proposal. In a spirit of compromise, her delegation was more than willing to continue searching for a compromise acceptable to all delegations, whether in the plenary meeting or in informal consultations.

22. **Mr. Ibrahima Khalil Diallo** (Senegal) said that the reference to trading partners was inappropriate. Some delegations were in favour of the draft article and some were not; it was as simple as that. He urged the Chairperson to close the discussion on draft article 92 so that the Commission could move forward.

23. **The Chairperson** noted that, while a considerable number of delegations were in favour of replacing the current version of draft article 92 with the text contained in A/CN.9/XLI/CRP.6, an even larger number of delegations were in favour of leaving draft article 92 unchanged. In line with usual practice, the current version of draft article 92 should therefore be retained.

24. *Draft article 92 was approved in substance and referred to the drafting group.*

25. **The Chairperson** invited further comments on the draft article 92 bis proposed by the representative of Sweden.

26. **Ms. Halde** (Canada) said that her delegation welcomed the Swedish delegation's proposal and

sympathized with its efforts to unify the law and reach out to States that would otherwise be unable to ratify the convention.

27. **Mr. Delebecque** (France) and **Mr. Tsantzalos** (Greece) expressed support for the position of the United States and Senegal.

28. **Mr. Bigot** (Observer for Côte d'Ivoire) said that the Swedish proposal, if adopted, would result in an even more fragile compromise. He could not therefore support the proposal, for the reasons mentioned by the United States and Senegal.

29. **Mr. Serrano Martinez** (Colombia) said that, in view of the overwhelming support for and recent approval of draft article 92, the Swedish proposal was no longer valid.

30. **Mr. Sandoval** (Chile) said that the Swedish proposal was unacceptable in terms of both form and content.

31. **Mr. Maradiaga** (Honduras) said that his delegation questioned whether the rules of procedure allowed for a whole new article to be added to the draft convention, as in the Swedish proposal, and could not, therefore, support the proposal.

32. **Mr. van der Ziel** (Observer for the Netherlands) said that the Swedish proposal was a very innovative idea and a perfect example of a compromise that accommodated States with strong views on the subject while minimizing the impact on others. In principle, his delegation would favour such a compromise. He would, however, like to see the proposal in writing first, so as to be able to consider it properly.

33. At first sight, for example, subparagraph (a) of the Swedish proposal seemed to repeat paragraph 1 of the Austrian and German proposal; with further consideration, however, it might be possible to find less far-reaching wording that still accommodated the concerns of those States in favour of the proposal.

34. As to subparagraph (b) of the Swedish proposal, he failed to see how it would affect decisions relating to draft article 61. If he had understood the proposal correctly, it would simply enable those States that objected to the amounts of limitation of liability set out in article 61, paragraph 1, to ratify the convention earlier than they would have done otherwise.

35. **Ms. Sobekwa** (South Africa) proposed that interested delegations should meet informally in order to draft a new compromise version of draft article 92 bis. The situation would be resolved only if the Commission found a compromise that was acceptable to all delegations.

36. **The Chairperson** reiterated that issues relating to legislative policy should be decided in the plenary meeting.

37. **Ms. Shall-Homa** (Nigeria) said that the Commission was opening a Pandora's box. Many delegations could point to issues that had not been resolved as they had hoped; if the proposed draft article 92 bis was discussed any further, any number of other "special declarations" might be proposed. Her delegation agreed with previous speakers that the matter should be closed.

38. **Ms. Downing** (Australia) said that, while she appreciated the Swedish delegation's efforts, she agreed with the United States and Senegal that the Swedish proposal undercut the compromise reached in the Working Group. That compromise, while not binding on the Commission, had been agreed as a package. If any of the elements of that package were changed, all other elements should then be up for discussion.

39. **Mr. Orfanos** (Observer for Cyprus) said that his delegation could not support the Swedish proposal.

40. **Ms. Markovčić Kostelac** (Observer for Croatia) said that she was unable to discuss the proposal until she had seen it in writing.

41. **Mr. von Ziegler** (Switzerland) said that the Swedish proposal was not a compromise in the true sense; rather, it reflected the fact that sometimes compromises were not possible, since it introduced the possibility of deviations from certain provisions of the draft convention. The provision allowing a State to substitute the amounts of limitation of liability set out in article 61, paragraph 1, by other amounts was very creative but if States were allowed to make special declarations, it would be difficult to know exactly which amounts applied at any given time. Furthermore, it was not clear what would happen at the end of the 10-year period. The insertion of a new chapter to clarify the procedure to be followed, while one possibility, was not worthwhile in his view.

42. Many compromises had been made on key issues, including on limitation of liability. Those compromises should be respected. The door-to-door aspect of the draft convention had been decided at an early stage. To conclude, the Swedish proposal did not have his delegation's support and need not be issued in writing. To postpone a decision would not be helpful, for the reasons explained by the representative of Nigeria.

43. **Mr. Mollmann** (Observer for Denmark) said he thought that a decision could be taken without waiting for a written text. His delegation understood Sweden's proposal for a draft article 92 bis but could not support it. With regard to subparagraph (a) of the proposal, although phrased somewhat differently it was similar enough to the

proposal of Austria and Germany contained in A/CN.9/XLI/CRP.6 that the comments already made by delegations in that regard were applicable. The second part of the proposal was innovative, but his delegation could not accept it for the reasons stated by the representative of Australia.

44. **Mr. Blake-Lawson** (United Kingdom) and **Mr. Bokama Olenkongo** (Observer for the Democratic Republic of the Congo) said that their delegations agreed with those that did not wish to change draft article 92 or add a draft article 92 bis.

45. **Mr. Sharma** (India) said with regard to subparagraph (a) of Sweden's proposal that, although his delegation was willing to discuss some of the problems concerning multimodal transport in draft article 27, it did not wish to allow for a reservation or declaration that would change the nature of the draft convention. With regard to subparagraph (b) of the proposal, as many delegations had said, the limits of liability in draft article 61 were part of a compromise package. The proposal for two layers of liability limits was creative but would not strengthen the maritime field. It would not be clear to users of the system when the various declarations would begin and end and what amount of limitation would apply to a given country at a given time. For all those reasons his delegation could not support the proposal.

46. **Ms. Czerwenka** (Germany) said that her delegation supported Sweden's proposal for a new draft article 92 bis.

47. **The Chairperson** said he took it that the majority of the Commission did not wish to approve the proposed draft article 92 bis.

48. *It was so decided.*

*The meeting was suspended at 4.25 p.m. and resumed at 5 p.m.*

*Draft article 93*

49. **Ms. Halde** (Canada) said that a minor technical correction was necessary in draft article 93, paragraph 1, second sentence, which read: "The declarations permitted by article 94, paragraph 1, and article 95, paragraph 2, should be made at the time of signature, ratification, acceptance, approval or accession." As it happened, paragraph 1 of draft article 94, which concerned a declaration by a contracting State with two or more territorial units that the convention was to extend to all its territorial units or only to one or more of them, permitted the contracting State to amend its declarations "at any time". The inconsistency between the two provisions could be corrected by referring to "the initial declaration" in draft article 93, paragraph 1.

50. **Mr. Morán Bovio** (Spain) said that his delegation could support the proposal of Canada, which, having a provincial system, would naturally be alert to such situations.

51. **Ms. Downing** (Australia) said that her delegation supported the Canadian proposal.

52. **Ms. Carlson** (United States of America) said that the point raised was not an issue for her delegation, since it did not intend to take advantage of draft articles 94 and 95, but it appeared that a similar situation prevailed with respect to declarations permitted by draft article 95, paragraph 2.

53. **Mr. Delebecque** (France) agreed that under draft article 95, paragraph 2, a regional economic integration organization was required to make not only an initial declaration but subsequent declarations as well. The adjective “initial” therefore applied to declarations under draft article 95 as well as those under draft article 94 and could simply be inserted before the word “declarations” in the second sentence of draft article 93, paragraph 1.

54. *Draft article 93, as amended, was approved in substance and referred to the drafting group.*

#### *Draft article 94*

55. **Ms. Halde** (Canada) said that her delegation wished to propose an amendment to the so-called “federal clause”, specifically to draft article 94, paragraph 3, for the sake of consistency with other conventions, such as those of the International Institute for the Unification of Private Law (UNIDROIT) and the Hague Convention on Choice of Court Agreements. Draft article 94 had been drawn directly from the text of the article 93 of the United Nations Convention on Contracts for the International Sale of Goods. The purpose of paragraph 3 of the provision in the Sales Convention was to provide an interpretation of the term “place of business” so that it would be tied to a territorial unit of a State rather than the State as a whole for purposes of the scope of application of the Convention. For example, if Canada became a party to the Sales Convention and declared that it extended to some of its territorial units but not to Saskatchewan, in the case of a sales contract between a company in Chile and a company in Saskatchewan the convention would not apply, and paragraph 3 would make that clear.

56. However the term “place of business” found in draft article 94, paragraph 3, was not used elsewhere in the draft convention, except in the definition of “domicile”. The key notion that required interpretation in order to be able to see clearly how the convention rules would apply if the convention did not extend to all the territorial units of a contracting State was the location of several connecting factors in a contracting State. In draft article 5, paragraph 1, for example, the connecting factors

that determined the scope of application of the convention were the location of the place of receipt, the port of loading, the place of delivery or the port of discharge in a contracting State. Other provisions that set out connecting factors were draft article 1, paragraph 28, draft article 20, paragraph 1 (a), and draft article 69, paragraph 1 (b). Her delegation therefore proposed to amend to draft article 94, paragraph 3, to read:

“If, by virtue of a declaration pursuant to this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, the relevant connecting factor for the purposes of article 1, paragraph 28, article 5, paragraph 1, article 20, paragraph 1 (a), and article 69, paragraph 1 (b), is considered not to be in a Contracting State unless it is in a territorial unit to which the Convention extends.”

Other drafting approaches could be taken, but the above suggestion was relatively simple and not inconsistent with drafting approaches used elsewhere.

57. **Ms. Czerwenka** (Germany) said that her delegation supported the substance of the proposal, provided it was drafted carefully in order to fit with the rest of the draft convention. For example, in draft article 5, not all of the connecting factors mentioned needed to be located in the contracting State for the convention to apply, and if one of them was located in another contracting State, the convention would apply in any case. The words “located in that State”, which appeared in the current text, were missing from the new proposal. Some careful drafting was in order but that could be handled by the drafting group.

58. **Mr. Sturley** (United States of America) said that his delegation agreed with the substance of the Canadian proposal. Although the draft article had no impact on the United States, his delegation was happy to accept its inclusion since it was important to his country’s largest trading partner. He agreed with the representative of Germany that there were some drafting details to be worked out. The real issue was not that the connecting factors were in a contracting State but that the places mentioned in the relevant articles would not be considered to be in a contracting State if they were located in a territorial unit excluded from the convention. In the hypothetical example in which Canada, in a declaration under article 94, excluded Saskatchewan, that would mean that a shipment originating in Saskatchewan would not for that reason alone be covered by the convention, although a shipment from Saskatchewan to a contracting State would be covered; and for the purposes of article 69, Saskatchewan would be excluded as one of the available forums, so that the convention would not guarantee access to a Saskatchewan court. With that understanding of the Canadian proposal, his delegation

thought that it was a good suggestion and that appropriate language should be worked out to give effect to it.

59. **Mr. Morán Bovio** (Spain) supported the Canadian proposal in principle. The drafting group should determine the new wording.

60. **Mr. Fujita** (Japan) said that although draft article 94 was not significant for Japan, his delegation supported the Canadian proposal in the interest of all countries that required a federal clause. A change in draft article 94, however, was relevant not only to the four other provisions already mentioned, but perhaps to others as well in which there was a reference to a contracting State, such as draft article 1, paragraph 29. That technical issue should be carefully scrutinized by the drafting group.

61. *Draft article 94, as amended, was approved in substance and referred to the drafting group for redrafting to reflect the debate.*

#### *Draft article 95*

62. **Mr. Imorou** (Benin) proposed deleting the first part of the last sentence of paragraph 1, “When the number of Contracting States is relevant in this Convention”, retaining simply the statement that a regional economic integration organization did not count as a contracting State. Logically, then, paragraph 3, which essentially equated a contracting State and a regional economic integration organization, should also be deleted.

63. **Ms. Czerwenka** (Germany) said that it was important to retain both paragraph 1 and paragraph 3 as drafted. Benin’s concerns were addressed in paragraph 1, which specified the instances in which a regional economic integration organization did not count as a contracting State.

64. **Mr. Morán Bovio** (Spain), concurring with the German delegation, observed that the inclusion of draft article 95 had been prompted by recent conventions such as the Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention), which also facilitated certain kinds of joint action by States through supranational regional organizations. The provision, which in any case limited the involvement of a regional economic integration organization in the last sentence of paragraph 1, was in no way detrimental to the draft Convention, even if it was never invoked.

65. **Mr. Sharma** (India) said that draft article 95 was intended to facilitate the inclusion of non-State entities which had the capacity to enter into contracts in matters covered by the draft Convention, when they were so mandated. Paragraphs 1 and 3 should be retained as drafted in the interests of global trade and freedom of contract. He saw no need to change the text and, indeed,

the very phrase in the third sentence of paragraph 1 that Benin wished to delete clarified the intention.

66. **Mr. van der Ziel** (Observer for the Netherlands), noting that his country was a member of a regional economic integration organization, said that he endorsed the remarks of Germany and Spain.

67. **Mr. Imorou** (Benin) said that what concerned his delegation was that draft article 95 put subregional organizations on a par with States.

68. **Mr. Bellenger** (France) said that his Government interpreted the phrase “When the number of Contracting States is relevant in this Convention,” to mean that a regional economic integration organization would not be counted among the number of contracting States necessary for the entry into force of the Convention or for its amendment. His delegation supported the current text of draft article 95.

69. **Mr. van Houtte** (Observer for the European Commission) said that as a representative of a regional economic integration organization, he urged the Commission to maintain the wording of draft article 95 as it stood, since it envisaged the normal way in which regional organizations participated in instruments like the draft convention. If the initial clause of the third sentence of paragraph 1 was deleted, the rest of the sentence would be unclear.

70. **Ms. Carlson** (United States of America), observing that weight should be given to the opinion of one of the regional organizations in question, said that draft article 95 should be retained in its current form.

71. **Ms. Markovčić Kostelac** (Observer for Croatia) said that her delegation supported retaining the current text of draft article 95. The provision had become a standard clause in similar international conventions adopted in recent years.

72. *Draft article 95 was approved in substance and referred to the drafting group.*

#### *Draft articles 96 (Entry into force), 97 (Revision and amendment) and 98 (Denunciation of this Convention)*

73. *Draft articles 96 to 98 were approved in substance and referred to the drafting group.*

#### *Draft article 84 (International conventions governing the carriage of goods by other modes of transport) (continued)*

74. **Mr. Fujita**, reporting on the informal consultations on draft article 84, explained, for the sake of those delegations uncomfortable with the text, that the article was needed because draft article 27 did not cover the conflict of conventions situations dealt with in draft article 84, where, notwithstanding draft article 27, the

type of carriage of goods envisaged entailed the overlapping application of both the draft convention and one or another of the unimodal transport conventions, for example, when a road cargo vehicle was placed aboard a ship with goods loaded. Similarly, an amendment of limitation levels in one of the unimodal conventions, which was likely to happen in the near future, would conflict with the limits in the draft convention, and again draft article 27 would not suffice to resolve the conflict.

75. It had consequently been decided to amend the chapeau of draft article 84 by inserting after the phrase “in force at the time this Convention enters into force”, the phrase “including any future amendment thereto”. The proposed amendment did not allow broad incursions into the draft regime because the situations dealt with in each of the subparagraphs were strictly limited in scope. It served the important purpose of softening the overly restrictive current wording of the chapeau, allowing some flexibility for future development of the law through amendments to existing conventions. The text referred in only generic terms to international conventions because, unlike the case of draft article 88, they were too numerous to be specifically listed.

76. *Draft article 84, as amended, was approved in substance and referred to the drafting group.*

*The meeting rose at 6.05 p.m.*

**Summary record of the 879th meeting, held at Headquarters, New York,  
on Wednesday, 25 June 2008, at 3 p.m.**

[A/CN.9/SR.879 and Corr.1]

*Chairperson:* Mr. Illescas (Spain)

*The meeting was called to order at 3.15 p.m.*

**Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea** (*continued*) (A/CN.9/642, A/CN.9/645, A/CN.9/658 and Add.1-13; A/CN.9/XLI/CRP.7)

*Draft article 49 (Delivery when a negotiable transport document or negotiable electronic transport record is issued) (continued)*

1. **Mr. Fujita** (Japan), introducing a proposal in respect of draft article 49 contained in A/CN.9/XLI/CRP.7 on behalf of the delegations that had participated in informal consultations, said that there had been very serious underlying disagreement from start to finish, and that the compromise version in the document before the Commission had been approved by a majority, but still over very strong opposition. In the proposed text, paragraph 1 of draft article 49 essentially reproduced the chapeau and subparagraphs (a) to (c) of the current text, except for a minor correction, and applied to all cases in which a negotiable transport document was issued. New paragraph 2, roughly covering the same ground as current subparagraphs (d) to (h), began with a new chapeau stating that the rule that followed applied if the transport document stated that the goods might be delivered without the surrender of the document, setting up an “opt-in” system that would be triggered by the transport document itself. In order to obviate anticipated objections by the banks, it was provided that the document itself must indicate the possibility of delivery without surrender. Another change was that new paragraph 2 (a), unlike the current subparagraph (d), had the carrier simply requesting instructions from the shipper and placed no obligation on the shipper to provide them, since the shipper was not always in a position to do so. In addition, whereas the current subparagraph (d) made notice to the holder the precondition for the remainder of the paragraph, the new paragraph 2 (a) set out two possible situations in which paragraphs 2 (a) to (e) would apply: when the holder did not respond to notice or when the holder would not be located — a common problem. Where the transport document stated nothing about delivery without surrender, the rules in article 49, paragraph 1, would apply.

2. The new system had advantages and disadvantages. Strong arguments had been made for a default or “opt-

out” rule, but the system presented in A/CN.9/XLI/CRP.7 had garnered the widest support in informal consultations. It should be noted that if the new text was adopted, consequential changes would need to be made to draft articles 47, 48 and 50.

3. **Mr. van der Ziel** (Observer for the Netherlands) said that the proposed new text did not undermine the value of the bill of lading but sought to deal with a structural problem common to the main commodities trades, where for trading reasons the terms of credit were often longer than the duration of the voyage of the goods, but where at times the voyage outlasted the period required for the trading of the goods. Two camps had formed during the fierce debate in informal consultations: there were those, led by the United Kingdom, who wanted to remove draft article 49 from the draft convention and turn it into a model law, and those, like his delegation, who felt very strongly that draft article 49 should stand as mandatory law. There had also been a basic disagreement about the value of an “opt-in” as against an “opt-out” system; although he would argue that there was not much difference between the two.

4. The key to whether new draft article 49, paragraph 2, would be applied in practice was in the hands of the banks, or more specifically of the International Chamber of Commerce (ICC) Banking Commission. In the commodities trade, letter of credit conditions required, without exception, the issue of a negotiable transport document, namely, the bill of lading; and the ICC Uniform Customs and Practice for Documentary Credits set out the requirements with which a bill of lading must comply to make it acceptable to banks. Should the ICC Banking Commission decide to issue a directive to banks not to accept a bill of lading conforming to the provisions of article 49, paragraph 2, that would mean that article 49 could not be applied in practice. Actually, each of the three commercial parties concerned — banks, commodity traders and carriers — would have to agree that the scheme in article 49, paragraph 2, was acceptable to them and that thenceforth all bills of lading could contractually conform to its provisions; but carriers and traders would have no option if the banks forbade it. Knowing how crucial ICC approval would be, the UNCITRAL secretariat had twice made presentations to it on features of the draft convention, including draft article 49. The bankers had been very attentive and generally positive, and ICC had touched on the matter in an article published in the

bimonthly magazine on letters of credit matters that it distributed worldwide to banks. Yet there had been no meaningful discussion within ICC, which had adopted a wait-and-see attitude.

5. In any case, the system established in the draft convention should be a matter of convenience for practitioners. Commodities trade was basically charterparty trade, which by reason of draft article 7 applied to deliveries; and the bill of lading was a very simple document referring to the terms and conditions of the charterparty, itself a document negotiated between two equal parties stating whether the carrier must deliver the cargo on instructions of the shipper with or without surrender of the document.

6. The chapeau of the new draft article 49, paragraph 2, would be improved if it were brought into line with the usual terminology of the bill of lading, and he would propose amending it to read: "If the negotiable transport document or the negotiable electronic transport record indicates, either expressly or through incorporation by a reference to the charterparty, that the goods may be delivered without the surrender of the transport document or the electronic transport record, the following rule applies."

7. **Mr. Schelin** (Observer for Sweden) said he believed that the system in paragraph 2 of the proposal, would only diminish the value of the bill of lading without solving the problem, because those trading in commodities without documents would have no way of knowing whether they were protected or not. Moreover, since draft article 48 required surrender of a non-negotiable transport document, in other words, a *recta* bill of lading, upon delivery, it was inconsistent not to require the surrender of a negotiable document. Furthermore, paragraph 2 touched on general principles of documents of title, and some jurisdictions would hesitate to adopt a draft convention that affected such general principles. Sometimes the industry benefited from having strict rules even if they caused some problems in the market. He believed that the principle in draft article 49 should be delivery against surrender of document — no more, no less. Consequently, his delegation would support paragraph 1 of the proposal but would prefer to delete paragraph 2.

8. **Ms. Downing** (Australia) said that, although her delegation preferred the proposal in A/CN.9/XLI/CRP.7 to the current text of draft article 49, the new proposal still did not address the concern that the function of the bill of lading as a document of title would be undermined. A bill of lading that did not have to be surrendered against delivery of the goods would simply not be considered a bill of lading in some jurisdictions. Even the proposed new wording made it too easy to extinguish title. The Australian banking industry had expressed concerns about potential loss of confidence in the bill of lading as

a document of title, and it was questionable whether buyers would continue to make payment if holding a bill of lading did not represent constructive possession of the goods.

9. Moreover, the new version still did not resolve the carrier's problem of how to make delivery, since a prudent shipper would refrain from providing delivery instructions for fear of being sued for conversion. There were other ways for a carrier to deal with the problem. If it anticipated a problem at certain destinations or in certain trades, the carrier could require prepaid freight or it could include a clause to the effect that if the goods were not collected the carrier would return them to the shipper at the shipper's cost.

10. **Mr. Imorou** (Benin) said that his delegation fully shared the concerns regarding delivery without surrender of a transport document. With respect to shipments of goods covered by letters of credit, notice to the banker was essential. Paragraph 2 (d) of the new proposal spoke of a person that became a holder of the transport document "pursuant to contractual or other arrangements", without specifying whether such arrangements had to be written or could be oral; an oral arrangement could create problems. Paragraph 2 (e), second sentence, contained the clause: "When the contract particulars state the expected time of arrival of the goods". As it happened, draft article 38 on contract particulars did not include a mention of the time of arrival, and when the African States had proposed the inclusion of such a mention the proposal had not been accepted.

11. **Mr. Honka** (Observer for Finland) said that his delegation was in favour of a certain amount of innovation over the status quo. Draft article 49 sought to solve a perennial problem in shipping that occurred when goods arrived before the bill of lading. The proposal in A/CN.9/XLI/CRP.7 had improved the text by offering an "opt-in" alternative in the chapeau of its paragraph 2. The proposed text represented less of a deviation from tradition and might therefore meet with greater acceptance. It should be recalled that even if the bill of lading stated that the goods could be delivered without the surrender of the transport document, the subparagraphs that followed set additional conditions for such delivery, so that the proposed change did not entail a major departure from the traditional function of the bill of lading. Since bills of lading already included many standard clauses, the addition of such a statement to a bill of lading was not an unreasonable request; the verb "states" should be retained. Sweden's concern about *recta* bills of lading had merit, but contradiction could be avoided by a few changes to draft article 48. As the representative of Japan had pointed out, if the proposal was adopted, some consequential changes would be necessary in other draft articles.



12. **Mr. Mollmann** (Observer for Denmark) said that the task before the Commission was simply to decide whether the new version was an improvement; otherwise the current wording of draft article 49 would be retained. His delegation had advocated mandatory legislation on the point in the draft convention and would prefer an opt-out regime where the provisions of draft article 49 would apply if nothing to the contrary was stated in the transport document. That would force the industry to take a stand if it wished to maintain the status quo, as it would not have to do with an opt-in regime. Another reason for preferring an opt-out regime was the point made by Australia that a bill of lading containing a statement that the goods could be delivered without surrender of the transport document might not be considered a bill of lading in some jurisdictions. The safeguards provided in the current text would be sufficient to protect the parties concerned. The problem being addressed was encountered chiefly in bulk trade, and banks and commodity traders were quite capable of figuring out how to protect themselves using the safeguards provided; holders of bills of lading would have the warning before them on the transport document.

13. Although his delegation preferred the mandatory rule in the current text, it could support the new version, but would prefer an opt-out formula. If the opt-in formula was retained, his delegation would support the Netherlands' proposed amendment to the chapeau of the new paragraph 2 in order to address the situation, typical in the bulk trade, in which a tramp bill of lading merely referred to the terms of a charterparty. In either case, the matter would be out of the Commission's hands, and those in the industry could decide whether or not to use the provision to solve their problem.

14. **Mr. Delebecque** (France) said that his delegation was still strongly in favour of simply deleting subparagraphs (d) to (h) of the current text, but in the spirit of compromise could accept the new version. However, it could only accept an opt-in formula and would oppose allowing paragraph 2 to apply simply by reference to a charterparty. The transport document itself must "state clearly" that the goods might be delivered without the surrender of the transport document. He had the impression that the Commission was trying to force banks to do without a document they considered necessary; his delegation did not feel in a position to judge for the banks what their needs were.

15. **Mr. Blake-Lawson** (United Kingdom) said that unfortunately the new version of draft article 49 did not resolve his delegation's concerns. He wondered if the failure of the ICC Banking Commission to comment on the provision indicated tacit acceptance or outright incredulity. The procedures detailed in draft article 49 would increase the risk of fraud. Either an opt-in or an opt-out alternative could lead to further fracturing of

international trade and complicate matters for carriers. The wisest course would be to delete all of chapter 9 on delivery of the goods and rethink the problem. However, in the spirit of the Working Group, his delegation would accept the decision of the majority.

16. **Mr. Gombrii** (Norway) said that there did seem to be a problem in certain trades where the parties were using bills of lading when bills of lading were not the appropriate instrument. As the representative of Australia had pointed out, there were alternatives, but practitioners seemed reluctant to resort to them. Those trades, however, were the exception; bills of lading functioned properly in thousands of transactions every day. His delegation had objected to a default rule that would erode the quality of the bill of lading as a document of title and, if the provisions in paragraph 2 of the new version were to be retained, it was strongly in favour of an opt-in formula. The proposed new version was more likely to be workable than the current one; the carriers, the commodity traders and the banks could make the system work if they could agree among themselves. The question of recta bills of lading had arisen; they fell under the definition of draft article 48 and did not need to be accommodated under draft article 49.

17. With regard to the Netherlands' proposed amendment to the chapeau of paragraph 2 of the new version, his delegation would prefer to retain the word "states", which was stronger than "indicates" and was not in favour of adding the possibility of incorporation by reference to a charterparty. Often there were long chains of charterparties relating to the same cargo, and it was difficult to know precisely what terms and conditions applied. It was better, especially for the master responsible for delivering the goods, for it to be clearly stated on the bill of lading itself that the goods could be delivered without surrender of the transport document.

18. **Mr. Fujita** (Japan) pointed out that a statement on a transport document that the goods could be delivered without surrender of the document might be valid in some jurisdictions, invalid in others. In those cases in which it was considered valid, the new paragraph 2 sought to ensure that there was a procedure to be followed. Delegations that advocated simply deleting paragraph 2 should be aware that they might be leaving the procedure entirely to the discretion of the carrier.

19. **Mr. Essigone** (Gabon) said that the version in A/CN.9/XLI/CRP.7 was certainly clearer thanks to the division into two paragraphs. Paragraph 1 emphasized the proper role of a bill of lading as conferring the right to receipt of the goods, thus giving it the weight of a bank draft. Paragraph 2, however, affected another important actor in maritime trade, namely, the banks. To involve banks in a system without prior consultation with the banking sector could lead to problems. Paragraph 2 should be revised to be acceptable to banks.

20. **Mr. Alba Fernández** (Spain) said that in principle, he favoured the proposal contained in document A/CN.9/XLI/CRP.7 because it addressed some of the concerns of delegations that preferred to let national courts settle issues related to negotiable transport documents. In practice, the “opt-in” rule would represent the smallest possible departure from traditional rules.

21. He would prefer for the chapeau of paragraph 2 to contain more explicit language requiring the parties to adhere to the rules set out in subparagraphs (a) to (e). Some bills of lading contained technical specifications with a specific purpose, which showed that the industry could adapt its documents and practices to particular legal situations.

22. **Mr. Sturley** (United States of America) said that the issue was a difficult one, as was often the case in commercial law when risk must be allocated between two innocent parties. He recognized the need to address the concerns of the banking industry. However, the proposal attempted to address a real problem that arose in practice, which the Commission should make an effort to solve. He therefore supported paragraph 2 of the proposal with the amendment put forward by the delegation of the Netherlands concerning incorporation by reference, which, despite the risks involved, would make the solution more effective.

23. **Mr. Berlingieri** (Italy) said that in the past, the bill of lading had travelled more slowly than the ship carrying the cargo; that problem had been solved by allowing the person to whom the bill of lading was to be delivered to contact the carrier, present a bank guarantee and collect the goods. That situation had changed over time, but it seemed to him that a document that was not the surrender document and did not grant constructive possession of the goods could not be defined as a negotiable transport document.

24. His delegation could not agree to the changes proposed by the representative of the Netherlands; he would prefer to insert “expressly” before “states” in the chapeau of paragraph 2. He would have the same objection to incorporating an arbitration clause simply by reference to the charterparty containing it. In Italy, if a bill of lading stated that it was issued in accordance with a specific charterparty and an arbitration clause contained in that charterparty was subsequently invoked, the courts would consider that there was no incorporation since the arbitration clause was not mentioned in the bill of lading. The solution was to require the document to contain an explicit statement that would alert third parties to the fact that it established conditions different from those that would normally be essential to a negotiable transport document.

25. He had doubts about the body of paragraph 2. Subparagraph (a) used the word “may” in referring to the

carrier’s options, but the carrier was still entitled to avail itself of the procedures set forth in draft article 50 in respect of undelivered goods. It might therefore be advisable for subparagraph (a) to contain a statement along the lines of “without prejudice to article 50”. Furthermore, subparagraph (c) stated that the person giving instructions under subparagraph (d) must indemnify the carrier against loss arising from its being held liable to the holder. Since such liability could no longer apply to delivery of the goods to the holder, the reference would seem to be to the carrier’s substantial obligation to deliver them in the condition in which they had been received. Yet subparagraph (e), a reference to which was included in subparagraph (c), stated that liability arose only if the holder became a holder after the goods had been delivered. The position of a holder who became a holder prior to delivery should be clarified.

26. In the spirit of compromise, his delegation was prepared to support the proposal, provided that the changes it had requested were made.

27. **Ms. Talbot** (Observer for New Zealand) said that the proposal was an improvement over the previous version of draft article 49; her delegation preferred the “opt-in” approach embodied in the chapeau of the new paragraph 2.

28. **Mr. Elsayed** (Egypt) said that the draft article contained highly technical issues that were difficult to address. While he appreciated the efforts of the delegations of Australia and Italy, the result had been to further complicate the problem. Unless the changes proposed by the representative of Italy were made, he would prefer to adopt the United Kingdom’s proposal to delete all of chapter 9, including draft article 49. The issues raised therein could then be addressed in practice and through a model law.

29. **Ms. Czerwenka** (Germany) said that her delegation was prepared to support the proposal as the outcome of informal consultations in which many positions had been reflected. She could not agree to the changes proposed by the observer for the Netherlands, but had no objection to the amendments suggested by the representative of Italy. If delegations could not accept the proposed new version of draft article 49 and reverted to the current text, she would prefer to delete subparagraphs (d) through (h).

30. **Mr. Sharma** (India) said that his delegation was satisfied with the current text of draft article 49 but was prepared in principle to accept the compromise proposal. There seemed to be general agreement on paragraph 1, which reflected normal practice; his delegation could also accept paragraph 2 with the amendments suggested by the representative of Italy. However, he could not support the suggestions made by the observer for the Netherlands, which might dilute the negotiable quality of the transport document.

31. **Mr. Mayer** (Switzerland) said that the proposal represented a valid compromise, which made substantial concessions to the delegations that had argued for the deletion of draft article 49, subparagraphs (d) through (h). As the observer for Finland had rightly stated, the new text did not constitute a serious deviation from the principles applying to bills of lading. He failed to understand the position of the delegations which felt that the holder's interests were still not adequately protected. The choice was between the current text of the draft article and the proposed new one, and the latter was a clear improvement over the former.

32. His delegation could accept the chapeau of paragraph 2 as proposed with the addition of a reference to draft article 50 as suggested by the representative of Italy. He agreed with the delegations of Finland and Sweden that there might be some inconsistency in the treatment of recta bills of lading that should be addressed; in principle, however, he was prepared to accept the proposal.

33. **Mr. Tsantzos** (Greece) said that his delegation could accept the proposed new text with the amendment to the chapeau of paragraph 2 that the delegation of the Netherlands had put forward.

34. **Mr. Hu Zhengliang** (China) said that for the most part, he shared the views expressed by the observer for Sweden. Draft article 49 established rules governing the delivery of the goods; because delivery was such an important aspect of carriage, those rules needed to be clearly understood. The current text was complicated and the proposed new text was even more so. It was rare for a negotiable transport document to state that the goods could be delivered without surrender of the document. Moreover, under many legal systems, including that of China, such a statement would be invalid, and he would prefer for the draft convention not to contemplate the consequences of its inclusion. He also agreed that paragraph 2 of the proposal might give rise to commercial fraud by the shipper and damage the credibility of negotiable bills of lading.

35. **Mr. Schelin** (Observer for Sweden) said he shared the representative of Italy's fear that the draft article might deprive the bill of lading of its character as a negotiable transport document. However, if the majority of delegations were in favour of the proposal, his delegation would like to see the word "expressly" inserted before "states".

36. **Mr. Sandoval** (Chile) said that his delegation supported the proposed new text of draft article 49.

37. **Mr. Imorou** (Benin) asked if the representative of Japan could explain whether paragraph 2 (d) of the proposal referred to oral as well as written arrangements. Furthermore, he wished to reiterate the point that subparagraph (e) described a situation in which the contract particulars stated the expected time of arrival of

the goods, whereas draft article 38 on contract particulars made no mention of time of arrival.

38. **Mr. Fujita** (Japan) said that he could not answer the questions raised by the representative of Benin with certainty, because the wording in question was taken from the current text of draft article 49, subparagraphs (g) and (h), respectively. He thought that the "arrangements" mentioned would involve a sales contract or letter of credit, both of which were written documents; theoretically, an oral agreement could also constitute a contractual or other arrangement made before delivery, since the provision did not state the contrary, but that would be quite unusual. The reference to a situation in which the contract particulars stated the expected time of arrival of the goods had been included in paragraph 2 (e) in order to cover such an eventuality; it was not mentioned in draft article 38 because the Working Group had considered it unwise to require carriers to include such a statement in all contracts.

39. He thought that the carrier could rely on draft article 50 without taking any of the steps envisaged in draft article 49; it could, for instance, store undelivered goods without requesting the shipper's consent. However, he had no objection to adding a reference to draft article 50 in paragraph 2 (a) of draft article 49 as the representative of Italy had suggested. His own delegation was prepared to accept the compromise proposal with the addition of a reference to draft article 50.

40. **The Chairperson** said that most delegations seemed to consider the version of draft article 49 contained in document A/CN.9/XLI/CRP.7 to be a good compromise. There also seemed to be significant support for the Italian delegation's proposal to replace "states" by "expressly states" in the chapeau of the new paragraph 2 and some support for its proposal to insert the phrase "without prejudice to article 50, paragraph 1" in the new paragraph 2 (a).

41. **Mr. van der Ziel** (Observer for the Netherlands), supported by **Mr. Sturley** (United States of America), said that, according to his calculations, the Dutch and Italian proposals enjoyed the same degree of support; the majority of delegations, however, seemed to be in favour of leaving the proposed version of draft article 49 contained in document A/CN.9/XLI/CRP.7 unchanged.

42. **Mr. Mollmann** (Observer for Denmark) endorsed the comments made by the representatives of the Netherlands and the United States and pointed out that it should not be assumed that delegations that preferred "states" rather than "indicates" in the chapeau of paragraph 2 were also in favour of the phrase "expressly states".

43. **Mr. Delebecque** (France) said that the French proposal was similar to the Italian proposal, which he supported.

44. **Mr. Schelin** (Observer for Sweden) said that his delegation supported the Chairperson's comments. It was important to bear in mind that some delegations had called for paragraph 2 to be deleted altogether.

45. **Ms. Czerwenka** (Germany) said that, even though her delegation had expressed its support for the version of draft article 49 contained in document A/CN.9/XLI/CRP.7, it understood "states" and "expressly states" to mean the same and could, therefore, accept either term.

46. **Mr. Hu Zhengliang** (China) expressed the hope that his delegation's preference for the deletion of paragraph 2 altogether would be taken into account.

47. **Mr. Sandoval** (Chile) said that, when he had spoken previously, it had been on the assumption that the Italian proposal to insert the word "expressly" had already been approved.

48. **The Chairperson** noted that those delegations that had expressed support for the Italian proposal had done so because they opposed the Dutch proposal; the two proposals could not therefore be said to enjoy the same degree of support. Having listened carefully to all the comments made, he stood by his initial conclusion that the majority of the Commission members wished to approve the version of draft article 49 contained in document A/CN.9/XLI/CRP.7, with the changes proposed by the representative of Italy.

49. *Draft article 49, as amended, was approved, in substance and referred to the drafting group.*

*Consequential changes to draft article 47 (Delivery when no negotiable transport document or negotiable electronic record is issued), draft article 48 (Delivery when a non-negotiable transport document that requires surrender is issued) and draft article 50 (Goods remaining undelivered)*

50. **Mr. Fujita** (Japan) said that, as a consequence of the approval of the amended draft article 49, a number of technical changes needed to be made to draft articles 47, 48 and 50.

51. Draft article 47, subparagraph (c), should read:

"(c) Without prejudice to article 50, paragraph 1, if the goods are not deliverable because (i) the consignee, after having received a notice of arrival, does not claim delivery of the goods at the time or within the time referred to in article 45 from the carrier after their arrival at the place of destination, or (ii) the carrier is, after reasonable effort, unable to locate the consignee in order to request delivery instructions, the carrier may so advise the controlling party and request instructions in respect of the delivery of the goods.

If, after reasonable effort, the carrier is unable to locate the controlling party, the carrier may so advise the shipper and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier may so advise the documentary shipper and request instructions in respect of the delivery of the goods;"

52. Draft article 48 (b) should read:

"(b) Without prejudice to article 50, paragraph 1, if the goods are not deliverable because (i) the consignee, after having received a notice of arrival, does not claim delivery of the goods at the time or within the time referred to in article 45 from the carrier after their arrival at the place of destination, (ii) the carrier is, after reasonable effort, unable to locate the consignee in order to request delivery instructions, or (iii) the carrier refuses delivery because the person claiming to be the consignee does not properly identify itself as the consignee or does not surrender the document, the carrier may so advise the shipper and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier may so advise the documentary shipper and request instructions in respect of the delivery of the goods;"

53. Lastly, in draft article 50, paragraph 1 (b), the words "the holder" should be inserted after the words "the controlling party".

54. **Mr. Mayer** (Switzerland) endorsed the changes that had been proposed but wondered whether a clause similar to that in draft article 48 (b) (iii) was also needed in draft article 49.

55. **Mr. Fujita** (Japan) agreed that such a clause might well be necessary but he was not in a position at the moment to propose exact language.

56. **Ms. Shall-Homa** (Nigeria) proposed aligning the title of draft article 49 with the title of draft article 48 by inserting the phrase "that does not require surrender" after "negotiable electronic transport record".

57. **Ms. Czerwenka** (Germany), supported by **Mr. Sharma** (India), said that draft article 49 had been discussed at length and should not be changed any further. Paragraph 2 of draft article 49 provided an exception to the rule established in paragraph 1; the amendment proposed by the representative of Nigeria would give the wrong impression as to the draft article's content.

58. *The consequential changes to draft articles 47, 48 and 50 were approved in substance and referred to the drafting group.*

*The meeting rose at 6 p.m*

**Summary record of the 880th meeting, held at Headquarters, New York,  
on Thursday, 26 June 2008, at 10 a.m**

[A/CN.9/SR.880 and Corr.1]

*Chairperson:* Mr. Illescas (Spain)

*The meeting was called to order at 10.15 a.m.*

**Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea** (*continued*) (A/CN.9/645; A/CN.9/XLI/CRP.1/Add.1-4 and CRP.8)

*Draft preamble*

1. **The Chairperson** invited the Commission to consider the draft preamble to the draft convention contained in A/CN.9/XLI/CRP.8.

*First preambular paragraph*

2. **Mr. Morán Bovio** (Spain) thanked the Commission secretariat for its prompt drafting of a preamble to the draft convention, in response to his delegation's request, and expressed his complete satisfaction with the text. The preamble, which would facilitate the interpretation of the convention and shed light on the work of the Commission over the previous six years, might require some minor changes, which could be handled by the drafting group.

3. The fact that the first paragraph of the draft preamble had appeared in other United Nations conventions did not diminish its validity in the least, as it clearly stated the ideals of the Organization that informed the Commission's work. Therefore, he fully supported the retention of the first preambular paragraph as drafted.

4. **Mr. Sharma** (India) suggested that "reaffirming their belief" should be changed to read "reaffirming the belief", as the belief being expressed was universal and therefore not limited to States parties.

5. **Ms. Anki Dosso** (Benin) proposed that "friendly relations among States" should be changed to read "trade relations among States".

6. **Mr. Ibrahima Khalil Diallo** (Senegal) expressed his satisfaction with the text as it stood. Although the suggestion made by the representative of India had some merit, the first paragraph should be retained in its current form.

7. **The Chairperson** took it that the Commission approved the first paragraph as drafted.

8. *The first preambular paragraph was approved.*

*Second preambular paragraph*

9. **Ms. Hu** Shengtao (China) proposed that in the phrase "international trade law, in reducing or removing legal obstacles to the flow of international trade", the word "trade" should be replaced by the word "transportation", since the draft convention specifically dealt with transportation law, rather than trade law in general. The proposed change would also underscore the relationship between transportation and international trade development.

10. **Mr. Sekolec** (Secretary of the Commission) welcomed the Commission's comments and explained that the wording of the second paragraph had been taken from General Assembly resolution 48/34.

11. **Ms. Anki Dosso** (Benin) suggested that the second paragraph should state that the progressive harmonization and unification of international trade law contributed not only to universal economic cooperation but also to development.

12. **Ms. Carlson** (United States of America) partially endorsed the Chinese proposal. She noted that if the word "trade" was replaced by the word "transportation" only the first time it appeared in the paragraph, but not the second, the text would then reflect the point the representative of China had made about the relationship between transportation and trade.

13. **Mr. Morán Bovio** (Spain) said that he supported the retention of the second paragraph in its current form. The first paragraph introduced in very broad terms the ideals that had inspired the convention. The next logical step was to articulate in general terms the need to remove obstacles to international trade through harmonization and unification of international trade law; specific references to transport law followed in the third paragraph.

14. **Mr. Fujita** (Japan) said that he favoured retention of the paragraph as drafted, as it fit into the coherent internal logic of the draft preamble.

15. **Mr. Maradiaga** (Honduras) said that he agreed with the remarks of the representative of Spain and supported retention of the current wording, which was systematic and coherent.

16. **Mr. Berlingieri** (Italy) requested clarification on whether General Assembly resolution 48/34 dealt with

trade law or transportation law. If the latter was the case, no changes should be made to the second paragraph. However, if that resolution dealt with trade law, he disagreed with the view of the representative of Japan on the coherence of the second paragraph within the draft preamble. Replacing the first use of the word “trade” with the word “transportation” made sense because the sentence would then convey the idea of the effect of international transportation law on the flow of international trade.

17. **The Chairperson** clarified that General Assembly resolution 48/34 related to the Hamburg Rules.

18. **Mr. Elsayed** (Egypt) proposed that the phrase “legal obstacles” should be expanded to read “legal and procedural obstacles”. He also requested a correction to the Arabic version.

19. **Mr. Chong** (Singapore) said that his delegation supported the Chinese proposal. He could not agree with the argument put forward by the representative of Japan; it was logical for the second paragraph to speak to the general concept of progressive harmonization and unification of international transport law, examples of which were then cited in the third paragraph.

20. **Mr. Sandoval** (Chile) said that he supported the retention of the second paragraph as drafted, as it indeed referred to the progressive harmonization and unification of international trade law. Transport law was only a subset of international trade law, which the Commission had been working to develop for several years. Specific references to transport in the third paragraph indicated the logical progression behind the structure of the draft preamble in its current form.

21. **Ms. Sobekwa** (South Africa) said that she supported the proposals made by the representatives of China and the United States because the draft convention specifically dealt with transport law.

22. **Ms. Czerwenka** (Germany) said that her delegation preferred to retain the current text. Although transportation law was indeed part of trade law, the third and sixth paragraphs went on to refer specifically to carriage of goods and its importance in promoting trade, addressing the concerns expressed by some delegations.

23. **Mr. Imorou** (Benin) said that it was logical for the second paragraph to refer specifically to transport, as the first paragraph dealt with international trade. Therefore, he endorsed the suggestions made by the representatives of China and the United States.

24. **Mr. Sharma** (India) said that he favoured retention of the current text in light of its relationship to the Hamburg Rules.

25. **Mr. Essigone** (Gabon) said that it was much wiser to retain the current text, given that transport law was an integral part of trade.

26. **Mr. Serrano Martínez** (Colombia) noted that the explanation of the origin of the second preambular paragraph should suffice to support retention. In any case, international trade law encompassed transport law.

27. **Mr. Honka** (Observer for Finland) said that his delegation had no strong views on the second paragraph but supported retention of the text as drafted.

28. **Mr. Sekolec** (Secretary of the Commission) said that, since the wording of the second paragraph had been taken directly from the General Assembly resolution, which existed in Arabic, he would present the Arabic version of the resolution to the representative of Egypt in order to address his concerns. If any additional improvement proved necessary, it would be handled by the Secretariat.

29. **The Chairperson** said that, since there was insufficient support for the suggested amendments, he took it that the Commission wished to approve the second paragraph as it stood.

30. *The second preambular paragraph was approved.*

#### *Third preambular paragraph*

31. **Mr. Imorou** (Benin) said that the third paragraph, which made a historical reference to the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading and its amending Protocols, should also mention its additional Protocols.

32. **The Chairperson** suggested the deletion of the word “amending” in order to avoid an unwieldy sentence.

33. *The third preambular paragraph, as amended, was approved.*

#### *Fourth preambular paragraph*

34. **Ms. Anki Dosso** (Benin) said that it would be more logical to reverse the order of the verbs “modernize” and “consolidate”.

35. *The fourth preambular paragraph, as amended, was approved.*

#### *Fifth preambular paragraph*

36. **Mr. Berlingieri** (Italy), supported by **Mr. Elsayed** (Egypt) and **Mr. Delebecque** (France), proposed that “various modes of transport” should be replaced by “other modes of transport”.

37. *The fifth preambular paragraph, as amended, was approved.*

*Sixth preambular paragraph*

38. *The sixth preambular paragraph was approved.*

39. *The draft preamble as a whole, as amended, was approved in substance and referred to the drafting group.*

**Adoption of the report of the Commission**

*Chapter III (Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea)*  
(A/CN.9/XLI/CRP.1/Add.1-16)

*Introduction and consideration of draft articles, chapters 1 and 2 of the draft convention*  
(A/CN.9/XLI/CRP.1/Add.1)

40. **Ms. Downing** (Australia) said that she wished the position of her delegation on draft article 5 to be more fully reflected. She accordingly proposed that the first sentence of paragraph 11 of A/CN.9/XLI/CRP.1/Add.1 should be placed at the end of paragraph 10, supplemented by the following: "One delegation proposed new subparagraphs 1 (d) and (e) and new paragraph 3 to try to achieve this". Paragraph 11 would then begin with the words "It was pointed out ...".

41. *It was so decided.*

42. **Ms. Czerwenka** (Germany) said that, since the proposal referred to in the first sentence of paragraph 12 concerning draft article 5 had been made by her delegation, she wished it to reflect more accurately Germany's position. The words "Another proposal was to limit ..." should be replaced by "Another proposal was to open the possibility for limiting ...".

43. *It was so decided.*

44. **Mr. M'inoti** (Kenya) pointed out an inconsistency in the draft report, which referred in some cases to the Commission and in others to the Commission Group, for example, in paragraph 14.

45. **The Chairperson** said that it should refer in every case to the Commission and would be corrected.

46. *The section of the draft report on the Introduction and on consideration of draft articles, chapters 1 and 2 of the draft convention and related definitions* (A/CN.9/XLI/CRP.1/Add.1), *as amended, was adopted.*

*Consideration of draft articles, chapter 2 (continued), together with draft article 82, and chapters 3 and 4 of the draft convention and related definitions*  
(A/CN.9/XLI/CRP.1/Add.2)

47. **Ms. Downing** (Australia) said that, in paragraph 7 of A/CN.9/XLI/CRP.1/Add.2, her delegation would appreciate the insertion after the first sentence of the following words: "One State reiterated its consistent and strong opposition to the inclusion of draft article 82 in its

current form", and the addition, at the end of the paragraph, of the following sentence: "There was also a proposal to allow States to make a reservation with respect to draft article 82".

48. *It was so decided.*

49. **Ms. Talbot** (Observer for New Zealand) said that, in view of the importance of the compromise reached at the twenty-first session of the Working Group, alluded to in the penultimate sentence of paragraph 9 and the last sentence of paragraph 12, it might be appropriate to insert explicit cross-references for the sake of greater clarity.

50. *It was so decided.*

51. *The section of the draft report on consideration of draft articles, chapter 2 (continued), together with draft article 82, and chapters 3 and 4 of the draft convention and related definitions* (A/CN.9/XLI/CRP.1/Add.2), *as amended, was adopted.*

*The meeting was suspended at 11.35 a.m. and resumed at 12.15 p.m.*

*Consideration of draft articles, chapter 4 (continued) of the draft convention* (A/CN.9/XLI/CRP.1/Add.3)

52. **Ms. Czerwenka** (Germany), supported by **Mr. Schelin** (Observer for Sweden) and **Mr. Fujita** (Japan), said that paragraphs 2 to 4 of A/CN.9/XLI/CRP.1/Add.3 reflected only one of the two interpretations of the meaning of draft article 12, paragraph 3, discussed by the Commission. Accordingly, she proposed deleting the phrase "but that the carrier was prevented from limiting its period of responsibility to exclude the time after initial loading of the goods, or prior to final unloading of the goods" from paragraph 2. In addition, paragraphs 3 and 4 should be redrafted to read as follows:

"3. Another interpretation was that draft article 12, paragraph 3, did not modify paragraph 1 but only aimed at preventing the carrier, even if it had concluded an agreement on the basis of draft article 14, paragraph 2, from limiting its period of responsibility to exclude the time after initial loading of the goods, or prior to final unloading of the goods. To that end, a suggestion was made that paragraph 3 could be moved to a position in the text immediately following paragraph 1, and that it could also be helpful to replace the opening phrase of paragraph 3 'For the purposes of determining the carrier's period of responsibility' by the words 'Subject to paragraph 1'. Some support was expressed for that possible approach.

4. There was agreement in the Commission that the different views that had been expressed on the possible interpretation of paragraph 3 illustrated

that there could be some ambiguity in the text. However, the Commission was of the view that it could be possible to clarify the text so as to ensure a more uniform interpretation. The Commission agreed that revised text for the resolution of the apparent ambiguity in paragraph 3 should be considered, and that it would delay its approval of draft article 12 until such efforts had been pursued.”

53. **Mr. Mollmann** (Observer for Denmark), supported by **Ms. Carlson** (United States of America) said that the amendments proposed by the representative of Germany gave the erroneous impression that there had been three different interpretations of draft article 12, paragraph 3. The proposed deletion of the last part of the second sentence of paragraph 2 gave particular cause for concern and his delegation therefore opposed the German proposal.

54. **The Chairperson** said that, if he heard no further objections, he would take it that the majority of the Commission wished to adopt the amendments proposed by the representative of Germany.

55. *It was so decided.*

56. **Mr. Elsayed** (Egypt) pointed out that paragraph 12 of the draft report did not reflect the Commission’s final decision to delete draft article 13.

57. **Ms. Lannan** (International Trade Law Division) said that the Commission’s final decisions on draft articles 12 and 13 were reflected in the section of the draft report contained in A/CN.9/XLI/CRP.1/Add.9.

58. **Ms. Downing** (Australia), referring to paragraph 15, said that, in order to reflect her delegation’s position on draft article 14, the following should be inserted after the second sentence: “Concern was also expressed that a traditional responsibility of the carrier was now being left to freedom of contract”.

59. *It was so decided.*

60. **Mr. Delebecque** (France), referring to paragraph 16, proposed inserting the following after the first sentence: “It was noted that draft article 83, subparagraph (b), could apply to cases in which the shipper assumed responsibility for handling in liner transportation”.

61. *It was so decided.*

62. *The section of the draft report on consideration of draft articles, chapter 4 (continued), of the draft convention (A/CN.9/XLI/CRP.1/Add.3) as amended, was adopted.*

*Consideration of draft articles, chapter 4 (continued) and chapter 5 of the draft convention (A/CN.9/XLI/CRP.1/Add.4)*

63. **Mr. Fujita** (Japan), referring to the final sentence of paragraph 11 of A/CN.9/XLI/CRP.1/Add.4 concerning draft article 18, said that, in the interests of clarity, the words “in the Working Group” should be inserted after the words “in paragraph 3”.

64. *It was so decided.*

65. **Mr. Elsayed** (Egypt) recalled that a number of African and Arab States had proposed amendments to paragraph 2 in addition to the deletion of paragraph 3 of draft article 18. In order to reflect that discussion, the first sentence of paragraph 9 of A/CN.9/XLI/CRP.1/Add.4 should begin: “The Commission heard strong expressions of support for proposed amendments to draft article 18, paragraph 2, as well as for the deletion of draft paragraph 3”.

66. *It was so decided.*

67. *The section of the draft report on consideration of draft articles, chapter 4 (continued) and chapter 5 of the draft convention (A/CN.9/XLI/CRP.1/Add.4), as amended, was adopted.*

*The meeting rose at 1.05 p.m.*



**Summary record of the 881st meeting, held at Headquarters, New York,  
on Thursday, 26 June 2008, at 3 p.m.**

[A/CN.9/SR.881 and Corr.1]

*Chairperson:* Mr. Illescas (Spain)

*The meeting was called to order at 3.15 p.m.*

**Election of officers** (*continued*)

1. **Ms. Flores** (Bolivarian Republic of Venezuela), speaking on behalf of the Group of Latin American and Caribbean States, nominated Mr. Sandoval (Chile) for the office of Vice-Chairperson.
2. **Mr. Oyarzábal** (Observer for Argentina) and **Mr. Serrano Martínez** (Colombia) seconded the nomination.
3. *Mr. Sandoval (Chile) was elected Vice-Chairperson by acclamation.*
4. **Mr. Chong** (Singapore), speaking on behalf of the Group of Asian States, nominated Mr. Fujita (Japan) for the office of Vice-Chairperson.
5. **Mr. Sharma** (India), **Mr. Jung** Yongsoo (Republic of Korea), **Ms. Hu** Shengtao (China) and **Mr. Saripudin** (Observer for Indonesia) seconded the nomination.
6. *Mr. Fujita (Japan) was elected Vice-Chairperson by acclamation.*

**Adoption of the report of the Commission**  
(*continued*)

*Chapter III (Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea) (continued)*  
(A/CN.9/XLI/CRP.1/Add.1-16)

*Consideration of draft articles, chapter 5 (continued) and chapter 6 of the draft convention and related definitions* (A/CN.9/XLI/CRP.1/Add.5)

7. *The section of the draft report on consideration of draft articles, chapter 5 (continued) and chapter 6 of the draft convention and related definitions* (A/CN.9/XLI/CRP.1/Add.5) *was adopted.*

*Consideration of draft articles, chapter 6 (continued) and chapter 7 of the draft convention and related definitions* (A/CN.9/XLI/CRP.1/Add.6)

8. *The section of the draft report on consideration of draft articles, chapter 6 (continued) and chapter 7 of the draft convention and related definitions* (A/CN.9/XLI/CRP.1/Add.6) *was adopted.*

*Consideration of draft articles, chapter 8 of the draft convention* (A/CN.9/XLI/CRP.1/Add.7)

9. **Mr. Mollmann** (Observer for Denmark), referring to the fifth sentence of paragraph 4 of A/CN.9/XLI/CRP.1/Add.7 concerning draft article 38, said that in the interests of logic the word “necessarily” before the word “delayed” should be replaced by the word “unnecessarily”.

10. *It was so decided.*

11. *The section of the draft report on consideration of draft articles, chapter 8 of the draft convention* (A/CN.9/XLI/CRP.1/Add.7), *as amended, was adopted.*

*Consideration of draft articles, chapter 8 (continued) and chapter 9 of the draft convention and related definitions* (A/CN.9/XLI/CRP.1/Add.8)

12. **Ms. Downing** (Australia), referring to paragraph 15 of A/CN.9/XLI/CRP.1/Add.8 concerning draft article 49, proposed the addition of a sentence at the end of the paragraph, reading: “It was stated that discussions with banks had indicated that article 49 would result in banks having additional risks to manage.”

13. **Mr. Sturley** (United States of America) said that the wording should be modified so as not to imply that it represented the view of all banks everywhere.

14. **Ms. Downing** (Australia) explained that the intention was to balance the statement in paragraph 17 that discussions with banks and commodities traders had indicated that they considered the new regime to present less risk for them. To satisfy the United States delegation, she proposed to revise the words “It was stated” to “One State emphasized”.

15. *It was so decided.*

16. *The section of the draft report on consideration of draft articles, chapter 8 (continued) and chapter 9 of the draft convention* (A/CN.9/XLI/CRP.1/Add.8), *as amended, was adopted.*

*Consideration of draft articles, chapter 9 (continued), chapter 10, chapter 4 (continued) and chapter 8 (continued) of the draft convention and related definitions* (A/CN.9/XLI/CRP.1/Add.9)

17. *The section of the draft report on consideration of draft articles, chapter 9 (continued), chapter 10,*

*chapter 4 (continued) and chapter 8 (continued) of the draft convention and related definitions (A/CN.9/XLI/CRP.1/Add.9) was adopted.*

*Consideration of draft articles, chapters 11 and 12 of the draft convention (A/CN.9/XLI/CRP.1/Add.10)*

18. *The section of the draft report on consideration of draft articles, chapters 11 and 12 of the draft convention (A/CN.9/XLI/CRP.1/Add.10) was adopted.*

*Consideration of draft articles, chapter 12 (continued) and chapters 13 to 15 of the draft convention and related definitions (A/CN.9/XLI/CRP.1/Add.11)*

19. **Mr. Fujita** (Japan), referring to paragraph 3 of A/CN.9/XLI/CRP.1/Add.11 concerning draft article 65, proposed inserting the words “or agreement” after “by declaration” in the last sentence, since under the Hague-Visby Rules, the time bar could be extended by agreement.

20. *It was so decided.*

21. **Ms. Downing** (Australia), referring to paragraph 13 concerning draft article 69, suggested inserting a sentence at the end of the paragraph to reflect a previous statement by her delegation about jurisdiction clauses in volume contracts. The sentence would read: “One example given was that such a State would be free to regulate jurisdiction issues arising out of a volume contract, including the circumstances in which a third party might be bound.”

22. *It was so decided.*

23. **Mr. Fujita** (Japan), referring to paragraph 25 concerning draft article 77, proposed inserting the words “or ‘claimant’” after the phrase “the term ‘plaintiff’” in the last sentence, so as to indicate clearly that neither “plaintiff” nor “claimant” were appropriate terms in that context.

24. *It was so decided.*

25. **Mr. van der Ziel** (Observer for the Netherlands), referring to paragraph 28 concerning draft article 78, said that the first sentence should be corrected to read: “By way of further explanation, it was observed that paragraph 1 of draft article 78 was intended to apply to charterparties and that paragraph 2 of the provision was intended to include bills of lading into which the terms of a charterparty had been incorporated by reference.”

26. *It was so decided.*

27. **Mr. van der Ziel** (Observer for the Netherlands), turning to paragraph 29 also concerning draft article 78, said that, possibly because of the misunderstanding reflected in paragraph 28, there was now an error in the version of paragraph 2 of draft article 78 contained in paragraph 29 that needed to be corrected. He suggested

replacing the words “such an arbitration agreement” with “such a transport document or electronic record”. It was the document or record, rather than the agreement, that must comply with the requirements outlined in the subsequent subparagraphs. It was not a substantive change, but would clarify the revised document.

28. **Ms. Czerwenka** (Germany) said that it was her recollection that the chapeau was to stand as drafted. Only those subparagraphs requiring corrections had been amended.

29. **Mr. Sturley** (United States of America) said that he was not against the proposal made by the representative of the Netherlands, but suggested using the term “electronic transport record” rather than “electronic record” for consistency with the language used throughout the draft convention.

30. **Mr. Fujita** (Japan), supported by **Mr. Sturley** (United States of America) and **Mr. Mollmann** (Observer for Denmark), said that, in his recollection, during the debate, the Secretary had read out subparagraphs (a), (b) and (c) of paragraph 2 of draft article 78, but had not read out the chapeau of paragraph 2. Since the Commission had approved the changes in subparagraphs (a) and (b), the chapeau should be changed accordingly; the proposed change to the chapeau was consistent with the Commission’s debate on the draft article.

31. *It was so decided.*

32. *The section of the draft report on consideration of draft articles, chapter 12 (continued) and chapters 13 to 15 of the draft convention and related definitions (A/CN.9/XLI/CRP.1/Add.11), as amended, was adopted.*

*Consideration of draft articles, chapters 16 and 17 of the draft convention (A/CN.9/XLI/CRP.1/Add.12)*

33. **Ms. Czerwenka** (Germany), referring to paragraph 11 of A/CN.9/XLI/CRP.1/Add.12 concerning draft article 84, said that, in order to make the reference clear, the following sentence should be inserted at the beginning of the paragraph: “It was suggested to delete the words ‘in force at the time this Convention enters into force’.”

34. *It was so decided.*

35. **Ms. Lannan** (International Trade Law Division) said that a new paragraph should be inserted after paragraph 14 of document A/CN.9/XLI/CRP.1/Add.12, reading: “Following informal consultations, it was proposed that the following phrase be inserted into the chapeau of the draft provision, after the phrase ‘enters into force’: ‘including any future amendment thereto’. Subject to the inclusion of a phrase along those lines, the

Commission approved the draft article and referred it to the Drafting Group.”

36. *It was so decided.*

37. *The section of the draft report on consideration of draft articles, chapters 16 and 17 of the draft convention (A/CN.9/XLI/CRP.1/Add.12), as amended, was adopted.*

*Consideration of draft articles, chapter 17 (continued) and chapter 18 of the draft convention (A/CN.9/XLI/CRP.1/Add.13)*

38. **Mr. van der Ziel** (Observer for the Netherlands), referring to paragraph 5 of A/CN.9/XLI/CRP.1/Add.13 concerning draft article 90, proposed replacing the first sentence by the following: “The proposal was accepted by acclamation by the Commission.”

39. *It was so decided.*

40. **Ms. Czerwenka** (Germany), referring to paragraph 9 concerning draft article 92, said that, in order to reflect her delegation’s comments more accurately, the last sentence should read: “Further, it was said that the definition of volume contract did not address the situation where the contract provided for a series of shipments by road but one single shipment by sea.”

41. *It was so decided.*

42. *The section of the draft report on consideration of draft articles, chapter 17 (continued) and chapter 18 of the draft convention (A/CN.9/XLI/CRP.1/Add.13), as amended, was adopted.*

*Consideration of draft articles, chapter 18 (continued) of the draft convention (A/CN.9/XLI/CRP.1/Add.14)*

43. **Ms. Sabo** (Canada), referring to paragraph 3 of A/CN.9/XLI/CRP.1/Add.14 concerning draft article 94, proposed inserting the word “multi-unit” before “States” and deleting the words “between federal and provincial government”, in line with the Commission’s usual practice of not identifying individual States and so as to better reflect what was actually said.

44. *It was so decided.*

45. *The section of the draft report on consideration of draft articles, chapter 18 (continued) of the draft convention (A/CN.9/XLI/CRP.1/Add.14), as amended, was adopted.*

*Consideration of draft articles, chapter 9 (continued) of the draft convention (A/CN.9/XLI/CRP.1/Add.15)*

46. **Ms. Downing** (Australia), referring to paragraph 4 of A/CN.9/XLI/CRP.1/Add.15 concerning draft article 49, proposed inserting the following sentence at the end of the paragraph: “There was some support for the

view that the new text of article 49 did not solve the problems previously identified.”

47. *It was so decided.*

48. **Mr. Mollmann** (Observer for Denmark), referring to paragraph 7 concerning draft article 49, proposed inserting the following sentence after the second sentence in order to reflect the comments made by the Australian and Danish delegations: “Further, concern was expressed that in some jurisdictions a transport document containing a statement that the goods may be delivered without surrender of the transport document would not be considered a negotiable document at all.”

49. *It was so decided.*

50. **Mr. Mollmann** (Observer for Denmark), referring to paragraph 9 concerning draft article 49, proposed inserting the phrase “into the transport document” after the word “incorporated” in the second sentence; otherwise it did not make sense.

51. *It was so decided.*

52. **Mr. van der Ziel** (Observer for the Netherlands), referring to paragraph 15 of A/CN.9/XLI/CRP.1/Add.15 concerning the debate on consequential changes to draft articles 47 and 48 to align them with the new text of draft article 49, said that there was another consequential change that should have been made to harmonize those three draft articles. In the new version of draft article 48, subparagraph (b) (iii) read: “the carrier refuses delivery because the person claiming to be the consignee does not properly identify itself as the consignee or does not surrender the document”. Draft articles 47 and 49 dealt with analogous although, of course, not identical situations and should probably contain a similar clause. He realized that the question did not, properly speaking, have to do with the adoption of the draft report; rather, it was a suggestion for the drafting group that perhaps it could consider the appropriateness of including such a change in the version the Commission would have before it when it considered the final adoption of the draft convention.

53. **Ms. Czerwenka** (Germany) said that the point had in fact been raised when the consequential changes were discussed but no decision had been taken.

54. **Mr. Fujita** (Japan) apologized for missing that point when he had proposed the consequential changes required to draft articles 47 and 48 and said that he would be happy to see the correction made but was not sure of the proper procedure.

55. **Mr. Estrella Faria** (International Trade Law Division) said that the changes involved were too substantive for the drafting group to consider; the Secretariat did not feel that it had the mandate to amend the text to that extent on its own initiative. Perhaps after

concluding its consideration of the draft report, the Commission could revert to the question of finalization and approval of the draft convention.

56. **Ms. Carlson** (United States of America) said that her delegation supported that suggestion.

57. **Ms. Sabo** (Canada) proposed that the debate that would follow should be reflected in the draft report.

58. **The Chairperson** said that, hearing no objection, he took it that the Commission, after completing the agenda item currently under discussion, wished to revert to consideration of draft articles 47 and 49 and to have the debate reflected in the draft report.

59. *It was so decided.*

60. *The section of the draft report on consideration of draft articles, chapter 9 (continued) of the draft convention (A/CN.9/XLI/CRP.1/Add.15), as amended, was adopted.*

**Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea (A/CN.9/645 and A/CN.9/XLI/CRP.1/Add.15)**

*Draft articles 47 and 49 (continued)*

61. **Mr. van der Ziel** (Observer for the Netherlands) said that his delegation's proposal was that subparagraph (b) (iii) in draft article 48, as it appeared in A/CN.9/XLI/CRP.1/Add.15, paragraph 15, namely, "(iii) the carrier refuses delivery because the person claiming to be the consignee does not properly identify itself as the consignee or does not surrender the document", should be inserted into draft article 47 following subparagraph (c) (ii), and into draft article 49, paragraph 2, following subparagraph (b) (ii), with any appropriate adjustments in wording.

62. **Mr. Sturley** (United States of America) said that his delegation could support the substance of the proposal of the Netherlands, since it was essentially a technical correction.

63. **Ms. Czerwenka** (Germany) pointed out that draft articles 47 and 49 applied to different situations and would require different wording. Draft article 47 referred to situations in which no negotiable transport document was issued.

64. **Mr. Mollmann** (Observer for Denmark) pointed out that draft article 47, subparagraph (a), second sentence, stated: "The carrier may refuse delivery if the person claiming to be the consignee does not properly identify itself as the consignee on the request of the carrier." Therefore, only the first part of draft article 48, subparagraph (b) (iii), was pertinent in draft article 47. His specific proposal was that in draft article 47,

subparagraph (c), first sentence, the word "or" should be deleted before "(ii)" and the words "or (iii) the carrier refuses delivery because the person claiming to be the consignee does not properly identify itself as the consignee," should be inserted before the words "the carrier may so advise the controlling party".

65. In draft article 49, on the other hand, paragraph 1 (a) (i) referred to the surrender of the negotiable transport document and stated that the holder would have to identify itself under certain circumstances, while paragraph 1 (a) (ii) talked about the holder demonstrating that it was the holder of the negotiable electronic transport record. Therefore, the whole text of draft article 48, subparagraph (b) (iii), could appropriately be inserted into draft article 49, paragraph 2 (a), provided the word "consignee" was replaced by the word "holder".

66. **Mr. Fujita** (Japan) said he would like to offer a further refinement: the clause to be inserted in draft article 49, paragraph 2 (a), first sentence, before the words "the carrier may so advise the shipper", should read: "or (iii) the carrier refuses delivery because the person claiming to be a holder does not properly identify itself as one of the persons referred to in article 1, paragraph 10 (a) (i)".

67. **Mr. Mayer** (Switzerland) questioned whether it was correct not to mention surrender of the document in draft article 49.

68. **Mr. van der Ziel** (Observer for the Netherlands) said that Japan's proposal was correct, since paragraph 2 of draft article 49 applied to transport documents that stated that the goods could be delivered without the surrender of the document.

69. **Ms. Czerwenka** (Germany) said that her delegation could accept the proposal with respect to draft article 47. With respect to draft article 49, as she understood it, an attempt should first be made to deliver the goods in accordance with the provisions of paragraph 1; only if that were impossible could delivery be made without surrender of the document pursuant to paragraph 2.

70. **Mr. Fujita** (Japan) said that in the situation covered by his proposal, it was possible that the holder might present a transport document but not surrender it.

71. **Mr. Schelin** (Observer for Sweden) asked if his understanding was correct that the phrase "the person claiming to be the consignee" would not be included, since paragraph 2 only came into play when the transport document did not need to be surrendered.

72. **The Chairperson** confirmed his interpretation.

73. **Mr. Sharma** (India) said that his delegation was fully in agreement with the composite proposals by the delegations of the Netherlands, Denmark and Japan and was satisfied that the inconsistency had been resolved.

74. *Draft articles 47 and 49, as amended, were approved in substance and referred to the drafting group.*

75. **Ms. Carlson** (United States of America) said that she spoke for all the delegations in expressing gratitude to the Chairperson for his outstanding leadership in bringing the agenda item to a successful conclusion and to the members of the Secretariat for their hard work and insightful suggestions. On returning to the capital her delegation would immediately set to work on the steps that would be required to prepare for implementation.

*The meeting rose at 5.55 p.m.*

**Summary record (partial) of the 881st meeting, held at Headquarters, New York,  
on Thursday, 3 July 2008, at 10 a.m.**

[A/CN.9/SR.882]

*Chairperson:* Mr. Illescas (Spain)

*The meeting was called to order at 10.30 a.m.*

**Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea** (*continued*)  
(A/CN.9/XLI/CRP.9)

1. **The Chairperson** drew attention to the report of the Drafting Group (Transport Law) contained in conference room paper A/CN.9/XLI/CRP.9, which set forth the consolidated text of the draft convention on contracts for the international carriage of goods wholly or partly by sea, and invited the Commission to consider the text article by article with a view to its adoption.
2. **Ms. Sabo** (Canada) noted that the preambular paragraphs in the English version should end with a comma rather than a semicolon.
3. *The draft preamble, as corrected, was adopted.*
4. *Draft articles 1 to 21 were adopted.*
5. **Mr. Alba Fernández** (Spain) pointed out that the Spanish version of draft article 22, paragraph 1, incorrectly referred to paragraph 1 of article 43, since draft article 43 consisted of a single paragraph.
6. *Draft article 22, as corrected, was adopted.*
7. **Ms. Lannan** (International Trade Law Division), in response to a question from the representative of Germany, confirmed that, as a result of the deletion of two earlier draft articles, draft articles 45, 46 and 47 did indeed correspond to the former draft articles 47, 48 and 49 debated in connection with A/CN.9/XLI/CRP.2/Add.7.
8. *Draft articles 23 to 47 were adopted.*
9. **Mr. Zinsou** (Benin), supported by **Mr. Bellenger** (France), said that in draft article 48, paragraph 4, the phrase in the French version “*toute dépense qu’il a exposée*” was infelicitous as a translation of “any costs incurred”; “*exposée*” should be changed to “*effectuée*”.
10. *Draft article 48, as amended, was adopted.*
11. *Draft articles 49 and 50 were adopted.*
12. **Mr. Bellenger** (France) pointed out that in draft article 51, paragraph 2, in the French version the expression “*dont on infère*”, rendering the English expression “that indicates”, was vague and hard to understand. Although the transport document need not

expressly state that it must be surrendered in order to obtain delivery of the goods, the terms of the document should show that to be the case. He proposed to substitute the phrase “*dont les termes revèlent*”.

13. *Draft article 51, as amended, was adopted.*
14. *Draft articles 52 to 58 were adopted.*
15. **Mr. Li Chenggang** (China) said that, although his delegation did not oppose the adoption of the text of draft article 59, it regretted that the Commission had not achieved as broad a consensus as possible. Higher limits of liability would make it harder for some member States to ratify the convention and would thus restrict its usefulness.
16. *Draft articles 59 to 77 were adopted.*
17. **Mr. Alba Fernández** (Spain) pointed out that in the Spanish version of draft article 78, there was an incorrect reference to article 93, whereas the other language versions referred to article 91.
18. *Draft article 78, as corrected, was adopted.*
19. *Draft articles 79 to 96 were adopted.*
20. *The signature clause was adopted.*
21. The draft convention on contracts for the international carriage of goods wholly or partly by sea (A/CN.9/XLI/CRP.9), as a whole, as amended, was adopted.

*Adoption of the report (continued)*

**Chapter III (Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea)** (*continued*)  
(A/CN.9/XLI/CRP.1/Add.1-16)

*Consideration of draft articles, report of the drafting group, decision of the Commission and recommendation to the General Assembly*  
(A/CN.9/XLI/CRP.1/Add.16)

22. **Ms. Zikmane** (Latvia), Rapporteur, introducing the remaining section of chapter III of the draft report of the Commission contained in A/CN.9/XLI/CRP.1/Add.16 relating to consideration of draft articles, signature clause, title and preamble of the draft convention; the report of the drafting group; and the decision of the Commission and recommendation to the

General Assembly, observed that the finalization and adoption of the draft convention had been the highlight of a very important session.

23. **Mr. Schoefisch** (Germany) pointed out that in paragraph 5 of A/CN.9/XLI/CRP.1/Add.16 concerning the preamble, the placement of the words “other” and “various” should be reversed; the Commission had decided to refer to “other modes of transport” rather than “various modes of transport” in the fifth preambular paragraph.

24. *The section of the draft report on consideration of draft articles, signature clause, title and preamble of the draft convention; the report of the drafting group; and the decision of the Commission and recommendation to the General Assembly (A/CN.9/XLI/CRP.1/Add.16), as amended, was adopted.*

25. *Chapter III (Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea), as a whole, as amended, was adopted.*

*The discussion covered in the summary record ended at 11.45 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.9/650) [Original: English]**

**CONTENTS**

I.	General . . . . .	
II.	International sale of goods . . . . .	
III.	International commercial arbitration and conciliation . . . . .	
IV.	International transport . . . . .	
V.	International payments (including independent guarantees and standby letters of credit) . . . . .	
VI.	Electronic commerce . . . . .	
VII.	Security interests (includes receivables financing) . . . . .	
VIII.	Procurement . . . . .	
IX.	Insolvency . . . . .	
X.	International construction contracts . . . . .	
XI.	International countertrade . . . . .	
XII.	Privately financed infrastructure projects . . . . .	
Annex		
	UNCITRAL legal texts . . . . .	

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[No publications recorded under this heading.]

## **XI. International countertrade**

[No publications recorded under this heading.]

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## Annex

### UNCITRAL legal texts

<i>Short title</i>	<i>Full title</i>
Hamburg Rules (1978)	United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg) <sup>a</sup>
Limitation Convention (1974/1980)	Convention on the Limitation Period in the International Sale of Goods, 1974 (New York), <sup>b</sup> and Protocol amending the Convention on the Limitation Period in the International Sale of Goods, 1980 (Vienna) <sup>c</sup>
UNCITRAL Arbitral Proceedings Notes (1996)	UNCITRAL Notes on Organizing Arbitral Proceedings (1996) <sup>d</sup>
UNCITRAL Arbitration Rules (1976)	UNCITRAL Arbitration Rules (1976) <sup>e</sup>
UNCITRAL Bills and Notes Convention (1988)	United Nations Convention on International Bills of Exchange and International Promissory Notes (1988) <sup>f</sup>
UNCITRAL Conciliation Rules (1980)	UNCITRAL Conciliation Rules (1980) <sup>g</sup>
UNCITRAL Construction Contracts Guide (1987)	UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works (1987) <sup>h</sup>
UNCITRAL Credit Transfer Model Law (1992)	UNCITRAL Model Law on International Credit Transfers (1992) <sup>i</sup>
UNCITRAL Electronic Funds Guide (1986)	UNCITRAL Legal Guide on Electronic Funds Transfers (1986) <sup>j</sup>
UNCITRAL Infrastructure Projects Guide (2001)	UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects (2001) <sup>k</sup>
UNCITRAL Insolvency Law Guide (2004)	UNCITRAL Legislative Guide on Insolvency Law (2004) <sup>l</sup>
UNCITRAL International Countertrade Guide (1992)	UNCITRAL Legal Guide on International Countertrade Transactions (1992) <sup>m</sup>
UNCITRAL Model Arbitration Law (1985)	UNCITRAL Model Law on International Commercial Arbitration (1985) <sup>n</sup>
UNCITRAL Model Conciliation Law (2002)	UNCITRAL Model Law on International Commercial Conciliation (2002) <sup>o</sup>
UNCITRAL Model Insolvency Law (1997)	UNCITRAL Model Law on Cross-Border Insolvency (1997) <sup>p</sup>
UNCITRAL Model Law on Electronic Commerce (1996)	UNCITRAL Model Law on Electronic Commerce (1996) <sup>q</sup>
UNCITRAL Model Law on Electronic Signatures (2001)	UNCITRAL Model Law on Electronic Signatures (2001) <sup>r</sup>
UNCITRAL Model Procurement Law (1994)	UNCITRAL Model Law on Procurement Of Goods, Construction and Services (1994) <sup>s</sup>
UNCITRAL Model Provisions on Infrastructure Projects (2003)	UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects (2003) <sup>t</sup>
United Nations Assignment Convention (2001)	United Nations Convention on the Assignment of Receivables in International Trade (2001) <sup>u</sup>

<i>Short title</i>	<i>Full title</i>
United Nations Convention on Electronic Contracting (2005)	United Nations Convention on the Use of Electronic Communications in International Contracts (2005) <sup>v</sup>
United Nations Guarantee and Standby Convention (1995)	United Nations Convention on Independent Guarantees and Standby Letters of Credit (1995) <sup>w</sup>
United Nations Sales Convention (1980)	United Nations Convention on Contracts for the International Sale of Goods (1980) <sup>x</sup>
United Nations Terminal Operators Convention (1991)	United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (1991) <sup>y</sup>

<sup>a</sup> United Nations publication, Sales No. E.95.V.14.

<sup>b</sup> 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.

<sup>c</sup> Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980 (United Nations publication, Sales No. E.81.IV.3), part I.

<sup>d</sup> Official Records of the General Assembly, Fifty-first Session, Supplement No. 17 (A/51/17), part II.

<sup>e</sup> United Nations publication, Sales No. E.93.V.6.

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<sup>l</sup> United Nations publication, Sales No. E.05.V.10.

<sup>m</sup> United Nations publication, Sales No. E.93.V.7.

<sup>n</sup> United Nations publication, Sales No. E.95.V.18.

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<sup>r</sup> United Nations publication, Sales No. E.02.V.8.

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<sup>t</sup> United Nations publication, Sales No. E.04.V.11.

<sup>u</sup> United Nations publication, Sales No. E.04.V.14.

<sup>v</sup> United Nations publication, Sales No. E.07.V.02.

<sup>w</sup> United Nations publication, Sales No. E.97.V.12.

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<sup>y</sup> 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.



### III. CHECK-LIST OF DOCUMENTS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

#### *Location in*

<i>Document Symbol</i>	<i>Title or description</i>	<i>Present volume</i>
<b>A. List of documents before the Commission at its forty-first session</b>		
<i>General series</i>		
A/CN.9/640	Report of the Working Group on Procurement on the work of its twelfth session (Vienna, 3-7 September 2007)	Part two, chap. II, A
A/CN.9/641	Report of the Working Group on Arbitration and Conciliation on the work of its forty-seventh session (Vienna, 10-14 September 2007)	Part two, chap. III, A
A/CN.9/642	Report of the Working Group on Transport Law on the work of its twentieth session (Vienna, 15-25 October 2007)	Part two, chap. I, A
A/CN.9/643	Report of the Working Group on Insolvency Law on the work of its thirty-third session (Vienna, 5-9 November 2007)	Part two, chap. IV, A
A/CN.9/644	Provisional agenda, annotations thereto and scheduling of meetings of the forty-first session	Not reproduced
A/CN.9/645	Report of the Working Group on Transport Law on the work of its twenty-first session (Vienna, 14-25 January 2008)	Part two, chap. I, I
A/CN.9/646	Report of the Working Group on Arbitration on the work of its forty-eighth session (New York, 4-8 February 2008)	Part two, chap. III, C
A/CN.9/647	Report of the Working Group on Insolvency Law on the work of its thirty-fourth session (New York, 3-5 March 2008)	Part two, chap. IV, C
A/CN.9/648	Report of the Working Group on Procurement on the work of its thirteenth session (New York, 7-11 April 2008)	Part two, chap. II, E
A/CN.9/649	Report of the Working Group on Security Interests on the work of its thirteenth session (New York, 19-23 May 2008)	Part two, chap. V, A
A/CN.9/650	Note by the Secretariat on a bibliography of recent writings related to the work of UNCITRAL	Part three, chap. II
A/CN.9/651	Note by the Secretariat on the status of conventions and model laws	Part two, chap. IX
A/CN.9/652	Note by the Secretariat on Technical cooperation and assistance	Part two, chap. VIII
A/CN.9/653	Note by the Secretariat on UNCITRAL rules of procedure and methods of work	Not reproduced
A/CN.9/654	Facilitation of cooperation, direct communication and coordination in cross-border insolvency proceedings	Not reproduced
A/CN.9/655	Note by the Secretariat on possible future work in the area of electronic commerce: Legal issues arising out of the implementation and operation of single windows in international trade	Part two, chap. VI, A
A/CN.9/656 and Add.1	Note by the Secretariat on the report on the survey relating to the legislative implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)	Not reproduced
A/CN.9/657 and Add.1-2	Current activities of international organizations related to the harmonization and unification of international trade law	Part two, chap. X
A/CN.9/658 and Add.1-14	Draft convention on contracts for the international carriage of goods wholly or partly by sea: compilation of comments by Governments and intergovernmental organizations	Not reproduced
A/CN.9/659 and Add.1-2	Note by the Secretariat on possible future work on indicators of Commercial Fraud	Part two, chap. VI, B

A/CN.9/660	Note by the Secretariat on UNCITRAL rules of procedure and methods of work -Comments received from Member States	Not reproduced
A/CN.9/661 and Add.1-3	Settlement of commercial disputes: 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 (New York, 1958) ("New York Convention")	Not reproduced
A/CN.9/662	Settlement of commercial disputes – Revision of the UNCITRAL Arbitration Rules – Observations by the Government of Canada	Not reproduced

## 2. Restricted series

A/CN.9/XLI/CRP.1 and Add.1-33	Draft report of the United Nations Commission on International Trade Law on the work of its forty-first session	Not reproduced
A/CN.9/XLI/CRP.2 and Add.1-8	Report of the Drafting Group: Draft convention on contracts for the international carriage of goods wholly or partly by sea	Not reproduced
A/CN.9/XLI/CRP.3	Note by the Secretariat on the draft convention on contracts for the international carriage of goods wholly or partly by sea	Not reproduced
A/CN.9/XLI/CRP.4	Proposal of the United States of America on electronic transferable records	Not reproduced
A/CN.9/XLI/CRP.5	Draft convention on contracts for the international carriage of goods wholly or partly by sea: Proposal of Germany, Austria, Switzerland and Australia to redraft article 81, paragraph 2	Not reproduced
A/CN.9/XLI/CRP.6	Draft convention on contracts for the international carriage of goods wholly or partly by sea: Proposal by Austria and Germany to redraft article 92	Not reproduced
A/CN.9/XLI/CRP.7	Draft convention on contracts for the international carriage of goods wholly or partly by sea: Proposal in respect of draft article 49	Not reproduced
A/CN.9/XLI/CRP.8	Draft preamble to the draft convention on contracts for the international carriage of goods wholly or partly by sea	Not reproduced
A/CN.9/XLI/CRP.9	Report of the Drafting Group: Draft convention on contracts for the international carriage of goods wholly or partly by sea	Not reproduced

## 3. Information series

A/CN.9/XLI/INF.1	List of participants	Not reproduced
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## B. List of documents before the Working Group on Transport Law on the work of its twentieth session

### Working papers

A/CN.9/WG.III/WP.92	Annotated provisional agenda	Not reproduced
A/CN.9/WG.III/WP.93	Note by the Secretariat on the preparation of a draft convention on the carriage of goods [wholly or partly] [by sea] – Comments and Proposals of the Government of Nigeria	Part two, chap. I, B
A/CN.9/WG.III/WP.94	Note by the Secretariat on the preparation of a draft convention on the carriage of goods [wholly or partly] [by sea] – Revised text of articles 42, 44 and 49 of the draft convention on the carriage of goods [wholly or partly] [by sea]	Part two, chap. I,C
A/CN.9/WG.III/WP.95	Note by the Secretariat on the preparation of a draft convention on the carriage of goods [wholly or partly] [by sea] – Proposal by the delegations of Denmark and the Netherlands	Part two, chap. I,D
A/CN.9/WG.III/WP.96	Note by the Secretariat on the preparation of a draft convention on the carriage of goods [wholly or partly] [by sea] – Proposal on Chapter 12 "Transfer of Rights" submitted by the Delegation of the Netherlands	Part two, chap. I,E
A/CN.9/WG.III/WP.97	Note by the Secretariat on the preparation of a draft convention on the carriage of goods [wholly or partly] [by sea] – Comments from Non-Governmental Organizations	Part two, chap. I,F

A/CN.9/WG.III /WP.98	Note by the Secretariat on the preparation of a draft convention on the carriage of goods [wholly or partly] [by sea] – Proposal by the Government of China on Jurisdiction	Part two, chap. I,G
A/CN.9/WG.III /WP.99	Note by the Secretariat on the preparation of a draft convention on the carriage of goods [wholly or partly] [by sea] – Proposal by the Government of China on Delivery of the Goods when a Negotiable Transport Document or a Negotiable Electronic Transport Record has been issued and on Goods Remaining Undelivered	Part two, chap. I,H
<b>Restricted series</b>		
A/CN.9/WG.III/XX/CRP.1 and Add.1-14	Draft report of Working Group III (Transport Law) on the work of its twentieth session	Not reproduced
A/CN.9/WG.III/XX/CRP.2	Preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea]: Proposal on ferry transport of trucks and railroad cars	Not reproduced
A/CN.9/WG.III/XX/CRP.3	Preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea]: Proposal by Austria and Germany on Article 84	Not reproduced
<b>Information series</b>		
A/CN.9/WG.III/XX/INF.1/Rev.1	List of participants	Not reproduced
<b>C. List of documents before the Working Group on Transport Law on the work of its twenty-first session</b>		
A/CN.9/WG.III/WP.100	Annotated provisional agenda	Not reproduced
A/CN.9/WG.III/WP.101	Note by the Secretariat on the draft convention on the carriage of goods [wholly or partly] [by sea]	Part two, chap. I,J
A/CN.9/WG.III/WP.102	Note by the Secretariat on the preparation of a draft convention on the carriage of goods [wholly or partly] [by sea] – Proposal of the delegation of the Netherlands to include “road cargo vehicle” in the definition of “container”	Part two, chap. I,K
A/CN.9/WG.III/WP.103	Note by the Secretariat on the preparation of a draft convention on the carriage of goods [wholly or partly] [by sea] – Proposal by the delegations of Italy, the Republic of Korea and the Netherlands to delete any reference to “consignor” and to simplify the definition of “transport document”	Part two, chap. I,L
<b>Restricted series</b>		
A/CN.9/WG.III/XXI/CRP.1 and Add.1-14	Draft report of Working Group III (Transport Law) on the work of its twenty-first session.	Not reproduced
A/CN.9/WG.III/XXI/CRP.2 and Add.1-7	Report of the Drafting Group: Draft convention on contracts for the international carriage of goods wholly or partly by sea	Not reproduced
A/CN.9/WG.III/XXI/CRP.3	Preparation of a draft convention on the carriage of goods [wholly or partly] [by sea]: Proposal by Angola, Benin, Burkina Faso, Cameroon, Congo, Côte d’Ivoire, Democratic Republic of the Congo, Equatorial Guinea, Gabon, Ghana, Guinea, Guinea-Bissau, Mauritania, Niger, Nigeria, Senegal and Togo	Not reproduced
A/CN.9/WG.III/XXI/CRP.4	Preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea]: Proposal by the delegations of France, the United States of America, Denmark, Finland, Japan, the Netherlands, Norway, Spain and Sweden	Not reproduced
A/CN.9/WG.III/XXI/CRP.5	Preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea]	Not reproduced
<b>Information series</b>		
A/CN.9/WG.III/XXI/INF.1/Rev.1	List of participants	Not reproduced

### D. List of documents before the Working Group on Procurement at its twelfth session

#### Working papers

A/CN.9/WG.I/WP.53	Annotated provisional agenda	Not reproduced
A/CN.9/WG.I/WP.54	Note by the Secretariat on 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, and abnormally low tenders, submitted to the Working Group on Procurement at its twelfth session	Part two, chap. II, B
A/CN.9/WG.I/WP.55	Note by the Secretariat on revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services – drafting materials for the use of electronic reverse auctions in public procurement, submitted to the Working Group on Procurement at its twelfth session	Part two, chap. II, C
A/CN.9/WG.I/WP.55	Note by the Secretariat on revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services – Proposal by the United States, submitted to the Working Group on Procurement at its twelfth session	Part two, chap. II, D

#### Restricted series

A/CN.9/WG.I/XII/CRP.1 and Add.1-4	Draft report of the Working Group on Procurement at its twelfth session.	Not reproduced
A/CN.9/WG.I/XII/CRP.2	Possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services – outstanding topics to be considered by the Working Group and project timetable	Not reproduced

#### Information series

A/CN.9/WG.I/XII/INF.1/ Rev.1	List of participants	Not reproduced
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### E. List of documents before the Working Group on Procurement at its thirteenth session

#### Working papers

A/CN.9/WG.I/WP.57	Annotated provisional agenda	Not reproduced
A/CN.9/WG.I/WP.58	Note by the Secretariat on 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, and abnormally low tenders, submitted to the Working Group on Procurement at its thirteenth session	Part two, chap. II, F
A/CN.9/WG.I/WP.59	Note by the Secretariat on revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services – drafting materials for the use of electronic reverse auctions in public procurement, submitted to the Working Group on Procurement at its thirteenth session	Part two, chap. II, G

#### Restricted series

A/CN.9/WG.I/XIII/ CRP.1 and Add.1-4	Draft report of the Working Group on Procurement at its thirteenth session.	Not reproduced
A/CN.9/WG.I/XIII/ CRP.2	Possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services – combined approach to drafting the materials for the use of framework agreements and dynamic purchasing systems in public procurement	Not reproduced

#### Information series

A/CN.9/WG.I/XIII/INF.1	List of participants	Not reproduced
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**F. List of documents before the Working Group on International  
Commercial Arbitration and Conciliation at its  
forty-seventh session**

**Working papers**

A/CN.9/WG.II/WP.146	Annotated provisional agenda	Not reproduced
A/CN.9/WG.II/WP.147 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-seventh session	Part two, chap. III, B

**Restricted series**

A/CN.9/WG.II/XLVII/ CRP.1 and Add.1-5	Draft report of the Working Group on Arbitration and Conciliation on the work of its forty-seventh session	Not reproduced
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**Information series**

A/CN.9/WG.II/XLVII/ INF.1	List of participants	Not reproduced
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**F. List of documents before the Working Group on International  
Commercial Arbitration and Conciliation at its  
forty-eighth session**

**Working papers**

A/CN.9/WG.II/WP.148	Annotated provisional agenda	Not reproduced
A/CN.9/WG.II/WP.149	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-eighth session	Part two, chap. III, D

**Restricted series**

A/CN.9/WG.II/XLVIII/ CRP.1 and Add.1-4	Draft report of the Working Group on Arbitration and Conciliation on the work of its forty-eighth session	Not reproduced
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**Information series**

A/CN.9/WG.II/XLVIII/ NF.1	List of participants	Not reproduced
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**G. List of documents before the Working Group on  
Insolvency Law at its thirty- third session**

**1. Working papers**

A/CN.9/WG.V/WP.77	Annotated provisional agenda	Not reproduced
A/CN.9/WG.V/WP.78 and Add.1	Note by the Secretariat on the treatment of corporate groups in insolvency, submitted to the Working Group on Insolvency Law at its thirty-third session (A/CN.9/WG.V/WP.78 and Add.1)	Part two, chap. IV, B

**2. Restricted series**

A/CN.9/WG.V/XXXIII/ CRP.1 and Add.1-4	Draft report of Working Group V (Insolvency Law) on the work of its thirty-third session	Not reproduced
A/CN.9/WG.V/XXXIII/ CRP.2	UNCITRAL Legislative Guide on Insolvency Law: Glossary and recommendations	Not reproduced

**3. Information series**

A/CN.9/WG.V/XXXIII/ INF.1	List of participants	Not reproduced
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## H. List of documents before the Working Group on Insolvency Law at its thirty-fourth session

### 1. Working papers

A/CN.9/WG.V/WP.79	Annotated provisional agenda	
A/CN.9/WG.V/WP.80 and Add.1	Note by the Secretariat on the treatment of corporate groups in insolvency, submitted to the Working Group on Insolvency Law at its thirty-fourth session	Part two, chap. IV, D

### 2. Restricted series

A/CN.9/WG.V/XXXIV/ CRP.1 and Add.1-4	Draft report of Working Group V (Insolvency Law) on the work of its thirty-fourth session	Not reproduced
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### 3. Information series

A/CN.9/WG.V/XXXIV/ INF.1	List of participants	Not reproduced
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## I. List of documents before the Working Group on Security Interests at its thirteenth session

### Working papers

A/CN.9/WG.VI/WP.32	Annotated provisional agenda	Not reproduced
A/CN.9/WG.VI/WP.33 and Add.1	Note by the Secretariat on security rights in intellectual property rights, submitted to the Working Group on Security Interests at its thirteenth session	Part two, chap. V, B

### Restricted series

A/CN.9/WG.VI/XIII/ CRP.1 and Add.1-4	Draft report of Working Group VI (Security Interests) on the work of its thirteenth session	Not reproduced
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### Information series

A/CN.9/WG.VI/XIII/ INF.1	List of participants	Not reproduced
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#### **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 to 1971); Privately Financed Infrastructure Projects (2001 to 2003); Procurement (as of 2004)
  - (b) Working Group II:  
International Sale of Goods (1968 to 1978); International Contract Practices (1981 to 2000); International Commercial Arbitration and Conciliation (as of 2000)
  - (c) Working Group III:  
International Legislation on Shipping (1970 to 1975); Transport Law (as of 2002)\*\*
  - (d) Working Group IV:  
International Negotiable Instruments (1973 to 1987); International Payments (1988 to 1992); Electronic Data Interchange (1992 to 1996); Electronic Commerce (as of 1997)
  - (e) Working Group V:  
New International Economic Order (1981 to 1994); Insolvency Law (1995 to 1999); Insolvency Law (as of 2001)\*
  - (f) Working Group VI:  
Security Interests (as of 2002)\*\*
7. Summary records of discussions in the Commission
8. Texts adopted by Conferences of Plenipotentiaries
9. Bibliographies of writings relating to the work of the Commission.

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\* For its 23rd session (Vienna, 11-22 December 2000), this Working Group was named Working Group on International Contract Practices (see the report of the Commission on its 33rd session A/55/17, para.186).

\*\* At its 35th session, the Commission adopted one-week sessions, creating six working groups.

Table 1  
**Reports on the annual sessions of the Commission**

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>
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
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



Table 2  
Resolutions of the General Assembly

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>
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
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

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>
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
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

**Table 3**  
**Reports of the Sixth Committee**

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>
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
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

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>
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
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

**Table 4**  
**Extracts from the reports of the Trade and Development Board of the United Nations Conference on Trade and Development**

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>
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

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>
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
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

**Table 5**  
**Documents submitted to the Commission, including reports of meetings of working groups**

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>
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
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

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>
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
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

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>
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
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
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

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>
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: 1982	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
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: 1982	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

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>
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
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
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



<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>
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
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
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

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>
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
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

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>
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
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
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

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>
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
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

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>
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
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
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

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>
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
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

**Table 6**  
**Documents submitted to Working Groups**

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>
<b>(a) Working Group I</b>		
<i>(i) Time limits and Limitation (Prescription)</i>		
A/CN.9/WG.1/WP.9	Volume II: 1971	Part two, I, C, 1
<i>(ii) Privately Financed Infrastructure Projects</i>		
A/CN.9/WG.I/WP.29 and Add.1-2	Volume XXXIV: 2003	Part two, I, B
<b>(b) Working Group II</b>		
<i>(i) International Sale of Goods</i>		
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

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>
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
<i>(ii) International Contract Practices</i>		
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)
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

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>
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
<i>(iii) International Commercial Arbitration</i>		
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
<b>(c) Working Group III</b>		
<i>(i) International Legislation on Shipping</i>		
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
<i>(ii) Transport Law</i>		
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



<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>
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/Rev1	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
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

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>
<b>(d) Working Group IV</b>		
<i>(i) International Negotiable Instruments</i>		
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 XXVII: 1986	Part two, I, A, 3
A/CN.9/WG.IV/WP.32 and Add.1-10	Volume XXVIII: 1987	Part two, I, 2
A/CN.9/WG.IV/WP.33	Volume XXVIII: 1987	Part two, I, 3
<i>(ii) International Payments</i>		
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.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
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
<i>(iii) Electronic Commerce</i>		
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

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>
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
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
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

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>
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
<i>(f) Working Group VI: Security Interests</i>		
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

Table 7  
**Summary Records of discussions in the Commission**

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>
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

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>
A/CN.9/SR.378, 379, 381-385 and 388	Volume XVIII: 1987	Part three, III
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

Table 8  
**Texts adopted by Conferences of Plenipotentiaries**

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>
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

Table 9  
**Bibliographies of writings relating to the work of the Commission**

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>
A/CN.9/L.20/Add.1	Volume I: 1968-1970	Part three
	Volume II: 1971	Part two
	Volume II: 1972	Part two
	Volume III: 1972	Part two
	Volume IV: 1973	Part two
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	
A/CN.9/284	Volume XV: 1984	Part three, II
	Volume XVI: 1985	Part three, III

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<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>
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
A/CN.9/602	Volume XXXVII: 2006	Part three, III
A/CN.9/625	Volume XXXVIII: 2007	Part three, II

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V.2225615

USD 80  
ISBN 978-92-1-133710-5

